

# APPENDIX

1

2025-00563 (La. 11/19/25)

STATE of Louisiana

v.

BJ MCELVEEN

No. 2025-K-00563

Supreme Court of Louisiana.

November 19, 2025

Applying For Writ Of Certiorari, Parish of East Baton Rouge, 19th Judicial District Court Number(s) 09-18-0487, Court of Appeal, First Circuit, Number(s) 2023 KA 0939.

1 Writ application denied.

Hughes, J., would grant and docket.

Crain, J., concurs.

McCallum, J., concurs.

Griffin, J., would grant and docket.

Guidry, J., would grant and docket.



2

2025-01097 (La. 11/19/25)

ACE AMERICAN INSURANCE COMPANY

v.

John P. GUILLORY and Preis PLC

No. 2025-CC-01097

Supreme Court of Louisiana.

November 19, 2025

Applying For Writ Of Certiorari, Parish of Calcasieu, 14th Judicial District Court

Number(s) 2024-334, Court of Appeal, Third Circuit, Number(s) CW 25-00275.

1 Writ application denied.



3

2025-01128 (La. 11/19/25)

Michelle Nicole LEBLANC

v.

Luke Gerald GUILLOT

No. 2025-C-01128

Supreme Court of Louisiana.

November 19, 2025

Applying For Writ Of Certiorari, Parish of East Baton Rouge, East Baton Rouge Family Court Number(s) F227545, Court of Appeal, First Circuit, Number(s) 2025 CA 0070.

1 Writ application denied.



4

2025-01105 (La. 11/19/25)

The PARISH OF CAMERON

v.

BURLINGTON RESOURCES OIL & GAS COMPANY, LP, et al.

No. 2025-CC-01105

Supreme Court of Louisiana.

November 19, 2025

Applying For Supervisory Writ, Parish of Cameron, 38th Judicial District Court

COURT OF APPEAL, FIRST CIRCUIT  
STATE OF LOUISIANA

RE: Docket Number 2023-KA-0939

State Of Louisiana

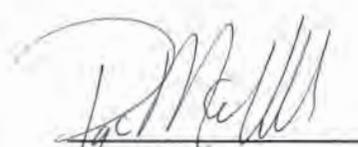
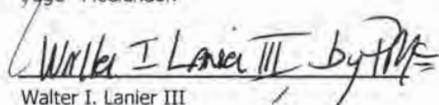
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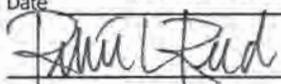
BJ McElveen

19th Judicial District Court  
Case #: 9180487  
East Baton Rouge Parish

On Application for Rehearing filed on 01/13/2025 by BJ McElveen

Rehearing denied

  
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Walter I. Lanier III

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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2023 KA 0939

STATE OF LOUISIANA

VERSUS

BJ MCELVEEN

Judgment Rendered: DEC 30 2024

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19<sup>th</sup> Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Suit No. 09-18-0487, Section 7

The Honorable Louise Hines, Judge Presiding

Hillar C. Moore, III  
District Attorney  
Cristopher J.M. Casler  
Assistant District Attorney  
Baton Rouge, Louisiana

Counsel for Appellee  
State of Louisiana

Jane C. Hogan  
Louisiana Appellate Project  
Hammond, Louisiana

Counsel for Defendant/Appellant  
BJ McElveen

BEFORE: McCLENDON, WELCH, AND LANIER, JJ.

McCleendon J. dissents for reasons assigned.  
JEW Welch J. concur in result

**LANIER, J.**

The defendant, BJ McElveen, was charged by bill of information with two counts of armed robbery using a firearm, violations of La. R.S. 14:64 and La. R.S. 14:64.3, and pled not guilty.<sup>1</sup> After a trial by jury, he was found guilty as charged on both counts. The defendant filed two written *pro se* motions for new trial, and made an oral and written motion for post-verdict judgment of acquittal, all of which the trial court denied. The trial court sentenced the defendant to twenty-five years imprisonment at hard labor on each count, to be served concurrently, and an additional five years on each count, to be served consecutive to the twenty-five-year sentences.<sup>2</sup>

The defendant now appeals, assigning error to the following: (1) the sufficiency of the evidence; (2) the admission of DNA evidence and expert testimony; (3) the jury instructions; (4) the effectiveness of trial counsel; (5) the denial of his motion for new trial without a hearing; (6) the lack of a twenty-four hour delay between the denial of post-trial motions and sentencing; (7) and the imposition of excessive sentences. For the following reasons, we affirm the convictions, vacate the sentences, and remand for resentencing.

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<sup>1</sup> According to the record and the defendant's brief on appeal, the defendant's full first name is BJ.

<sup>2</sup> While the minutes indicate the sentences were imposed without the benefit of probation, parole, or suspension of sentence, the sentencing transcript shows the trial court did not restrict benefits or state the additional five-year sentences are to be served at hard labor, without benefit of parole, probation, or suspension of sentence, as statutorily mandated. See La. R.S. 14:64(B) and La. R.S. 14:64.3(A). Where there is a conflict between the transcript and the minutes, the transcript prevails. See **State v. Lynch**, 441 So.2d 732, 734 (La. 1983); **State v. Parker**, 2023-0941 (La. App. 1st Cir. 6/27/24), 392 So.3d 652, 655, n.1. Nonetheless, when a trial court does not mention the statutory restriction of benefits, such conditions are self-activating pursuant to La. R.S. 15:301.1(A). Further, because an appellate court may correct an illegal sentence at any time and no discretion is involved regarding the requirement that the additional five-year penalty on each count be served at hard labor, this court may correct this error instead of remanding for resentencing. See La. Code Crim. P. art. 882; see also **Parker**, 392 So.3d at 662. However, as discussed in patent error review section, *infra*, the sentences must be vacated due to other trial error.

## STATEMENT OF FACTS

On July 23, 2018, at about 9:00 a.m., officers of the Baton Rouge Police Department (BRPD) and East Baton Rouge Parish Sheriff's Office (EBRPSO) were dispatched to a Capital One Bank, located at 12211 Coursey Boulevard, the scene of an armed robbery. Before the robbery, Erika Ellie-Jackson, the teller who opened the bank that day, entered and disarmed the building. Cornetta Washington, the other teller, waited in the parking lot until Ms. Jackson gave her the signal to enter. As Ms. Washington entered, two masked men abruptly came inside and told her and Ms. Jackson to get on the floor. One of the assailants pushed Ms. Washington down while the other dragged Ms. Jackson to the cash vaults. As ordered at gunpoint, Ms. Jackson and Ms. Washington opened the cash vaults. After taking over \$100,000, the assailants ran across the street and then through a field. Ms. Jackson immediately pressed the alarm button and called 911.

Deputies arrived at the scene, searched the field, and recovered a camouflage backpack used in the robbery, containing wads of cash wrapped in Capital One wrappers and a loaded handgun. The backpack was sent to the Louisiana State Police Crime Lab (LSPCL) where it was processed for DNA, and presumptive DNA test results led to the identification of the defendant as a suspect. Later, after an anonymous Crime Stoppers tipster identified "BJ" as one of the robbers, the defendant was taken into custody, and his reference DNA samples were sent to the lab. Supplemental DNA testing showed the defendant's DNA was on the straps, zipper, and zipper pulls of the backpack.

## ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant contends the evidence, when viewed in the light most favorable to the State, was insufficient to support the convictions. He argues the DNA evidence only shows he and two other individuals touched a backpack used in the robbery. The defendant further

contends there was no corroboration of the tip naming him as a suspect or any other identifying evidence.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV, § 1, La. Const. art. I, § 2. The standard of review for sufficiency of the evidence to support a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime, and the defendant's identity as the perpetrator of that crime, beyond a reasonable doubt. See La. Code Crim. P. art. 821(B); **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); **State v. Currie**, 2020-0467 (La. App. 1st Cir. 2/22/21), 321 So.3d 978, 982. When the identity of the perpetrator is at issue, the State is required to negate any reasonable probability of misidentification. A positive identification by only one witness is sufficient to support a conviction. **State v. Bessie**, 2021-1117 (La. App. 1st Cir. 4/8/22), 342 So.3d 17, 23, writ denied, 2022-00846 (La. 9/20/22), 346 So.3d 802.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Currie**, 321 So.3d at 982. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable

doubt. **State v. Southall**, 2022-0746 (La. App. 1st Cir. 6/2/23), 369 So.3d 925, 930, writ denied, 2023-00875 (La. 2/6/24), 378 So.3d 750.

Armed robbery is defined by La. R.S. 14:64(A) as “the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.” Furthermore, La. R.S. 14:64.3(B) provides for additional punishment if the dangerous weapon used in the commission of the armed robbery is a firearm. The defendant does not dispute that an armed robbery with a firearm occurred. He argues, however, that the evidence was insufficient to support his convictions because the State did not sufficiently prove that he was one of the armed robbers in this case.

At trial, the State presented surveillance footage, collected by Captain Justin Payer of the EBRPSO, from Capital One and United Community Bank (UCB), located across the street from Capital One. A UCB camera facing Capital One captured two blurred figures in the distance, as they emerged from trees and bushes next to Capital One. Capital One’s interior surveillance footage shows the assailants then enter the bank and commit the robbery.

The first assailant to enter was wearing a dark or navy blue hoodie, had a gun in one hand, the camouflage backpack in the other, and at one point, is shown pointing the gun at Ms. Jackson’s back and head. He appeared to be wearing gloves on both hands. The second assailant was wearing a gray long-sleeved shirt, a dark hooded shirt underneath, and a red and black glove on one hand. The footage shows the assailants’ backs as they grabbed money from the safe and loaded it into the backpack and a white bag. After it was loaded with money, the assailant in the gray shirt touched the backpack with both of his hands, one bare and one gloved, as he grabbed it from the other assailant and put it on his back. They then exited the bank.

Timestamped just a few minutes after the initial UCB video from the camera facing Capital One, another UCB video from the same camera shows the assailants fleeing after the robbery. They ran across the street from the Capital One to the UCB side parking lot. A third video, facing the UCB rear parking lot, captured the assailants then running from the UCB side parking lot to its rear parking lot, with the assailant wearing a gray long-sleeved shirt still carrying the camouflage backpack on his back. The individuals' faces are not visible on any of the video footage.

Both victims, Ms. Jackson and Ms. Washington, testified they were unable to see the assailants' faces. However, they each testified the assailants spoke with a New Orleans accent. Specifically, Ms. Washington noted, when the safe did not initially open, one assailant said, "Open the vault, stop playing." One of them also said, "baby, you going to be okay," using what Ms. Washington referred to as New Orleans slang. After opening the main vault, Ms. Jackson and Ms. Washington were then instructed to open the inner vault. Once the assailants loaded the cash and exited the bank, Ms. Jackson alerted the police, as Ms. Washington stood in the door to see the direction in which the assailants fled, which was to the UCB parking lot.

Deputy Steven Gallo, one of the officers dispatched to the robbery, interviewed John Bass, a bystander who reported seeing two black males as they ran through the UCB parking lot and toward a fence line surrounding the field used to cut through a trail from Coursey Boulevard to the Southpark area. Bass indicated that one of the males had a backpack on and the other had a bunch of cash in his hands, which Bass thought looked suspicious. Bass photographed the individuals, showing their backs, as they fled on foot.

Deputy Michelle Partenheimer of the EBRPSO arrived at the scene about thirty minutes after the dispatch, received a photo of the suspects running across

the field, and searched the area on foot. Within view of the bank, Deputy Partenheimer and another deputy found a camouflage backpack under a truck bed cover. Within the vicinity, they also found a red and black glove, a bundle of wrapped cash, loose bills hidden in some tires leaning against a row house in the area, a black t-shirt, a dark blue hoodie, and a pair of camouflage gloves.<sup>3</sup> Of the approximate \$123,600 that was stolen from the bank, nearly all of it, except an approximate \$1400, was recovered.

Sergeant Jason Fitzpatrick of the EBRPSO Crime Scene Division photographed and collected the evidence. As shown in the photographs, the backpack contained stacks of cash, carbon receipts, and a Glock .40 caliber handgun with an extended magazine. He processed several items for fingerprints and/or DNA, including the money wrappers, handgun, camouflage gloves, black t-shirt, and blue hoodie, and areas at Capital One, including the door, safe handles, and the floor of the safe. He further submitted the backpack, red and black glove, and several swabs to the LSPCL.

Lieutenant Chuck Foster of the EBRPSO armed robbery and burglary division was also dispatched to the scene. He confirmed the recovered camouflage backpack matched the one in surveillance footage. He further noted the defendant is depicted touching the backpack during the robbery, and, while putting the backpack on his back as they exited the bank, was only wearing one glove.

Four days after the robbery, Lieutenant Foster received the presumptive LSPCL test results on the backpack. Lieutenant Foster and Zachary Shawhan, a DNA Forensic Supervisor at the LSPCL and expert witness in DNA forensics, testified at trial regarding the DNA results. Preliminary testing, completed July 31, 2018, yielded a DNA profile from the straps, zipper, and zipper pulls of the backpack, which was consistent with being a mixture of DNA from more than

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<sup>3</sup> The red and black glove is also referenced in the record as red and gray. Additional cash was found in the UCB parking lot.

three contributors, with a major mixture of two contributors. The results were inconclusive as to any minor contributor, due to the limited nature of the contribution. The DNA profile generated from the major mixture was searched in the Combined DNA Index System (CODIS), and the defendant was identified as a suspect.<sup>4</sup>

While attempting to determine the defendant's whereabouts, Lieutenant Foster received a Crime Stoppers tip identifying the assailants. Lieutenant Foster testified the tip provided specific details of the robbery, not shared with the public and known only by investigating law enforcement officers and the perpetrators of the crime. In naming both assailants, the tipster identified the assailant shown in Capital One surveillance footage squatting in front of the vault as Baylon Trim (in the dark hoodie), and the other assailant (in the gray shirt) was known to the tipster by the first name BJ. At that time, the defendant's name had not been released because he was still at large, though Lieutenant Foster already had a warrant for the defendant's DNA. As Lieutenant Foster testified, the first name given by the tipster, BJ, was consistent with the presumptive identification of the DNA profile from the backpack. Lieutenant Foster further noted that in his twenty-nine years of working in law enforcement, he had not been aware of many other individuals with that first name.

With FBI assistance, Lieutenant Foster discovered the defendant had left the state and was located in Texas. After FBI communications with members of the defendant's family, the defendant turned himself in on or about August 2, 2018. At that point, Lieutenant Foster executed the warrant for the defendant's DNA and sent two reference samples to the LSPCL for comparison to the DNA samples taken from backpack. Lieutenant Foster also obtained and executed a DNA search

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<sup>4</sup> Swabs taken from the red and black glove and handgun were inconclusive, due to the complex nature of the profile.

warrant for Mr. Trim, who was incarcerated at the time, and submitted his DNA to the crime lab.

Supplemental DNA testing, completed on August 9, 2018, after reference samples for Mr. Trim and the defendant were submitted to the crime lab, confirmed the defendant's DNA was on the backpack.<sup>5</sup> However, Mr. Trim was excluded as a major contributor to the DNA profile. In that regard, Lieutenant Foster noted one of the assailants, wearing the dark or navy blue hoodie, had gloves on both hands. Consistent with the DNA results, the assailant wearing the gray shirt, believed to be the defendant, only had on one glove and was shown in video footage handling the backpack with his ungloved hand. Lieutenant Foster further testified he learned during the investigation the defendant was from the New Orleans area.

The defendant did not testify at trial. On appeal, he argues there was no direct evidence to prove he committed the robbery. He notes neither his fingerprints nor DNA were found at the scene. He further contends there were no details or evidence to corroborate the anonymous tip.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Williams**, 2001-0944 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135. The reviewing court does not determine whether another possible hypothesis has been suggested by the defendant which could explain the events in an exculpatory fashion; rather, the reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is

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<sup>5</sup> In accordance with the final DNA results, the defendant cannot be excluded as a major contributor to the DNA profile obtained from the straps, zipper, and zipper pulls of the backpack. Assuming two contributors, the deduced DNA profile was 2.69 billion times more likely to be observed if it had originated from a mixture of DNA from the defendant and an unknown contributor than if it had originated from two unrelated, random individuals. Mr. Shawhan testified that the DNA results consisted of a statistical DNA "inclusionary" match of the defendant's DNA to the samples taken from the backpack.

sufficiently reasonable that a rational factfinder could not have found proof of guilt beyond a reasonable doubt. **State v. Jones**, 2016-1502 (La. 1/30/18), 318 So.3d 678, 682 (*per curiam*).

In the instant case, presumptive test results showed the defendant's DNA was on the backpack used in the robbery, found abandoned in the field across the street from Capital One, where the assailants fled after the robbery. Consistent with the presumptive DNA match, the police received a tip naming the assailant who only had a glove on one of his hands but handled the bag with both hands as BJ, the defendant's first name. The final DNA testing of the backpack confirmed the defendant's DNA was on the backpack. While there was no other evidence to connect Mr. Trim to this case, he was identified as the assailant who had gloves on both hands.<sup>6</sup> Additionally, we note the tellers testified the assailants had distinct accents indicating they were from the New Orleans area, and Lieutenant Foster testified he learned the defendant was in fact from New Orleans.<sup>7</sup>

Furthermore, there was testimony the defendant fled the state after the robbery. Flight and attempt to avoid apprehension indicate consciousness of guilt, and therefore, are circumstances from which a juror may infer guilt. **Southall**, 369 So.3d at 933. Thus, under the facts and circumstances presented in this case, we cannot say that the jury was irrational in determining the defendant was one of the perpetrators in this case. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660-662.

An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict

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<sup>6</sup> Consistent with video footage and testimony indicating one of the assailants was fully gloved while the other only wore one red glove during the offense, we reiterate the police recovered a pair of camouflage gloves and one red and black glove in the area where the assailants fled.

<sup>7</sup> On appeal, the defendant concedes in his brief he was born in New Orleans but states he moved to Baton Rouge at eight years of age. However, there was no evidence or testimony presented at trial to show he moved from New Orleans.

on the basis of an exculpatory hypothesis presented to, and rationally rejected by, the jury. See State v. Calloway, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*). We find the jury could have rationally inferred the evidence presented by the State negated any reasonable probability of misidentification in this case. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, the elements of both counts of armed robbery with a firearm and the defendant's identity as the perpetrator of the offenses. Accordingly, we find no merit in assignment of error number one.

#### **ASSIGNMENT OF ERROR NUMBER TWO**

In assignment of error number two, the defendant argues the trial court violated his right to confrontation in allowing Mr. Shawhan to testify about the supplemental DNA results, though he was not the DNA analyst who performed the testing.<sup>8</sup> The defendant claims the DNA report was the only evidence that implicated him and argues its introduction was not harmless. He concedes this court resolved this issue in a mid-trial writ, but argues the instant case is distinguishable from the relied upon cases.<sup>9</sup>

In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const. amend. VI. The confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had

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<sup>8</sup> The defendant concedes the initial report did not violate his right of confrontation as it did not name him as a suspect or DNA match.

<sup>9</sup> See State v. McElveen, 2022-1066 (La. App. 1st Cir. 9/29/22), 2022 WL 4546008 (unpublished). Although a pretrial determination does not absolutely preclude a different decision on appeal, judicial efficiency demands that this court accord great deference to its pretrial decisions unless it is apparent, in light of a subsequent trial record, that the determination was patently erroneous and produced an unjust result. State v. Ard, 2022-0230 (La. App. 1st Cir. 12/22/22), 361 So.3d 473, 480 n.2, writ denied, 2023-00281 (La. 9/26/23), 370 So.3d 471. Nonetheless, we elect to discuss the merits of the defendant's argument.

had a prior opportunity for cross-examination.” **Crawford v. Washington**, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004); **State v. McIntosh**, 2018-0768 (La. App. 1st Cir. 2/28/19), 275 So.3d 1, 6, writ denied, 2019-00734 (La. 10/21/19), 280 So.3d 1175.

The **Crawford** Court drew a distinction between testimonial and nontestimonial statements and confined its holding to testimonial evidence. **McIntosh**, 275 So.3d at 6 (citing Crawford, 541 U.S. at 61-68, 124 S.Ct. at 1370-74). Testimonial statements, while not fully defined by the court, include those “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]” **Crawford**, 541 U.S. at 52, 124 S.Ct. at 1364.

In **Melendez-Diaz v. Massachusetts**, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the United States Supreme Court considered whether sworn drug analysis certificates attesting that material seized by the police from the defendant contained cocaine were testimonial in nature, thus rendering the certificates’ affiants “witnesses” subject to the defendant’s right of confrontation. Finding that the certificates were affidavits made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, the Court held that the lab certificates were testimonial in nature. Accordingly, absent a showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the affidavits were not admissible in evidence against the defendant. **Id.**, 557 U.S. at 311, 129 S.Ct. at 2532. The Court stated, “[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.” **Id.**, 557 U.S. at 319, 129 S.Ct. at 2537. The Court further stated, “there is little reason to believe that confrontation will be useless in testing analysts’ honesty, proficiency, and methodology—the features that are

commonly the focus in the cross-examination of experts.” *Id.*, 557 U.S. at 321, 129 S.Ct. at 2538.

In *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), the defendant was arrested for driving while intoxicated (DWI). The principal evidence against him was a forensic laboratory report certifying that his blood-alcohol concentration (BAC) was well above the threshold for an aggravated DWI offense. At trial, the prosecution did not call as a witness the analyst who completed and signed the “certificate of analyst” of the report and had been assigned to test the defendant’s blood sample. Further, the prosecution did not call as a witness the examiner who reviewed the analysis and certified that the analyst who tested the sample was qualified to conduct the BAC test, and that the “established procedure” for handling and analyzing the defendant’s sample “had been followed.” *Id.*, 564 U.S. at 653, 131 S.Ct. at 2710-11. Instead, the State introduced the analyst’s finding as a “business record” during the testimony of another analyst who was familiar with the laboratory’s testing procedures, but ha[d] “neither observed nor reviewed [the analyst’s] analysis.” *Id.*, 564 U.S. at 655, 131 S.Ct. at 2712.

The New Mexico Supreme Court held that, although the blood-alcohol analysis was testimonial, the Confrontation Clause did not require the certifying analyst’s in-court testimony, finding that the live testimony of the other analyst had satisfied the constitutional requirements. On review, in reversing the lower decision, the United States Supreme Court’s holding was set forth as follows:

The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification *or perform or observe the test reported in the certification*. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused’s right is to be confronted with the analyst who made the certification, unless that

analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.” (Emphasis added).

*Id.*, 564 U.S. at 652, 131 S.Ct. at 2710.<sup>10</sup>

In **Williams v. Illinois**, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) (plurality opinion), abrogated by **Smith v. Arizona**, 602 U.S. 779, 144 S.Ct. 1785, 219 L.Ed.2d 420 (2024), the United States Supreme Court found no violation of the Confrontation Clause where an expert witness testified that a DNA profile produced by a private laboratory, Cellmark, from swabs taken from a rape victim matched the DNA profile produced by a state forensic analyst from a blood sample drawn from the defendant. The expert witness in **Williams** did not conduct or observe the DNA testing, but testified that based on her own comparison of the two DNA profiles, she concluded the defendant could not be excluded as a source of the semen identified in the vaginal swabs. The Cellmark report itself was neither admitted into evidence nor shown to the factfinder. The expert witness did not quote or read from the report; nor did she identify it as the source of any of the opinions she expressed. *Id.*, 567 U.S. at 61-62, 132 S.Ct. at 2230.

The Court in **Williams** gave two independent reasons for finding that the testimony was properly admitted. First, the expert’s reliance on the report was not offered to prove the truth of the matter asserted<sup>11</sup> because the results of the DNA test were relayed by the expert solely for the purpose of explaining the assumptions on which her opinion rested. *Id.*, 567 U.S. at 56-59, 132 S.Ct. at 2227-28. Second, the DNA profile was produced before the defendant was identified as the assailant or targeted as a suspect. *Id.*, 567 U.S. at 57-59, 132 S.Ct. at 2228.

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<sup>10</sup> As Justice Sotomayor pointed out in her concurrence, **Bullcoming** was “not a case in which the person testifying [was] a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.” **Bullcoming**, 564 U.S. at 672, 131 S.Ct. at 2722.

<sup>11</sup> Subsequently in **Smith**, discussed *infra*, the United States Supreme Court found “no meaningful distinction between disclosing an out-of-court statement” to “explain the basis of an expert’s opinion” and “disclosing that statement for its truth.” **Smith**, 602 U.S. at 795, 144 S.Ct. at 1798 (quoting **Williams**, 567 U.S. at 106, 132 S.Ct. 2221 (Thomas, J., concurring in judgment)).

In affirming the trial court's denial of the defendant's motion to exclude the testimony under the Confrontation Clause, the Court in **Williams** stated:

[W]e also conclude that even if the report produced by Cellmark had been admitted into evidence, there would have been no Confrontation Clause violation. The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory.

**Williams**, 567 U.S. at 58, 132 S.Ct. at 2228. The Court specifically noted that the abuses that prompted the adoption of the Confrontation Clause shared two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct; and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions. **Id.**, 567 U.S. at 82, 132 S.Ct. at 2242.

Subsequently, in **State v. Bolden**, 2011-2435 (La. 10/26/12), 108 So.3d 1159, 1161-62 (*per curiam*), the Louisiana Supreme Court held that a DNA profile created prior to the defendant becoming a suspect in the case was non-testimonial in nature. The Court stated,

No error under the Confrontation Clause occurs when a DNA expert testifies that in his or her opinion the DNA profile developed from a sample taken from defendant matches the DNA profile developed by other, non-testifying technicians from biological samples taken from the victim of a sexual assault if: the tests on the victim's samples were conducted before the defendant was identified as the assailant or targeted as a suspect[.]

**Id.**, 108 So.3d at 1161-62 (citing **Williams**, 567 U.S. at 82-83, 132 S.Ct. at 2242-43).

In **State v. Grimes**, 2011-0984 (La. App. 4th Cir. 2/20/13), 109 So.3d 1007, writ denied, 2013-0625 (La. 10/11/13), 123 So.3d 1216, the appellate court

considered **Bullcoming**, **Williams**, and their progeny. In **Grimes** the defendant was convicted of aggravated rape, aggravated kidnapping, and sexual battery of two victims that occurred in the years 1993 and 1997. At the time of the attacks, the perpetrator was unknown. Sexual assault kits were collected and DNA analyses in 2005 identified the defendant as the perpetrator. On appeal, the defendant argued he was denied his constitutional rights to confront/cross-examine the analysts who performed the DNA tests in that case. Thus, the appellate court considered whether supervisors who had not performed DNA analyses could testify as to the actual analysts' findings contained in reports. **Grimes**, 109 So.3d at 1017-26.

The appellate court found no merit in the defendant's argument. Specifically, the court held DNA evidence generated before the defendant was identified as a suspect was properly admitted under **Williams**, stating, "there is no evidence that the defendant was a suspect or target in the two later cases at the time the DNA profiles were requested or produced, or that the DNA profiles in those two cases were 'prepared for the primary purpose of accusing' the defendant." **Grimes**, 109 So.3d at 1025-1026. Regarding DNA evidence generated after the defendant became a suspect in the case, the court noted the analyst who testified at trial was the "certifying" analyst on the reports at issue. Therefore, the court held, "even assuming for the sake of argument that the last two DNA profiles—generated after defendant was identified as a suspect in the first three cases—were prepared for the primary purpose of accusing defendant, and thus might have been considered testimonial statements/evidence covered by the Confrontation Clause, they nevertheless would have been admissible under **Bullcoming** and **Melendez-Diaz**." **Id.**, 109 So.3d at 1025-26. (Internal quotations omitted).

More recently, in **Smith**, which abrogated **Williams**, the United States Supreme Court held, "If an expert for the prosecution conveys an out-of-court

statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts.” **Smith**, 602 U.S. at 795, 144 S.Ct. at 1798. In **Smith**, law enforcement officers found the defendant with what appeared to be drugs. **Id.**, 602 U.S. at 789, 144 S.Ct. at 1795. The analyst who tested the substances did not testify at the trial. **Id.**, 602 U.S. at 790, 144 S.Ct. at 1795. Instead, a substitute expert reviewed the lab report and the analyst’s notes, referred to the materials at trial, conveyed what the documents said, and offered his opinion on the chemical nature of the substances. **Id.**, 602 U.S. at 791, 144 S.Ct. at 1795-1796. The Court held that the testifying analyst testified to the truth of the other analyst’s report and remanded for the state court to determine whether the report was testimonial. **Id.**, 602 U.S. at 796-802, 144 S.Ct. at 1798-1802.

The Court noted its holding in **Smith** follows from its other holdings about the Confrontation Clause’s application to forensic evidence. The Court added,

A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See **Crawford**, 541 U.S., at 68, 124 S.Ct. 1354; **Melendez-Diaz**, 557 U.S., at 311, 129 S.Ct. 2527. Neither may the State introduce those statements through a surrogate analyst *who did not participate* in their creation. See **Bullcoming**, 564 U.S., at 663, 131 S.Ct. 2705. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them. (Emphasis added).

**Id.**, 602 U.S. at 802-803, 144 S.Ct. at 1802; see also **United States v. Turner**, 709 F.3d 1187, 1191-94 (7th Cir. 2013) (holding any error was harmless, but stating that a surrogate expert’s testimony concerning analysis of a test for cocaine “put [the actual analyst’s] out-of-court statements before the jury” and “allowed [the surrogate] to vouch for the reliability of [the analyst’s] work[.]”).

In this case, the State attempted to introduce the DNA reports into evidence during the direct examination of Mr. Shawhan, a DNA forensic supervisor at the LSPCL, after the trial court ruled him an expert in DNA forensics.<sup>12</sup> The trial court ruled the reports and testimony by Mr. Shawhan regarding the reports inadmissible, as a different analyst, who no longer worked at the LSPCL, performed the testing in this case. In granting the State's application for supervisory review and reversing the trial court's ruling, this court, in part, cited **Bolden, Grimes, and Williams** in finding that the expert testimony and DNA reports at issue are admissible. **McElveen**, 2022 WL 4546008 at \*1.

Prior to Mr. Shawhan's testimony, Lieutenant Foster testified, without objection, the presumptive DNA testing of the backpack led to the identification of the defendant. The backpack was recovered and collected in the normal course of business prior to the defendant being identified as a suspect. The primary purpose of the collection and subsequent testing was to catch the criminals who had committed the offenses, not to target the defendant. The defendant concedes the presumptive test results, generated before the defendant was identified as the assailant or targeted as a suspect, were properly admitted in this case. As Lieutenant Foster also testified, without objection, he collected DNA reference samples from the defendant after his arrest and sent the samples to the lab. Finally, Lieutenant Foster testified, again without objection, that the subsequent lab report confirmed the presumptive match, specifically showing the defendant's DNA was on the backpack.

Mr. Shawhan likewise testified regarding the presumptive match generated before the defendant became a suspect in this case. As to his testimony regarding the final test results, generated after the defendant was developed as a suspect and arrested in this case, we note Mr. Shawhan testified he participated in the 2018

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<sup>12</sup> We note the trial court prompted its own ruling on the evidence. The defense attorney later noted he was in agreement with the trial court and objected for the record.

technical review process for the DNA analyses in this case. Specifically, he served as the technical reviewer whose role was to verify and confirm all of the policies and procedures “[a]t every step of the process[.]” As a LSPCL DNA forensic supervisor, Mr. Shawhan evaluated the analysis process in this case and verified that it upheld the lab’s policies and procedures. Mr. Shawhan testified the steps of technical review included “putting on the analyzer . . . and the results that go into a report.” Mr. Shawhan also stated his verification included, “screening, extraction, quantification, amplification, genetic analyzer, and interpretation.”

Based on our review of the jurisprudence and the record in its entirety, we are convinced that our pretrial determination in this matter was not patently erroneous and did not produce an unjust result. The defendant was not a suspect or target when the presumptive test results were generated. Thus, the report and testimony by both Lieutenant Foster and Mr. Shawhan regarding the evidence recovered, submitted, and tested, and the results of presumptive analysis were properly admitted under **Williams**<sup>13</sup> and **Bolden**. Regarding the supplemental DNA results generated after defendant was identified as a suspect in this case, Mr. Shawhan reviewed every step of the process to verify that the established procedure for handling and analyzing the defendant’s sample had been followed. Assuming the supplemental results generated after the defendant was identified as a suspect in this case were testimonial, the State was properly allowed to introduce them through Mr. Shawhan, a participant in the process. Thus, the supplemental report and related testimony were properly admitted under **Smith**, **Bullcoming**, and **Melendez–Diaz**.<sup>14</sup> See also **State v. Chisolm**, 49,043 (La. App. 2d Cir.

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<sup>13</sup> The United States Supreme Court was silent in **Smith** regarding the second reason the **Williams** court gave for finding no violation of the Confrontation Clause in that case, that the DNA profile was produced before the defendant was identified as the assailant or targeted as a suspect, relied on in **Bolden** and **Grimes**.

<sup>14</sup> We note the defendant may have waived his right of confrontation by failing to timely file a written demand for the analyst who performed the tests to testify, pursuant to La. R.S. 15:501(B).

5/14/14), 139 So.3d 1091, 1102, writ denied, 2014-1203 (La. 3/13/15), 176 So.3d 1031 (court found no error where expert witness performed a technical review of analyst's work and confirmed proper protocols were used, examined the data, and testified regarding her own conclusions); **State v. Welch**, 2012-1531 (La. App. 1st Cir. 3/22/13), 115 So.3d 490, 498 (considering his credentials and explanation of the test results, this court found no confrontation clause violation in allowing a forensic toxicologist to testify on the basis of the report by his fellow toxicologist).

Moreover, even if we were to find, in light of **Smith**, that the admission of testimonial statements through a surrogate analyst violated the Confrontation Clause, confrontation errors are subject to a harmless error analysis. See Delaware v. Van Arsdall, 475 U.S. 673, 680-81, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986); **State v. Patton**, 2010-1841 (La. App. 1st Cir. 6/10/11), 68 So.3d 1209, 1218. Factors to be considered by the reviewing court include: the importance of the testimony in the prosecution's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; the extent of cross-examination otherwise permitted; and the overall strength of the prosecution's case. **Van Arsdall**, 475 U.S. at 684, 106 S.Ct. at 1438; **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990), cert. denied, 506 U.S. 880, 113 S.Ct. 231, 121 L.Ed.2d 167 (1992). The verdict may stand if the reviewing court determines that the guilty verdict rendered in the particular trial is surely unattributable to the error. **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

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See La. R.S. 15:499, *et seq.* (Louisiana's statutory scheme which requires a defendant to exercise his Confrontation Clause rights prior to trial); **State v. Simmons**, 2011-1280 (La. 1/20/12), 78 So.3d 743, 746-47 (*per curiam*). Although the record does not reflect the State filed formal notice, pursuant to La. R.S. 15:501(A), of its intent to introduce the crime lab reports. According to the record, it appears the State's production of discovery included copies of the lab reports as attachments. See State v. Young, 552 So.2d 669, 672 (La. App. 2d Cir. 1989). However, rather than merely offering the reports as proof, the State elected to call Mr. Shawhan as a witness to testify as an expert in DNA forensics.

Herein, the supplemental test results merely verified and confirmed the presumptive CODIS match. The backpack, which was subjected to two DNA tests, was also seen on the video footage evidence and found near the crime scene. Therefore, Mr. Shawhan's testimony on the results of the supplemental DNA report was cumulative of testimony presented by Lieutenant Foster. Finally, the defendant was identified as one of the assailants by a tipster. Accordingly, we find that the verdicts in this case were surely unattributable to any error in the admission of the supplemental test results and Mr. Shawhan's related testimony. Thus, under a harmless error analysis, the defendant fails to show his entitlement to relief. See State v. West, 2024-00133 (La. 11/6/24), \_\_\_ So.3d \_\_\_, \_\_\_, 2024 WL 4688793, \*2. Considering the foregoing, we find no merit in assignment of error number two.

### **ASSIGNMENT OF ERROR NUMBER THREE**

In assignment of error number three, the defendant contends the trial court erred in including an instruction on flight in pre-deliberation jury instructions. He argues there was no evidence to support the claim that he fled the jurisdiction. He further argues the instruction was not harmless considering the evidence in this case.

The trial court must instruct the jury on the law applicable to the case. La. Code Crim. P. art. 802(1). In analyzing jury instructions, the cases caution against taking certain phrases out of context of the charge as a whole. The test articulated is whether, taking the instruction as a whole, reasonable persons of ordinary intelligence would understand the charge. **State v. West**, 568 So.2d 1019, 1023 (La. 1990); **State v. Leger**, 2017-0461 (La. App. 1st Cir. 5/11/20), 303 So.3d 337, 346 (on remand). As stated by the Louisiana Supreme Court, "a great deal of credit should be accorded to the good sense and fairmindedness of jurors who have heard the evidence and who know what was and was not proven." **State v. Dupre**,

408 So.2d 1229, 1234 (La. 1982); **State v. Brown**, 2020-0150 (La. App. 1st Cir. 2/19/21), 2021 WL 650816, \*14 (unpublished), writ denied, 2021-00458 (La. 6/1/21), 316 So.3d 835.

Herein, over the defendant's objection, the trial court provided the following instruction to the jury:

*If you find* that the defendant fled immediately after a crime was committed or after he was accused of a crime, the *flight alone* is not sufficient to prove that the defendant is guilty. However, flight may be considered along with all other evidence. You must decide whether such flight was due to consciousness of guilt or to other reasons unrelated to guilt. [Emphasis added]

An instruction on flight is permitted in criminal cases where it is supported by the evidence. **State v. Hollins**, 2023-0785 (La. App. 1st Cir. 3/19/24), 387 So.3d 641, 650.

We find the evidence of flight was sufficient to warrant the above instruction. Without objection, Lieutenant Foster testified he looked for the defendant after receiving the presumptive DNA test results and subsequent tip. He stated the FBI "tirelessly" assisted him in the search and ultimately discovered the defendant was no longer in Louisiana, but in Texas. Lieutenant Foster further testified members of the defendant's family "got" the defendant to turn himself in. Defense counsel had the opportunity to cross examine Lieutenant Foster on this testimony. Further, a great deal of credit should be given to the jurors who were instructed to assess the evidence to determine if the defendant fled in this case. Considering the foregoing, we find no error in the trial court's inclusion of an instruction on flight. Accordingly, we find assignment of error number three lacks merit.

#### **ASSIGNMENT OF ERROR NUMBER FOUR**

In assignment of error number four, the defendant contends his trial counsel was constitutionally deficient in failing to challenge this court's decision on the

mid-trial writ regarding the admissibility of the DNA evidence. He further notes his counsel failed to call his mother to testify or give adequate notice to call an alibi witness to testify. Finally, he argues his counsel rendered ineffective assistance at sentencing.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. McMillan**, 2009-2094 (La. App. 1st Cir. 7/1/10), 43 So.3d 297, 302, writ denied, 2010-1779 (La. 2/4/11), 57 So.3d 309. A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. **McMillan**, 43 So.3d at 302. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that, but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. However, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **Id.** at 302-303.

Decisions relating to investigation, preparation, and strategy require an evidentiary hearing, and therefore, cannot possibly be reviewed on appeal. **State**

**v. Bias**, 2014-1588 (La. App. 1st Cir. 4/24/15), 167 So.3d 1012, 1021, writ denied, 2015-1051 (La. 5/13/16), 191 So.3d 1053. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rests with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. Furthermore, “[t]he election to call or not call a particular witness is a matter of trial strategy and not, per se, evidence of ineffective counsel.” **State v. Folsie**, 623 So.2d 59, 72 (La. App. 1st Cir. 1993).

We note the defendant’s first claim of ineffective assistance of counsel fails, as he cannot show prejudice as a result of the admission of DNA evidence. In addition to this court finding the DNA evidence admissible in the mid-trial writ ruling, we further have addressed the issue on appeal, finding no merit in the assignment of error. Thus, in the absence of prejudice to the defendant, there is no need to determine whether counsel’s performance was deficient. We further note the defendant’s argument regarding his counsel’s adequacy at sentencing is pretermitted due to this court’s finding, discussed *infra*, on assignment of error number six. Finally, the other deficiencies alleged by the defendant on appeal address matters of trial preparation and strategy, which cannot be reviewed on appeal. Therefore, assignment of error number four is without merit or otherwise not subject to appellate review.

#### **ASSIGNMENT OF ERROR NUMBER FIVE**

In assignment of error number five, the defendant argues the trial court erred in failing to hold a hearing on his *pro se* motions for new trial. He argues his motions presented numerous claims that required a hearing.

As the State notes in its brief on appeal, the defendant did not request a hearing on the motions for new trial below, nor did he object to the trial court’s ruling or lack of a hearing. An irregularity cannot be availed of after the verdict

unless it was objected to at the time of the occurrence. La. Code Crim. P. art. 841(A). The contemporaneous objection rule has two purposes: to put the trial judge on notice of the alleged irregularity so that he may cure the problem, and to prevent the defendant from gambling on a favorable verdict and then resorting to appeal on errors that might easily have been corrected by an objection. **State v. Cockerham**, 2017-0535 (La. App. 1st Cir. 9/21/17), 231 So.3d 698, 708, writ denied, 2017-1802 (La. 6/15/18), 245 So.3d 1035. Thus, to preserve an issue for appellate review, a party must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for the objection. See La. Code Crim. P. art. 841(A); See also **State v. Johnson**, 2015-0513 (La. App. 1st Cir. 12/23/15), 185 So.3d 822, 829, writ denied, 2016-0174 (La. 2/3/17), 215 So.3d 688. Thus, we find this issue was not preserved for appellate review.

Furthermore, the defendant submitted his motions for new trial without argument. There was nothing to suggest that he intended to call any witnesses or submit any evidence in support of his motions, or that he was prevented from doing so. Accordingly, the trial court did not err or abuse its discretion in ruling on the motions without a hearing. We find no merit in assignment of error number five.

#### **ASSIGNMENT OF ERROR NUMBER SIX/PATENT ERROR REVIEW**

In assignment of error number six, the defendant argues the trial court erred in failing to observe the statutorily required twenty-four-hour delay, prior to the imposition of the sentences. We agree.

Herein, the defendant filed motions for new trial and post-verdict judgment of acquittal, and the trial court denied them on the day of sentencing, just prior to the imposition of the sentences. However, under La. Code Crim. P. art. 873, in pertinent part, “[i]f a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is

overruled.” There is no indication in the record the defendant waived the delay in this case. Thus, the trial court erred by sentencing the defendant immediately after ruling on the motion for new trial.

In **State v. Augustine**, 555 So.2d 1331, 1333-34 (La. 1990), the Louisiana Supreme Court noted that a failure to observe the twenty-four-hour delay provided in Article 873 may be considered harmless error where the defendant could not show that he suffered prejudice from the violation, and sentencing is not raised on appeal. See **State v. Stafford**, 2020-0299 (La. App. 1st Cir. 2/22/21), 321 So.3d 965, 969. Where, however, a defendant does challenge his sentence, failure to follow the required twenty-four-hour delay renders a sentence void. **Augustine**, 555 So.2d at 1333 (citing **State v. Mistich**, 186 La. 174, 171 So. 841 (1937) and **State v. George**, 218 La. 18, 48 So.2d 265 (1950), cert. denied, 340 U.S. 949, 71 S.Ct. 528, 95 L.Ed. 684 (1951)).

In this case, through a claim of excessiveness, the defendant is challenging his sentences, thus meeting the requirements of **Augustine** for remand. See **State v. Pursell**, 2004-1775 (La. App. 1st Cir. 5/6/05), 915 So.2d 871, 874. Additionally, as stated, the record does not contain an expressed or even an implicit waiver of the sentencing delay. While defense counsel did not contest or object to moving on to sentencing after the rulings on the motions, in **State v. Kisack**, 2016-0797 (La. 10/18/17), 236 So.3d 1201, 1205 (*per curiam*), cert. denied, 583 U.S. 1160, 138 S.Ct. 1175, 200 L.Ed.2d 322 (2018), the Louisiana Supreme Court found the defense counsel’s participation in the sentencing hearing was insufficient to constitute a waiver of the delay required by Article 873. As further observed by the court, “[a]n implicit waiver . . . runs afoul of the plain language of Art. 873 that requires that the waiver be expressly made.” **Id.** Therefore, given the circumstances presented, we must vacate the defendant’s sentences and remand the case to the trial court for resentencing. See **Augustine**,

555 So.2d at 1333-1335; **State v. Denham**, 2001-0400 (La. App. 1st Cir. 12/28/01), 804 So.2d 929, 932, writ denied, 2002-0393 (La. 1/24/03), 836 So.2d 37.

Because we find that **Augustine** requires the reversal of the defendant's sentences and remand for resentencing, it is at this time premature to review the merits of the defendant's excessiveness claim raised in assignment of error number seven. See State v. Thompson, 2010-2254 (La. App. 1st Cir. 6/10/11), 2011 WL 3423798, \*1 (unpublished). However, we note that, when resentencing the defendant, the trial court should advise him of the time limitations provided by La. Code Crim. P. art. 930.8(A) for applying for post-conviction relief. The sentences are hereby vacated, and the matter is remanded to the trial court for resentencing in accordance with this opinion. We pretermit discussion of the merits of assignment of error number seven.

**CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED FOR RESENTENCING.**

STATE OF LOUISIANA  
COURT OF APPEAL  
FIRST CIRCUIT

2023 KA 0939

STATE OF LOUISIANA  
VERSUS  
BJ McELVEEN

\*\*\*\*\*

**McClendon, J., dissenting.**

In light of the United States Supreme Court's opinion in **Smith v. Arizona**, 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024), I must respectfully disagree.

NINETEENTH JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

STATE OF LOUISIANA

SECTION VII

VERSUS

BJ MCELVEEN

NO. 09-18-0487

JURY TRIAL

Testimony and Notes of Evidence, taken in the  
above-entitled and -numbered cause, before the HONORABLE  
BEAU M. HIGGINBOTHAM, Judge, presiding on WEDNESDAY, the  
28TH day of SEPTEMBER, 2022.

APPEARANCES:

REPRESENTING THE STATE OF LOUISIANA:

MR. STUART THERIOT, ESQ.  
MS. ROKEYA MORRIS, ESQ.  
EAST BATON ROUGE DISTRICT ATTORNEY'S OFFICE

REPRESENTING THE DEFENDANT:

MR. ROBERT TUCKER, SR., ESQ.  
MR. ROBERT TUCKER, JR, ESQ.  
ATTORNEY AT LAW

**FILED**

SEP 28 2022

*Theresa Tassistro*  
DEPUTY CLERK OF COURT

REPORTED BY: THERESA TASSISTRO, CCR #24015

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**THE COURT:**

All right. Ladies and gentlemen, Mr. Shawhan is to be considered as an expert in the field of DNA Forensics, okay?

**MR. THERIOT:**

Thank you.

**D I R E C T E X A M I N A T I O N**

**BY MR. THERIOT:**

**Q.** Mr. Shawhan, right out of the gate, if you don't mind elaborating, what is DNA?

**A.** DNA? Well, it stands for deoxyribonucleic acid. And of what's particular importance for us for the discussion today is that you get half of it from your mother and half of it from your father, and it's unique to each individual. It makes you who you are, essentially.

**Q.** And how does it make one person unique from the other?

**A.** Well, because you get half of your DNA from your mother and half of your DNA from your father, you have a unique set of genetic code that's unique to you as an individual.

**Q.** And when you're performing an analysis, is there guidelines or thresholds you're looking for when doing a DNA analysis on a certain piece of evidence?

**A.** Yes. We have several guidelines, several thresholds that have to be met in order to perform DNA analysis.

**Q.** And can you go through what those thresholds and guidelines are?

**A.** Yes. As far as why we -- I'd like to talk about why we have guidelines and why we have thresholds, and that's because we're an accredited laboratory. Based on our accreditation, we have to meet certain criteria before we can even look at DNA profiles. We have to do what's referred to as validation studies. And we perform -- we

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derive certain answers and results based on known samples that we, then, apply to unknown samples, and that's where those thresholds and those things come from.

**Q.** And when analyzing and looking at thresholds, I mean, is there a way to visualize it to the jury about how you're looking at a threshold?

**A.** Yes. When we're looking at a DNA profile, we're looking at something called an electropherogram. The easiest way for me to communicate this to you is I know that you've seen an electrocardiogram. This is the thing that measures the pulse of the heart, and the more intense the pulse, the taller the peak. And if you've seen an ER show, you've seen an electrocardiogram. Well, what we're looking at is an electropherogram, and it's very similar. We're looking at peaks, and these peaks are visualizations of what the DNA profile is, and so the taller the peak, the more concentrated the DNA is there. And so when we're evaluating or we're interpreting DNA analysis, we're looking at those peaks and we're making certain determinations off those values of how tall the peak is, where the peak falls on the plane that we're looking at.

**Q.** Very well. And in viewing a piece of evidence and looking for the analysis, is that where you're going to see the chart, so to speak, the analysis?

**A.** Yes. So before we actually get to the DNA profile, we have something called the DNA analysis process. And so we have extraction, quantitation, amplification, we put it on an instrument called a genetic analyzer that, then, allows us to view that DNA profile. And so in extraction, what we're doing is we're isolating the DNA from whatever substance it's on. So let's say it's a swab or a cutting of something. What we're doing in extraction is we're trying

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1 to just get to where the DNA is. At quant, which is the  
2 next step, we're essentially asking the question, hoping to  
3 get an answer, an estimate, how much DNA did we get from  
4 that sample. At amplification, what we're doing is we're  
5 generating millions of copies of that DNA, so that we can  
6 put on the analyzer to, then, visualize it. And that's what  
7 we do when we're making interpretations. We're looking at  
8 that visualized e-gram is what we call it, the  
9 electropherogram.

10 Q. Now, in your -- sorry -- in your training, is there  
11 certain terminology that you use on a report when doing an  
12 analysis regarding what we call a DNA hit? I mean, is there  
13 certain phrases or terminology you use that might be  
14 different than the typical lay person?

15 A. Yes. We -- so I look at the DNA evidence, and then I  
16 type up a report, and that report will have certain  
17 scientific conclusions in it.

18 Q. And does it say Joe Smith's DNA is here, or is there  
19 certain terminology that's used in the scientific community?

20 A. So when we make an inclusion or an exclusion, what we  
21 essentially say is an individual cannot be excluded -- that  
22 means we're including the person; or we'll say an individual  
23 can be excluded -- that means we're saying when we look at  
24 the evidence and look at the reference, they're not  
25 matching. And then we don't leave it at that. We also  
26 offer a statistic, because a scientist, it wouldn't be very  
27 appropriate for us to just say an individual is there or  
28 he's not there. It's far more informative for us to offer  
29 statistical weight to show you how informative my  
30 conclusions are.

31 Q. And in your role in the report, are -- you mentioned  
32 earlier, are you reviewing the data, as well? I guess I'll

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rephrase, but do you review data sometimes your name's not listed in the report?

A. That's correct. We have an extensive review process at our crime lab. We have a three tier review process. We have a quality review, a technical review, and then an administrative review. As a supervisor, I can do all three. It's pretty routine in our field. And specifically in science, something that's heavily regulated by policies and procedures that a technical reviewer can testify and can discuss any of the results in the report.

Q. Okay. And the case you're here for today, did you take that role regarding analysis regarding this case?

A. Yes. I was a technical reviewer in this case.

Q. But as a tech reviewer, you reviewed the data, as well?

A. That's correct. That's -- you have to, yeah.

Q. And were you in line with the results from that report?

A. That's correct.

**MR. THERIOT:**

Your Honor, can I approach?

**THE COURT:**

Sure.

**BY MR. THERIOT:**

Q. Handing you what I've filed and marked as S26. Do you recognize this document?

A. I do. I can see our SP number, and this is a number that each case will have a unique lab number with it, and that number stays with it throughout its entirety. And I see, you know, evidence that we took in, and I can see the analyst's initials that wrote this report.

Q. And this is the report that you reviewed the data as the reviewer at the crime lab?

A. That's correct.

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Q. And you stand by the conclusions contained in the report?

A. That's correct.

MR. THERIOT:

At this time, I'd like to offer, file, and introduce what would be S26, and I have copies to publish to the jury.

MR. TUCKER, SR:

May I see S26? All right.

MR. THERIOT:

Your Honor, if you want to ask him, Mr. Tucker, on the record. He's nodding his head at me, but --

MR. TUCKER, SR:

Yes. The question is?

MR. THERIOT:

I'm trying to offer, file, and introduce S26 and publish to the jury.

MR. TUCKER, SR:

I have no objection.

MR. THERIOT:

Thank you.

THE COURT:

All right. Before we do that, ladies and gentlemen, we're going to take a quick recess. Please do not talk amongst yourselves about the case. If you would retire to the jury room --

(REPORTER'S NOTE: WHEREUPON, THE JURY WAS EXCUSED FROM THE COURTROOM.)

THE COURT:

All right. They have been retired from the courtroom. We're going to take a recess. I'll

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see attorneys in chambers, please.

**RECESS**

**THE COURT:**

All right. Y'all may be seated. Before we call back in the jury, State, you have anything to put on record, and the Defense? You can be seated, Mr. McElveen?

**MR. THERIOT:**

Your Honor, yes, before we proceed, we were questioning Mr. Shawhan. Attempted to introduce a report, there was no objection from the Defense. My understanding is the objection was from the Court, itself. However, at the pleasure of the Court, I can resume laying a foundation in an attempts to, then, submit the report. I did, during the break, give your staff notice of two cases, one from the Supreme Court, one from the Louisiana Supreme Court, that we believe are on point regarding this very issue. So I can continue to lay a foundation, if need be, but also note that before the break, the Defense did not have an objection to us publishing this report.  
A.

**THE COURT:**

So it's the State's position that just because the State -- or the Defense did not object, that this Court should let in, maybe, possibly inadmissible evidence before the trier of fact.

**MR. THERIOT:**

That's why I was saying if you want me to proceed, I can continue to lay a foundation if

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that would sway the Court's mind, but we're just, for the record, stating that it was not the Defense objection.

**THE COURT:**

No. You indicated that the Defense did not have an objection.

**MR. THERIOT:**

That's correct. Defense does not have an objection.

**THE COURT:**

So it's your position from the State that this Court ought to let in inadmissible evidence because there was a lack of objection upon the Defense?

**MR. THERIOT:**

I'm just, for the record, stating that the objection comes from the bench, from the Court. That it was not a Defense objection.

**THE COURT:**

It's not an objection. It's my job to not put before the trier of fact inadmissible evidence.

**MR. THERIOT:**

Okay. I'm just laying the foundation that the Defense did not object when I attempted to introduce this item. But I can continue to lay a foundation with Mr. Shawhan if that would possibly sway the Court's mind as to what happened before the break. I can continue to lay a foundation with Mr. Shawhan.

**THE COURT:**

So Mr. Shawhan -- is that -- am I pronouncing

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that correctly?

**MR. SHAWHAN:**

I typically tell people Shawhan, but even that's not right, so --

**THE COURT:**

Shawhan.

**MR. SHAWHAN:**

Just go ahead and say Shawhan.

**THE COURT:**

No. How do you pronounce it?

**MR. SHAWHAN:**

I say Shawhan. My dad -- I didn't find it out till college how to correctly pronounce my last name.

**THE COURT:**

Okay. Shawhan. Okay. Mr. Shawhan. Mr. Theriot, did he do the analysis to make this report?

**MR. THERIOT:**

Not the report of Ms. Proctor, but he did do the analysis, Your Honor.

**THE COURT:**

He interpreted somebody else's work?

**MR. THERIOT:**

Machinery work. It's extrapolations from a machine, but -- you could further go towards that it's not one person. It's multiple people working on the report from the crime lab.

**THE COURT:**

Okay. But did Mr. Shawhan do the analysis in which he performed, made the extrapolations, got the numbers, put them into the computer, and then

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shifted down the line?

**MR. THERIOT:**

That's again why I wanted to lay a foundation with Mr. Shawhan to clarify for the Court for the record.

**THE COURT:**

Mr. Theriot, you clearly thought you had already laid the foundation earlier. Now you want to have a second bite at the apple, because of the issue with the Court.

**MR. THERIOT:**

To continue laying a foundation that he's testified previously in court as a tech reviewer.

**THE COURT:**

If you thought you needed to continue to lay the foundation, then why would you offer a report to be offered into evidence, if you thought you had laid the sufficient foundation? Clearly, now that there is an issue with the Court, you wish to go forward and further and try to lay a foundation in order to get your position accepted. Did Mr. Shawhan do the actual physical forensic analysis of the evidence?

**MR. THERIOT:**

He did do forensic analysis of the evidence. That's correct.

**THE COURT:**

He did not -- you told me in chambers he did not do the actual analysis. He is interpreting somebody else's work. Is that not correct?

**MR. THERIOT:**

As a DNA expert, that is correct. Just like

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if the Defense would call their own expert, they would be interpreting someone else's work, and Defense experts are allowed to testify in court. He is a DNA expert who is interpreting the data. That is correct.

**THE COURT:**

Okay. Thank you for that. And on that report that you're trying to enter into evidence, there is not a certification, there's not a person signing off saying these are, in fact, the findings of the person who did the physical analysis?

**MR. THERIOT:**

There is the signing of the finding, that's correct. That's from the crime lab, and there's more signatures, but as he explained on direct before the break, there's a process, and as a tech reviewer, he reviews it and it goes up to a managing supervisor. So he already established before the break that, as part of the crime lab's process, he reviews it as a peer review process. So we already established on direct that he reviewed the data and it's a team effort in regards to the report. So that was before the break, he testified that he had reviewed the data, as well.

**THE COURT:**

And you indicated earlier, I don't know the full name, but it's a female something Proctor is the person who did the actual analysis?

**MR. THERIOT:**

The signature is of an F. Nicole Proctor,

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that's correct, Your Honor.

**THE COURT:**

Nicole Proctor. And clearly, she's not here today. You told me that in court, but she's not testifying, and you indicated this was the last witness for the State. So she's not here today?

**MR. THERIOT:**

She's -- she left the crime lab. She's in Texas, Your Honor.

**THE COURT:**

Okay. And has her findings been subjected to cross-examination prior to today?

**MR. THERIOT:**

Cross-examination with defense attorney? No, not -- not in a trial setting.

**THE COURT:**

I didn't ask about a trial setting, Mr. Theriot. I said has it been subject to cross-examination before today?

**MR. THERIOT:**

If you would categorize the peer review process as cross-examination, I would say yes.

**THE COURT:**

You're telling me that a peer review process within somebody's own company is cross-examination?

**MR. THERIOT:**

As Mr. Mai from before, and then Mr. Shawhan before even the break stated that there's a process and they peer review each other to correct see if there's any miscalculations or red flags.

**THE COURT:**

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And you think that's cross-examination?

**MR. THERIOT:**

Sorry. Tech reviewer, but that's why I asked him --

**THE COURT:**

But you consider that cross-examination under the law and under our constitution?

**MR. THERIOT:**

No. That's why I asked if you said a trial setting -- confrontation clause would be correct. No, it's not been -- this is the trial that we're having right here, so Ms. Proctor was not cross-examined in a trial setting. That's why I asked before for clarity, if you meant a trial setting. So no, this is -- there's never been a cross-examination in a trial setting, as we are here today, or have been for the past couple of days, in trial. Again, in preparation, state that it is the same fact pattern that we saw in the Supreme Court case, the state Supreme Court case in *State v. Bolden*, and the SCOTUS, US Supreme Court case in *Williams v. Illinois*, so it's same fact pattern would apply. I know Mr. Shawhan was a tech reviewer. I prepped with him, and as a tech reviewer who -- as a DNA expert who's been tendered as a DNA expert, he's gone over the data that went into the report in this case.

**THE COURT:**

So you indicated that *Williams v. Illinois*, 132 Supreme Court 2221, I believe, is the citation that dealt with a bench trial and not a jury trial, and the actual issue was whether or not the

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Illinois law was interpreted correctly for the confrontation. And in that case, it actually says that the law -- in a bench trial, you can offer certain evidence, but not in a jury trial. Was this a jury trial or a bench trial in *Williams*?

**MR. THERIOT:**

If *Williams* was a bench trial, it would be a bench trial, but I believe in *State v. Bolden*, that was a jury trial and they mentioned *Williams*. I think they said that the verdict came down before *Williams*, but the *Bolden* case, which is Louisiana Supreme Court, would be a jury trial.

**THE COURT:**

And in *Williams*, it involves actually two different agencies, is that correct, that did testing on the --

**MR. THERIOT:**

I think *Williams* was an outside agency, but it was outside agency that was reviewing the same data from another agency. So it's, again, the same data --

**THE COURT:**

They weren't reviewing. They actually did a comparison and made a match, and then the state -- Illinois state lab did a separate match to confirm the -- whatever the lab's name was in *Williams*.

**MR. THERIOT:**

So you would have two analysts reviewing the same data, but you're correct, there would be two different agencies, but it's still two people reviewing the same data, and that that expert was out able to testify to the findings of that data.

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**THE COURT:**

And then *Williams* was the -- is it Cellmark?  
Is that the name of the -- yeah, Cellmark was the  
independent lab. Was that report admitted into  
evidence in *Williams*?

**MR. THERIOT:**

I'm not familiar with the answer to that. I  
know what we're dealing with here is twofold, both  
the report, itself, and then Mr. Shawhan's  
testimony, so I'm not sure if the report was  
submitted in *Williams*. I just know that an expert  
was able to testify to another expert's data.

**THE COURT:**

Again, that's -- there's a difference between  
a trier of fact and a bench trial.

**MR. THERIOT:**

And I would counter, unless I'm incorrect,  
what I read was that *State v. Bolden*, Supreme  
Court case, was a trier of fact jury trial and  
they took it up on appeal.

**THE COURT:**

Was the Cellmark report offered into evidence  
in that case?

**MR. THERIOT:**

And that's the *Williams v. Illinois*, Your  
Honor?

**THE COURT:**

That's correct. That's the case that you  
gave to the Court.

**MR. THERIOT:**

I don't see a mention of a report, Your  
Honor. I just see that another expert was able to

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testify to the findings and to the data that they viewed.

**THE COURT:**

They actually didn't testify to the data that was produced by Cellmark, because that report was never entered into evidence. There was one statement in that case, in which the analyst from the Illinois laboratory indicated that their analysis of the evidence matched the Cellmark, and it was not offering -- the report was not offered to prove the truth of the matter asserted.

**MR. THERIOT:**

I would still -- that's the findings in *Williams*, I can dispute that, Your Honor, but I would still point to *Bolden*, being that that was a jury trial and that that was pronounced and another DNA expert testifying to another expert's data. So I would still say that Supreme Court *State v. Bolden* would be controlling in this courtroom.

**THE COURT:**

And in this report or in this case, there was a DNA profile produced from some other evidence that did not come from Mr. McElveen?

**MR. THERIOT:**

No. The supplemental report that was -- the supplemental report that goes towards Mr. McElveen is the swab that Det. Foster testified that he took from Mr. McElveen that was, then, sent to the crime lab.

**THE COURT:**

But that was after Mr. McElveen was developed

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as a suspect.

**MR. THERIOT:**

That's correct, Your Honor. There was an initial hit, but the protocol is that you send to confirm a supplemental hit and they took a swab from Mr. McElveen.

**THE COURT:**

Well, I understand the process, but I just want you to answer the question. The supplemental report deals with a reference swab, which was taken after -- after the crime committed, right?

**MR. THERIOT:**

M-hm. Yes.

**THE COURT:**

And after Mr. McElveen was developed as a suspect?

**MR. THERIOT:**

Yes.

**THE COURT:**

That's how they obtained the warrant in order to get that DNA --

**MR. THERIOT:**

Correct.

**THE COURT:**

-- for Mr. McElveen?

**MR. THERIOT:**

Correct.

**THE COURT:**

Okay. And so the -- the unknown sample, which was the basis of the search warrant for the swab for Mr. McElveen, where was that developed from?

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MR. THERIOT:

The crime lab when they swabbed the backpack.  
They swabbed the backpack and --

THE COURT:

Which was a piece of evidence involved in  
this crime?

MR. THERIOT:

Correct. The backpack that was sent --  
Mr. Fitzpatrick that was sent off by Det. Foster,  
they sent the backpack and, as Mr. Mai explained,  
the backpack was swabbed, so the crime lab  
developed the initial reference on Mr. McElveen,  
but then you collect a sample to, then, follow up  
on that. So the swab came from the swab of the  
backpack.

THE COURT:

Well, under *Williams*, and I've already asked  
my questions about *Bolden*, you're attempting to  
enter a piece of evidence which Mr. Shawhan did  
not do the analysis of and interpret the person  
who did the analysis' findings, and that person is  
not here to testify and be cross-examined under  
the confrontation clause. *Bolden*, itself, stands  
citing *Crawford* that confrontation clause did not  
bear or bar, excuse me, the admission of  
out-of-court statements that fall within a firmly  
rooted exception to the hearsay rule, which we  
know this is hearsay. We have the person that is  
making the statement not here. *Crawford* court  
held that such statements could be admitted only  
where the declarant is unavailable and only when  
the defendant has had a prior opportunity to

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cross-examine. You, yourself, indicated that the -- this piece of evidence, this declarant has not been cross-examined previously. Scientific reports could not be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subjected to confrontation. Each of the reports in what *Crawford* was talking about contained a testimonial certification made in order to prove a fact at a criminal trial. You're offering a report in which Mr. Shawhan is going to testify that that out-of-court statement is being offered for the truth of the matter asserted. So here, when talking about *Crawford*, in contrast, the question is the constitutionality of allowing an expert -- which I've allowed Mr. Shawhan to be an expert in this court, and I've got no doubt about his qualifications -- is the constitutionality of showing an expert witness to discuss other's testimonial statements if those statements are not themselves admitted by -- admitted as evidence.

**MR. THERIOT:**

And what I would counter, Your Honor -- I'm not sure if you were finished or not. What I would counter is that Mr. Shawhan was involved in this process. You indicated off record it's semantic. He was the tech reviewer in this report. He reviewed everything, he took part in this process, and as a DNA expert, he can testify to his expert findings regarding data that he, himself, as viewed. So that would -- and he's subject to cross-examination. I believe

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Mr. Tucker wanted to ask about we were talking about Ms. Proctor and all that, go towards the weight of the evidence, but he is a DNA expert who's reviewed every step of the process, it's a multi-step process that involves multiple people, and as someone that took part in that process and has reviewed the data, he can come to his expert conclusion, his own expert conclusion, if you want to characterize it that way, as to what the data shows. It wouldn't be hearsay if it's his own expert opinion, conclusion, as he's viewing the same data that's been viewed beforehand. So it would be his own expert opinion regarding the data that -- while it eventually went to this report, if the issue is the report, he can give his own expert testimony and conclusion given the data that he's reviewed as he's gone -- and he was involved in the report back in 2018, so it's not like we pulled him out of nowhere and gone retroactive. He was a tech reviewer in 2018, so he was involved in the initial report back in 2018, he's still at the crime lab, and he's a DNA expert that can give his expert opinion on the data that he has reviewed. If the issue is the report, itself, and you don't want him to read from the report, I still believe that he can give his own expert opinion regarding -- his own expert conclusion regarding the data that he had reviewed as he was involved in this report in 2018 as a tech reviewer. So he was involved in the report from 2018 a.

**THE COURT:**

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Mr. Theriot, you've already indicated that Mr. Shawhan did not perform the analysis of the physical items and DNA extracted from those items. Is that incorrect or is that correct?

**MR. THERIOT:**

He performed the analysis on the data --

**THE COURT:**

No, sir.

**MR. THERIOT:**

You're not letting me answer, Your Honor.

**THE COURT:**

Yes, you did. You just said he performed the analysis on the data. Did he perform the extraction, did he perform the extrapolation in order to find those numbers that Mr. Shawhan interpreted?

**MR. THERIOT:**

Well, the extrapolation --

**THE COURT:**

It's a yes-or-no question, Mr. Theriot.

**MR. THERIOT:**

The extrapolation --

**THE COURT:**

Did he perform the physical analysis or not?

**MR. THERIOT:**

Machines do the extrapolation. You can't cross-examine a machine. It's done by machines, and then he reads the data. So machines do the extrapolation and they read the data from the machines.

**THE COURT:**

There was a process involved in order for

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that machine to get that data.

**MR. THERIOT:**

M-hm.

**THE COURT:**

Did Mr. Shawhan perform that process?

**MR. THERIOT:**

He was a part of the process as a tech reviewer.

**THE COURT:**

No, no. I'm not asking you if he's part of the process that their protocol set out for to ensure the accuracy of the finding. It's a very specific question. I think you're talking around me, Mr. Theriot. Did he perform the physical process of taking that -- that DNA and extrapolating it, doing all the expansion, whatever it is, in order for that computer to say these are the findings?

**MR. THERIOT:**

I believe the best answer would come from Mr. Shawhan if you want to ask him those questions.

**THE COURT:**

I'm not asking him, sir. I'm asking you.

**MR. THERIOT:**

My explanation is multiple people performed the roles in the report.

**THE COURT:**

Okay. So you're conceding that Mr. Shawhan did not do those physical processes or those physical analysis?

**MR. THERIOT:**

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I can't say if he did it all or not all of them, but there's multiple stages and multiple people. They would not be able to get reports out if it's just one person -- one report per analyst. I would say he did the analysis. The extraction is separate, but he analyzed the data that came to the conclusions in this report.

**THE COURT:**

Defense, do y'all have anything to add?

**MR. TUCKER, SR:**

At this particular point, Your Honor, we agree with the Court's position and ruling in this matter, and we don't believe that this individual can testify as to what the technicians who actually collected the material did. And I don't believe that he can verify not being present and not being the one to have done the actual analytical work on the specimen, itself, as to whether or not it would be totally valid or even whether or not protocol had been followed.

**MR. THERIOT:**

And I would just, again, highlight that Defense objection is now joining, seeing how the Court is going, but there was no initial objection. But I guess the ruling we need is that -- I believe the issue is the report and also if Mr. Shawhan can't testify further at all, given that he's been tendered as an expert witness and can view data and make his own interpretation. That's a totally -- the State sees that as a totally separate issue, that just like a defense attorney can hire someone who, then, looks at

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State data and makes their own conclusion.

Mr. Shawhan's been tendered as --

**THE COURT:**

All right. You're exactly right, Mr. Theriot. And then when you offer that expert up, they have the ability to cross-examine that expert, and then when they put up their own expert, that's how the process works. They've had a chance to cross-examine that witness.

**MR. THERIOT:**

They can cross-examine Mr. Shawhan is what I'm saying. He's been tendered as a DNA expert. They can cross-examine him. He's sitting right there.

**THE COURT:**

No. It's got to be -- the actual analysis has to be subjected to the cross-examination, which is the declarant, which is the declarant that's doing the actual, physical process of analyzing a piece of evidence, and then making that report. He has not been subjected to cross-examination. He is not the declarant in the report.

**MR. THERIOT:**

So again, the twofold question is that he can't make his own conclusions as an expert witness? He's been tendered as an expert witness, and he's sitting in court, and he's been cross-examined, so he's an expert witness and looking at data --

**THE COURT:**

You're conflating the two issues here, Mr.

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Theriot.

**MR. THERIOT:**

I believe it's two -- twofold.

**THE COURT:**

What you're trying to enter is a report that Mr. Shawhan has reviewed and said yeah, I think that this is all good. He did not perform the analysis, he did not produce the evidence that he's reviewed in order to say it was good. What's her name? I've already forgotten her name, the one that actually did the analysis.

**MR. THERIOT:**

Proctor?

**THE COURT:**

Proctor. Excuse me. Proctor is the declarant, and she has not been subjected to cross-examination about that testimony.

**MR. THERIOT:**

But following the Court's logic, the report would come out first and Defense would hire a Defense expert. Obviously, they would not be there to --

**THE COURT:**

We're not going down your scenario, Mr. Theriot.

**MR. THERIOT:**

But that's a different expert giving an opinion.

**THE COURT:**

This is testimonial in nature, this report, and you're trying to offer it for the truth of the matter asserted without the declarant being here

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to be subjected to cross-examination.

**MR. THERIOT:**

No. I've moved on from that, Your Honor. I get that, the report. The next question is -- for the ruling, is it just the report, or is Mr. Shawhan who's been admitted -- submitted, and tendered as an expert witness can still give his own expert opinion from the data that's subject outside the report? It's a separate issue.

**THE COURT:**

You offered him as an expert in forensics. He has not done a forensic test in this case. Your own admission. He has not done a forensic test. You offered him as a DNA expert in forensics.

**MR. THERIOT:**

He was a DNA forensic expert. If we're going into what that means, he's an expert in DNA. He's talked about the -- to that.

**THE COURT:**

DNA forensics.

**MR. THERIOT:**

We would still contend that he has a right under the Code as an expert witness to give his own expert opinion of the data that he has reviewed in this case.

**THE COURT:**

Okay. Well, the Court disagrees. He can testify. You can continue to question him, but he is not to testify as to any finding in that report. He can testify that he has reviewed what was submitted and agrees with it, but he cannot

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testify as to any finding in this report.

**MR. THERIOT:**

But the ruling I'm looking for -- I get the report, but you're also saying he can't make an independent finding? I mean, he's an expert witness. If he looks at the report and independently comes to the conclusion, he can't make an independent finding?

**THE COURT:**

That's the cart before the horse, Mr. Theriot.

**MR. THERIOT:**

No. I think that's a separate issue than what you're talking about with the report.

**THE COURT:**

It's the cart before the horse. You're trying to admit evidence that's inadmissible at this point, because it -- obviously it has not been admitted, because the declarant is not here. And if were to be even considered, that piece evidence, that testimonial evidence would have been subjected to cross-examination before the trial.

**MR. THERIOT:**

It's still a separate issue from him being a DNA expert, he can make his own conclusions from what he's viewing. That's a separate issue than what you're talking about with the report.

**THE COURT:**

So it's your contention that any expert can consider any piece of evidence and give their opinion even if it's not admissible in a court of

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law?

**MR. THERIOT:**

What is the point of an expert witness? They go through items --

**THE COURT:**

No.

**MR. THERIOT:**

-- and they give expert conclusion. So if he has --

**THE COURT:**

What if it's a flawed piece of evidence?

**MR. THERIOT:**

Well, we already talked about on direct that they saw no contamination or red flags in the report, and he has the numerous pages of tech review process that shows there's no red flags in the report. So if there's no flags in the report and reviewed the process and go through page-by-page --

**THE COURT:**

Mr. Theriot, you're attempting to go around the rules of evidence.

**MR. THERIOT:**

I'm not attempting to go --

**THE COURT:**

You are. You're trying to get in a piece of evidence which is testimonial and the declarant has not been subjected to cross-examination. It's hearsay. We know it's hearsay. It violates the confrontation clause. And as I stated, he can testify. He's an expert in forensics, but he's not an expert in forensic analysis. And

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1 therefore, I'm not allowing that report to come  
2 in.

3 **MR. THERIOT:**

4 We can go forward, Your Honor. Outside the  
5 presence of the jury, but I believe that  
6 Mr. Shawhan has the qualifications to review this  
7 data and make his independent conclusion as to  
8 what that data would show. It's outside the  
9 report, it would be his own independent finding  
10 that is proper as an expert to do so if he's  
11 viewed the data, just as any other expert coming  
12 in viewing data can make a conclusion on that data  
13 if he's done it on his own, which he has. So that  
14 would be outside the report that you speak of.  
15 That would not be hearsay or confrontation of a  
16 testimonial statement, as it's his own expert  
17 interpretation of the data. And he's a tech  
18 reviewer on the initial in 2018, so it's not like  
19 he's coming in backwards. Just like he did in  
20 2018, reviewed it again. He's been involved since  
21 2018 when this report was first published, but it  
22 would be outside the report, his own independent  
23 expert opinion.

24 **MR. TUCKER, SR:**

25 Your Honor, we would object to that.  
26 Particularly anything outside of the presence of  
27 the jury. This is a 12-man jury trial, as  
28 everybody knows, and we would object to it, Your  
29 Honor. It would be confusing to the jury,  
30 unnecessarily burdensome, and it would be  
31 misleading for them.

32 **MR. THERIOT:**

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I'm not sure how it could be misleading.  
He's been tendered as an expert, and it's his own  
review of data. I mean, he's an expert witness.  
I'm not sure where the confusion would come in.  
He's been tendered in front the jury as an expert  
witness.

**THE COURT:**

I'm not arguing his qualifications as an  
expert, Mr. Theriot, but I'm not allowing this  
report to come into evidence as the -- Ms. Proctor  
is not here to testify to it, to the foundation of  
it, as a basis of a piece of admissible evidence  
and be subjected to cross-examination.

**MR. THERIOT:**

And once again, I understand that ruling, but  
my question is his own independent testimony,  
which is outside of the report. It's separate  
from that.

**THE COURT:**

It's not admissible, Mr. Theriot.

**MR. THERIOT:**

His testimony is not admissible?

**THE COURT:**

As to the findings of that report, which is  
inadmissible in this court, yes, it is -- his  
testimony is not allowed, that's correct.

**MR. THERIOT:**

So his testimony is not allowed to all the  
data he has reviewed himself in his expert  
capacity? That's separate from -- that's separate  
from the report, itself. It's separate from just  
the report, because if he's reviewed all the data

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and comes to his own conclusion, that's testimony that's separate.

**THE COURT:**

I've made my ruling, Mr. Theriot. If you want to dance the thin line, you may do that, but tread carefully in front of this jury. Let's go ahead and bring the jury in.

**MR. THERIOT:**

Oh, I'm sorry. For the record, Your Honor, we just object to the ruling regarding the report and ask for a stay towards that issue.

**THE COURT:**

All right. Your objection is noted, and I will deny the motion to stay.

**MR. TUCKER, SR:**

At this time -- well, prior to the motion to stay, Your Honor, we would request and move that, absent Proctor, that the reports be deemed inadmissible.

**THE COURT:**

It has not been admitted into evidence at this point.

**MR. TUCKER, SR:**

Very well.

**MR. THERIOT:**

And Your Honor, that's --

(REPORTER'S NOTE: WHEREUPON, THE JURY WAS BROUGHT INTO THE COURTROOM.)

**MR. TUCKER, SR:**

Defense waives polling.

**MR. THERIOT:**

State waives polling.

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**THE COURT:**

All right. Y'all may be seated. Hopefully, everybody got a good bite to eat. I apologize the lengthy lunch break. There's an issue that arose that we had to deal with, so we dealt with that and we're ready to go. Okay? Mr. Theriot?

**MR. THERIOT:**

Thank you.

**BY MR. THERIOT:**

**Q.** Mr. Shawhan, you mentioned earlier about the process being a tech reviewer, and want to go just further down detail. Is there worksheets or a fuller case file that you go through in terms of reviewing data in your role?

**A.** Yes. As a technical reviewer, it's my job to look at every aspect of the case. And it may be helpful to discuss how I'm able to do that. When evidence comes to our laboratory, it's assigned that State Police number, and that number stays with the evidence throughout its entirety at the lab. And any -- anything that's generated from what comes in the door is properly labeled. It will have -- even our, like the little tubes that we have, have little cryogenic labels on there.

**MR. TUCKER, SR:**

May we approach, Your Honor?

**THE COURT:**

Sure.

**(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE BEGAN.)**

**MR. TUCKER, SR:**

He's talking about tubes, equipment. This is dangerous.

**MR. THERIOT:**

He's not talking about the report. I'm going

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1 to go through page-by-page in the review process  
2 and what data he looked at. That's not the  
3 report. That's separate than what the ruling was.  
4 There was two different rulings. I was trying to  
5 get a ruling on that. You said not the report.  
6 He's not testifying to Proctor's report. He's  
7 testifying to his review process and the data that  
8 can be looked at. That is separate.

9 **MR. TUCKER, SR:**

10 That is confusing the jury.

11 **THE COURT:**

12 I'm going to tell you this, Mr. Theriot. Two  
13 things. You're asking him about a report that's  
14 testimonial in nature. We already went over this.

15 **MR. THERIOT:**

16 No. This is not --

17 **THE COURT:**

18 He is not to testify to anything in that  
19 report.

20 **MR. THERIOT:**

21 That's not the report.

22 **THE COURT:**

23 He may testify that he reviewed somebody  
24 else's work, but he is not to testify,  
25 specifically, as to what he has reviewed and what  
26 he did after that.

27 **MR. THERIOT:**

28 -- to anything in the report. That's the  
29 data that he reviewed as an expert. That's  
30 separate than the report. The report, you already  
31 ruled on and we made our objection to that. This  
32 is separate than from the report. This is

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separate data that he reviewed, the crime lab worksheet. It's not the report. It's separate. So you're saying he can't review any -- can't go over any of the work product that he, himself, reviewed as an expert?

**THE COURT:**

He did not do the analysis on that.

**MR. THERIOT:**

He, himself, reviewed it as a tech reviewer on the report in 2018.

**THE COURT:**

Again, Mr. Theriot, I didn't invent math. I can tell you two plus two is four. That doesn't make me an expert. Doesn't make the process right. I can say two plus three is four.

**MR. THERIOT:**

He's already been tendered as an expert, and this is stuff that he reviewed in 2018 and reviewed again.

**THE COURT:**

Just because he's an expert, Mr. Theriot, he gets to testify to whatever he wants to? No, that's not the case.

**MR. THERIOT:**

It's not whatever he wants to. It's stuff --

**THE COURT:**

And we're not going to go down that road.

**MR. THERIOT:**

-- it's stuff that he, himself, reviewed.

**THE COURT:**

Secondly, I would advise you probably need to find Ms. Proctor and get her on Zoom, because

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that's the least this Court's going to allow at  
this point, because I'm about to declare a  
mistrial.

**MR. THERIOT:**

Yes, Your Honor. May I make a record?

**THE COURT:**

No. That's it.

(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE  
CONCLUDED.)

**MR. THERIOT:**

Your Honor, can ask the jury be excused,  
please, I apologize, based on what was discussed  
at the bench?

**THE COURT:**

Why don't you approach? Defense?

(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE BEGAN.)

**THE COURT:**

I'm not sure, Mr. Theriot, what the  
disconnected here is, but you don't get to make  
requests like that in front of the jury. I'm the  
one who determines whether or not they're going to  
be relieved from this courtroom to determine or to  
deal with an objectionable issue, okay?

**MR. THERIOT:**

Okay.

**THE COURT:**

Don't do that again in front of this jury.

**MR. THERIOT:**

Yes, Your Honor. We're going to ask and move  
again to see -- it's twofold. We've already moved  
for a writ on the report. I was going to move and  
ask for a writ and a stay regarding him not being

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allowed to testify any further. It's a separate issue.

**THE COURT:**

I didn't say he couldn't testify any further. Do not put words in this Court's mouth.

**MR. THERIOT:**

His testimony --

**THE COURT:**

I've repeatedly told you that he can testify as an expert in forensics. That's what you offered him as.

**MR. THERIOT:**

M-hm. But he can't go through any of the data that he, himself, reviewed? That's what you just said when we approached earlier.

**THE COURT:**

Forensics. What did he do forensically in this matter? What piece of evidence did he test in order to come to a conclusion? He hasn't. He's interpreting somebody else's information, somebody else's data.

**MR. THERIOT:**

Okay. And that goes to the process of the crime lab.

**THE COURT:**

Mr. Theriot, I'm going to tell you right now

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**MR. THERIOT:**

That's why I asked you outside the jury.

**THE COURT:**

-- you're not going to sit here and argue with this Court. You have an issue, take it up.

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**MR. TUCKER, SR:**

Your Honor, I move for a mistrial.

**MR. THERIOT:**

That's why I asked off the record and asked to take a writ and a stay outside the presence of the jury.

**THE COURT:**

I deny both of your requests at this time. If it persists, I will. This is very highly unprofessional, and it's done in front of a jury.

**MR. THERIOT:**

I'm not trying to do it in front of the jury. That's why I asked if they could be excused and asked to take a second issue --

**THE COURT:**

Return to your tables and conduct yourselves accordingly. I'm going to tell you that right now. I've already given you a way out and you refuse to take it. Return to your table.

**(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE CONCLUDED.)**

**BY MR. THERIOT:**

**Q.** Mr. Shawhan, is there anything else that -- actions you take in reviewing data in your role as a forensic DNA expert?

**A.** Yes. The role of a technical reviewer is to verify and confirm that all of policies and procedures were adhered to. This would include every step of the process. This would include screening, this would include extraction, this would include quant, amp, putting on the analyzer, and interpretation, and the results that go into a report. That's what the tech review process is.

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1 Q. And is there -- again, what did -- outside, what did  
2 you review in this matter?

3 A. I reviewed the entire case file, and so that would be  
4 every aspect of the case that the Louisiana State Police  
5 Crime Lab has performed, I reviewed. And it -- it may be  
6 helpful to discuss we don't do this arbitrarily. These are  
7 recommendations that come from the National Institute of  
8 Justice. This is the process that they recommend to be the  
9 most efficient.

10 Q. And is there controls or qualities that you deal with?  
11 Can you go through that?

12 A. Yes. At every step of the process, we have positive  
13 controls and we have negative controls. And the -- what the  
14 positive control is, is it's known data. And so at the end  
15 of the process, we should be able to confirm that those  
16 results are what are expected. And so that's -- a positive  
17 control is a known sample that's input into the process. A  
18 negative control, which is also goes throughout the entirety  
19 of the process is exactly what it sounds like. There  
20 shouldn't be any data there at the end of the process.  
21 These controls were performed in this case, and  
22 everything -- all of our policies and procedures were  
23 adhered to.

24 Q. And as part of the file and the review process, what  
25 are you looking at?

26 A. I am looking at all data generated from this case.  
27 This would be data from every step of the process, from  
28 screening, extraction, quantification, amplification,  
29 genetic analyzer, and interpretation. All -- every when  
30 we're trained, we're encouraged to put any -- any  
31 interpretations that are made, we're supposed to document  
32 them, and we retain those documents indefinitely at our

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crime laboratory.

Q. And again, was this recent? Was this a while back in 2018? Like, when are you going through these steps of this process?

A. That's correct. For this particular case, these results were performed in 2018.

Q. And when you say following the procedure, you say controls and whatnot, like what, specifically, are you looking into?

A. We have, like, a lot of written documentation of what -- what can be interpreted, what is the correct results, and all of that is very transparent in our retention, our document retention, our records that we keep in our case files. Every -- every aspect of the case, I can evaluate and look at.

MR. TUCKER, SR:

May we approach, Judge?

THE COURT:

Sure.

(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE BEGAN.)

MR. TUCKER, SR:

Tell him what you just asked me.

MR. THERIOT:

I intent to not admit, proffer, ask for a writ, or object, get a writ return date unless he has a separate issue as the first writ that we took notice of regarding the report. This goes towards what you don't wish him to testify to, and I'd ask to proffer it, ask for a writ return date, and take writ on the second issue regarding his not being allowed to testify outside the report, which we see as a separate issue with the report

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being inadmissible. I am not trying to do it in front of the jury, but I can't have the jury excused. The jury is in here. If we want to do it outside the presence of the jury, I'm fine to do that, as well.

**THE COURT:**

I'm not clear what -- you asked for your objection to be noted on the record -- and for a stay and I denied your stay. You did not ask for a writ return date or a writ return time. And now, we're going a little bit further and you wish to object to what?

**MR. THERIOT:**

I see it as two separate issues, Your Honor, one being the report. And then we started questioning Mr. Shawhan. You said not to question him regarding things outside the report, either. I see to be a second issue, so I'm taking a written objection --

**THE COURT:**

I didn't say anything outside the report. I said he can't testify as to what's in that report.

**MR. THERIOT:**

Yeah. But I started asking questions regarding the worksheet and Bob objected and you said not to go down that path, either. So that would be outside the report, so that would be separate data that's outside the report, and you do not wish him to testify to. That's where the confusion is coming from. I see it as two separate issues. I understand the ruling on the report. You're saying there's been a ruling

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regarding what he can testify to as an expert witness, and we see that as an issue we take up on writ and object to your ruling, acknowledge it, and ask for a writ return date. I see it as two separate issues.

**THE COURT:**

It's 1:30. You got till two o'clock.

**MR. THERIOT:**

Two o'clock writ return date? Okay. I mean, he's the final witness, Your Honor. I mean, can't move --

**THE COURT:**

You want me to give you a month from now?

**MR. THERIOT:**

No. I'm just talking about --

**THE COURT:**

These people are here. It's Wednesday.

**MR. THERIOT:**

I understand it's Wednesday. Actually moving pretty quickly for a 12-person jury trial, so I understand started off on the wrong foot, but they waited for an hour for defense counsel to be late, and now, I mean, it seems to go always towards the State.

**THE COURT:**

Well, it's your burden.

**MR. THERIOT:**

I understand.

**THE COURT:**

It's your burden, Mr. Theriot.

**MR. THERIOT:**

Defense was late.

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**THE COURT:**

You're not going to sit here and say they were late, that's why they had to wait, so I, the Court, ought to give y'all some slack. No one's getting slack, and they felt it when they walked in, and I berated both of them.

**MR. THERIOT:**

Understood. I have my appellate work on the writ, but two o'clock writ return date, writ return time?

**THE COURT:**

At 1:45 or whenever it was, when y'all were in my office, y'all said y'all were already working on it. That was at 11:45.

**MR. THERIOT:**

Okay. I'll let them know.

**(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE CONCLUDED.)**

**BY MR. THERIOT:**

**Q.** Mr. Shawhan, after reviewing the data in this matter, were you able to, in your expert opinion, come to a conclusion regarding the data?

**A.** Yes. Yeah. In -- after reviewing the data, yes.

**Q.** And what would your own independent conclusion be?

**THE COURT:**

Excuse me, Mr. Shawhan.

**MR. SHAWHAN:**

Yes, sir.

**THE COURT:**

Ladies and gentlemen, we are going to take a brief recess. If y'all would return to the jury room, and do not talk amongst yourselves, please.

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(REPORTER'S NOTE: WHEREUPON, THE JURY WAS EXCUSED FROM THE  
COURTROOM.)

THE COURT:

All right. The jury has been retired from  
the courtroom. We will be in recess, and I will  
see counsel in chambers.

(END OF TRANSCRIPT.)

Woo

STATE OF LOUISIANA  
COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

NO. 2022 KW 1066

VERSUS

B.J. MCELVEEN

SEPTEMBER 29, 2022

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In Re: State of Louisiana, applying for supervisory writs,  
~~19th Judicial District Court, Parish of East Baton~~  
Rouge, No. 09-18-0487.

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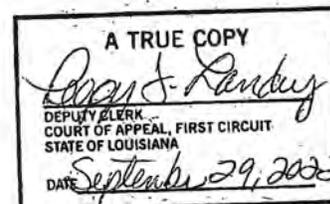
BEFORE: WHIPPLE, C.J., GUIDRY AND WOLFE, JJ.

**STAY LIFTED; WRIT GRANTED.** The trial court's ruling limiting testimony from the State's DNA expert and excluding the lab reports is reversed. No error under the Confrontation Clause occurs when a DNA expert testifies that in his or her opinion the DNA profile developed from a sample taken from defendant matches the DNA profile developed by other, non-testifying technicians from biological samples taken from the evidence. **State v. Bolden**, 2011-2435 (La. 10/26/12), 108 So.3d 1159, 1161-62 (per curiam). cf. **State v. Oliphant**, 2013-273 (La. App. 3rd Cir. 11/20/13), 127 So.3d 91 (the testimony of an alternate crime lab employee regarding results of DNA analysis, rather than employee who actually performed the analysis, did not violate the defendant's confrontation rights. The crime lab employee who actually performed the analysis was on maternity leave and the testifying employee was recognized as an expert in DNA analysis and admittedly familiar with the protocols and procedures required of the analysis). Further, the Louisiana State Police Crime Laboratory scientific analysis reports are admissible. Even if forensic DNA reports are admitted in evidence without in-court testimony of the scientist/analyst who either signed the certification or performed or observed the test reported in the certification, generally, there is no Sixth Amendment Confrontation Clause violation because the reports are not testimonial. **State v. Grimes**, 2011-0984 (La. App. 4th Cir. 2/20/13), 109 So.3d 1007, writ denied, 2013-0625 (La. 10/11/13), 123 So.3d 1216 (citing **Williams v. Illinois**, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012)).

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COURT OF APPEAL, FIRST CIRCUIT

*Reagan J. Landry*  
DEPUTY CLERK OF COURT  
FOR THE COURT



NINETEENTH JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

STATE OF LOUISIANA

SECTION VII

VERSUS

BJ MCELVEEN

NO. 09-18-0487

JURY TRIAL

Testimony and Notes of Evidence, taken in the above-entitled and -numbered cause, before the HONORABLE BEAU M. HIGGINBOTHAM., Judge, presiding on FRIDAY, the 30TH day of SEPTEMBER, 2022.

APPEARANCES:

REPRESENTING THE STATE OF LOUISIANA:

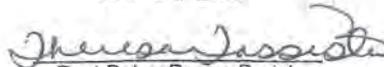
MR. STUART THERIOT, ESQ.  
MS. ROKEYA MORRIS, ESQ.  
EAST BATON ROUGE DISTRICT ATTORNEY'S OFFICE

REPRESENTING THE DEFENDANT:

MR. ROBERT TUCKER SR., ESQ.  
MR. ROBERT TUCKER JR., ESQ.  
EAST BATON ROUGE PUBLIC DEFENDER'S OFFICE

CERTIFIED TRUE AND  
CORRECT COPY

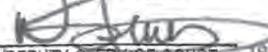
SEP 08 2023

  
Theresa Tassistro  
East Baton Rouge Parish  
Deputy Clerk of Court

REPORTED AND TRANSCRIBED BY: THERESA TASSISTRO, CCR #24015

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**THE COURT:**

All right. Good morning, everyone.

**MR. THERIOT:**

Good morning, Your Honor.

**MS. MORRIS:**

Good morning, Your Honor.

**THE COURT:**

All right. Before -- all right. We do have Mr. McElveen in court, we have counsel for both sides. We had a meeting about the jury instructions. Each side had an issue we discussed in chambers. Mr. Theriot, I'll let you put your record on about the jury instructions.

**MR. THERIOT:**

Yes, Your Honor. We had asked, and the Court agreed, to add, which will now be on page 4, a paragraph of Flight of the Defendant. We thank you for the Court's ruling. And then we objected, I think the Court agreed to the objection, to not add any further language to page 7, and I guess going into 8, about the Duty to Deliberate. So, State -- I'm looking over the new, final -- I say final -- form, and the State is fine with the final jury instructions.

**THE COURT:**

Your issue was the admission of the flight instruction?

**MR. THERIOT:**

That's correct, Your Honor. I'm just saying -- yes.

**THE COURT:**

And Mr. Tucker?

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**MR. TUCKER SR.:**

I did not want the flight instruction.  
There's no need for it. There was no flight  
involved.

**THE COURT:**

All right. So, your objection is noted, Mr.  
Tucker. Det. Foster did indicate that he had fled  
to Texas, so we're going to put it in there, and  
then you can address it in closing -- or in your  
case.

**MR. TUCKER SR.:**

And at this particular point -- are we on the  
record?

**THE COURT:**

We are.

**MR. TUCKER SR.:**

I object to it. I will be objecting to it  
all the way down the line.

**THE COURT:**

Okay. Now, that was the only issue that you  
had, Mr. Theriot?

**MR. THERIOT:**

Yes, Your Honor.

**THE COURT:**

Mr. Tucker, you wish in the very end of the  
jury instructions to add some language?

**MR. TUCKER SR.:**

I'm turning. I'm sorry, Judge.

**THE COURT:**

You had -- correct me if I'm wrong. You had  
wished to add language in there about a hung jury?

**MR. TUCKER SR.:**

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Yes.

**THE COURT:**

Okay. I'm sorry?

**MR. TUCKER SR.:**

And the verdict must be unanimous, and if they cannot agree, then it is a hung jury.

**THE COURT:**

Okay. The language of unanimous is in there. You do see that in there, right, at the very end?

**MR. TUCKER SR.:**

What page is that?

**THE COURT:**

That would be page 7.

**MR. TUCKER SR.:**

Let me see. I had to go back to it. I'm sorry.

**MR. THERIOT:**

For the record, I'm -- nobody's copy. I'm just showing it to him, Your Honor.

**THE COURT:**

On page 7, that second full paragraph at the end, unanimous vote of 12 out of 12 of you is required to reach a verdict in this case. Now, you wish to add the language of something to the line of if not, then it's a hung jury?

**MR. TUCKER SR.:**

Yes.

**THE COURT:**

Okay. This comes from the treatise. A hung jury is not an option or a verdict. It is an outcome of the indecision or inability of them to come to a unanimous verdict. So, it is not a

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verdict, and so, it should not be included in the instructions. So, I'm going to be denying that request to insert in here language about a hung jury.

**MR. TUCKER SR.:**

Very well. So, the language that you need to discuss the case amongst yourselves, but only while all 12 are present in the jury room. Very well, Your Honor. Just note my objection for the record --

**THE COURT:**

Okay.

**MR. TUCKER SR.:**

-- but I do understand the Court.

**THE COURT:**

Okay. And your objection is noted. Mr. Tucker -- or actually, Mr. Theriot and Mr. Tucker, we did discuss in chambers the verdict form. There's two, one for each count. Are y'all okay with the verdict form?

**MR. THERIOT:**

Yes, Your Honor. State's satisfied with the verdict form for both counts.

**THE COURT:**

Mr. Tucker?

**MR. TUCKER SR.:**

Yes, Your Honor.

**THE COURT:**

All right. And lastly, Mr. Tucker, y'all taking any action on the decision from the First Circuit?

**MR. TUCKER SR.:**

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Not at present, Your Honor. When we do, we will -- if we need to, we will do it at that time and we will do it in globo.

**THE COURT:**

All right. Any other issues we need to discuss before we bring in the jury?

**MR. TUCKER SR.:**

No.

**MR. THERIOT:**

No, Your Honor. Do you want Mr. Shawhan to go back to where he was seated?

**THE COURT:**

Yes.

**MR. THERIOT:**

And I indicated to -- and Your Honor, again, the ruling, this is the last State's witness. I just plan to continue with Mr. Shawhan and introduce what's going to be S26, and then go through that and tender to Defense.

**THE COURT:**

Okay. Before we bring in the jury, Mr. McElveen?

**THE DEFENDANT:**

Sir.

**THE COURT:**

From what Mr. Theriot indicated, this is the State's last witness in their case in chief. It would, then, shift over to you to present evidence if you wish to. You don't have to, and that would not be held against you, but you have the right to testify in your own defense. Do you understand that?

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**THE DEFENDANT:**

Yes, sir.

**THE COURT:**

If you want to get up here, you get to get up here. Nobody can prevent you from that. Do you understand that?

**THE DEFENDANT:**

Yes, sir.

**THE COURT:**

On the flip side of that is that you, also, have the right not to testify in your defense for fear of self-incrimination, and if you don't want to, nobody can make you get up here. Do you understand that?

**THE DEFENDANT:**

Yes, sir.

**THE COURT:**

And if you choose not to make -- or to testify in your own defense, that will not be held against you. Do you understand that?

**THE DEFENDANT:**

Yes, sir.

**THE COURT:**

Okay. I'm going to give you time to speak with Mr. Theriot -- excuse me, not Mr. Theriot -- Mr. Tucker about that. And when it does come your time when they rest, I will then, outside the presence of the jury, ask whether or not you wish to testify or not to testify in your own defense, okay?

**THE DEFENDANT:**

Yes, sir.

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**THE COURT:**

All right. I think that's it. Let's bring them in.

(REPORTER'S NOTE: WHEREUPON, THE JURY WAS BROUGHT INTO THE COURTROOM.)

**MR. THERIOT:**

State waives polling, Your Honor.

**MR. TUCKER SR.:**

Defense waives polling, Your Honor.

**THE COURT:**

All right. Y'all may be seated. All right. Good morning, ladies and gentlemen. I didn't get to see y'all yesterday. I wanted to let y'all know that I apologize for the wasted day. It's not the State or the Defense's fault, it's not the Court's fault. We had an issue come up, and we could not proceed until that was dealt with, okay? So, know that's why we didn't get to see y'all yesterday and resume with the trial, but that being said, we're going to get right to it, so that we can accomplish it. I'm going to turn it over to the State.

**MR. THERIOT:**

Thank you.

-- R E D I R E C T E X A M I N A T I O N --

**BY MR. THERIOT:**

**Q.** Good morning, Mr. Shawhan.

**A.** Good morning.

**Q.** Thank you for returning. I was going to show you earlier what's been marked as S26.

**MR. TUCKER SR.:**

May I see S26, please?

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**BY MR. THERIOT:**

**Q.** Mr. Shawhan, you stated previously you recognized S26?

**A.** That's correct.

**Q.** And what is S26?

**A.** This is a report with our SP number 10357 of '18. I can see the analyst's initials who wrote the report, and there are several exhibits that I can see that were taken through DNA analysis.

**Q.** And this report would go towards the conclusion of DNA analysis in this case?

**A.** That is correct.

**MR. THERIOT:**

Your Honor, I'd like to publish to the jury, I've made copies, S26, the DNA report in this case.

**MR. TUCKER SR.:**

May we approach, Your Honor?

**THE COURT:**

Yes.

(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE BEGAN.)

**MR. TUCKER SR.:**

All right. I'm going to continue to lodge an objection in this matter. He testifies to somebody else's report. He just said that this is a report that so-and-so did. I'm objecting to it on the grounds of hearsay, and I am preserving the record.

**THE COURT:**

Absolutely. It's noted. But, Mr. Theriot, you need to offer, file, and introduce it before you publish it.

**MR. THERIOT:**

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Okay. I can do that again, Your Honor. I just recall on Wednesday, we had offered, filed, and introduced it, and then we stopped the publishing, but I can redo it again for the record.

**THE COURT:**

I never admitted it in as evidence.

**MR. THERIOT:**

Okay. I'll do that.

**MR. TUCKER SR.:**

Thank you -- my objection.

**THE COURT:**

Yes.

(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE CONCLUDED.)

**MR. THERIOT:**

Your Honor, like to offer, file, and introduce what would be S26, the DNA report in this case.

**THE COURT:**

All right. Over Defense objection, I will admit it.

**MR. THERIOT:**

And at this time, Your Honor, I'd like to publish. I made copies for the jury, the DNA report in this case.

**THE COURT:**

Okay.

(REPORTER'S NOTE: WHEREUPON, THE EXHIBIT WAS PUBLISHED TO THE JURY.)

**BY MR. THERIOT:**

Q. Mr. Shawhan, I first want to go to there's a single

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1 page in there, page 1 of 1, talks about a nonanalytical  
2 discrepancy. Do you see that page?  
3 **A.** Yes, sir.  
4 **Q.** Can you explain to the jury what was the reason for  
5 this page?  
6 **A.** Yes. So, when we say a nonanalytical discrepancy form,  
7 what we're communicating there is that this discrepancy  
8 doesn't impact the analytical nature of our job. It doesn't  
9 impact anything downstream of the DNA analysis process.  
10 What we're noting is a discrepancy in how the evidence was  
11 described and how the evidence was received.  
12 **Q.** And what was the discrepancy here?  
13 **A.** So, all the language is on the discrepancy, and you can  
14 see the submittal form, which is our contract with the  
15 agency. It communicates to us what's being submitted, and  
16 it also communicates to the agency what sort of testing  
17 we'll do. And so, on the submittal form, it's stated that  
18 one red-and-gray glove was submitted, but when the  
19 technician actually examined the evidence, they noted that  
20 it was a red-and-black glove. And as scientists, we tend to  
21 be a little bit more technical and precise in our language,  
22 because we understand how important that can be. And so,  
23 this is -- this is not peculiar or out of the ordinary for  
24 us to note a discrepancy like this.  
25 **Q.** Discrepancy is black versus gray. It doesn't have  
26 anything to do with contamination of any DNA?  
27 **A.** That's correct. And specifically, what was described  
28 was one red, gray glove, and what we saw that was submitted  
29 was one red, black glove.  
30 **Q.** Okay. So, going towards, say, the initial report,  
31 which is two pages, 1 of 2, that would be the initial  
32 analysis in this case?

1     **A.**    That's correct.

2     **Q.**    And was there able to be a DNA profile or anything  
3     noticed from that analysis, the initial report, which is the  
4     first two pages?

5     **A.**    Yes.  There's several conclusions in the first report,  
6     and those conclusions are from a swab taken from straps,  
7     zipper, and zipper pulls of backpack, which is 1A; there  
8     will also be a conclusion for Exhibit 2A, one swab taken  
9     from interior of glove; there will also be a conclusion for  
10    Exhibit 3, one swab from grip and handle of Glock handgun;  
11    and there will be a conclusion for Exhibit 4, one swab from  
12    trigger of Glock handgun.

13    **Q.**    Going to Exhibit 1A with the swab of the backpack.  
14    What was the conclusion there initially?

15    **A.**    The initial conclusion was that a DNA profile obtained  
16    from the swab taken from the straps, zipper, and zipper  
17    pulls of the backpack was consistent with being a mixture of  
18    DNA from more than three contributors with a major mixture  
19    of two contributors.  Due to the limited nature of the minor  
20    contribution, no conclusions can be made regarding any minor  
21    contributor.

22    **Q.**    So, y'all noticed there was a possible DNA profile on  
23    the backpack swab?

24    **A.**    That's correct.  And specifically, what we're  
25    communicating with this language -- and we realize as  
26    scientists, we try to make it as easy to understand as we  
27    can while still upholding the integrity of the science.  So,  
28    we describe a major mixture of two contributors with the  
29    profile as a whole as being more than three contributors.  
30    What this means is if you make a comparison to an  
31    electrocardiogram, which is more familiar -- that measures  
32    the pulse of the heart -- and the more intense the pulse,

1 the higher the peak. When we're looking at a DNA profile,  
2 we're looking at an electrocardiogram -- I'm sorry, an  
3 electropherogram, which we commonly refer to as an e-gram.  
4 And it's very similar -- the more concentrated the DNA, the  
5 taller the peak is. So, when we describe a major  
6 contributor, we're looking at the taller peaks in the DNA  
7 profile of what we're visualizing in an e-gram. And so, at  
8 the outset, we noticed that there was a major mixture of two  
9 contributors. And so, this conclusion is one that we would  
10 refer to as being left open, so if any references were ever  
11 submitted, we can make comparisons to these profiles. We do  
12 note that we would not be able to make any conclusions on  
13 the minor contribution. So, major, taller peaks; minor,  
14 smaller peaks.

15 Q. And in this matter, were y'all -- profile -- were you  
16 eventually given a profile to compare in the supplemental  
17 report?

18 A. That's correct. In the supplemental report, we were  
19 able to make comparisons based on reference samples that  
20 were submitted.

21 Q. And that would be the last three pages of the report  
22 that -- to you?

23 A. That's correct.

24 Q. And what was the reference swab, or whom the reference  
25 swab was compared in the supplemental report?

26 A. There were two reference swaps that were submitted,  
27 Baylon Trim and BJ McElveen.

28 Q. And looking at Exhibit 1A and Exhibit 5 -- well,  
29 Exhibit 5, what is Exhibit 5, I'm sorry?

30 A. Exhibit 5 is a reference sample from BJ McElveen.

31 Q. So, a swab from his person?

32 A. That's correct. And specifically, oral reference

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1 swabs.

2 Q. And going down to the results on Exhibit 1A, what were  
3 the results when you had the reference swab from Mr.  
4 McElveen?

5 A. In the supplemental report where comparisons were made,  
6 Exhibit 1A, BJ McElveen cannot be excluded as a major  
7 contributor to the DNA profile obtained from the swab taken  
8 from the straps, zipper, and zipper pulls of the backpack.  
9 See statistical analysis. Baylon Trim can be excluded as a  
10 major contributor to this profile. And so, when we use the  
11 language of -- and again, we're scientists. We have  
12 standards and protocols and guidelines on how we are to  
13 conclude on evidence. This is a very standard conclusion,  
14 so when it's stated that BJ McElveen cannot be excluded,  
15 that's an inclusionary statement. When Baylon Trim is  
16 stated that can be excluded, we're excluding him from the  
17 major contributor of the profile. And again, we could not  
18 make comparisons to the minor contributor. In addition to  
19 this conclusion, we offer statistical analysis, because as  
20 scientists, it wouldn't be very informative for us to just  
21 make a declarative statement. What we also offer are  
22 statistics to offer the weight, how informative is this  
23 conclusion.

24 Q. We'll get to that in a minute. So, Mr. Trim can be  
25 excluded, but Mr. McElveen's DNA profile, you said, was  
26 inclusive from the swabs of the backpack?

27 A. Yes. And the technical language that we use is that  
28 cannot be excluded.

29 Q. And that's as to minor -- sorry -- the major  
30 contributor to the swabs, the DNA, on the backpack?

31 A. That's correct.

32 Q. Now, going towards the -- I'm sorry -- statistical

1 analysis which is on the next page, can you walk the jury  
2 through what does that mean? You touched on it before.

3 **A.** Yes. The specific statistic that is used for this  
4 conclusion is called a likelihood ratio. And what we're  
5 doing in a likelihood ratio is that we're pitting two  
6 mutually exclusive scenarios against one another. That is  
7 to say if Scenario A is true, then Scenario B cannot be  
8 true; if Scenario B is true, then Scenario A cannot be true.  
9 The further the number is away from one, the more likely it  
10 is that Scenario A is true, as opposed to Scenario B being  
11 true. And we don't -- as scientists, we don't refer to  
12 statistics as being good or bad. We refer to them as being  
13 informative or noninformative. And typically, anything  
14 that's over a million is considered to be an informative  
15 statistic.

16 **Q.** And what was the statistical analysis here regarding  
17 DNA value for Mr. McElveen compared to the backpack swab?

18 **A.** Assuming two contributors, the deduced DNA profile  
19 was -- and I'll read the most conservative statistic -- 2.69  
20 billion times more likely to be observed if it had  
21 originated from a mixture of DNA from BJ McElveen and an  
22 unknown contributor than if it had originated from two  
23 unrelated, random individuals. So, there, you can see  
24 Scenario A and Scenario B. And the way you understand these  
25 numbers, if the further it is from one, the more likely it  
26 is that Scenario A is true, as opposed to being Scenario B.  
27 If it was less than one, that would mean Scenario B was  
28 true, as opposed to being Scenario A. Given that this stat  
29 is 2.69 billion times -- the most conservative number is  
30 2.69 billion times, what this statistic is informing you is  
31 that Scenario A is 2.69 billion times more likely than it  
32 being Scenario B.

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1 Q. And then is there other analysis numbers there? You  
2 said you went with the conservative one.

3 A. That's correct. So, in -- in forensic statistical  
4 analysis, these are population statistics. And so, the FBI,  
5 in 1999, I believe, issued population statistics for these  
6 three population groups: Caucasian, African-American, and  
7 Southwest Hispanic. And so, a number of people were --  
8 their profiles were generated and certain allelic  
9 frequencies were determined to be in certain populations,  
10 and so this is a subset of the population that's used to  
11 offer statistical inclusions.

12 Q. So, going to the second number, is it fair to say that  
13 it's almost like rolling a dice and you have 7.6 billion  
14 sides to the die in rolling it, or what would you say?

15 A. The best way to understand the statistic is that two  
16 mutually exclusive scenarios are being pitted against one  
17 another. And so, really, the best way to see this is we --  
18 we -- as our laboratory considered the possibility of BJ  
19 McElveen and an unknown contributor and two unrelated  
20 contributors. It's 2.69 billion times more likely that it's  
21 Scenario A, BJ McElveen and an unknown, than it is two  
22 unrelated individuals were -- contributed to this profile.  
23 That's how -- that's the best way to understand this  
24 statistic.

25 Q. And that goes towards that BJ McElveen DNA cannot be  
26 excluded as the major contributor on the backpack that was  
27 swabbed at the Louisiana State Police Crime Lab?

28 A. That's correct.

29 Q. Thank you very much, Mr. Shawhan. Please answer any  
30 questions Mr. Tucker may have for you.

31 -- R E C R O S S - E X A M I N A T I O N --

32 BY MR. TUCKER SR.:

1 Q. Good morning, Mr. Shawhan.  
2 A. Good morning.  
3 Q. You still have that report in your hand?  
4 A. Yes, sir.  
5 Q. All right. That is Exhibit 26, S26.  
6 MR. TUCKER SR.:  
7 May I approach the witness?  
8 THE COURT:  
9 Sure.  
10 BY MR. TUCKER SR.:  
11 Q. S26. Whose report is that?  
12 A. This is Francine Nicole Proctor's report.  
13 Q. Francine Nicole Proctor's report?  
14 A. Yes, sir. And probably the best way to communicate  
15 this is she's an analyst trained with the Louisiana State  
16 Police Crime Lab.  
17 Q. I know her.  
18 A. Okay.  
19 Q. But, you can tell them.  
20 A. Yes. She's an analyst with our crime lab, one that I'm  
21 still employed at, and that she happens to no longer be  
22 employed at. She moved on to a different position.  
23 Q. All right. But, she put that together? She put that  
24 report together?  
25 A. She put it together. And typical in our crime lab and  
26 any accredited laboratory, you're going to have an extensive  
27 review process.  
28 Q. I got all of that.  
29 A. Yes, sir.  
30 Q. I appreciate it.  
31 MR. TUCKER SR.:  
32 May I approach very quickly, please?

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Mr. Theriot?

(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE BEGAN.)

MR. TUCKER SR.:

Don't mean to be painful. I'm making a record. I object to his testimony as hearsay. He just got finished saying that it was Ms. Proctor who did it, and I'm sticking to that for my record.

THE COURT:

It's -- your objection is ongoing.

MR. TUCKER SR.:

Thank you.

MR. THERIOT:

I would note that, Your Honor, that there was no initial objection. We had the one from the First Circuit, so I don't think we need to approach every time. I mean, I understand it's an ongoing objection --

THE COURT:

That's why I'm saying his objection is --

MR. TUCKER SR.:

I disagree.

THE COURT:

-- ongoing.

MR. TUCKER SR.:

Thank you.

(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE CONCLUDED.)

BY MR. TUCKER SR.:

Q. All right. So, Ms. Proctor put the report together.

A. That's correct. And it may be --

Q. Now, the next thing is you had an opportunity to work

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1 with the material that you know a professional, you know Ms.  
2 Proctor is a pro. You've worked with her before? You've  
3 seen her work?  
4 A. Yes. How I would describe it, we are professionals,  
5 but how I would describe it is that we have policies and  
6 procedures at our place -- at our laboratory, and so it's  
7 not as if any one analyst issues a report arbitrarily.  
8 Q. Very good.  
9 A. Yeah.  
10 Q. Now, I got another question for you. Do you know who  
11 in the field went and picked up the samples?  
12 A. I can see that -- who submitted the evidence on our lab  
13 report.  
14 Q. And who submitted it on your lab report?  
15 A. So, the statement that we have is that on 7/24/2018 at  
16 1:28 PM, Evidence Technician Ashley Heard received the  
17 following evidence from the East Baton Rouge Parish  
18 Sheriff's Office via --  
19 Q. Stop right there. Ashley Heard is -- Ashley Heard  
20 received the evidence from the East Baton Rouge Parish  
21 Sheriff's Office.  
22 A. Yes.  
23 Q. Now, do you supervise the East Baton Rouge Parish  
24 Sheriff's Office?  
25 A. No, sir.  
26 Q. Do you assure that the scientific protocols that you  
27 have in place at the State Police Headquarters are followed  
28 by each and every member of the State Police or the  
29 Sheriff's Office personnel?  
30 A. Can you rephrase that question?  
31 Q. Okay. Are you in command and control of the  
32 individuals in law enforcement who go out and pick up the

1 material?  
2 A. No, sir, but we do partner with them, and we do aid in  
3 training.  
4 Q. All right. In this particular case, did you go out  
5 there to the scene?  
6 A. No, sir.  
7 Q. Did you pick up any evidence?  
8 A. No, sir.  
9 Q. So, is it fair to say that what you can attest to and  
10 what you can control is what is given to you?  
11 A. So, we -- so, we have a whole case file where I would  
12 be able to observe everything taken through the DNA  
13 analysis, so yes. What you're saying is true that, as  
14 evidence is submitted to us, we have no control on it  
15 outside of our laboratory.  
16 Q. Right.  
17 A. But, one thing we do in our laboratory is we want to  
18 uphold the integrity of the evidence as it's given to us  
19 from --  
20 Q. Right.  
21 A. -- the initial --  
22 Q. That's the key. You said as it is given --  
23 THE COURT:  
24 Mr. Tucker, Mr. Tucker, let him finish his  
25 statement, and then you can ask a question after  
26 that.  
27 MR. TUCKER SR.:  
28 All right. I'm on cross.  
29 THE COURT:  
30 I understand, but he still can finish his  
31 answer.  
32 BY MR. TUCKER SR.:

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1 Q. Proceed.

2 A. Yes. I really was just simply saying that we uphold  
3 the integrity of the evidence as it comes to us. That's  
4 the -- that's our primary objective as forensic scientists.

5 Q. I believe you, because this isn't our first rodeo  
6 together, either, and I believe you. Make that statement  
7 again, please, as to what you do.

8 A. As a forensic scientist, it's our job to uphold the  
9 integrity of the DNA evidence as it comes to us.

10 Q. As it comes to us.

11 A. That's correct.

12 Q. So, you don't know where this evidence was from the  
13 24th to the -- what was that date -- the 24th to sometime in  
14 September?

15 A. Actually, at the bottom of our report, we retain  
16 certain portions of evidence, so the evidence that is  
17 retained at our laboratory, I can confirm that it is where  
18 it should be.

19 Q. Okay. Ashley Heard retrieved the -- would it surprise  
20 you if I told you that Ashley Heard retrieved the evidence  
21 on 7/24?

22 A. No, sir, it would not surprise me.

23 Q. And that from 7/24 to August 29th, can you tell me  
24 where that material was?

25 A. I can tell -- so, at the bottom of our report, one of  
26 the last statements we issue is a retention statement. And  
27 so, on the -- just to give an example, on the first report,  
28 we say the remaining portions of Exhibits 1A, 2A, 3, and 4  
29 were retained at the Louisiana State Police Crime Lab. All  
30 other evidence will be returned to the submitting agency.  
31 So, the evidence that we retain, I can confirm and offer  
32 assurances that it is where it should be.

1 Q. All right. Now, the officer who picked up that  
2 evidence at the crime scene, did you see what he did with  
3 it?  
4 A. No, sir.  
5 Q. Did you control how long he had it in his possession  
6 before he turned it over?  
7 A. No, sir.  
8 Q. All right. Let me ask you something else. Is there a  
9 difference between contact DNA and actual bronchial swab?  
10 A. Buccal?  
11 Q. Buccal swab.  
12 A. So, a buccal swab is a cheek swab. That is cheek cells  
13 is what it is. A contact swab is -- it could mean many  
14 things. Typically, it means -- typically, it means  
15 epithelial cells or skin cells or -- basically, what was  
16 touched. That's what a contact swab means. Now, I will say  
17 a buccal swab is a very technical usage of the term. And in  
18 my conversations with officers, they usually confuse that a  
19 buccal swab is actually a cheek swab, and so they just get  
20 the terminology wrong.  
21 Q. Okay. Okay. Now, contact DNA, I had my son here  
22 yesterday and I touched his back. I got contact DNA on my  
23 hand, huh? You can get contact DNA from touching up on  
24 someone?  
25 A. There are a lot of studies on contact DNA and there are  
26 so many variables at play. For instance, if we're  
27 discussing leaving DNA behind, we're typically going to be  
28 talking about epithelial cells, and the language that's used  
29 in scientific articles is shedder status, like shedding skin  
30 cells. And we don't all, as people, shed skin cells at the  
31 same rate or -- so it's -- there's almost too many variables  
32 at play to really discuss hypothetical situations, because

1 almost -- you know, you could throw out any hypothetical  
2 situation, and as a scientist, I have to say yes, that's  
3 potentially true.

4 Q. Thank you. And it is excellent that you use the term  
5 hypothetical. I understand. Now, you talked about a  
6 discrepancy relative to a glove in this case, or  
7 something -- as a matter of fact, let's go to page 1 of 1  
8 that you discussed with Mr. Theriot. This is the  
9 discrepancy form?

10 A. Yes, sir.

11 Q. All right. Who produced this discrepancy form?

12 A. All of that information will be on the form, itself,  
13 and so you can see the analyst, Tabitha Mizell, issued the  
14 discrepancy.

15 Q. M-hm. And so, there was a discrepancy in the evidence?

16 A. Specifically, a color. One red, gray glove was  
17 discussed or mentioned on the submittal form. We noted, as  
18 a laboratory, that the item that was actually submitted was  
19 one red-and-black glove.

20 Q. Okay. And do you know whether or not any DNA was taken  
21 from the red glove, the black glove, the pink glove, the  
22 blue glove, or the purple glove?

23 A. I know that a swab was taken from the red-and-black  
24 right glove.

25 Q. Okay.

26 A. And specifically, a swab was taken from the interior of  
27 the glove.

28 Q. Very good. And did any of that material taken from  
29 those gloves have anything to do with BJ McElveen?

30 A. The conclusion we have in the first report is that the  
31 DNA profile obtained from the swab taken from the interior  
32 of the glove was consistent with being a mixture of DNA from

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1 more than three contributors. Due to the complex nature of  
2 the profile, no further conclusions can be made.

3 Q. Outstanding.

4 A. And just to offer some explanation on what complex  
5 means, so in some conclusions --

6 Q. I didn't ask you that.

7 A. Oh, sorry.

8 Q. And who did you say did this form?

9 A. The discrepancy form --

10 Q. Yes.

11 A. -- or the report?

12 Q. Yes.

13 A. The discrepancy form, all that information is actually  
14 maintained on the form, and the analyst, Tabitha Mizell,  
15 typed up these words.

16 Q. Okay. Let me ask you this: You guys -- well, your  
17 office and you have a system of checks and balances,  
18 protocols in place, to assure consistency.

19 A. That is correct.

20 Q. And it is also in place, I would venture to say, or is  
21 it fair to say, to prevent contamination?

22 A. That is correct.

23 Q. So, DNA samples can be contaminated; is that correct?

24 A. That is correct.

25 Q. They can be contaminated by exposure?

26 A. What do you mean by exposure?

27 Q. By exposure, I mean to elements.

28 A. Well, DNA, itself, is biological material --

29 Q. M-hm.

30 A. -- so it will -- it doesn't just come from the  
31 elements. It comes from people.

32 Q. And it will degrade?

1 A. Yes. There are three things that degrade DNA -- heat,  
2 moisture, and light.

3 Q. Heat, moisture, and light, okay. And your system is in  
4 place to prevent any contamination; is that correct?

5 A. Yes. We have -- and we have ways to detect  
6 contamination, as well, I'd like to add.

7 Q. All right. But, you do not have control of the  
8 material in the field; is that correct?

9 A. That is correct. Unless our CSI team goes out.

10 Q. And did your CSI team go out in this case?

11 A. Let's see. No, sir.

12 Q. Okay. And is it fair to say that you did not see the  
13 method used by the personnel East Baton Rouge Parish or  
14 anybody else in law enforcement to retrieve these said items  
15 and exhibits?

16 A. That's correct. In this specific instance, I would not  
17 have seen that, but we do offer -- we do partner with  
18 agencies, our local agencies, and we do help train.

19 Q. We're just talking about this one. Okay. So, the  
20 answer is no. Did you write the protocol for the collection  
21 of evidence for East Baton Rouge Parish Sheriff's Office?

22 A. I know that they're currently using guidelines that I  
23 helped to write.

24 Q. Very good. But, do you know whether or not they did it  
25 on this particular occasion?

26 A. I cannot confirm that.

27 Q. Yes or no? Thank you. Thank you for your candor.  
28 Thank you. Okay. Now, let's go back to this page 3 of 3.  
29 It says statistical analysis at the top. You got it?

30 A. Yes, sir.

31 Q. All right. Did you generate this report?

32 A. No, sir.

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1 Q. You did not generate this report. Based on the  
2 document you have there and evidence, who did it?  
3 A. Francine Nicole Proctor.  
4 Q. Okay. And Tabitha Mizell?  
5 A. She was the technician.  
6 Q. Okay. Now, this is -- this is a word -- would you read  
7 the top line under Exhibit 1A for me, please?  
8 A. The conclusion statement?  
9 Q. Uh-huh.  
10 A. Assuming two contributors, the deduced DNA profile was  
11 2.69 billion times more likely to be observed if it had  
12 originated from a mixture of DNA from BJ McElveen and an  
13 unknown contributor than if it had originated from two  
14 unrelated random individuals.  
15 Q. All right. What is the first word in that paragraph.  
16 It is what?  
17 A. Assuming.  
18 Q. Okay. Now, this sounds and it looks big, but the value  
19 and the population, it says 2.69 billion in the Caucasian  
20 population.  
21 A. That's correct.  
22 Q. Of course, being African-American, that number would be  
23 very -- would be lower; is that correct?  
24 A. Not necessarily.  
25 Q. If it's an African-American and it is exposed to the  
26 DNA sampling of the Caucasian individual, it says here that  
27 the value would be 2.69 billion.  
28 A. And again, these are not specific. This is referred to  
29 as population genetics.  
30 Q. Yes.  
31 A. And this is a subset of the populations, so specific  
32 individuals within these population groups could have more

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1 common alleles or more rare alleles.  
2 Q. I'm with you. I'm glad you said that. Population,  
3 okay? Go to 7.2 billion African-American. Now, like you  
4 said, population specific. Let's look at that. He's a  
5 member of the African-American group. It would be logical  
6 that his propensity to be in that group would increase  
7 exponentially. If a group is 2.69 and if -- and he doesn't  
8 belong to that group, but it's 2.69 billion, but here's a  
9 group that he does belong to, it's 7.20 billion. You would  
10 imagine that in his own group, the percentages would rise,  
11 wouldn't it?

12 A. No, sir. That's an inappropriate use of population  
13 genetics --

14 Q. Well, explain.

15 A. -- statistics. It's just a subset of the population.  
16 These numbers are simply a subset of the population.  
17 Individuals can have more rare alleles or more common  
18 alleles. And to use the statistical analysis to determine  
19 anything in this manner would be an inappropriate use of the  
20 statistical analysis.

21 Q. Let me ask you this: Would leaving evidence an officer  
22 picked up at crime scene in the trunk of his car in July for  
23 over 24 hours, is that normal?

24 MR. THERIOT:

25 Your Honor, we have to approach on that  
26 question.

27 THE COURT:

28 Okay.

29 (REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE BEGAN.)

30 MR. THERIOT:

31 I'm not sure if that was a hypothetical, or  
32 he's indicating that someone left it in the trunk

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of their car for 24 hours, because that was never testified to, so I'm not sure if that was a hypothetical, or if he's trying to say that somebody in this case left it in the trunk of the car for 24 hours. I think the distinction has been made -- I mean, is he offering a hypothetical to the expert, or is he trying to claim that that happened in this case? There's no testimony that's come up that that's happened in this case.

**MR. TUCKER SR.:**

We're in a line to talk about the deterioration of DNA material. We're talking about the difference between contact DNA and the swabbing DNA. We're talking about what causes DNA to degenerate -- deteriorate. And that's what I'm asking. That's all I've asked.

**MR. THERIOT:**

I'm saying it needs to be clarified. That's a -- offering a hypothetical? He's indicating that it's happened in this case, which is not -- any testimony, again. If he wants to say hypothetically, that's fine, but if he's trying to --

**MR. TUCKER SR.:**

His whole testimony is hypothetical.

**THE COURT:**

Why don't you rephrase the question?

**MR. THERIOT:**

Thank you.

**MR. TUCKER SR.:**

I'll rephrase.

**(REPORTER'S NOTE: WHEREUPON, THE BENCH CONFERENCE**

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1 that time, and then passed through?  
2 A. I can't confirm that.  
3 Q. And DNA can be contaminated?  
4 A. Yes.  
5 MR. TUCKER SR.:  
6 Your Honor, at this time, I'll tender this  
7 witness --  
8 THE COURT:  
9 All right.  
10 MR. TUCKER SR.:  
11 -- subject to recall. Thank you.  
12 MR. THERIOT:  
13 Your Honor, thank you. We do have some  
14 redirect questions.  
15 -- R E D I R E C T E X A M I N A T I O N --  
16 BY MR. THERIOT  
17 Q. Mr. Shawhan, I think there was some confusion there.  
18 You looked at page -- first page, 1 of 2, and it said  
19 evidence submitted. What was the date the Crime Lab  
20 received that?  
21 A. On 7/24/2018.  
22 Q. What is the day before 7/24/2018?  
23 A. 7/23.  
24 Q. So, there would be a day between 23 and 24?  
25 A. Yeah, like --  
26 Q. Just calendar wise?  
27 A. Yes. Yeah.  
28 Q. So, 7/24, the Crime Lab receives the backpack?  
29 A. That's correct.  
30 Q. Is the backpack swabbed at the Crime Lab?  
31 A. That is correct, yeah.  
32 Q. And you indicated to Mr. Tucker that while it was

1 swabbed at the Crime Lab, and that's Exhibit 1A?  
2 A. That is correct. One swab taken from straps, zipper,  
3 and zipper pulls of backpack is Exhibit 1A.  
4 Q. And where was it maintained after it was swabbed at the  
5 Crime Lab?  
6 A. The swab is maintained with us, or -- I'm sorry. The  
7 extract is maintained with us. Through the course of DNA  
8 analysis, the DNA analysis process, we consume the swab and  
9 retain the extract.  
10 Q. So, you still have the swab from the backpack post  
11 7/24?  
12 A. Yes. Yeah.  
13 Q. And then going to the report that's 1 of 3, bottom of  
14 page 1, when did Exhibit 205 get in the Crime Lab?  
15 A. Exhibit 5 was submitted on August 9, 2018.  
16 Q. And what was -- 205, what swab was that?  
17 A. Exhibit 5 -- so, it's submission 2 and Exhibit 5, and  
18 that's a reference from BJ McElveen.  
19 Q. Mr. McElveen's swab, when did this swab get to the  
20 Crime Lab?  
21 A. The swab was received by the Crime Lab on August 9,  
22 2018.  
23 Q. That would be after July 24th?  
24 A. That's correct.  
25 Q. That's after your Crime Lab swabbed the backpack?  
26 A. That's correct.  
27 Q. And as -- you were a reviewer in this report in 2018,  
28 correct?  
29 A. That's correct.  
30 Q. And as a DNA expert that's been tendered to this court,  
31 do you stand by the results of this report?  
32 A. Yes, absolutely.

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1 Q. And again, the comparison of Mr. McElveen's swab and  
2 the swab from the backpack, what was the conclusions made in  
3 this report?

4 A. BJ McElveen cannot be excluded as a major contributor  
5 to the DNA profile obtained from the swab taken from the  
6 straps, zipper, and zipper pulls of the backpack. See  
7 statistical analysis.

8 Q. And going towards statistical analysis, that's not  
9 talking about the number of people in the world, 2.6 billion  
10 Caucasian?

11 A. That's correct.

12 Q. That's going towards the value versus something else  
13 being a result?

14 A. That's correct. This is a statistical value that --  
15 and again, the best way to explain this is that anything  
16 over a million, anything over the number a million, here in  
17 these little boxes, we would consider an informative  
18 statistic. That is to say that the conclusion that's  
19 offered is informative. And again, as scientists, we don't  
20 describe conclusions or statistics as good or bad. We  
21 describe them as informative or noninformative.

22 Q. And as an African-American, Mr. McElveen would go  
23 towards the second analysis, the 7 --

24 A. The best way to view these statistics is -- is not  
25 dependent on the person being included ethnicity. The best  
26 way to understand these population genetics is this is the  
27 best way we have to offer statistical weights to  
28 conclusions. And there's a certain principle in statistics  
29 called the Hardy-Weinberg Equilibrium that has to be met to  
30 dictate whether or not there's a sufficient enough of a  
31 sample size. And the population groups that the FBI used  
32 back in the day is considered to be within Hardy-Weinberg

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1 Equilibrium. And so, that is to say that it is a sufficient  
2 subset of the population to be used as -- for statistical  
3 analysis.

4 Q. The following numbers that you see, that leads to the  
5 conclusion you standby regarding Mr. McElveen's swab  
6 compared to the backpack?

7 A. Yes. The words I would use is this is an informative  
8 statistic.

9 Q. Cannot be excluded as a major contributor.

10 A. That's correct.

11 Q. And finally, Mr. Tucker talked about contact DNA,  
12 someone touching that backpack could leave their contact  
13 DNA?

14 A. Yes.

15 MR. THERIOT:

16 Thank you. I have no further questions, Your  
17 Honor.

18 THE COURT:

19 All right. Thank you, sir. Appreciate it.  
20 Is that the report that was entered?

21 MR. SHAWHAN:

22 This is the State's report, yes, sir. Sorry.  
23 I have some of my own mixed in. These are State's  
24 exhibits.

25 MR. THERIOT:

26 I'm just indicating he can step down, Your  
27 Honor. We can -- I have his number for -- if he  
28 needs to be called back, but --

29 THE COURT:

30 All right. Absolutely. Mr. Theriot?

31 MR. THERIOT:

32 Your Honor, at this time, the State rests its



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Louisiana State Police  
Crime Laboratory  
Scientific Analysis Report

Lab Case #: SP-010357-18  
Agency Case #: 18-44011  
Case Officer: Charles Foster  
Parish of Offense: East Baton Rouge

AGENCY

East Baton Rouge Parish Sheriff's Office  
2867 General Isaac Smith Ave.  
P.O. Box 3277  
Baton Rouge, LA 70821-3277

19th Judicial District, Parish of East Baton Rouge  
Office of the District Attorney  
222 St. Louis St.  
Baton Rouge, LA 70802-5878

INDIVIDUALS

Capital One Bank - Victim

ANALYSIS REQUESTED DNA. This examination was completed on 7/31/2018 and the report was released on 8/6/2018 .

EVIDENCE SUBMITTED

On 7/24/2018 at 1:28 PM, Evidence Technician Ashley Heard received the following evidence from the East Baton Rouge Parish Sheriff's Office via Jeffrey Norton:

- Evidence Submission 0001: Four sealed evidence packages containing backpack, glove and swabs from gun and door frame
- Exhibit #0001-01: One camouflage Zipit brand backpack
- Exhibit #0001-01A: One swab/extract taken from straps, zipper, and zipper pulls of backpack
- Exhibit #0001-02: One red and black right glove
- Exhibit #0001-02A: One swab/extract taken from interior of glove
- Exhibit #0001-03: One swab/extract from grip and handle of Glock handgun
- Exhibit #0001-04: One swab/extract from trigger of Glock handgun

RESULTS AND CONCLUSIONS

Exhibits 1-4 were examined using Louisiana State Police Crime Laboratory (LSPCL) protocols.

DNA analysis was performed on the following items using LSPCL protocols:  
one swab taken from the straps, zipper, and zipper pulls of the backpack (Exhibit 1A)  
one swab taken from the interior of the glove (Exhibit 2A)  
one swab from the grip and handle of the Glock handgun (Exhibit 3)  
one swab from the trigger of the Glock handgun (Exhibit 4).

The DNA from Exhibits 1A, 2A, 3 and 4 was amplified using the PCR-based PowerPlex Fusion 6C System. The samples were analyzed using a capillary electrophoresis instrument, and DNA typing was conducted according to LSPCL protocols.

Exhibit 1A

The DNA profile obtained from the swab taken from the straps, zipper, and zipper pulls of the backpack was consistent with being a mixture of DNA from more than three contributors, with a major mixture of two contributors.

Report ID: SP-010357-18-0001

376 East Airport Avenue, Baton Rouge, Louisiana 70806  
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An ASCLD/LAB-International Accredited Testing Laboratory

Analyst's Initials: *CF*

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Due to the limited nature of the minor contribution, no conclusions can be made regarding any minor contributor.

Exhibit 2A

The DNA profile obtained from the swab taken from the interior of the glove was consistent with being a mixture of DNA from more than three contributors. Due to the complex nature of the profile, no further conclusions can be made.

Exhibit 3

The DNA profile obtained from the swab from the grip and handle of the Glock handgun was consistent with being a mixture of DNA from a minimum of three contributors. Due to the limited nature of the profile, no further conclusions can be made.

Exhibit 4

The partial DNA profile obtained from the swab from the trigger of the Glock handgun was consistent with being a mixture of DNA from a minimum of three contributors. Due to the limited nature of the profile, no further conclusions can be made.

Reference samples from any suspects developed during the course of the investigation should be submitted to the laboratory for additional analysis and comparison.

The DNA profile generated from Exhibit 1A was searched in the Combined DNA Index System (CODIS) as a one-time event and generated an investigative lead.

The remaining portions of Exhibits 1A, 2A, 3, and 4 were retained at the LSPCL. All other evidence will be returned to the submitting agency.

**SIGNATURE**

Analysis Performed By:

*F. Nicole Proctor*

F. Nicole Proctor  
Forensic Scientist

Evidence Screening Performed By:

*Tabitha Mizell*

Tabitha Mizell  
Forensic Scientist

In compliance with the Louisiana Code of Criminal Procedure Article 719 (A) and ASCLD/LAB-*International* accreditation standards, available at [www.asclcd-lab.org](http://www.asclcd-lab.org), (including the Quality Assurance Standards for Forensic DNA Testing Laboratories and DNA Databasing Laboratories, available at [www.fbi.gov](http://www.fbi.gov)), conclusions and opinions in this lab report are based on the use of validated test methods following established procedures of this Laboratory by analysts who are trained, competent, qualified, and authorized to perform said tests, using all equipment required for the correct performance of these tests.





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**Louisiana State Police  
Crime Laboratory**  
Scientific Analysis Report

Lab Case #: SP-010357-18  
Agency Case #: 18-44011  
Case Officer: Charles Foster  
Parish of Offense: East Baton Rouge

**AGENCY**

**East Baton Rouge Parish Sheriff's Office**  
2867 General Isaac Smith Ave.  
P.O. Box 3277  
Baton Rouge, LA 70821-3277

**19th Judicial District, Parish of East Baton Rouge**

Office of the District Attorney  
222 St. Louis St.  
Baton Rouge, LA 70802-5878

**INDIVIDUALS**

Capital One Bank - Victim  
Baylen Trim - Suspect  
B J McElveen - Suspect

**ANALYSIS REQUESTED** DNA. This examination was completed on 8/29/2018 and the report was released on 9/10/2018 .

**EVIDENCE SUBMITTED**

On 7/24/2018 at 1:28 PM, Evidence Technician Ashley Heard received the following evidence from the East Baton Rouge Parish Sheriff's Office via Jeffrey Norton:

Evidence Submission 0001: Four sealed evidence packages containing backpack, glove and swabs from gun and door frame  
Exhibit #0001-01: One camouflage Zipit brand backpack  
Exhibit #0001-01A: One swab/extract taken from straps, zipper, and zipper pulls of backpack

On 8/9/2018 at 9:50 AM, Evidence Technician Ashley Heard received the following evidence from the East Baton Rouge Parish Sheriff's Office via Nyki Paxton:

Evidence Submission 0003: Five sealed evidence packages which contained:  
Exhibit #0003-07: One swab/extract from bed cover  
Exhibit #0003-08: One swab/extract from black t-shirt  
Exhibit #0003-09: One swab/extract from blue hoodie  
Exhibit #0003-10: One swab/extract from camouflage gloves  
Exhibit #0003-11: One swab/extract from exterior door handle of bank

Evidence Submission 0004: One sealed evidence package which contained:  
Exhibit #0004-06: Baylen Trim: Two oral reference swabs

On 8/9/2018 at 9:50 AM, Evidence Technician Ashley Heard received the following evidence from the East Baton Rouge Parish Sheriff's Office via Nyki Paxton:

Evidence Submission 0002: One sealed evidence envelope which contained:  
Exhibit #0002-05: B J McElveen: Two oral reference swabs

**RESULTS AND CONCLUSIONS**  
**SUPPLEMENTAL LAB REPORT**

Report ID: SP-010357-18-0004

376 East Airport Avenue, Baton Rouge, Louisiana 70806  
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Analyst's Initials: *FTF*  
Page 1 of 3



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This lab report is a supplement to DNA request report ID: SP-010357-18-0001 released on 08/06/2018.

Exhibits 5-11 were examined using Louisiana State Police Crime Laboratory (LSPCL) protocols.

DNA analysis was performed on the following items using LSPCL protocols:

- one oral reference swab from B J McElveen (Exhibit 5)
- one oral reference swab from Baylen Trim (Exhibit 6)
- one swab from the bed cover (Exhibit 7)
- one swab from the black t-shirt (Exhibit 8)
- one swab from the blue hoodie (Exhibit 9)
- one swab from the camouflage gloves (Exhibit 10)
- one swab from the exterior door handle of the bank (Exhibit 11).

The DNA from Exhibits 7-11 was amplified using the PCR-based PowerPlex Fusion 6C System. The DNA from Exhibits 5 and 6 was amplified using the PCR-based PowerPlex Fusion System. The samples were analyzed using a capillary electrophoresis instrument, and DNA typing was conducted according to LSPCL protocols.

Exhibit 1A

B J McElveen (Exhibit 5) cannot be excluded as a major contributor to the DNA profile obtained from the swab taken from the straps, zipper, and zipper pulls of the backpack; see Statistical Analysis. Baylen Trim (Exhibit 6) can be excluded as a major contributor to this profile.

Exhibit 5

A DNA profile was obtained from the reference sample from B J McElveen.

Exhibit 6

A DNA profile was obtained from the reference sample from Baylen Trim.

Exhibit 7

A partial DNA profile was obtained from the swab from the bed cover. Due to the limited nature of the profile, no conclusions can be made.

Exhibit 8

There was insufficient DNA on the swab from the black t-shirt to produce a valid profile.

Exhibit 9

The DNA profile obtained from the swab from the blue hoodie was consistent with being a mixture of DNA from a minimum of two contributors. Due to the limited nature of the profile, no further conclusions can be made.

Exhibit 10

There was insufficient DNA on the swab from the camouflage gloves to produce a valid profile.

Exhibit 11

The DNA profile obtained from the swab from the exterior door handle of the bank was consistent with being a mixture of DNA from a minimum of two contributors. Due to the limited nature of the profile, no further conclusions can be made.

Reference samples from any additional suspects developed during the course of the investigation should be submitted to the laboratory for additional analysis and comparison.

The DNA profiles obtained from Exhibits 5 and 6 have been entered into the Combined DNA Index System (CODIS).

The remaining portions of Exhibits 5-11 were retained at the LSPCL. All other evidence will be returned to the submitting agency.



Exhibit(s): 1A

**Statistical Analysis**

**Conclusion:** Assuming two contributors, the deduced DNA profile was VALUE times more likely to be observed if it had originated from a mixture of DNA from B J McElveen and an unknown contributor than if it had originated from two unrelated, random individuals.

Value	Population
2.69 billion	Caucasian
7.20 billion	African American
13.7 billion	SW Hispanic

The above statistical analysis was based on the allele frequencies from the following sources:

Tamyra R. Moretti, Lilliana I. Moreno, Jill B. Smerick, Michelle L. Pignone, Rosana Hizon, John S. Buckleton, Jo-Anne Bright, Anthony J. Onorato. Population data on the expanded CODIS core STR loci for eleven populations of significance for forensic DNA analyses in the United States. Forensic Science International: Genetics <<http://dx.doi.org/10.1016/j.fsigen.2016.07.022>>

**SIGNATURE**

Analysis Performed By:

*F. Nicole Proctor*

F. Nicole Proctor  
Forensic Scientist

Evidence Screening Performed By:

*Tabitha Mizell*

Tabitha Mizell  
Forensic Scientist

In compliance with the Louisiana Code of Criminal Procedure Article 719 (A) and ASCLD/LAB-International accreditation standards, available at [www.ascl-d-lab.org](http://www.ascl-d-lab.org), (including the Quality Assurance Standards for Forensic DNA Testing Laboratories and DNA Databasing Laboratories, available at [www.fbi.gov](http://www.fbi.gov)), conclusions and opinions in this lab report are based on the use of validated test methods following established procedures of this Laboratory by analysts who are trained, competent, qualified, and authorized to perform said tests, using all equipment required for the correct performance of these tests.

on Tuesday, July 24, 2018

Forensic Scientist

*Mike Palmer*

on Tuesday, July 24, 2018

DNA Supervisor





# Louisiana State Police Crime Laboratory Non-Analytical Discrepancy Form

Lab Case Number: **SP-010357-18**

Agency:

East Baton Rouge Parish Sheriff's Office

Case Officer: Charles Foster

**Related Evidence:**

<u>Evidence Number</u>	<u>Description</u>
0001	Four sealed evidence packages containing backpack, glove and swabs from gun and door frame
0001-02	One red and black right glove

**Nature of Discrepancy:**

The submittal form is not consistent with the evidence that was submitted. An explanation of the actual evidence submitted is listed below. The statement "See Non-Analytical Discrepancy Form" was written on the submittal form.

Submittal form states: one red/grey glove  
Item submitted: one red/black glove

Submittal form was corrected to reflect item submitted.

Analyst: Tabitha Mizell on Tuesday, July 24, 2018  
Forensic Scientist

Witness: Johnnie on Tuesday, July 24, 2018  
Forensic Scientist

Approved By: Amber P. [Signature] on Tuesday, July 24, 2018  
DNA Supervisor

This document is intended to serve as a record of a discrepancy which exists between what was submitted to the Louisiana State Police Crime Laboratory and the accompanying description of it on the laboratory's 'Request for Scientific Analysis' form. This discrepancy was identified after the evidence was opened.

Report ID: SP-010357-18-0002

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