No. 25-6922

In the Supreme Court of the United States

BJ MCELVEEN,

Petitioner,

v.

LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

APPENDIX TO BRIEF IN OPPOSITION

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SUPREME COURT
STATE OF LOUISIANA

NO.

STATE OF LOUISIANA,
Respondent

VERSUS

BJ McELVEEN,
Petitioner

Original Application for Supervisory Writs
on behalf of BJ McElveen, Defendant/Petitioner

To the First Circuit Court of Appeal,
Docket Number 2023-KA-0939
Welch and Lanier JJ.
McClendon, C.J. dissenting

Affirming the Convictions From the

19th Judicial District Court
East Baton Rouge Parish, Docket No. 09-18-0487, Section 7
Honorable Louise Hines

ORIGINAL WRIT APPLICATION ON BEHALF OF BJ McELVEEN

A Criminal Proceeding

VOL. I of II

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SUPREME COURT OF LOUISIANA
CRIMINAL
WRIT APPLICATION FILING SHEET

TO BE COMPLETED BY COUNSEL OR PRO SE LITIGANT FILING APPLICATION

CASE TITLE: State v. BJ McElveen

APPLICANT PARTY NAME(S): BJ McElveen

Have there been any other filings in this Court in this matter: □ YES ■ NO

Are you seeking a Stay Order? □ YES ■ NO. If so, you MUST complete a criminal priority form.

Are you seeking Priority Treatment? □ YES □ NO. If so, you MUST complete a criminal priority form.

Does this pleading contain confidential information? □ YES ■ NO. If so, please file a motion to seal.

Does any pleading contain a constitutional challenge to any Louisiana codal or statutory provision? □ YES ■ NO

If yes, which pleading? _____

If yes, has the Office of the Louisiana Attorney General been notified pursuant to La. R.S. 13:4448? □ YES □ NO

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Is the pleading being filed: □ In proper person. □ In forma pauperis

Are there any pro se litigants involved in this matter: □ YES □ NO

TYPE OF PLEADING

□ Felony (death penalty) ■ Felony (non-death penalty) □ Misdemeanor □ Post-Conviction (death penalty)

□ Post-Conviction (non-death penalty) □ Criminal other

LOWER COURT INFORMATION

Parish and Judicial District Court: 19th JDC, East Baton Rouge Docket No: 09-18-0487

Judge and Section: Hon. Louise Hines, Section VII Date of Ruling: 2/2/23

APPELLATE COURT INFORMATION

Circuit: 1st Docket No.: 23-KA-939 Applicant: BJ McElveen Filing date: 5/20/24

Was this pleading simultaneously filed? □ YES ■ NO

Ruling date: 12/30/24 Action: Affirmed Convictions, Vacated Sentences

Panel of Judges: Welch and Lanier, JJ. - McClendon, C.J. dissenting En Banc: □

REHEARING INFORMATION

Applicant: BJ McElveen Filing date: 1/13/25 Ruling date: 4/2/2025

Action: Rehearing Denied Panel of Judges: McClendon, C.J. and Lanier, J. En Banc: □

PRESENT STATUS

□ pre-trial

□ hearing; scheduled date: _____

□ trial. Scheduled date: _____

□ trial in progress

Is there a stay now in effect? □ YES ■ NO

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal, to the lower court judge, and to all other counsel and unrepresented parties.

Date: 5/2/25 Signature: /s/ Jane Hogan

(Rev. 12/2022)

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ATTACHMENTS

STATEMENT OF WRIT GRANT CONSIDERATIONS

Pursuant to Rule X, §1(a) and Rule X,§4(2) of the Rules of this Court, BJ McElveen asserts that this case presents the following Writ Grant Consideration:

1. Conflicting Decisions.

BJ McElveen's armed robbery convictions stand solely on the results of DNA testing performed by unconfronted forensic analysts. The State never called those analysts at trial and instead introduced their crucial evidence through a representative of the Louisiana State Police Crime Lab who performed no testing, observed no testing being performed, and did not author the lab report. The First Circuit's plurality opinion which upheld the admissibility of this evidence failed to properly apply the controlling decision of *Smith v. Arizona*, 602 U.S. 779 (2024). As the plurality opinion is directly at odds with jurisprudence from the highest court in the country, as well as this Court's recent per curiam in *State v. Morgan*, 401 So.3d 650 (La. 2/25/25), this Court should grant the writ, apply *Smith* and vacate Mr. McElveen's convictions.

4. Erroneous Interpretation or Application of Constitution or Laws.

In upholding Mr. McElveen's convictions for armed robbery, the First Circuit relied entirely on the inadmissible DNA evidence, which at most proved that Mr. McElveen could not be excluded as having touched the outside of a backpack that was used in a robbery. Moreover, Mr. McElveen's DNA was allegedly found in a mixture of at least three individuals. When viewed in the light most favorable to the State, the evidence fails to exclude a reasonable hypothesis of innocence. As such, this Court should either remand for a new trial, pursuant to *State v. Oliphant*, 133 So.3d 1255 (La. 2/21/14), or recognize that without the inadmissible DNA evidence no incriminating evidence remains and enter a judgment of acquittal pursuant to *Hudson v. Louisiana*, 450 U.S. 40 (1981).

The First Circuit also applied the incorrect legal standard in evaluating the harmlessness of the improperly admitted DNA evidence. Applying the correct legal standard, as enumerated in *Chapman v. California*, Mr. McElveen's verdict was surely attributable to the improperly admitted DNA evidence, as this evidence represented the entirety of the State's case.

5. Gross Departure from Proper Judicial Proceedings.

After trial, Mr. McElveen filed a *pro se* motion for new trial that argued he had fired his lawyer prior to trial in open court and that his lawyer had not submitted alibi evidence in a timely manner. The record reveals a tension between Mr. McElveen and his trial counsel, who was

appointed three months before the hearing. Given the constitutional implications in Mr. McElveen's motion for new trial, the trial court should have set the motion for a hearing and the failure to do so was a departure from proper judicial proceedings.

STATEMENT OF JURISDICTION

On September 30, 2023, a jury in East Baton Rouge Parish convicted BJ McElveen of two counts of armed robbery. Attachment A. On February 2, 2023, the trial court sentenced Mr. McElveen to 25 years on each count, to run concurrently, with an additional five years to be served consecutively. Attachment B. Mr. McElveen timely appealed and the First Circuit affirmed his convictions on December 30, 2024. Attachment C. Mr. McElveen timely applied for rehearing, which the First Circuit denied on April 2, 2025. Attachment D.

Mr. McElveen now timely seeks a writ from this Court pursuant to La. Const. Art. V, § 5.

MEMORANDUM

STATEMENT OF THE CASE

On July 23, 2018, Erika Elie-Jackson arrived to work at the Capital One on Coursey Boulevard after 8:00 a.m. R. 269. Ms. Elie-Jackson testified that after disarming the alarm system, she signaled to her coworker Cornetta Washington that it was safe to enter. R. 270. Ms. Washington "entered the bank, then two men came in right behind her…pushed her to the floor and said get down on the floor." R. 270. Ms. Elie-Jackson and Ms. Washington were held at gunpoint and ordered to open the vault. R. 271. Ms. Elie-Jackson testified that she did not get a good look at either man and could not identify their height or build. R. 277. The only identifying characteristic was that she believed they were from New Orleans based on their accents. R. 276.

The surveillance footage showed that one individual wore a dark hoodie, held a gun, and forced the two bank tellers to open the safe. State's Exhibit S3. The second individual wore a gray hoodie, held a camouflage backpack, and wore a red and black glove on only one hand. State's Exhibit S3; R. 308. After clearing out the safe, the individuals fled through a field and a residential neighborhood, dropping stacks of cash, clothing, and the backpack along the way. State's Exhibit S5; R. 319.

Having developed no immediate leads, law enforcement received a Crime Stoppers tip that Baylon Trim committed the robbery with a man named BJ. R. 318. On August 2, 2018, Mr. McElveen willingly turned himself in and submitted to a DNA test. R. 312.

DNA analysts Tabitha Mizell and F. Nicole Proctor generated two DNA reports, which were introduced into evidence during Zachary Shawhan's testimony, as State's Exhibit S-26, over objection. The initial report is dated August 6, 2018, and describes the result of an examination completed on July 31, 2018. Of note, the report describes Exhibit 1A as a "DNA profile obtained from the swab taken from the straps, zipper, and zipper pulls of the backpack" used in the robbery. Exhibit S-26, 8/6/18 Report, p. 1. This profile consisted of a "mixture from more than three contributors, with a major mixture of two contributors." Id. According to the report, 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." Exhibit S-26, 8/6/18 Report, p. 2.

Tabitha Mizell and F. Nicole Proctor released a supplemental DNA report on September 10, 2018, from an examination they conducted on August 29, 2018. Exhibit S-26, 9/10/18 Report, p. 1. According to this report, Mr. McElveen "cannot be excluded as a major contributor to the DNA profile obtained from the straps, zipper, and zipper pulls of the backpack." Id., p. 2. The report further contained a statistical analysis that concluded it was 2.63 billion times more likely that Mr. McElveen's DNA was contained in the mixture of Exhibit 1A, then of two random individuals. Id., p. 3.

On October 2, 2018, the State filed a bill of information that formally charged BJ McElveen with two counts of armed robbery, for robbing each of the bank tellers. R. 20. Mr. McElveen was initially represented by conflict counsel Brady Skinner and on November 13, 2019, the court appointed the Southern University Law Clinic. R. 3. On July 23, 2020, the Law Clinic moved to be relieved as counsel of record citing difficulties created by the COVID-19 pandemic. R. 59. The court reappointed Mr. Skinner as conflict counsel and the matter remained pending for several years. R. 4-6.

A few months before trial, Mr. Skinner resigned as conflict counsel and the Office of the Public Defender appointed Robert Tucker on June 30, 2022. R. 81. On September 26, 2022, Mr. McElveen's trial began with jury selection. R. 10. On September 27, 2022, prior to opening statements, Mr. Tucker informed the State of Mr. McElveen's intention to call an alibi witness, to which the State objected as untimely, and the court sustained the objection. R. 145.

Ms. Washington testified that she could not identify either suspect and that there was only one firearm involved. R. 292. Ms. Washington testified the only distinguishing characteristic was that one man spoke with a New Orleans accent. R. 288.

Captain Justin Payer responded to the scene and collected surveillance videos of the robbery, which showed two masked individuals emerging from the bushes and approaching the Capital One at 8:27 a.m. R. 171. Three minutes later, the surveillance footage showed the same individuals flee the bank, run across the street and through the parking lot of the nearby UCB Bank. R. 173. Captain Payer recovered a stack of cash in the parking lot of the UCB Bank, but did not recover any other evidence. R. 186. Captain Payer testified that he accompanied Detective Foster to follow up on a Crime Stoppers tip that proved invalid but otherwise conducted no further investigation. R. 188.

Deputy Steven Gallo testified that he responded to the scene and interviewed John Bass, who photographed the suspects as they ran through the parking lot towards a footpath that led to a residential neighborhood. R. 198; State's Exhibit S4. Deputy Gallo then relocated to Southpark Drive, where deputies found various items of clothing scattered around the yards of two residential duplexes. R. 202. Among the items recovered were sweatshirts, T-shirts, and a red-and-black glove that seemingly matched the glove worn by the suspect holding the backpack. R. 203.

Lieutenant Michelle Partenheimer testified that she arrived approximately 30 minutes after the robbery, canvased the area, and located a backpack and some clothing underneath an old truck bed. R. 211. Approximately 20 feet from the truck bed, Lieutenant Partenheimer located a bundle of cash inside of an old tire. R. 212. Lieutenant Partenheimer acknowledged that this area was heavily trafficked by pedestrians, and she did not have personal knowledge of how these items were left at this location. R. 215.

Sergeant Jason Fitzpatrick also responded to the scene and took 170 photographs of the items recovered from the residential area. State's Exhibit S5. Sergeant Fitzpatrick testified that he recovered a bundle of cash and a handgun with an extended clip from inside the backpack. R. 234. Following this testimony, the court admonished the State for publishing "170 pictures, of which 150 of them weren't even necessary" and noted that three jurors had fallen asleep. R. 242.

Lieutenant Chuck Foster testified that he was the case agent and sent the backpack and other items to the Crime Lab to be processed for DNA. R. 308. Lieutenant Foster testified that the Crime Lab swabbed the backpack's zipper and straps and "were able to get an identification that led to Mr. McElveen." R. 311. Lieutenant Foster then obtained a warrant for Mr. McElveen's arrest and to take his DNA. R. 312. Mr. McElveen was in Texas at the time and willingly turned himself into the authorities. R. 312.

Detective Foster also testified that he received two Crime Stoppers tips pertaining to this case. The first was a tip from a restaurant employee who claimed that a dishwasher had a camouflage backpack. R. 315. Detective Foster responded to the tip and determined that it was a coworker calling in a prank. R. 315. Detective Foster then received a second tip that Baylon Trim committed the robbery with a man named BJ. R. 318; 324. Detective Foster did not reveal the source of the information, nor did the State call the informant to testify. However, Mr. Trim was never charged with the robbery because his DNA was not found on any piece of recovered evidence. R. 318.

The State then called John Mai, a DNA technician at the Crime Lab, and the court called a bench conference and warned the State it could not elicit any testimony from Mr. Mai pertaining to the results of the DNA analysis since he did not perform the analysis. R. 340. The court noted there was " a lot of hearsay" in the DNA report and reiterated that Mr. Mai could only testify as to actions he performed. R. 340. Mr. Mai testified that the backpack was properly received in a manner consistent for scientific analysis and was swabbed for DNA according to protocols. R. 342.

The State then called DNA expert Zachary Shawhan to testify about the DNA results from the report. After identifying the report which described an examination conducted and signed by two different forensic scientists, the court excused the jury and held it would not permit the introduction of the report because Mr. Shawhan had not conducted the experiment, nor authored the report as either the analysist or the screener. R. 626; State's Exhibit S26. The State conceded that Mr. Shawhan had not performed the forensic analysis of the DNA and was only interpreting someone else's work. R. 627. The court noted the analysis was performed by F. Nicole Proctor, and the State noted she "left the crime lab. She's in Texas, Your Honor." R. 629.

After extensive argument, the court held that the Crime Lab report was inadmissible, and that Mr. Shawhan could not testify to any conclusions made by Ms. Proctor. The court then stated, "I would advise you probably need to find Ms. Proctor and get her on Zoom, because that's the least this Court's going to allow at this point, because I'm about to declare a mistrial." R. 651-52. The defense then moved for a mistrial, which the court denied. R. 654. The State sought an emergency writ of the ruling, and the court eventually dismissed the jury for the day. R. 660. The First Circuit stayed the trial and on September 29, 2022, granted the State's writ and held the report

was admissible and that Mr. Shawhan could testify about the results of the DNA analysis performed by Ms. Proctor. R. 95. Trial counsel did not seek supervisory review in this Court.

On September 30, 2022, trial resumed, and Mr. Shawhan testified that a swab from the straps and zipper of the backpack produced a DNA profile that was "consistent with being a mixture of DNA from more than three contributors with a major mixture of two contributors." R. 375. Mr. Shawhan testified that on August 9, 2018, the lab received buccal swabs from Baylon Trim and BJ McElveen. R. 394. After comparing the profiles, the lab concluded that Mr. McElveen could not be excluded as a major contributor to the mixed DNA profile obtained from the exterior backpack swab. R. 395.

Following Mr. Shawhan's testimony, the State rested, and the defense rested without calling any witnesses. After deliberations began, the jury returned once with a question and ultimately convicted Mr. McElveen as charged. R. 436.

On February 2, 2023, the court denied Mr. McElveen's post-trial motions and immediately sentenced him to 25 years on each count to run concurrently, with an additional five consecutive years for having committed the robbery while armed with a firearm. R. 15-16.

Mr. McElveen timely appealed his convictions and sentences and urged seven assignments of error. On December 30, 2024, the First Circuit affirmed Mr. McElveen's convictions but vacated his sentences due to the trial court's failure to observe the mandatory sentencing delay. Notably, Chief Judge McClendon dissented and found that the admission of the DNA results through the testimony of a surrogate analysis was precluded under the United States Supreme Court's decision of *Smith v. Arizona*, 602 U.S. 779, 783 (2024), which was issued while Mr. McElveen's case was pending on appeal.

On January 13, 2024, Mr. McElveen filed a timely petition for rehearing. Exhibit C. On April 2, 2025, the First Circuit denied rehearing.

ASSIGNMENTS OF ERROR

1. The introduction of the DNA report and Zachary Shawhan's testimony violated BJ McElveen's right to confront and cross-examine adverse witnesses.

2. There is insufficient evidence to support BJ McElveen's armed robbery convictions.

3. The trial court erroneously included a jury instruction on flight.

4. Trial counsel rendered constitutionally deficient performance for failing to effectively litigate against the admissibility of the DNA report and failing to present evidence of innocence.

5. The trial court erred by failing to grant a hearing on Mr. McElveen's Motion for New Trial

SUMMARY OF THE ARGUMENT

BJ McElveen's convictions for armed robbery rest entirely upon an inadmissible DNA report and testimony from a DNA expert who did not conduct an independent examination of the DNA. While Mr. McElveen's case was submitted on briefs, the United States Supreme Court held decided *Smith v. Arizona*, 602 U.S. 779 (2024), and held that a testifying expert cannot restate the substance of someone else's lab work as support for his own "independent opinion." Under *Smith*, the DNA reports produced by Tabitha Mizell and F. Nicole Proctor were clearly inadmissible without subjecting these analysts to cross-examination. Mr. Shawhan's surrogate testimony about the supplemental report's conclusions and Detective Foster's testimony about an initial presumptive lead generated by a non-testifying analyst, are equally inadmissible under *Smith.* While a dissenting judge on the First Circuit recognized that *Smith* required reversal, the First Circuit ultimately denied Mr. McElveen's request for rehearing in light of *Smith.*

The First Circuit also erroneously upheld Mr. McElveen's convictions, as the inadmissible evidence proves only that he and at least two individuals touched the exterior of a backpack that was used in a robbery. There was no DNA or fingerprint evidence linking Mr. McElveen to the crime scene or to any clothing or gloves presumably worn by the suspects. Mr. McElveen was not identified as a suspect by the bank tellers, nor any other witness, and his DNA was not found on the gun or money found inside the backpack. The admission of the accusatory, testimonial DNA report and the testimony from a DNA expert who did not perform the DNA examination violated Mr. McElveen's right to confront his accusers and without this evidence, his conviction cannot stand.

The court also erroneously included a jury charge pertaining to flight, when there was no evidence submitted that Mr. McElveen went to Texas to evade authorities. To the contrary, when Mr. McElveen learned he was wanted he immediately turned himself in.

The record also contains multiple examples of trial counsel rendering deficient representation, including the failure to litigate against the admissibility of the DNA report and the failure to present evidence supporting innocence. The trial court also erroneously denied Mr. McElveen's *pro se* motion for a new trial without hearing.

LAW AND ARGUMENT

1. The introduction of the DNA report and Zachary Shawhan's testimony violated BJ McElveen's right to confront and cross-examine adverse witnesses.

BJ McElveen's armed robbery convictions stand solely on the results of DNA testing performed by unconfronted forensic analysts. The State never called those analysts at trial, and instead introduced their crucial evidence through a representative of the Louisiana State Police (LSP) Crime Lab who performed no testing, observed no testing being performed, and did not author the lab report. In fact, this lab representative freely admitted that he was "simply a technical reviewer" whose work on this case began and ended with making sure that the work of the unconfronted analysts "upheld our policies and procedures" and further admitted he could "really only testify to our results and our policies and procedures." R. 392.

On the third day of trial, the court ruled that the DNA reports were inadmissible hearsay and any testimony pertaining to the report would also be inadmissible unless the State called either Tabitha Mizell or F. Nicole Proctor to testify. R. 12. The State objected to the ruling and sought an emergency writ, which the First Circuit granted, holding the DNA reports were not testimonial pursuant to *Williams v. Illinois*, 567 U.S. 50 (2012). *State v. McElveen*, 22-KW-1066 (La. App. 1 Cir. 9/29/22).

DNA Analyst Zachary Shawhan proceeded to testify, throughout 25 pages of the record, to the findings of the supplemental report. R. 371-96. Mr. Shawhan's testimony was clearly limited to reciting the conclusions and findings from the DNA report, as he admitted that his work in this case was only that of a technical reviewer, and that he performed no testing, no observation of testing, and authored no report.

> Counsel: Based on these reports that you have in front of you and the ones that you went through and the ones that somebody else prepared, can you say with any amount of certainty that whoever prepared the DNA material or collected it from the scene followed all of your protocols?
>
> Shawhan: As an analyst for Louisiana State Police Crime Lab, I can really only testify to our results and our policies and procedures.
>
> Counsel: What other interaction have you had in this case?
>
> Shawhan: I'm simply a technical reviewer in this case, which means I evaluated the entire DNA analysis process and made sure it upheld our policies and procedures. That's the interaction I've had with this case.

R. 392.

On appeal, Mr. McElveen argued the admission of the supplemental DNA report and Mr. Shawhan's testimony violated Mr. McElveen's right to confrontation. In a plurality opinion, the

First Circuit committed factual error by finding that Mr. Shawhan was a "participant" in the DNA examination and therefore properly testified about the DNA report's conclusion. The First Circuit also committed legal error by failing to properly apply *Smith v. Arizona*, as noted by the dissent, and applying the incorrect harmless error standard.

i. Confrontation Clause Jurisprudence

The Sixth Amendment to the U.S. Constitution provides the defendant "[i]n all criminal prosecutions . . . shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court has identified a "core class of 'testimonial' statements" which equate to a witness who bears testimony against an accused. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Those statements include "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits…[and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* (internal quotations and citations omitted).

The *Crawford* Court further noted that testimonial statements are admissible when the witness is absent from trial "only where the declarant is unavailable, and only where defendant has had a prior opportunity to cross-examine." (footnote omitted). *Id*. at 1369. Thus, the Confrontation Clause requires "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id*. at 1370.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that certificates of forensic analysis that certified a substance was cocaine were "testimonial statements" which required the person who conducted the experiments to testify and be subject to cross-examination.

Two years later, the Court held that a forensic laboratory report certifying a defendant's blood-alcohol concentration was also a testimonial statement which required the analyst who conducted the analysis or signed the report to testify subject to cross-examination. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). The Court specifically held:

> 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.

Id. at 652 (emphasis added).

The following year, the Supreme Court decided *Williams v. Illinois*, 567 U.S. 50 (2012), in which vaginal swabs from a sexual assault kit performed on a rape victim were sent by the Illinois State Police (ISP) crime lab to a private laboratory, Cellmark, which sent back a report containing a male DNA profile. *Id.* at 59. Meanwhile, a DNA profile had been produced by the ISP crime lab from a blood sample taken from the defendant after his August 2000 arrest on unrelated charges. *Id.* After receipt of the DNA profile extracted by Cellmark from the vaginal swabs taken from the rape victim, a computer search by the ISP crime lab showed a match between that DNA profile and the known DNA profile of defendant. *Id.* The victim subsequently identified the defendant in a lineup as her attacker, and he was arrested. *Id.* at 60.

At trial in *Williams*, the victim testified and identified the defendant in court as her attacker and three forensic witnesses testified for the State. *Id.* First, an ISP forensic scientist testified that he had confirmed the presence of semen on the vaginal swabs taken from the victim and afterward had resealed the evidence and left it in a secure freezer at the lab. *Id.* Second, a state forensic analyst testified that she had developed a DNA profile from the blood sample drawn from the defendant after his unrelated August 2000 arrest, and that she had entered that DNA profile into the state forensic database. *Id.* Finally, a DNA expert testified that the male DNA profile produced by Cellmark from vaginal swabs taken from the rape victim matched the male DNA profile produced from the sample of the defendant's blood. At the time Cellmark sent its DNA report to the state police lab the defendant was not a suspect in the February 2000 sexual assault, kidnaping and robbery. Notably, the Cellmark laboratory report was neither admitted into evidence nor shown to the factfinder.

The *Williams* Court held there was no Confrontation Clause violation even though the testimony of the three DNA experts relied upon the DNA profile created by Cellmark, whose scientists did not testify. The Court noted its "conclusion is entirely consistent with *Bullcoming* and *Melendez-Diaz*" because:

> In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* that the defendant's blood alcohol level exceeded the legal limit and in *Melendez-Diaz* that the substance in question contained cocaine. Nothing comparable happened here. In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood.

Williams, 567 U.S. at 79.

The Court further noted that even if the Cellmark report had been introduced into evidence, no Confrontation Clause violation would have occurred because the report "was not to accuse petitioner or to create evidence for use at trial." *Id.* at 84. When the Cellmark report was generated, the primary purpose was to "catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." *Id.*

Following *Williams*, in a similar sexual assault case this Court held that since the *Williams* decision was a "bare majority" with "no agreement on any single rationale among the five Justices" its holding should apply "no more broadly than the particular circumstances that led to the convergence of the votes…and that are substantially similar to those in the present case." *State v. Bolden,* 108 So.3d 1159, 1161 (La. 10/26/12). The *Bolden* Court defined the limited application of *Williams* as follows:

> 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, the tests are conducted by an accredited laboratory, and the report of the test results itself is not introduced as a certified declaration of fact by the accredited laboratory.

Id. (internal citations and quotations omitted).

The DNA report in this case is identical to the type of inadmissible, accusatory, testimonial reports at issue *Bullcoming* and *Melendez-Diaz*, rather simply a non-accusatory report at issue in *Williams* and *Bolden.* As such, *Williams* and *Bolden* lend no support to the admission of this evidence.

ii. The recent decision of *Smith v. Arizona* was decided while Mr. McElveen's case was submitted on briefs to the First Circuit.

The most recent case on this issue is *Smith v. Arizona*, 602 U.S. 779, 783 (2024), which was decided while Mr. McElveen's case was submitted on briefs to the First Circuit. In *Smith,* the Supreme Court held that a testifying expert cannot restate the substance of someone else's lab work as support for his own "independent opinion." *Id*. at 798–99. This Court has subsequently applied *Smith* in a recent *per curiam. See State v. Morgan,* 401 So.3d 650 (La. 2/25/25) ("The trial court erred in granting the State's motion in limine to present surrogate analyst testimony regarding the report and/or underlying data generated by an absent analyst of evidence gathered by police after defendant's arrest when that analyst is allegedly unavailable and where defendant has not had an opportunity to cross examine that particular analyst.").

Under *Smith*, the DNA reports produced by Tabitha Mizell and F. Nicole Proctor were clearly inadmissible without subjecting these analysts to cross-examination. Mr. Shawhan's surrogate testimony about the supplemental report's conclusions and Detective Foster's testimony about an initial presumptive lead generated by a non-testifying analyst, are equally inadmissible under *Smith.*

iii. Mr. Shawhan did not participate in the DNA examination and therefore his testimony was that of a surrogate analyst, which must be evaluated in light of *Smith.*

The plurality opinion commits factual error by finding that the introduction of the supplemental DNA report and Mr. Shawhan's testimony pertaining to its results were properly admitted because he was "a participant in the process." *State v. McElveen*, 23-KA-939 at *19 (La. App. 1 Cir. 12/30/24). This misconstrues Mr. Shawhan's role as a technical reviewer of the examinations performed by F. Nicole Proctor and Tabitha Mizell. When asked to describe his actions in this case, Mr. Shawhan testified that he "reviewed the entire case file" to determine that the analysts complied with established protocols. R. 655. It is undisputed that Mr. Shawhan did not conduct any examination of Mr. McElveen's DNA or the backpack, and on cross-examination confirmed that as a "technical reviewer" he could only testify about the Crime Lab's policies and procedures, and the results generated by Ms. Proctor and Ms. Mizell. R. 392.

John Mai, another Crime Lab employee, aptly described the work of a technical reviewer as someone who is not present when a test is performed who then later "can look over…notes" to make sure someone else's DNA test complied with policies and procedures. R. 345.[1]

As recognized by the dissent, Mr. Shawhan's testimony as a technical reviewer, who did not perform or observe the testing, is identical to the issue presented in *Smith*, as Arizona argued that "a surrogate analyst can testify to all the same substance—that is, someone else's substance—as long as he bases an 'independent opinion' on that material." *Smith*, at 798-993. The *Smith* Court rejected this argument, finding that this would "allow every testimonial lab report [] come into evidence through any trained surrogate, however remote from the case", without allowing defendants the "right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted." *Id.* at 799. This would result in an "end run" around

[1] Mr. Mai testified: "[W]e do have the ability to review each other's work….in our lab…we review each other's work. While I'm not present to – exactly like an eagle eye over somebody, I can look over their notes, I can make sure if they documented something, it should be documented, or something that should be documented is noted….that is also part of that review process. **I want to make sure, as a reviewer, as somebody that's not there at the exact moment when something is done**, that any notes, any documentation that's taken…is necessary in our case folder that it can be reviewed at a later date and confirmed that it is done properly according to our procedures and protocols." R. 345 (emphasis added).

the Court's Confrontation Clause jurisprudence. *Id.* Applying *Smith,* the DNA reports and Mr. Shawhan's testimony were clearly inadmissible and violated Mr. McElveen's Sixth Amendment right to confrontation.

iv. Under *Smith*, the presumptive CODIS match and correlating testimony is inadmissible.

At the time of Mr. McElveen's trial and appellate briefing, *Williams v. Illinois*, 567 U.S. 50 (2012), had yet to be abrogated by *Smith*, and this Court cautioned that *Williams* should apply "no more broadly than the particular circumstances that led to the convergence of the votes…and that are substantially similar to those in the present case." *State v. Bolden*, 108 So.3d 1159, 1161 (La. 10/26/12). Pursuant to *Williams*, there is no Confrontation Clause violation when a DNA expert testifies that in his opinion the DNA profile developed from a sample taken from a defendant matches the DNA profile developed by another, 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, the tests are conducted by an accredited laboratory, and the report of the test results itself is not introduced as a certified declaration of fact by the accredited laboratory.

Mr. McElveen conceded in his initial brief that pursuant to *Williams*, the initial DNA report, which merely stated an investigative lead was developed after entering the backpack DNA swab into CODIS, would not violate Mr. McElveen's confrontation rights. This is no longer the case, as *Smith* now holds that "[w]hen an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth…[a]nd if those are testimonial…the Confrontation Clause will bar their admission." *Smith v. Arizona*, 602 U.S. at 783.

Applying *Smith*, Detective Foster's testimony pertaining to the alleged results of the initial DNA testing is inadmissible, as it was only relevant and probative for its truth if it assumed the truth of the absent witness' statement. As *Smith* is a new rule of law, announced after Mr. McElveen's trial, he should not be faulted for failing to object to Detective Foster's testimony under *Smith.*

It is also notable that the expert, Mr. Shawhan, testified that he reviewed the Crime Lab's "entire file" in preparation for his testimony, but did not testify that there was a presumptive match

to Mr. McElveen.[2] Thus, the only testimony about an alleged, initial presumptive match came from Detective Foster, who admitted that he was unqualified to testify about DNA. R. 316.

v. The First Circuit failed to apply the *Chapman* analysis in evaluating whether the admissibility of the DNA evidence through a surrogate analyst amounted to harmless error.

The plurality opinion noted that even if the supplemental DNA report and Mr. Shawhan's testimony were inadmissible under *Smith*, any resulting error was harmless.[3] In conducting a harmless error analysis, the First Circuit failed to apply the *Chapman* standard.

In *Chapman v. California*, 386 U.S. 18 (1967), the United States Supreme Court established the standard for harmless error review for federal constitutional error in both state and federal courts. Under that test, the State bears the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24; *see also State v. Gibso*n, 391 So.2d 421, 426-27 (La. 1980), *State v. Kent*, 382 So.3d 69, 78 (La. 3/22/24). The United States Supreme Court has clarified that the critical inquiry is whether the verdict rendered was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *see also United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008) ("A defendant convicted on the basis of constitutionally inadmissible Confrontation Clause evidence is entitled to a new trial unless it was harmless in that there 'there was [no] reasonable possibility that the evidence complained of might have contributed to the conviction.'").

In citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the First Circuit improperly applied the harmless error analysis utilized for a Confrontation Clause violation stemming from the denial of a defendant's right to impeach a witness. *See also United States v. Alvarado-Valdez*,

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[2] Detective Foster also claimed that he learned four days after the robbery, on "Friday evening," that the Crime Lab was "able to get an identification that led to Mr. McElveen. R. 311. However, the initial DNA report does not corroborate that Mr. McElveen was generated as an initial identification, and the report also notes that the initial DNA examination was completed the following Tuesday, July 31, 2018.

[3] With no basis in the record, the lead opinion also erroneously suggests that Mr. McElveen may have waived his right of confrontation under La. R.S. 15:501. *State v. McElveen*, p.19–20 n.14. This is incorrect, as the record does not contain a notice of intent to offer proof by certificate filed by the State at least 45 days prior to trial, as is mandatory under the statute. La. R.S. 15:501(A) ("the party seeking to introduce a certificate made in accordance with R.S. 15:499 shall, not less than forty-five days prior to the commencement of the trial, give written notice of intent to offer proof by certificate."). While the lead opinion acknowledges that "the record does not reflect the State filed formal notice," it also suggests that the State's double error—in failing to call the testifying analysts and failing to comply with the mandatory language of the statute—may nonetheless be waived by mere provision of the report in discovery.

This is clearly incorrect and cannot be squared with the plain text of the statute. The statute is unambiguous in requiring the State to give notice. It is only upon the receipt of the notice that triggers the requirement of the defense to demand the testimony of the analyst. La. R.S. § 15:501(B).

In suggesting that Mr. McElveen bore an additional, extra-statutory burden to take steps to ensure that the State's witnesses appear in court, the lead opinion further departs from the reasoning of *Smith*, which reaffirmed that the "Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Smith v. Arizona*, 602 U.S. 779, 792 n.3 (2024) (cleaned up).

521 F.3d 337, 341 (5th Cir. 2008) (discussing different applications of *Chapman* depending on the type of Confrontation Clause error). In contrast, the present case involves the admission of evidence tainted by a Confrontation Clause violation, rather than a curtailment of cross-examination. Thus, the First Circuit should not have looked to the strength of the other evidence, nor shifted the burden to Mr. McElveen to prove he is entitled to relief, but rather determine whether the State proved beyond a reasonable doubt that Mr. McElveen's verdict is surely unattributable to the admission of the DNA reports and corresponding testimony.

vi. Under the correct legal standard, the State cannot prove that the error in admitting the surrogate DNA analyst's testimony did not contribute to Mr. McElveen's verdict beyond a reasonable doubt.

Under the correct *Chapman* standard, the State has the burden to prove beyond a reasonable doubt that Mr. Shawhan's testimony did not contribute to Mr. McElveen's conviction. *See United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008) ("Accordingly, the government must demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction."). The State cannot meet this burden because quite literally the only incriminating evidence against Mr. McElveen was that his DNA was found on the exterior of a backpack used in a robbery.

While the plurality opinion referenced an anonymous tip that Baylon Trim and "BJ" committed the robbery, as well as the fact Mr. McElveen was arrested in Texas, the true foundation of the State's entire case is the DNA evidence. This is apparent from the outset, as the State told the jury during opening statements that the armed robbery was "almost the perfect crime," but that Mr. McElveen "gets sloppy and he leaves something behind." R. 157. The State then told the jury that it would see "who, what, when, and where there was DNA left. You'll hear testimony from DNA experts, police officers, witnesses, and two victims[.]" R. 158.

The State had the burden of proving Mr. McElveen's identity. There were no witnesses to this crime, and the victims could not identify Mr. McElveen. Thus, the only evidence of identity came from the conclusions drawn by the non-testifying F. Nicole Proctor and Tabitha Mizell. While Detective Foster testified as a non-DNA expert that there was a presumptive match to Mr. McElveen, the true weight of the State's case came from Mr. Shawhan, the final witness called

prior to deliberations. Not only did Mr. Shawhan testify for over 25 pages of the record, but the State referenced Mr. Shawhan's testimony five times[4] throughout its closing arguments:

As acknowledged by the State during closing arguments, the DNA evidence is the only evidence that proves Mr. McElveen touched a backpack that was used in a robbery. Mr. Shawhan's expert testimony—based on another expert's testimonial evidence—established that Mr. McElveen could not be excluded as a major contributor to the backpack swab. This goes to the core of proving Mr. McElveen's identity, an essential element of which the State bears the burden of proof. While Mr. Shawhan could testify as a technical reviewer about the general policies and procedures of the Crime Lab, the only person who could testify whether those policies and procedures were followed in this case were the analysts who conducted the testing. Absent the testimony of Ms. Mizell and Ms. Proctor, there is no way of knowing whether the tests were conducted according to protocol and produced reliable results.

The fact that the prosecutor repeatedly highlighted the evidence that violated the right to Confrontation in closing argument is enough to warrant reversal under *Chapman* because the State cannot credibly argue that there was no possibility that the evidence it highlighted contributed to the verdict. *See United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) ("Here, because the government's closing argument relied on the very evidence that offends the Confrontation Clause, we cannot see how the government can conclusively show that the tainted evidence did not contribute to the conviction.") (cleaned up); *see also United States v. Alvarado-Valdez*, 521 F.3d 337, 342-43 (5th Cir. 2008) (same).

vii. Conclusion

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[4] You heard all that testimony from the DNA expert. And one of the things he repeatedly said was that BJ McElveen cannot be excluded as a major contributor to the DNA profile. He said that the likelihood ratio was 2.9 billion. That is very far away from the number one. I may not have been good at counting the other day, but I know that one and 2.9 billion are very far away from each other. And he stated that they used the straps, the zippers, and the zipper pulls. R. 403.

You guys have plenty of common sense. You saw the robbery. You saw the camo backpack several times. You saw the DNA that was all over the backpack, the backpack that was found 30 to 45 minutes after the robbery, found near the bank. The backpack was also submitted to the Crime Lab the very next day. R. 405.

And BJ is seen on that video with his ungloved hand touching that backpack, touching the strap that went to the DNA lab the very next day, and he's the major contributor on there. R. 406.

That backpack that was found 30 or 45 minutes after the crime, the backpack that is being worn by one of the assailants in this picture, that backpack which the DNA said that -- you saw the report --Mr. McElveen cannot be excluded as a major contributor to the DNA profile swab from the straps, the zipper, and the zipper pulls. What is he holding? The strap of that backpack, and that is why, without -- without a glove on a his hand, and that is why his DNA is all over that backpack. R. 418.

The Crime Lab report states that he cannot be excluded, because he was the person who was touching that backpack on July 23, 2018, committing this crime. Also, the DNA report talks about the ratio. Again, 2.9 billion is very far from one. There's your identity - there's your identity, as one of the obligations that the State has to prove.
R. 419 (emphasis added).

Because Mr. McElveen's conviction cannot be sustained without the DNA report or Mr. Shawhan's testimony, this Court should find there is insufficient evidence and enter a judgment of acquittal. At a minimum, this Court should vacate his convictions and remand the matter for a new trial.

2. There is insufficient evidence to support BJ McElveen's armed robbery convictions.

The only incriminating evidence against Mr. McElveen is F. Nicole Proctor's conclusion that he could not be excluded as a major contributor to the mixed DNA profile obtained from a swab of the backpack's straps and zipper. It is important to recognize that the DNA profile from the backpack was a mixture of at least three contributors and that Mr. McElveen's DNA was not found on any items inside the backpack, including the firearm and bundles of cash. Mr. McElveen's DNA was also not found on any items of discarded clothing, including a red-and-black glove presumably worn by the individual holding the backpack in the surveillance video.

The Crime Lab's report represents the entirety of the State's case, as the bank tellers could not identify the suspects, the surveillance footage did not reveal any distinguishing characteristics of either suspect, and the State did not present any witness who identified Mr. McElveen as a suspect. Furthermore, Mr. McElveen did not make any incriminating statements to the police or on a recorded phone call from jail, and has consistently maintained his full innocence of the crime. Mr. McElveen was also not found in possession of any items take during the robbery and was not alleged to have spent large amounts of cash in the days following the robbery. The minimal evidence in this case, even when viewed in the light most favorable to the State, fails to exclude a reasonably hypothesis of innocence and Mr. McElveen's convictions should therefore be vacated.

i. Relevant Law

In evaluating the sufficiency of the evidence to support a conviction, a reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307 (1979); *State v. Captville*, 448 So.2d 676, 678 (La. 1984).

When reviewing a conviction based upon circumstantial evidence, the reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, a reasonable trier of fact could have concluded beyond a reasonable doubt that every reasonable

hypothesis of innocence had been excluded. *See State v. Morris*, 414 So.2d 320, 321-22 (La. 1982) (citation omitted). The reviewing court "does *not* determine whether another *possible* hypothesis has been suggested by 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 sufficiently reasonable that a rational factfinder 'could not have found proof of guilt beyond a reasonable doubt.'" *State v. Jones,* 318 So.3d 678, 682 (La. 1/30/18) (citing *State v. Captville,* 448 So.2d 676, 680 (La. 1984) (emphasis in original).

Armed robbery is 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. La. R.S. 14:64. When the dangerous weapon used is a firearm, an additional five-year penalty applies to any sentence imposed. La. R.S. 14:64.3.

ii. <u>There is no direct evidence that BJ McElveen committed armed robbery.</u>

There is no direct evidence that BJ McElveen committed armed robbery because the DNA evidence should have been deemed inadmissible. Moreover, even if this evidence were properly admitted, when viewed in the light most favorable to the prosecution, this proves only that Mr. McElveen touched the outside of a backpack that was used in a robbery. However, <u>at least</u> two other people touched the same backpack in the same place. Although the police recovered a gun, clothing, bundles of cash, and even gloves allegedly worn by the suspects, Mr. McElveen's DNA was not found on any other piece of evidence. Despite processing the crime scene and evidence for fingerprints, Mr. McElveen's fingerprints were not located at the scene or on any piece of recovered evidence.

The DNA report and testimony from Zacharay Shawhan is the only incriminating evidence against Mr. McElveen. As fully described in Assignment of Error One, both the report and testimony pertaining to the report were inadmissible hearsay which should have been excluded. However, the *Jackson* standard requires this Court to consider all of the evidence introduced at trial, even evidence which the trial court has admitted improperly and which may therefore provide an independent basis for reversing the defendant's conviction on grounds of trial error. *State v. Hearold*, 603 So. 2d 731, 734 (La. 1992) ("[W] hen the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the assignments of trial error to determine whether the accused is entitled to a new trial.").

Mr. McElveen is entitled to a full acquittal because even considering the inadmissible DNA report, he is at most guilty of having touched a backpack that was used in a robbery. A similar situation occurred in *State v. Oliphant*, 133 So.3d 1255 (La. 2/21/14), in which this Court vacated an armed robbery conviction that was based upon: (i) the defendant and his brother's conflicting statements; (ii) evidence that two bloodhounds tracked the defendant's scent from the scene to the location of the getaway car; and (iii) a DNA analysis of a stocking allegedly worn during the robbery that concluded the defendant could not be excluded as one of two contributors. *Id.* at 1259.

This Court noted that although the conflicting statements and DNA evidence were "not overwhelmingly strong, when considered together it is sufficient to support the conviction." *Id.* However, due to the improperly admitted bloodhound evidence, this Court vacated the conviction because it could not determine whether the verdict was "surely unattributable to the bloodhound evidence." *Id.* at 1261. Rather than enter a judgment of acquittal based on insufficient evidence, this Court remanded for a new trial.

As recognized by *Oliphant*, DNA evidence that only mildly incriminates someone as having touched an item allegedly used during a robbery is not "overwhelmingly strong" and likely would be insufficient to sustain a conviction on its own. In contrast to *Oliphant*, Mr. McElveen had not given a conflicting statement to law enforcement and the only evidence presented at trial was the improperly admitted DNA evidence. At worst, this proves only that Mr. McElveen touched a backpack that was used in a robbery, in the same location that at least two other people had touched. This evidence is insufficient to sustain his conviction and therefore, Mr. McElveen is entitled to a full acquittal or, at a minimum, a new trial.

iii. The circumstantial evidence also fails to justify BJ McElveen's convictions.

The other circumstantial evidence that seemingly implicated Mr. McElveen was the bank tellers' testimony that the suspects spoke like they were from New Orleans, and Detective Foster's claims that there was a presumptive positive DNA match to BJ McElveen prior to his arrest, and that a Crime Stoppers informant claimed Baylon Trim committed the robbery with a person named BJ.

Both bank tellers testified that it seemed as if the suspects were from New Orleans because of the way they said, "baby." R. 277; 288. Detective Foster testified that during the investigation he learned that Mr. McElveen was from New Orleans. R. 320. It is worth noting that in 2018, there

were approximately 79,966 Black Men[5] living in New Orleans. It is also worth noting that Mr. McElveen was born in New Orleans on October 24, 1996, but moved to Baton Rouge when he was eight years old after Hurricane Katrina. R. 20. Thus, Mr. McElveen had spent his formative years in Baton Rouge and had lived in Baton Rouge for 13 years at the time of his arrest. Not only did the State fail to establish that Mr. McElveen spoke with a New Orleans accent, the State never asked either bank teller to listen to Mr. McElveen's voice to determine whether it sounded like the suspects. *See State v. Steward*, 975 So.2d 829 (La. App. 2 Cir. 2/13/08) (collecting cases and holding that voice identification is an acceptable and reliable means of proving identity).

Detective Foster claimed that four days after the robbery, the Crime Lab processed the backpack and "were able to get an identification that led to Mr. McElveen." R. 311. According to the DNA report, the backpack swab generated a profile that was then "searched in the Combined DNA Index Systems (CODIS) as a one-time event and generated an investigative lead." State's Exhibit S26, p. 2. However, the DNA report does not specify that the investigative lead pointed towards BJ McElveen and Mr. Shawhan made absolutely no mention of this presumptive lead during his testimony. Not only is Detective Foster's testimony uncorroborated, but it is also suspicious that a presumptive positive would have matched to BJ McElveen from a CODIS search given that he was a first-felony offender whose DNA profile would not have been uploaded in CODIS.

Detective Foster also claimed that after he received notice of the presumptive match, he received an anonymous tip that Baylon Trim committed the crime with a person named BJ. However, Detective Foster refused to provide any other details:

> That particular tip, I wanted to keep the integrity of the Crime Stoppers intact, though. I can't elaborate a whole lot on that or I will definitely give away the actual person who called this in, and I don't want to do that and I will not do that. But, that particular person knew very specific details of this robbery that was not shared to the public…they did identify a Baylon Trim that was going to be one of the perpetrators….[who] was the one squatting in front of the vault. The other perpetrator…they only knew him by the first name of BJ.

R. 317-18.

As the United States Supreme Court has observed, albeit in the Fourth Amendment context: an anonymous tip "provides virtually nothing from which one might conclude that its author is either honest or his information reliable[.]" *Illinois v. Gates*, 462 U.S. 213, 227 (1983). An

[5] According to the 2015 U.S. Census, Black Men aged 15-84 made up 26% of the total population of New Orleans, which was 307,565. *See* https://www.vera.org/publications/new-orleans-jail-population-quarterly-report/new-orleans-whos-in-jail-and-why-first-quarterly-report/black-men-are-overrepresented-in-our-jail

anonymous tip may provide probable cause for an arrest or reasonable suspicion for an investigatory stop, only if it "accurately predicts future conduct in sufficient detail to support a reasonable belief that the informant had reliable information regarding the suspect's illegal activity." *State v. Gates,* 145 So.2d 288, 297 (La. 5/7/14).

Whether this tip was sufficiently reliable to justify the affidavit for arrest or the search warrant for Mr. McElveen's DNA was never litigated and so it is not an issue on appeal. However, it is worth noting that this tip was neither reliable nor accurate as the informant claimed Baylon Trim committed the robbery with a man named BJ. Law enforcement obtained a warrant for both Mr. Trim and Mr. McElveen's DNA and ultimately did not arrest Mr. Trim because there was no evidence corroborating the tip. There was also never any indication that Mr. Trim and Mr. McElveen knew each other.

While the State did not call this "particular person [who] knew very specific details of the robbery" to testify, it is critical to note that this person ultimately provided inaccurate information pertaining to Baylon Trim. Without any additional information pertaining to this tip, it is certainly plausible that this tipster was actually one of the robbers who made a false tip in order to lead the investigation in a different direction.

iv. Conclusion

Given that there was no eyewitness identification of Mr. McElveen, no incriminating evidence found at his house, no fingerprints or DNA found at the scene or on any item taken in the robbery, the State's evidence only proves that Mr. McElveen touched a backpack that was used in a robbery. Mr. McElveen was also not the only person who touched this backpack, as the DNA profile was a mixture of *at least three* individuals. Even viewing this evidence under the *Jackson* standard, it fails to exclude every reasonable hypothesis of innocence and Mr. McElveen's convictions should be vacated.

3. The trial court erroneously included a jury instruction on flight.

The trial court erred in including a jury instruction on flight as there was no evidence to support the claim that Mr. McElveen had fled the jurisdiction. At the charge conference, prior to the delivery of the jury charge, the defendant objected to the inclusion of an instruction on flight. R. 366. The trial court overruled the defendant's objection, and gave 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.

R. 425.

The ruling of the trial court on an objection to a portion of its charge to the jury will not be disturbed unless the disputed portion, when considered in connection with the remainder of the charge, is shown to be both erroneous and prejudicial. *State v. Butler*, 563 So.2d 976, 988 (La. App. 1 Cir. 1990). If there is testimony of flight after the crime was committed and the jury charge regarding flight is brief when considered in connection with the remainder of the charge, the instruction is neither erroneous nor prejudicial. *State v. Bell*, 721 So.2d 38, 41 (La. App. 5 Cir. 10/14/98).

In this case, Detective Foster testified that after Mr. McElveen was developed as a suspect, he was located in Texas because "he had already fled the State." R. 312. However, Mr. McElveen was a musician who travelled frequently and there is absolutely no indication that he went to Texas with the knowledge that he was wanted by authorities. Moreover, Detective Foster admitted that Mr. McElveen turned himself in to authorities in Texas, which further disproves that he was on the run.

The appropriate standard for determining harmless error is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in the instant trial was surely unattributable to the error. *State v. James*, 665 So.2d 581, 584 (La. App. 5 Cir. 11/28/95). As previously noted, the only incriminating evidence against Mr. McElveen was that he could not be excluded as having touched a backpack that was used in a robbery. Thus, instructing the jury that it could infer his presence in Texas was attributable to a guilty conscious was not a harmless error given the complete lack of evidence.

4. Trial counsel rendered constitutionally deficient performance for failing to effectively litigate against the admissibility of the DNA report and failing to present evidence of innocence.

Mr. McElveen's case was pending for four years prior to trial, during which time his attorney was changed four times with trial counsel being appointed less than three months before trial. The lack of consistent, adequate representation caused Mr. McElveen to file numerous *pro se* motions in attempts to preserve his constitutional rights. The record also proves that there were

tensions between trial counsel and Mr. McElveen prior to trial, [6] as the court noted there was a "back-and-forth" between counsel and Mr. McElveen, who has "refused to talk at some points with Mr. Tucker[.]" R. 148. Aside from the obvious tensions and the fact that trial counsel referred to his client as "Mr. McAlpine" approximately 18 times[7] during trial, there are multiple examples throughout the record of counsel failing to provide effective representation, which further requires that Mr. McElveen's convictions be vacated.

i. Relevant Law

The Sixth Amendment to the United States Constitution and Article 1, § 13 of the Louisiana Constitution safeguard a defendant's right to the effective assistance of trial counsel. *State v. Thomas*, 124 So. 3d 1049, 1053 (La. 9/4/13). A defendant asserting an ineffective assistance claim must show: (1) that defense counsel's performance was deficient and (2) that the deficiency prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668 (1984). The defendant has the burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Claims of ineffective assistance of counsel are generally best addressed through an application for post-conviction relief, rather than on direct appeal, so a full evidentiary hearing may be held in the district court. *State v. Truitt*, 500 So.2d 355, 359 (La. 1987). However, if the record contains sufficient evidence to rule on the merits and the claim is properly raised in an assignment of error, an appellate court may address the claim in a measure of judicial economy. *State v. Armstead*, 980 So.2d 20, 24 (La. App. 5 Cir. 2/6/08).

The First Circuit found that Mr. McElveen's counsel was not deficient for failing to adequately litigate the admissibility of the DNA report. As to his claim that counsel was ineffective for failing to provide notice of an alibi or present evidence supporting Mr. McElveen's innocence, the First Circuit found that this claim could not be resolved on the face of the record. and failing to effectively represent Mr. McElveen during sentencing.

ii. Trial counsel did not litigate the admissibility of the DNA report.

[6] On the morning of trial, counsel noted that "Mr. McElveen was here two, three weeks ago…[and] told me he was going to get additional counsel." R. 148. In Mr. McElveen's Motion for New Trial, he avers that he appeared in court a few weeks before trial and specifically fired his attorney on the record. R.116. Despite trial counsel and Mr. McElveen's recollections, there are no court minutes of any such hearing in the record.

[7] R. 159; 160; 398; 408; 409; 410; 411; 412; 413; 414; 415.

A reasonable attorney would have recognized that the admissibility of the DNA report was critical as the State's entire case is built upon this report. However, trial counsel did not file a brief opposing the State's mid-trial writ and after the First Cicuit granted the State's writ, the trial court asked counsel whether the defense would be taking any further "action on the decision from the First Circuit," to which trial counsel replied, "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." R. 368-69.

According to Mr. McElveen's *pro se* motion for new trial, his attorney stated that if the First Circuit granted the State's writ, counsel would file a writ to this Court. However, after the First Circuit's ruling, Mr. McElveen avers, "my lawyer did not file the writ like he promised. I asked why he lied [and] he said shut up he knew what he was doing." R. 117.

As fully briefed in Assignment of Error One and Two, the admissibility of the DNA report and Mr. Shawhan's testimony should have been further litigated and the failure to seek supervisory review of the First Circuit's mid-trial ruling, which relied upon distinguishable case law even at the time, was deficient representation.

iii. Trial counsel failed to timely notify the State of an alibi witness and attempted to argue facts not in evidence during closing.

Mr. McElveen's *pro se* Motion for New Trial challenged his attorney's refusal to call Mr. McElveen's mother to testify. R. 117. The record indicates that following jury selection and immediately before opening statements, trial counsel informed the State for the first time that it "may be calling an alibi witness." R. 144. Trial counsel claimed the lack of notice was due to Mr. McElveen refusing to communicate and the court sustained the State's objection to the untimely notice of an alibi. R. 145.

A defendant must serve an alibi notice on the State within 10 days following the written demand of the district attorney. La. C.Cr.P. art. 727. Although trial counsel was only appointed three months prior to trial, counsel still failed to provide a timely pretrial disclosure of an alibi witness, which deprived Mr. McElveen of his right to present a defense.

It is unclear whether Mr. McElveen's mother was the alibi witness that counsel failed to timely disclose, but during closing statements trial counsel mentioned that Mr. McElveen had:

> irritated his parents enough to throw him out….Someone throws all his stuff out. Have you notice BJ has got on the same clothes, because he doesn't have any more, because when he got kicked out of the house, they threw all of his stuff out? Guess what was included?

R. 413.

The court sustained the State's objection to this argument, as it contained facts that were never mentioned during the case. In a letter written to the court by Mr. McElveen's mother, she wrote that she had placed his backpack with his clothes and music outside of her house and it was stolen. R. 126. Clearly Mr. McElveen's mother was a critical witness who should have been presented to the jury because it would have corroborated his innocence.

5. The trial court erred by failing to grant a hearing on Mr. McElveen's Motion for New Trial.

On November 3, 2022, Mr. McElveen filed a *pro se* Motion for New Trial that claimed his attorney did not visit or counsel him, did not provide him with copies of discovery, failed to file a mid-trial writ, and refused to call Mr. McElveen's mother to testify on his behalf. R. 116. Mr. McElveen also wrote that although he had "fired" his attorney in open court "he was still able to represent me." R. 117.

The decision on a motion for new trial rests within the sound discretion of the trial judge, and its ruling will not be disturbed on appeal absent a clear showing of abuse. *State v. Quimby*, 419 So.2d 951 (La.1982). The merits of such a motion must be viewed with extreme caution in the interest of preserving the finality of judgments. As a general rule, a motion for new trial will be denied unless injustice has been done. La.C.Cr.P. art. 851; *State v. Dickerson*, 579 So.2d 472 (La. App. 3 Cir. 4/17/91).

Mr. McElveen's motion made numerous claims which clearly required a hearing, including that his lawyer did not present evidence supporting Mr. McElveen's innocence. Among the grounds listed for a new trial is that the defendant has discovered and presented evidence supporting his factual innocence. La. C.Cr.P. art. 851. At a minimum, a hearing was needed so that Mr. McElveen's mother could testify and the court could determine whether she could provide evidence supporting innocence.

Mr. McElveen's motion also suggests that he might have been denied his right to self-representation. Given that there are no minutes or transcript in the record of the hearing in which Mr. McElveen fired his attorney in open court, it is impossible to determine whether Mr. McElveen had attempted to represent himself at that time or obtain different counsel prior to trial.

While it is "beyond dispute that [t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process," *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004), a criminal defendant also has the right to "proceed without counsel

when he intelligently elects to do so." *Faretta v. California*, 422 U.S. 806, 807 (1975); *Miller v. Thaler*, 714 F.3d 897, 903 (5th Cir. 2013).

Waiver of the right to counsel must be knowing and intelligent, and the defendant must clearly and unequivocally request self-representation. *Id*.; *United States v. Long*, 597 F.3d 720, 723 (5th Cir. 2010). Once a defendant unequivocally invokes the right of self-representation, whether expressly or constructively, the court must hold a *Faretta* hearing to ensure that the defendant's request to proceed without counsel is knowing and voluntary. *See Faretta*, 422 U.S. at 835-36; *United States v. Cano*, 519 F.3d 512, 516 (5th Cir. 2008). A *Faretta* warning, therefore, is required when the defendant unequivocally invokes his right to proceed on his own behalf and waives his right to counsel. *See Cano*, 519 F.3d at 516; *see also*, *Long*, 597 F.3d at 724.

In dismissing this claim, the First Circuit faults Mr. McElveen, a *pro se* litigant for failing to request a hearing and failing to object to the court dismissing the pleading without a hearing. While *pro se* litigants should generally be given wide latitude, as they are at a disadvantage having no formal training in the law and rules of procedure; a *pro se* litigant also assumes responsibility for his lack of knowledge of the law, and must carry his burden of proof to be entitled to relief. *See Patterson v. Charles*, 282 So.3d 1075, 1096 (La. App. 4 Cir. 9/11/19); *State v. Cannon*, 399 So.3d 853 (La. App. 2 Cir. 10/2/24).

Both Mr. McElveen and his attorney claimed that there was a hearing a few weeks before the trial in which Mr. McElveen fired his lawyer in open court. It is completely unknown whether the court then informed Mr. McElveen of his right to self-representation or his right to hire a different attorney. Given the constitutional implications of this issue, the court should have set Mr. McElveen's Motion for New Trial for a hearing. The fact that Mr. McElveen flagged this issue in a *pro se* filing should have alerted the court as to a need for a hearing and the fact that he did not attach a show cause order to his pleading should not be held against him.

CONCLUSION

There is no evidence to support BJ McElveen's convictions for armed robbery. The First Circuit factually and legally erred in its analysis of Mr. McElveen's Confrontation Clause claim. Without the improperly admitted DNA evidence, Mr. McElveen's conviction must be vacated. However, even considering this evidence in a sufficiency review reveals only that Mr. McElveen cannot be excluded as having touched the outside of a backpack that was used in a robbery. Given

that this evidence fails to exclude a reasonable hypothesis of innocence, he is entitled to a judgement of acquittal or, at a minimum, a new trial.

PRAYER FOR RELIEF

BJ McElveen prays that this Court grant his writ, order full briefing and oral argument, and ultimately vacate his convictions.

Submitted by:

Jane Hogan

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Counsel for BJ McElveen

VERIFICATION AND CERTIFICATE OF SERVICE

I hereby verify the allegations contained in this application for supervisory writs and certify that a copy of the foregoing writ application with all assignments of error, has been served upon the parties below on May 2, 2025, via electronic mail and/or U.S. Mail, postage pre-paid:

First Circuit Court of Appeal
1600 N. 3rd Street
Baton Rouge, LA 70802

Honorable Louise Hines
300 North Blvd., Ste. 6401
Baton Rouge, Louisiana 70802

Dylan Alge, Assistant District Attorney
222 St. Louis Street, Fifth Floor
Baton Rouge, Louisiana 70802

BJ McElveen DOC # 772647
Catahoula Correctional Center
499 Old Columbia Road
Harrisonburg, Louisiana 71340

Jane Hogan

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recess and for the transcript to be typed for the State to file Writ. At 3:25 pm. the Court ordered recess. This matter continued for trial-Jury on September 29, 2022 at 9:00 am. The accused signed notice.

SEPTEMBER 29, 2022

This matter came before the Court for Continuation of Trial - Jury, pursuant to previous assignment. The accused was present (not brought in court today) represented by ROBERT W TUCKER, SR. Mr. STUART THERIOT and Ms. Rokeya Morris, Assistant District Attorney, was present for the State of Louisiana. The Court is still waiting on the Writ return from the First Circuit Court of Appeal. Chambers conference this morning. At 2:30 pm. the Court still waiting on Writ Return from the First Circuit, at this time the Court released the jurors for the day and ordered them to return back tomorrow morning at 9:00 am. At 2:45 pm. the Writ return came back from the First Circuit, Granted. This matter continued for trial-Jury to resume on September 30, 2022 at 9:00 am.

SEPTEMBER 30, 2022

This matter came before the Court for Continuation of Trial - Jury, pursuant to previous assignment. The accused was present in court (Jail) represented by ROBERT W TUCKER, SR and Mr. Robert Tucker, Jr. Mr. STUART THERIOT and Ms. Rokeya Morris, Assistant District Attorney, was present for the State of Louisiana. At 9:13 am. all parties present in Court. Chambers conference this morning with both counsel regarding final jury instructions. The Court heard preliminary matters. The Defense stated to take no action at this time regarding Writ. At 9:19 am. the Court conferred with the defendant regarding his right to testify or not to testify on his behalf to confer with his counsel and the Court will discuss with him later. At 9:22 am. the jurors entered in Court. The State and Defense waived polling.

The State contined with witness 13) Mr. Zachary Shawhan, La State Police Crime Lab testimony. The State submitted with evidence S-26 (report). Bench conference (Defense objection) S-26 admitted into evidence. The State published evidence to the jurors. At 9:35 am.

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Attachment A

the Defense cross examined the witness. Bench conference. The Defense continued with cross examination of the witness. At 10:00 am. the State redirects the witness. The State Rest. At 10:06 am. the Court ordered a recess and retired the jurors.

At 10:25 am. all parties present in Court. The Court conferred with the defendant regarding his right to testify and he stated that he does not wish to testify on his behalf. At 10:33 am. the jurors entered in Court. The State and Defense waived polling. The Defense Rest.

At 10:36 am. the State submitted with closing statements. At 10:51 am. Bench conference, the Defense Moved for Rule 56 Motion for Directed Verdict of Acquittal, Denied. The Defense objected. At 10:52 am. the Defense submitted with closing statements. At 11:15 am. Bench conference (State objection) The Defense continued with closing statements. At 11:23 am. Bench conference (Court) At 11:29 am. the State submitted with rebuttal statements. At 11:33 am. the Court read jury instructions to the jurors. At 11:52 am. the two alternate jurors kept seperate at this time. At 11:53 am. the Court retired the jurors for deliberation phase of the trial. At 1:07 pm. all parties present in Court. The jurors have (2) questions. Chambers conference with both counsel. The Court made statements. The State and Defense made statements. At 1:11 pm. the jurors entered in Court. The State and Defense waived polling. Mr. LaPlace, foreperson entered in Court with questions. At 1:14 pm. the Court re-read the definition of the charge "Armed Robbery w/ Firearm" to the jurors. At 1:16 pm. the Court retired the jurors to continue with deliberations.

At 2:04 pm. all parties present in Court. The two alternate juros brought in the Court room. At 2:06 pm. the jurors entered in Court. The State and Defense waived polling. Juror # 123 Mr. Chase LaPlace, foreperson entered in Court with verdict form in hand. The Court reviewed the form then handed to the Clerk to read into the record:

For charge ARMED ROBBERY WHILE THE OFFENDER WAS ARMED W/ FIREARM , The JURY found the accused guilty. For charge ARMED ROBBERY WHILE THE OFFENDER WAS ARMED W/ FIREARM , The JURY found the accused guilty. The Defense objected to verdict. The Clerk orally polled the jurors verdicts as to both counts all

Attachment A

twelve voted "Yes, this is their verdict". The Court written polled the jurors also. At 2:16 pm. the Court retired the jurors and thanked them for their service. The Defense moved for Post Verdict Acquittal. The State submitted with arguments. The Court Denied, Defense objected. The Defense stated to file Appeal. The Court placed HOLD and ordered pre-sentence investigation report (faxed commitment to probation & parole). This matter set for sentencing on November 30, 2022 at 9:00 am. The accused signed notice.

NOVEMBER 30, 2022

This matter came before the Court for Sentencing, pursuant to previous assignment. The accused was present in court (Jail), counsel not present filed continuance. Ms. MORGAN JOHNSON, Assistant District Attorney, was present for the State of Louisiana. Probation & parole needs more time to complete pre-sentence investigation report. Maintained hold and held @ parish prison. The Sentencing was fixed for 02/02/2023 at 09:00 AM. The accused signed notice. Notify Counsel of the next court date.

FEBRUARY 2, 2023

This matter came before the Court for Sentencing, pursuant to previous assignment. The accused was present in court (Jail) represented by ROBERT W TUCKER, SR. ROKEYA J. MORRIS, Assistant District Attorney, was present for the State of Louisiana. The Defense filed Motions: 1) Vedict Judgment of Acquittal, Denied. 2) Transcript for Discovery to Defense, Denied. 3) To appoint Appelate Project as counsel, Granted. 4) Motion to relieve Mr. Tucker as counsel, Granted. The Court recieved (3) letters from the accused mother; sister and from the accused filed into the record. The Defense counsel addressed the Court before sentencing.

For charge ARMED ROBBERY WHILE THE OFFENDER WAS ARMED W/ FIREARM , The Court sentenced the accused to be confined in the custody of the Secretary of the DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, State of Louisiana, for a period of 25 year(s) at hard labor, WITHOUT BENEFIT PROBATION, PAROLE OR

twelve voted "Yes, this is their verdict". The Court written polled the jurors also. At 2:16 pm. the Court retired the jurors and thanked them for their service. The Defense moved for Post Verdict Acquittal. The State submitted with arguments. The Court Denied, Defense objected. The Defense stated to file Appeal. The Court placed HOLD and ordered pre-sentence investigation report (faxed commitment to probation & parole). This matter set for sentencing on November 30, 2022 at 9:00 am. The accused signed notice.

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SUSPENSION OF SENTENCE. The accused is to be given credit for time served as a result of his arrest on this charge only, from arrest to bond and from conviction or remand to imposition of sentence.

The Court advised the accused of his right to appeal his conviction and his sentence within thirty days from this date and his right to post-conviction relief within two years from the finality of the judgment of conviction and sentence. The Court further advised the accused that a Motion to Reconsider Sentence is to be filed within thirty days from this date. The Court ordered this sentence to run Concurrent WITH EACH OTHER.

For charge ARMED ROBBERY WHILE THE OFFENDER WAS ARMED W/ FIREARM , The Court sentenced the accused to be confined in the custody of the Secretary of the DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, State of Louisiana, for a period of 25 year(s) at hard labor, WITHOUT BENEFIT PROBATION, PAROLE, OR SUSPENSION OF SENTENCE. The accused is to be given credit for time served as a result of his arrest on this charge only, from arrest to bond and from conviction or remand to imposition of sentence.

The Court advised the accused of his right to appeal his conviction and his sentence within thirty days from this date and his right to post-conviction relief within two years from the finality of the judgment of conviction and sentence. The Court further advised the accused that a Motion to Reconsider Sentence is to be filed within thirty days from this date. The Court ordered this sentence to run Concurrent WITH EACH OTHER .

THE COURT ADDED + 5 YEARS (FOR WEAPON) TO RUN CONSECUTIVE TO THE 25 YEARS SENTENCE.

A TRUE COPY OF THE MINUTES OF COURT

THIS 12th DAY OF Sept,

20 23

Deputy Clerk for
Doug Welborn, Clerk of Court
Parish of East Baton Rouge
State of Louisiana

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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

****

19th 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.

McClendon, J. dissents for reasons assigned.
FRW Welch, J. concurs in result

Attachment C

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.[1] 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.[2]

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.

---

[1] According to the record and the defendant's brief on appeal, the defendant's full first name is BJ.

[2] 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.[3] 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

[3] 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.[4]

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

[4] 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.[5] 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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[5] 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.[6] 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.[7]

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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[6] 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.

[7] 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.[8] 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.[9]

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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[8] 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.

[9] 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

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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.[10]

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[11] 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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[10] 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.

[11] 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.[12] 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

[12] 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**[13] 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**.[14] See also **State v. Chisolm**, 49,043 (La. App. 2d Cir.

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[13] 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**.

[14] 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).

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.

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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. Folse**, 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.

Attachment C

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 2023-KA-0939

State Of Louisiana

- - Versus - -

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

Page McClendon

Walter I. Lanier III by PMC
Walter I. Lanier III

Date APR 02 2025

Rodd Naquin, Clerk

Attachment D

SUPREME COURT
STATE OF LOUISIANA

NO.

STATE OF LOUISIANA,
Respondent

VERSUS

BJ McELVEEN,
Petitioner

Original Application for Supervisory Writs
on behalf of BJ McElveen, Defendant/Petitioner

To the First Circuit Court of Appeal,
Docket Number 2023-KA-0939
Welch and Lanier JJ.
McClendon, C.J. dissenting

Affirming the Convictions From the

19th Judicial District Court
East Baton Rouge Parish, Docket No. 09-18-0487, Section 7
Honorable Louise Hines

Appendix

VOL. II of II

Exhibit A:	Appellant's Brief, Filed by BJ McElveen
Exhibit B:	Appellee's Brief, Filed by the State of Louisiana
Exhibit C:	Application for Rehearing, Filed by BJ McElveen

DOCKET NUMBER: 2023 KA 939

STATE OF LOUISIANA

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA,
Appellee

VERSUS

BJ MCELVEEN,
Appellant

Original Brief on Appeal
Filed on Behalf of Appellant, BJ McElveen,
Conviction and Sentence from the 19th Judicial District Court
East Baton Rouge Parish Docket No. 09-18-0487, Section 7
Honorable Louise Hines

APPELLANT'S ORIGINAL BRIEF

A CRIMINAL PROCEEDING

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Exhibit A

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Exhibit A

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STATEMENT OF JURISDICTION

Jurisdiction vests in this Honorable Court under Article V, Section 10 of the Louisiana Constitution of 1974. On September 30, 2023, a jury in East Baton Rouge Parish convicted BJ McElveen of two counts of armed robbery. Attachment A. On February 2, 2023, the trial court sentenced Mr. McElveen to 25 years on each count, to run concurrently, with an additional five years to be served consecutively. Attachment B.

On March 1, 2023, Mr. McElveen timely moved for an appeal. R. 128. He now files this brief within the briefing schedule set by this Court.

STATEMENT OF THE CASE

On July 23, 2018, two masked individuals robbed a Capital One Bank in Baton Rouge. The surveillance footage showed that one individual wore a dark hoodie, held a gun, and forced the two bank tellers to open the safe. State's Exhibit S3. The second individual wore a gray hoodie, held a camouflage backpack, and wore a red and black glove on only one hand. State's Exhibit S3; R. 308. After clearing out the safe, the individuals fled through a field and a residential neighborhood, dropping stacks of cash, clothing, and the backpack along the way. State's Exhibit S5; R. 319.

Having developed no immediate leads, law enforcement received a Crime Stoppers tip that Baylon Trim committed the robbery with a man named BJ. R. 318. On August 2, 2018, Mr. McElveen willingly turned himself in and submitted to a DNA test. R. 312.

On October 2, 2018, the State filed a bill of information that formally charged BJ McElveen with two counts of armed robbery, for robbing each of the bank tellers. R. 20. Mr. McElveen was initially represented by conflict counsel Brady Skinner and on November 13, 2019, the court appointed the Southern University Law Clinic. R. 3. On July 23, 2020, the Law Clinic moved to be relieved as counsel of record

Exhibit A

citing difficulties created by the COVID-19 pandemic. R. 59. The court reappointed Mr. Skinner as conflict counsel and the matter remained pending for several years. R. 4-6.

A few months before trial, Mr. Skinner resigned as conflict counsel and the Office of the Public Defender appointed Robert Tucker on June 30, 2022. R. 81. On September 26, 2022, Mr. McElveen's trial began with jury selection. R. 10. On September 27, 2022, prior to opening statements, Mr. Tucker informed the State of Mr. McElveen's intention to call an alibi witness, to which the State objected as untimely, and the court sustained the objection. R. 145.

On the third day of trial, the trial court ruled that the DNA report was inadmissible hearsay and any testimony pertaining to the report would also be inadmissible unless the State called the forensic scientist who conducted the analysis. R. 12. The State objected to the ruling and sought an emergency writ, which this Court granted on September 29, 2022. R. 95.

On September 30, 2022, trial resumed and at 11:52 a.m., the jurors retired to deliberate. R. 14. After returning to ask a question, at 2:06 p.m. the jury returned a verdict of guilty as charged. R. 14; 436. On February 2, 2023, the court denied Mr. McElveen's post-trial motions and immediately sentenced him to 25 years on each count to run concurrently, with an additional consecutive five years for having committed the robbery while armed with a firearm. R. 15-16.

ASSIGNMENTS OF ERROR

1. There is insufficient evidence to support BJ McElveen's armed robbery convictions.

2. The introduction of the DNA report and Zachary Shawhan's testimony violated BJ McElveen's right to confront and cross-examine adverse witnesses.

3. The trial court erroneously included a jury instruction on flight.

4. Trial counsel rendered constitutionally deficient performance for failing to effectively litigate against the admissibility of the DNA report, failing to

present evidence of innocence, and failing to render effective representation during sentencing.

5. The trial court erred by failing to grant a hearing on Mr. McElveen's Motion for New Trial.

6. The trial court's failure to observe the mandatory 24-hour sentencing delay constitutes an error patent.

7. The trial court erred when it imposed an unconstitutionally excessive sentence of 30 years on a first offender.

ISSUES PRESENTED

1. Whether there is sufficient evidence to support BJ McElveen's armed robbery convictions.

2. Whether the introduction of the DNA report and Zachary Shawhan's testimony violated BJ McElveen's right to confront and cross-examine adverse witnesses.

3. Whether the trial court erroneously included a jury instruction on flight.

4. Whether trial counsel rendered constitutionally deficient performance that is apparent from the record on appeal.

5. Whether the trial court erred by failing to grant a hearing on Mr. McElveen's Motion for New Trial.

6. Whether the trial court's failure to observe the mandatory 24-hour sentencing delay constitutes an error patent.

7. Whether the trial court erred when it imposed an unconstitutionally excessive sentence of 30 years on a first offender.

STATEMENT OF FACTS

On July 23, 2018, Erika Elie-Jackson arrived to work at the Capital One on Coursey Boulevard after 8:00 a.m. R. 269. Ms. Elie-Jackson testified that after disarming the alarm system, she signaled to her coworker Cornetta Washington that it was safe to enter. R. 270. Ms. Washington "entered the bank, then two men came in right behind her…pushed her to the floor and said get down on the floor." R. 270. Ms. Elie-Jackson and Ms. Washington were held at gunpoint and ordered to open the vault. R. 271. Ms. Elie-Jackson testified that she did not get a good look at either man and could not identify their height or build. R. 277. The only identifying

characteristic was that she believed they were from New Orleans based on their accents. R. 276.

Ms. Washington could not identity either suspect and testified that there was only one firearm involved. R. 292. Ms. Washington testified the only distinguishing characteristic was that one man spoke with a New Orleans accent. R. 288.

Captain Justin Payer responded to the scene and collected surveillance videos of the robbery, which showed two masked individuals emerge from the bushes and approach the Capital One at 8:27 a.m. R. 171. Three minutes later, the surveillance footage showed the same individuals flee the bank, run across the street and through the parking lot of the nearby UCB Bank. R. 173. Captain Payer recovered a stack of cash in the parking lot of the UCB Bank, but did not recover any other evidence. R. 186. Captain Payer testified that he accompanied Detective Foster to follow up on a Crime Stoppers tip that proved invalid but otherwise conducted no further investigation. R. 188.

Deputy Steven Gallo testified that he responded to the scene and interviewed John Bass, who photographed the suspects as they ran through the parking lot towards a footpath that led to a residential neighborhood. R. 198; State's Exhibit S4. Deputy Gallo then relocated to Southpark Drive, where deputies found various items of clothing scattered around the yards of two residential duplexes. R. 202. Among the items recovered were sweatshirts, T-shirts, and a red-and-black glove that seemingly matched the glove worn by the suspect holding the backpack. R. 203.

Lieutenant Michelle Partenheimer testified that she arrived approximately 30 minutes after the robbery, canvased the area, and located a backpack and some clothing underneath an old truck bed. R. 211. Approximately 20 feet from the truck bed, Lieutenant Partenheimer located a bundle of cash inside of an old tire. R. 212. Lieutenant Partenheimer acknowledged that this area was heavily trafficked by

pedestrians, and she did not have personal knowledge of how these items were left at this location. R. 215.

Sergeant Jason Fitzpatrick also responded to the scene and took 170 photographs of the items recovered from the residential area. State's Exhibit S5. Sergeant Fitzpatrick testified that he recovered a bundle of cash and a handgun with an extended clip from inside the backpack. R. 234. Following this testimony, the court admonished the State for publishing "170 pictures, of which 150 of them weren't even necessary" and noted that three jurors had fallen asleep. R. 242.

Lieutenant Chuck Foster testified that he was the case agent and sent the backpack and other items to the Crime Lab to be processed for DNA. R. 308. Lieutenant Foster testified that the Crime Lab swabbed the backpack's zipper and straps and "were able to get an identification that led to Mr. McElveen." R. 311. Lieutenant Foster then obtained a warrant for Mr. McElveen's arrest and to take his DNA. R. 312. Mr. McElveen was in Texas at the time and willingly turned himself into the authorities. R. 312.

Detective Foster also testified that he received two Crime Stoppers tips pertaining to this case. The first was a tip from a restaurant employee who claimed that a dishwasher had a camouflage backpack. R. 315. Detective Foster responded to the tip and determined that it was a coworker calling in a prank. R. 315. Detective Foster then received a second tip that Baylon Trim committed the robbery with a man named BJ. R. 318; 324. Detective Foster did not reveal the source of the information, nor did the State call the informant to testify. However, Mr. Trim was never charged with the robbery because his DNA was not found on any piece of recovered evidence. R. 318.

The State then called John Mai, a DNA technician at the Crime Lab, and the court called a bench conference and warned the State it could not elicit any testimony

from Mr. Mai pertaining to the results of the DNA analysis since he did not perform the analysis. R. 340. The court noted there was " a lot of hearsay" in the DNA report and reiterated that Mr. Mai could only testify as to actions he performed. R. 340. Mr. Mai testified that the backpack was properly received in a manner consistent for scientific analysis and was swabbed for DNA according to protocols. R. 342.

The State then called DNA expert Zachary Shawhan to testify about the DNA results from the report. After identifying the report which described an examination conducted and signed by two different forensic scientists, the court excused the jury and held it would not permit the introduction of the report because Mr. Shawhan had not conducted the experiment, nor authored the report as either the analysist or the screener. R. 626; State's Exhibit S26. The State conceded that Mr. Shawhan had not performed the forensic analysis of the DNA and was only interpreting someone else's work. R. 627. The court noted the analysis was performed by F. Nicole Proctor, and the State noted she "left the crime lab. She's in Texas, Your Honor." R. 629.

After extensive argument, the court held that the Crime Lab report was inadmissible, and that Mr. Shawhan could not testify to any conclusions made by Ms. Proctor. The court then stated, "I would advise you probably need to find Ms. Proctor and get her on Zoom, because that's the least this Court's going to allow at this point, because I'm about to declare a mistrial." R. 651-52. The defense then moved for a mistrial, which the court denied. R. 654. The State sought an emergency writ of the ruling, and the court eventually dismissed the jury for the day. R. 660. This Court issued a stay of the trial and on September 29, 2022, granted the State's writ and held the report was admissible and that Mr. Shawhan could testify about the results of the DNA analysis performed by Ms. Proctor. R. 95.

On September 30, 2022, trial resumed, and Mr. Shawhan testified that a swab from the straps and zipper of the backpack produced a DNA profile that was "consistent with being a mixture of DNA from more than three contributors with a major mixture of two contributors." R. 375. Mr. Shawhan testified that on August 9, 2018, the lab received buccal swabs from Baylon Trim and BJ McElveen. R. 394. After comparing the profiles, the lab concluded that Mr. McElveen could not be excluded as a major contributor to the mixed DNA profile obtained from the exterior backpack swab. R. 395.

Following Mr. Shawhan's testimony, the State rested, and the defense rested without calling any witnesses. After deliberations began, the jury returned once with a question and ultimately convicted Mr. McElveen as charged. R. 436.

On February 2, 2023, a sentencing hearing occurred and the defense briefly argued that Mr. McElveen was a first offender who was working and had a family. R. 448. The court denied all post-trial motions and immediately imposed sentence without obtaining a waiver of the sentencing delay. The court noted that while Mr. McElveen has "consistently maintained [his] innocence" he was found guilty. R. 449. The court stated it did not "know what inspired you to do this with the clean record that you had," but stated it was concerned by the seriousness of the offense and therefore imposed a 25-year sentence for each count, to run concurrently, and an additional five years to be served consecutively. R. 450.

SUMMARY OF THE ARGUMENT

BJ McElveen's convictions for armed robbery rest entirely upon an inadmissible DNA report and testimony from a DNA expert who did not conduct an independent examination of the DNA. At worst, this inadmissible evidence proves only that Mr. McElveen and at least two individuals touched the exterior of a backpack that was used in a robbery. There was no DNA or fingerprint evidence

linking Mr. McElveen to the crime scene or to any clothing or gloves presumably worn by the suspects. Mr. McElveen was not identified as a suspect by the bank tellers, nor any other witness, and his DNA was not found on the gun or money found inside the backpack. The admission of the accusatory, testimonial DNA report and the testimony from a DNA expert who did not perform the DNA examination violated Mr. McElveen's right to confront his accusers and without this evidence, his conviction cannot stand.

The court also erroneously included a jury charge pertaining to flight, when there was no evidence submitted that Mr. McElveen went to Texas to evade authorities. To the contrary, when Mr. McElveen learned he was wanted he immediately turned himself in.

The record also contains multiple examples of trial counsel rendering deficient representation, including the failure to litigate against the admissibility of the DNA report, the failure to present evidence supporting innocence, and various deficiencies during sentencing. The trial court also erroneously denied Mr. McElveen's *pro se* motion for a new trial without hearing and failed to observe the mandatory 24-hour sentencing delay. Finally, the imposition of a 30-year sentence is excessive in consideration of both the minimal evidence used to convict Mr. McElveen and his status as a first offender.

LAW AND ARGUMENT

1. **There is insufficient evidence to support BJ McElveen's armed robbery convictions.**

The only incriminating evidence against Mr. McElveen is F. Nicole Proctor's conclusion that he could not be excluded as a major contributor to the mixed DNA profile obtained from a swab of the backpack's straps and zipper. It is important to recognize that the DNA profile from the backpack was a mixture of at least three contributors and that Mr. McElveen's DNA was not found on any items inside the

backpack, including the firearm and bundles of cash. Mr. McElveen's DNA was also not found on any items of discarded clothing, including a red-and-black glove presumably worn by the individual holding the backpack in the surveillance video.

The Crime Lab's report represents the entirety of the State's case, as the bank tellers could not identify the suspects, the surveillance footage did not reveal any distinguishing characteristics of either suspect, and the State did not present any witness who identified Mr. McElveen as a suspect. Furthermore, Mr. McElveen did not make any incriminating statements to the police or on a recorded phone call from jail, and has consistently maintained his full innocence of the crime. Mr. McElveen was also not found in possession of any items take during the robbery and was not alleged to have spent large amounts of cash in the days following the robbery. The minimal evidence in this case, even when viewed in the light most favorable to the State, fails to exclude a reasonably hypothesis of innocence and Mr. McElveen's convictions should therefore be vacated.

i. Relevant Law

In evaluating the sufficiency of the evidence to support a conviction, a reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307 (1979); *State v. Captville*, 448 So.2d 676, 678 (La. 1984).

When reviewing a conviction based upon circumstantial evidence, the reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, a reasonable trier of fact could have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded. *See State v. Morris*, 414 So.2d 320, 321-22 (La. 1982) (citation omitted). The reviewing court "does *not* determine whether another *possible* hypothesis has been

suggested by 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 sufficiently reasonable that a rational factfinder 'could not have found proof of guilt beyond a reasonable doubt.'" *State v. Jones,* 318 So.3d 678, 682 (La. 1/30/18) (citing *State v. Captville,* 448 So.2d 676, 680 (La. 1984) (emphasis in original).

Armed robbery is 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. La. R.S. 14:64. When the dangerous weapon used is a firearm, an additional five-year penalty applies to any sentence imposed. La. R.S. 14:64.3.

ii. <u>There is no direct evidence that BJ McElveen committed armed robbery.</u>

There is no direct evidence that BJ McElveen committed armed robbery because the DNA evidence, when viewed in the light most favorable to the prosecution, proves only that Mr. McElveen touched the outside of a backpack that was used in a robbery. However, <u>at least</u> two other people touched the same backpack in the same place. Although the police recovered a gun, clothing, bundles of cash, and even gloves allegedly worn by the suspects, Mr. McElveen's DNA was not found on any other piece of evidence. Despite processing the crime scene and evidence for fingerprints, Mr. McElveen's fingerprints were not located at the scene or on any piece of recovered evidence.

The DNA report and testimony from Zacharay Shawhan is the only incriminating evidence against Mr. McElveen. As fully described in Assignment of Error Two, both the report and testimony pertaining to the report were inadmissible hearsay which should have been excluded. However, the *Jackson* standard requires this Court to consider all of the evidence introduced at trial, even evidence which

the trial court has admitted improperly and which may therefore provide an independent basis for reversing the defendant's conviction on grounds of trial error. *State v. Hearold*, 603 So. 2d 731, 734 (La. 1992) ("[W] hen the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the assignments of trial error to determine whether the accused is entitled to a new trial.").

Mr. McElveen is entitled to a full acquittal because even considering the inadmissible DNA report, he is at most guilty of having touched a backpack that was used in a robbery. A similar situation occurred in *State v. Oliphant*, 133 So.3d 1255 (La. 2/21/14), in which the Supreme Court vacated an armed robbery conviction that was based upon: (i) the defendant and his brother's conflicting statements; (ii) evidence that two bloodhounds tracked the defendant's scent from the scene to the location of the getaway car; and (iii) a DNA analysis of a stocking allegedly worn during the robbery that concluded the defendant could not be excluded as one of two contributors. *Id.* at 1259.

The Court noted that although the conflicting statements and DNA evidence were "not overwhelmingly strong, when considered together it is sufficient to support the conviction." *Id.* However, due to the improperly admitted bloodhound evidence, the Court vacated the conviction because it could not determine whether the verdict was "surely unattributable to the bloodhound evidence." *Id.* at 1261. Rather than enter a judgment of acquittal based on insufficient evidence, the Court remanded for a new trial.

As recognized by *Oliphant*, DNA evidence that only mildly incriminates someone as having touched an item allegedly used during a robbery is not "overwhelmingly strong" and likely would be insufficient to sustain a conviction on

its own. In contrast to *Oliphant*, Mr. McElveen had not given a conflicting statement to law enforcement and the only evidence presented at trial was the improperly admitted DNA evidence. At worst, this proves only that Mr. McElveen touched a backpack that was used in a robbery, in the same location that at least two other people had touched. This evidence is insufficient to sustain his conviction and therefore, Mr. McElveen is entitled to a full acquittal or, at a minimum, a new trial.

iii. The circumstantial evidence also fails to justify BJ McElveen's convictions.

The other circumstantial evidence that seemingly implicated Mr. McElveen was the bank tellers' testimony that the suspects spoke like they were from New Orleans, and Detective Foster's claims that there was a presumptive positive DNA match to BJ McElveen prior to his arrest, and that a Crime Stoppers informant claimed Baylon Trim committed the robbery with a person named BJ.

Both bank tellers testified that it seemed as if the suspects were from New Orleans because of the way they said, "baby." R. 277; 288. Detective Foster testified that during the investigation he learned that Mr. McElveen was from New Orleans. R. 320. It is worth noting that in 2018, there were approximately 79,966 Black Men[1] living in New Orleans. It is also worth noting that Mr. McElveen was born in New Orleans on October 24, 1996, but moved to Baton Rouge when he was eight years old after Hurricane Katrina. R. 20. Thus, Mr. McElveen had spent his formative years in Baton Rouge and had lived in Baton Rouge for 13 years at the time of his arrest. Not only did the State fail to establish that Mr. McElveen spoke with a New Orleans accent, the State also never asked either bank teller to listen to Mr. McElveen's voice to determine whether it sounded like the suspects. *See State v.*

[1] According to the 2015 U.S. Census, Black Men aged 15-84 made up 26% of the total population of New Orleans, which was 307,565. *See* https://www.vera.org/publications/new-orleans-jail-population-quarterly-report/new-orleans-whos-in-jail-and-why-first-quarterly-report/black-men-are-overrepresented-in-our-jail

Steward, 975 So.2d 829 (La. App. 2 Cir. 2/13/08) (collecting cases and holding that voice identification is an acceptable and reliable means of proving identity).

Detective Foster claimed that four days after the robbery, the Crime Lab processed the backpack and "were able to get an identification that led to Mr. McElveen." R. 311. According to the DNA report, the backpack swab generated a profile that was then "searched in the Combined DNA Index Systems (CODIS) as a one-time event and generated an investigative lead." State's Exhibit S26, p. 2. However, the DNA report does not specify that the investigative lead pointed towards BJ McElveen and Mr. Shawhan made absolutely no mention of this presumptive lead during his testimony. Not only is Detective Foster's testimony uncorroborated, but it is also suspicious that a presumptive positive would have matched to BJ McElveen from a CODIS search given that he was a first-felony offender whose DNA profile would not have been uploaded in CODIS.

Detective Foster also claimed that after he received notice of the presumptive match, he received an anonymous tip that Baylon Trim committed the crime with a person named BJ. However, Detective Foster refused to provide any other details:

> That particular tip, I wanted to keep the integrity of the Crime Stoppers intact, though. I can't elaborate a whole lot on that or I will definitely give away the actual person who called this in, and I don't want to do that and I will not do that. But, that particular person knew very specific details of this robbery that was not shared to the public…they did identify a Baylon Trim that was going to be one of the perpetrators….[who] was the one squatting in front of the vault. The other perpetrator…they only knew him by the first name of BJ.

R. 317-18.

As the United States Supreme Court has observed, albeit in the Fourth Amendment context: an anonymous tip "provides virtually nothing from which one might conclude that its author is either honest or his information reliable[.]" *Illinois v. Gates*, 462 U.S. 213, 227 (1983). An anonymous tip may provide probable cause for an arrest or reasonable suspicion for an investigatory stop, only if it "accurately

predicts future conduct in sufficient detail to support a reasonable belief that the informant had reliable information regarding the suspect's illegal activity." *State v. Gates,* 145 So.2d 288, 297 (La. 5/7/14).

Whether this tip was sufficiently reliable to justify the affidavit for arrest or the search warrant for Mr. McElveen's DNA was never litigated and so it is not an issue on appeal. However, it is worth noting that this tip was neither reliable nor accurate as the informant claimed Baylon Trim committed the robbery with a man named BJ. Law enforcement obtained a warrant for both Mr. Trim and Mr. McElveen's DNA and ultimately did not arrest Mr. Trim because there was no evidence corroborating the tip. There was also never any indication that Mr. Trim and Mr. McElveen knew each other.

While the State did not call this "particular person [who] knew very specific details of the robbery" to testify, it is critical to note that this person ultimately provided inaccurate information pertaining to Baylon Trim. Without any additional information pertaining to this tip, it is certainly plausible that this tipster was actually one of the robbers who made a false tip in order to lead the investigation in a different direction.

iv. Conclusion

Given that there was no eyewitness identification of Mr. McElveen, no incriminating evidence found at his house, no fingerprints or DNA found at the scene or on any item taken in the robbery, the State's evidence only proves that Mr. McElveen touched a backpack that was used in a robbery. Mr. McElveen was also not the only person who touched this backpack, as the DNA profile was a mixture of *at least three* individuals. Even viewing this evidence under the *Jackson* standard, it fails to exclude every reasonable hypothesis of innocence and Mr. McElveen's convictions should be vacated.

2. The introduction of the DNA report and Zachary Shawhan's testimony violated BJ McElveen's right to confront and cross-examine adverse witnesses.

Although the admissibility of the DNA report was litigated mid-trial,[2] Mr. McElveen was denied his Sixth Amendment right to confrontation when the court permitted the State to introduce the report and allow Mr. Shawhan to testify about the results produced by a different DNA analysist. The cases relied upon by this Court in its writ decision are factually distinguishable and strictly prohibit the introduction of an accusatory report developed after the defendant has become a suspect. Given that the DNA report was quite literally the only evidence that implicated Mr. McElveen, the introduction of this evidence was not a harmless error.

i. Relevant Law

The Sixth Amendment to the U.S. Constitution provides the defendant "[i]n all criminal prosecutions . . . shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court has identified a "core class of 'testimonial' statements" which equate to a witness who bears testimony against an accused. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Those statements include "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits…[and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* (internal quotations and citations omitted).

The *Crawford* Court further noted that testimonial statements are admissible when the witness is absent from trial "only where the declarant is unavailable, and only where defendant has had a prior opportunity to cross-examine." (footnote omitted). *Id*. at 1369. Thus, the Confrontation Clause requires "not that evidence be

[2] After receiving this Court's ruling, trial resumed on September 30, 2022, and counsel urged a repeated, continuous objection to the introduction of the DNA report and to Mr. Shawhan's testimony. R. 381.

reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id*. at 1370.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that certificates of forensic analysis that certified a substance was cocaine were "testimonial statements" which required the person who conducted the experiments to testify and be subject to cross-examination.

Two years later, the Court held that a forensic laboratory report certifying a defendant's blood-alcohol concentration was also a testimonial statement which required the analyst who conducted the analysis or signed the report to testify subject to cross-examination. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). The Court specifically held:

> 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.

Id. at 652 (emphasis added).

The following year, the Supreme Court decided *Williams v. Illinois*, 567 U.S. 50 (2012), in which vaginal swabs from a sexual assault kit performed on a rape victim were sent by the Illinois State Police (ISP) crime lab to a private laboratory, Cellmark, which sent back a report containing a male DNA profile. *Id.* at 59. Meanwhile, a DNA profile had been produced by the ISP crime lab from a blood sample taken from the defendant after his August 2000 arrest on unrelated charges. *Id.* After receipt of the DNA profile extracted by Cellmark from the vaginal swabs taken from the rape victim, a computer search by the ISP crime lab showed a match between that DNA profile and the known DNA profile of defendant. *Id.* The victim

subsequently identified the defendant in a lineup as her attacker, and he was arrested. *Id.* at 60.

At trial in *Williams*, the victim testified and identified the defendant in court as her attacker and three forensic witnesses testified for the State. *Id.* First, an ISP forensic scientist testified that he had confirmed the presence of semen on the vaginal swabs taken from the victim and afterward had resealed the evidence and left it in a secure freezer at the lab. *Id.* Second, a state forensic analyst testified that she had developed a DNA profile from the blood sample drawn from the defendant after his unrelated August 2000 arrest, and that she had entered that DNA profile into the state forensic database. *Id.* Finally, a DNA expert testified that the male DNA profile produced by Cellmark from vaginal swabs taken from the rape victim matched the male DNA profile produced from the sample of the defendant's blood. At the time Cellmark sent its DNA report to the state police lab the defendant was not a suspect in the February 2000 sexual assault, kidnaping and robbery. Notably, the Cellmark laboratory report was neither admitted into evidence nor shown to the factfinder.

The *Williams* Court held there was no Confrontation Clause violation even though the testimony of the three DNA experts relied upon the DNA profile created by Cellmark, whose scientists did not testify. The Court noted its "conclusion is entirely consistent with *Bullcoming* and *Melendez-Diaz*" because:

> In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* that the defendant's blood alcohol level exceeded the legal limit and in *Melendez-Diaz* that the substance in question contained cocaine. Nothing comparable happened here. In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood.

Williams, 567 U.S. at 79.

The Court further noted that even if the Cellmark report had been introduced into evidence, no Confrontation Clause violation would have occurred because the report "was not to accuse petitioner or to create evidence for use at trial." *Id.* at 84. When the Cellmark report was generated, the primary purpose was to "catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." *Id.*

Following *Williams*, in a similar sexual assault case the Louisiana Supreme Court held that since the *Williams* decision was a "bare majority" with "no agreement on any single rationale among the five Justices" its holding should apply "no more broadly than the particular circumstances that led to the convergence of the votes…and that are substantially similar to those in the present case." *State v. Bolden*, 108 So.3d 1159, 1161 (La. 10/26/12). The *Bolden* Court defined the limited application of *Williams* as follows:

> 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, the tests are conducted by an accredited laboratory, and the report of the test results itself is not introduced as a certified declaration of fact by the accredited laboratory.

Id. (internal citations and quotations omitted).

The DNA report in this case is identical to the type of inadmissible, accusatory, testimonial reports at issue *Bullcoming* and *Melendez-Diaz*, rather simply a non-accusatory report at issue in *Williams* and *Bolden*. As such, *Williams* and *Bolden* lend no support to the admission of this evidence.

ii. The narrow holdings of *Bolden* and *Williams* do not apply in this case.

The DNA report in this case consists of a two-page initial report, a three-page supplemental report, and a one-page noted discrepancy. Each report was signed by F. Nicole Proctor and reviewed by Tabitha Mizell. State's Exhibit S26.

The two-page report concerns the initial examination of evidence performed on July 13, 2018. This report makes no mention of Mr. McElveen and merely describes the evidence received and noted that certain swabs produced DNA profiles that were consistent with being mixtures of multiple contributors. This type of report, generated before Mr. McElveen became a suspect that only described DNA profiles is akin to the Cellmark report in *Williams* and thus introducing the initial two-page report did not violate Mr. McElveen's right to confrontation.

The same cannot be said for the three-page supplemental lab report of an examination performed by F. Nicole Proctor and reviewed by Tabitha Mizell on August 29, 2018, which was after Mr. McElveen was arrested and had become a suspect. The report contains the results of comparisons between the DNA profiles generated and Mr. McElveen and Mr. Trim's DNA. On the second page of this report, it notes that Mr. McElveen cannot be excluded as a major contributor to the DNA profile obtained from the swab taken of the exterior of the backpack. State's Exhibit S26. The third page of the report details the probability that the deduced profile from the backpack matched Mr. McElveen's DNA as opposed to an unknown random individual.

This three-page report is identical to the type of impermissible hearsay reports generated in *Bullcoming* and *Melendez-Diaz*, as it was produced for the very purpose of accusing Mr. McElveen of a crime. *See State v. Grimes*, 109 So.3d 1007, 1026 (La. App. 4 Cir. 2/20/13) (noting that a DNA report generated after the defendant had been targeted as a suspect that matched his known DNA profile to the three male DNA profiles produced from the vaginal swabs was clearly "prepared for the

primary purpose of accusing" the defendant). As such, the Confrontation Clause forbids the introduction of this report without either F. Nicole Proctor or Tabitha Mizell testifying at trial, subject to cross-examination.

In contrast to *Williams, Bolden,* and *Grimes,* Mr. McElveen's case does not involve a sexual assault and the testifying DNA expert had not conducted any independent examination on the DNA samples. Mr. Shawhan did not swab the backpack and produce a profile from that sample, nor did he swab Mr. McElveen and produce a profile from that sample. Mr. Shawhan also did not independently compare the two samples to independently conclude that Mr. McElveen could not be excluded as a contributor to the profile generated from the backpack.

Mr. Shawhan testified that he was only a "technical reviewer" who "evaluated the entire DNA analysis process and made sure it upheld our policies and procedures." R. 392. Mr. Shawhan admitted he did not generate the report and was not the technician assisting the DNA analyst in the production of the report. Thus, he had no independent knowledge of this case or the examinations performed and essentially read the report aloud into the record. When asked specific questions, such as whether the Crime Lab's CSI team responded to the scene, Mr. Shawhan paused and consulted the report. "Let's see. No, sir." R. 388. He also could not independently answer whether the DNA samples had degraded and whether the East Baton Rouge Parish Sheriff's Office had utilized best practices in the collection and preservation of the backpack. R. 388.

In *State v. Mullins,* 188 So.3d 164 (La. 1/27/16), the Louisiana Supreme Court refused to expand the holdings of *Williams* and *Bolden,* to permit the introduction of a psychologist's letter which contained the results of IQ testing of the victim. "[B]ecause the letter contains the results of the testing, the primary purpose of which was to provide evidence of the victim's IQ, an essential element of the crime, the letter contained a testimonial statement" and required the testimony of the person

who administered the test. *Id.* at 171. In *Mullins,* the State called a different expert to testify about the results of the IQ test but the Court noted that nothing in this expert's testimony indicated "that he used anything other than the IQ test results to form his 'opinion' as to the victim's IQ." *Id.* at 172

> When an expert merely repeats or summarizes the content of hearsay, his testimony cannot reasonably be considered an "opinion," as it operates as little more than circumvention of the hearsay rules. *See e.g. United States v. Pablo,* 696 F.3d 1280, 1288 (10th Cir. 2012) ("If an expert simply parrots another individual's out-of-court statement, rather than conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert's opinion, then the expert . . . thereby becomes little more than a backdoor conduit for an otherwise inadmissible statement.").

State v. Mullins, 188 So.3d at 172.

The issue at bar is identical to *Mullins,* as the DNA report was clearly a testimonial statement and Mr. Shawhan did nothing more than read the report into the record over continuing contemporaneous objections. Although this issue was litigated mid-trial, and this Court previously held that both the report and Mr. Shawhan's testimony were admissible, this Court should reconsider that ruling in light of the full record.

iii. The admission of this evidence was not a harmless error.

Confrontation Clause violations may constitute harmless error. *State v. Welch,* 760 So. 2d 317, 321-22 (La. 4/11/00). The factors to be considered in determining whether the error was harmless include the importance of the testimony of the witness in the State's case, whether the testimony is cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of the cross-examination permitted, and the overall strength of the State's case. *Id.*

Here, the importance of the DNA report and Mr. Shawhan's testimony cannot be overstated because this evidence was the entirety of the evidence against Mr. McElveen. There was no identification, eyewitness, or testimony from anyone with direct knowledge that implicated Mr. McElveen. There were no incriminating

statements made to law enforcement or recorded jail calls. There was no testimony from anyone that Mr. McElveen was spending copious amounts of stolen money. The only evidence against Mr. McElveen was the inadmissible DNA report and Mr. Shawhan's testimony.

iv. Conclusion

Because Mr. McElveen's conviction cannot be sustained without the DNA report or Mr. Shawhan's testimony, this Court should find there is insufficient evidence and enter a judgment of acquittal. At a minimum, this Court should vacate his convictions and remand the matter for a new trial.

3. The trial court erroneously included a jury instruction on flight.

The trial court erred in including a jury instruction on flight as there was no evidence to support the claim that Mr. McElveen had fled the jurisdiction. At the charge conference, prior to the delivery of the jury charge, the defendant objected to the inclusion of an instruction on flight. R. 366. The trial court overruled the defendant's objection, and gave 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.

R. 425.

The ruling of the trial court on an objection to a portion of its charge to the jury will not be disturbed unless the disputed portion, when considered in connection with the remainder of the charge, is shown to be both erroneous and prejudicial. *State v. Butler*, 563 So.2d 976, 988 (La. App. 1 Cir. 1990). If there is testimony of flight after the crime was committed and the jury charge regarding flight is brief when considered in connection with the remainder of the charge, the

instruction is neither erroneous nor prejudicial. *State v. Bell*, 721 So.2d 38, 41 (La. App. 5 Cir. 10/14/98).

In this case, Detective Foster testified that after Mr. McElveen was developed as a suspect, he was located in Texas because "he had already fled the State." R. 312. However, Mr. McElveen was a musician who travelled frequently and there is absolutely no indication that he went to Texas with the knowledge that he was wanted by authorities. Moreover, Detective Foster admitted that Mr. McElveen turned himself in to authorities in Texas, which further disproves that he was on the run.

The appropriate standard for determining harmless error is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in the instant trial was surely unattributable to the error. *State v. James*, 665 So.2d 581, 584 (La. App. 5th Cir. 11/28/95). As previously noted, the only incriminating evidence against Mr. McElveen was that he could not be excluded as having touched a backpack that was used in a robbery. Thus, instructing the jury that it could infer his presence in Texas was attributable to a guilty conscious was not a harmless error given the complete lack of evidence.

4. **Trial counsel rendered constitutionally deficient performance for failing to effectively litigate against the admissibility of the DNA report, failing to present evidence of innocence, and failing to render effective representation during sentencing.**

Mr. McElveen's case was pending for four years prior to trial, during which time his attorney was changed four times with trial counsel being appointed less than three months before trial. The lack of consistent, adequate representation caused Mr. McElveen to file numerous *pro se* motions in attempts to preserve his constitutional rights. The record also proves that there were tensions between trial counsel and Mr.

McElveen prior to trial, [3] as the court noted there was a "back-and-forth" between counsel and Mr. McElveen, who has "refused to talk at some points with Mr. Tucker[.]" R. 148. Aside from the obvious tensions and the fact that trial counsel referred to his client as "Mr. McAlpine" approximately 18 times[4] during trial, there are multiple examples throughout the record of counsel failing to provide effective representation, which further requires that Mr. McElveen's convictions be vacated.

i. Relevant Law

The Sixth Amendment to the United States Constitution and Article 1, § 13 of the Louisiana Constitution safeguard a defendant's right to the effective assistance of trial counsel. *State v. Thomas*, 124 So. 3d 1049, 1053 (La. 9/4/13). A defendant asserting an ineffective assistance claim must show: (1) that defense counsel's performance was deficient and (2) that the deficiency prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668 (1984). The defendant has the burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Claims of ineffective assistance of counsel are generally best addressed through an application for post-conviction relief, rather than on direct appeal, so a full evidentiary hearing may be held in the district court. *State v. Truitt*, 500 So.2d 355, 359 (La. 1987). However, if the record contains sufficient evidence to rule on the merits and the claim is properly raised in an assignment of error, an appellate court may address the claim in a measure of judicial economy. *State v. Armstead*, 980 So.2d 20, 24 (La. App. 5 Cir. 2/6/08).

[3] On the morning of trial, counsel noted that "Mr. McElveen was here two, three weeks ago…[and] told me he was going to get additional counsel." R. 148. In Mr. McElveen's Motion for New Trial, he avers that he appeared in court a few weeks before trial and specifically fired his attorney on the record. R.116. Despite trial counsel and Mr. McElveen's recollections, there are no court minutes of any such hearing in the record.

[4] R. 159; 160; 398; 408; 409; 410; 411; 412; 413; 414; 415.

Trial counsel rendered deficient performance by failing to adequately litigate the admissibility of the DNA report, failing to provide notice of an alibi or present evidence supporting Mr. McElveen's innocence, and failing to effectively represent Mr. McElveen during sentencing.

ii. Trial counsel did not litigate the admissibility of the DNA report.

A reasonable attorney would have recognized that the admissibility of the DNA report was critical as the State's entire case is built upon this report. However, trial counsel did not file a brief opposing the State's mid-trial writ and after this Court granted the State's writ, the trial court asked counsel whether the defense would be taking any further "action on the decision from the First Circuit," to which trial counsel replied, "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." R. 368-69.

According to Mr. McElveen's *pro se* motion for new trial, his attorney stated that if this Court granted the State's writ, he would file a writ to the Supreme Court. However, after this Court's ruling, "my lawyer did not file the writ like he promised. I asked why he lied [and] he said shut up he knew what he was doing." R. 117.

As fully briefed in Assignment of Error Two, the admissibility of the DNA report and Mr. Shawhan's testimony should have been further litigated and the failure to seek supervisory review of this Court's mid-trial ruling, which relied upon distinguishable case law, was deficient representation.

iii. Trial counsel failed to timely notify the State of an alibi witness and attempted to argue facts not in evidence during closing.

Mr. McElveen's *pro se* Motion for New Trial challenged his attorney's refusal to call Mr. McElveen's mother to testify. R. 117. The record indicates that following jury selection and immediately before opening statements, trial counsel informed the State for the first time that it "may be calling an alibi witness." R. 144. Trial counsel

claimed the lack of notice was due to Mr. McElveen refusing to communicate and the court sustained the State's objection to the untimely notice of an alibi. R. 145.

A defendant must serve an alibi notice on the State within 10 days following the written demand of the district attorney. La. C.Cr.P. art. 727. Although trial counsel was only appointed three months prior to trial, counsel still failed to provide a timely pretrial disclosure of an alibi witness, which deprived Mr. McElveen of his right to present a defense.

It is unclear whether Mr. McElveen's mother was the alibi witness that counsel failed to timely disclose, but during closing statements trial counsel mentioned that Mr. McElveen had:

> irritated his parents enough to throw him out….Someone throws all his stuff out. Have you notice BJ has got on the same clothes, because he doesn't have any more, because when he got kicked out of the house, they threw all of his stuff out? Guess what was included?

R. 413.

The court sustained the State's objection to this argument, as it contained facts that were never mentioned during the case. In a letter written to the court by Mr. McElveen's mother, she wrote that she had placed his backpack with his clothes and music outside of her house and it was stolen. R. 126. Clearly Mr. McElveen's mother was a critical witness who should have been presented to the jury because it would have corroborated his innocence.

iv. Trial counsel rendered deficient performance during sentencing.

The Sixth Amendment requires effective assistance of counsel during sentencing, and an "objectively reasonable standard of performance requires that counsel be aware of the sentencing options in the case and ensure that all reasonably available mitigating information and legal arguments are presented to the court." *State v. Harris*, 340 So.3d 845, 858 (La. 7/9/20). As recognized in *Harris*, at a minimum a sentencing counsel should conduct a reasonable investigation into

sentencing considerations, present all relevant mitigation to the court, object to any excessive penalty, and file a motion for reconsideration of sentence to preserve the defendant's right to challenge his sentence on appeal.

Despite an abundance of available mitigation and the presence of individuals willing to testify on Mr. McElveen's behalf, the only mitigation presented were letters that Mr. McElveen, his family, and his mother sent directly to the court. R. 123-26. During sentencing, trial counsel simply asked for leniency on Mr. McElveen's behalf because he was a first offender who "has a family" and was on the verge of signing a contract to record music. R. 448. Counsel did not make any specific argument pertaining to mitigating factors of Article 894.1 and failed to mention that Mr. McElveen was a father to three small children. Moreover, following sentencing counsel did not object to the 30-year sentence and did not file a motion for reconsideration of sentence, which limits Mr. McElveen's ability to challenge his sentence on appeal.

5. The trial court erred by failing to grant a hearing on Mr. McElveen's Motion for New Trial.

On November 3, 2022, Mr. McElveen filed a *pro se* Motion for New Trial that claimed his attorney did not visit or counsel him, did not provide him with copies of discovery, failed to file a mid-trial writ, and refused to call Mr. McElveen's mother to testify on his behalf. R. 116. Mr. McElveen also wrote that although he had "fired" his attorney in open court "he was still able to represent me." R. 117.

The decision on a motion for new trial rests within the sound discretion of the trial judge, and its ruling will not be disturbed on appeal absent a clear showing of abuse. *State v. Quimby*, 419 So.2d 951 (La.1982). The merits of such a motion must be viewed with extreme caution in the interest of preserving the finality of judgments. As a general rule, a motion for new trial will be denied unless injustice

has been done. La.C.Cr.P. art. 851; *State v. Dickerson*, 579 So.2d 472 (La. App. 3 Cir. 4/17/91).

Mr. McElveen's motion makes numerous claims which clearly required a hearing, including that his lawyer did not present evidence supporting Mr. McElveen's innocence. Among the grounds listed for a new trial is that the defendant has discovered and presented evidence supporting his factual innocence. La. C.Cr.P. art. 851. At a minimum, a hearing was needed so that Mr. McElveen's mother could testify and the court could determine whether she could provide evidence supporting innocence.

Mr. McElveen's motion also suggests that he might have been denied his right to self-representation. Given that there are no minutes or transcript in the record of the hearing in which Mr. McElveen fired his attorney in open court, it is impossible to determine whether Mr. McElveen had attempted to represent himself at that time or obtain different counsel prior to trial.

While it is "beyond dispute that [t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process," *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004), a criminal defendant also has the right to "proceed without counsel when he intelligently elects to do so." *Faretta v. California*, 422 U.S. 806, 807 (1975); *Miller v. Thaler*, 714 F.3d 897, 903 (5th Cir. 2013).

Waiver of the right to counsel must be knowing and intelligent, and the defendant must clearly and unequivocally request self-representation. *Id*.; *United States v. Long*, 597 F.3d 720, 723 (5th Cir. 2010). Once a defendant unequivocally invokes the right of self-representation, whether expressly or constructively, the court must hold a *Faretta* hearing to ensure that the defendant's request to proceed without counsel is knowing and voluntary. *See Faretta*, 422 U.S. at 835-36; *United States v. Cano*, 519 F.3d 512, 516 (5th Cir. 2008). A *Faretta* warning, therefore, is

required when the defendant unequivocally invokes his right to proceed on his own behalf and waives his right to counsel. *See Cano*, 519 F.3d at 516; *see also*, *Long*, 597 F.3d at 724.

Both Mr. McElveen and his attorney claimed that there was a hearing a few weeks before the trial in which Mr. McElveen fired his lawyer in open court. It is completely unknown whether the court then informed Mr. McElveen of his right to self-representation or his right to hire a different attorney. Given the constitutional implications of this issue, the court should have set Mr. McElveen's Motion for New Trial for a hearing.

6. The trial court's failure to observe the mandatory 24-hour sentencing delay constitutes an error patent.

On February 2, 2023, the court noted that Mr. McElveen had filed a *pro se* motion for new trial and that trial counsel had filed a written motion for post-verdict judgment of acquittal. R. 449. The court denied the motions and then immediately imposed sentence without asking whether Mr. McElveen would waive the mandatory 24-hour sentencing delay. R. 449.

Code of Criminal Procedure article 873 provides that if a motion for new trial or for arrest of judgment is filed, a "sentence shall not be imposed until at least 24 hours after the motion is overruled. If the defendant expressly waives a delay provided in this article…sentence may be imposed immediately." The Louisiana Supreme Court has found the failure to observe this delay is an error patent where a defendant challenges his penalty on appeal. *State v. Francis*, 268 So.3d 289 (La. 4/29/19) (citing *State v. Augustine*, 555 So.2d 1331, 1334 (La. 1990)).

As Mr. McElveen challenges his penalty on appeal, the failure to observe a delay in imposing a 30-year sentence cannot be considered a harmless error and his sentence should be vacated.

7. The trial court erred when it imposed an unconstitutionally excessive sentence of 30 years on a first offender.

Excessive sentences are prohibited under the Eighth Amendment of the United States Constitution and La. Const. art. I, § 20. A sentence may be constitutionally excessive even when the sentence falls within the range permitted by statute. *See State v. Sepulvado*, 367 So.2d 762, 769 (La. 1979). For a sentence to be found excessive, it must be "so grossly disproportionate to the crime committed, in light of the harm caused to society, as to shock our sense of justice." *State v. Cann*, 471 So.2d 701, 703 (La. 1985). Absent a showing of manifest abuse of discretion, a sentence is not set aside as excessive. *State v. Guzman*, 769 So.2d 1158 (La. 5/16/00); *see also State v. Shaw*, 850 So.2d 868, 878 (La. App. 2 Cir. 6/25/03) ("If the record supports the sentence imposed, the appellate court shall not set aside a sentence for excessiveness.").

A trial court has wide discretion to sentence within the statutory limits. *State v. Black*, 669 So.2d 667 (La. App. 2 Cir. 2/28/96). A reviewing court should consider three factors when reviewing a trial court's sentencing discretion: (1) the nature of the crime, (2) the nature and background of the offender, and (3) the sentence imposed for similar crimes by the same court and other courts. *State v. Smith*, 846 So.2d 786, 789 (La. App. 3 Cir. 2/12/03).

Code of Criminal Procedure Article 894.1(A) provides a court shall impose a sentence of imprisonment if there is an undue risk that during a period of a suspended sentence or probation that the defendant would commit another crime, that the defendant is in need of correctional treatment, and that a lesser sentence would depreciate the seriousness of the crime. Article 894.1(B) lists 33 potential aggravating and mitigating factors that "shall be accorded weight" in a court's determination of sentence.

Although the trial court is not required to list every aggravating and mitigating circumstance, the record must reflect that the trial court adequately considered the sentencing guidelines of La. C. Cr. P. art. 894.1. *State v. Smith*, 433 So.2d 688 (La.1983). Merely reciting Article 894.1(B) factors, only to ignore them in favor of imposing a harsh penalty based on the conviction alone, does not constitute "adequate consideration."

While armed robbery is unquestionably a serious offense, it is worth noting that the State claimed that Mr. McElveen was the unarmed suspect and never alleged that he handled or used a firearm. It is also significant that Mr. McElveen has no criminal history and is a father to three small children, whom he supported financially and emotionally prior to his arrest.

Under Article 894.1(B)(33), the court is also permitted to consider "[a]ny other relevant mitigating circumstance." It is relevant that the State's case against Mr. McElveen rests entirely upon inadmissible evidence, which at worst proves that he touched a backpack that was used in a robbery. Given the lack of evidence against Mr. McElveen, condemning him to spend the next three decades in prison is the needless imposition of pain and suffering.

A review of similar sentences imposed on first offenders further demonstrates that Mr. McElveen's sentence is excessive. For example, in *State v. Roddy*, 756 So.2d 1272 (La. App. 2 Cir. 4/7/00), a 22-year-old first felony offender defendant received a 20-year sentence for armed robbery of a bank and had a prior juvenile record. In *State v. Lewis*, 892 So.2d 702 (La. App. 2 Cir. 1/26/05), the defendant, a first felony offender, received three concurrent 20-year sentences for the armed robbery of three employees at a bank.

Given the lack of evidence against Mr. McElveen and other mitigating factors, an effective life sentence of 30 years is unconstitutionally excessive.

CONCLUSION AND PRAYER FOR RELIEF

There is no evidence to support BJ McElveen's convictions for armed robbery. For all reasons asserted herein, Mr. McElveen prays that this Court recognize there is insufficient evidence to sustain his convictions and enter a judgment of acquittal. Alternatively, Mr. McElveen prays that this Court vacate his convictions and remand the matter for a new trial.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2024, I caused a copy of the foregoing Appellant's Brief to be sent to the following parties via U.S. Mail, postage pre-paid:

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300 North Blvd., Ste. 6401
Baton Rouge, Louisiana 70802

Dylan Alge, Assistant District Attorney
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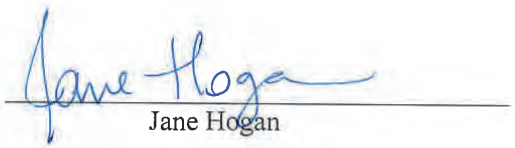

Jane Hogan

recess and for the transcript to be typed for the State to file Writ. At 3:25 pm. the Court ordered recess. This matter continued for trial-Jury on September 29, 2022 at 9:00 am. The accused signed notice.

SEPTEMBER 29, 2022

This matter came before the Court for Continuation of Trial - Jury, pursuant to previous assignment. The accused was present (not brought in court today) represented by ROBERT W TUCKER, SR. Mr. STUART THERIOT and Ms. Rokeya Morris, Assistant District Attorney, was present for the State of Louisiana. The Court is still waiting on the Writ return from the First Circuit Court of Appeal. Chambers conference this morning. At 2:30 pm. the Court still waiting on Writ Return from the First Circuit, at this time the Court released the jurors for the day and ordered them to return back tomorrow morning at 9:00 am. At 2:45 pm. the Writ return came back from the First Circuit, Granted. This matter continued for trial-Jury to resume on September 30, 2022 at 9:00 am.

SEPTEMBER 30, 2022

This matter came before the Court for Continuation of Trial - Jury, pursuant to previous assignment. The accused was present in court (Jail) represented by ROBERT W TUCKER, SR and Mr. Robert Tucker, Jr. Mr. STUART THERIOT and Ms. Rokeya Morris, Assistant District Attorney, was present for the State of Louisiana. At 9:13 am. all parties present in Court. Chambers conference this morning with both counsel regarding final jury instructions. The Court heard preliminary matters. The Defense stated to take no action at this time regarding Writ. At 9:19 am. the Court conferred with the defendant regarding his right to testify or not to testify on his behalf to confer with his counsel and the Court will discuss with him later. At 9:22 am. the jurors entered in Court. The State and Defense waived polling.

The State contined with witness 13) Mr. Zachary Shawhan, La State Police Crime Lab testimony. The State submitted with evidence S-26 (report). Bench conference (Defense objection) S-26 admitted into evidence. The State published evidence to the jurors. At 9:35 am.

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Attachment A Exhibit A

the Defense cross examined the witness. Bench conference. The Defense continued with cross examination of the witness. At 10:00 am. the State redirects the witness. The State Rest. At 10:06 am. the Court ordered a recess and retired the jurors.

At 10:25 am. all parties present in Court. The Court conferred with the defendant regarding his right to testify and he stated that he does not wish to testify on his behalf. At 10:33 am. the jurors entered in Court. The State and Defense waived polling. The Defense Rest.

At 10:36 am. the State submitted with closing statements. At 10:51 am. Bench conference, the Defense Moved for Rule 56 Motion for Directed Verdict of Acquittal, Denied. The Defense objected. At 10:52 am. the Defense submitted with closing statements. At 11:15 am. Bench conference (State objection) The Defense continued with closing statements. At 11:23 am. Bench conference (Court) At 11:29 am. the State submitted with rebuttal statements. At 11:33 am. the Court read jury instructions to the jurors. At 11:52 am. the two alternate jurors kept seperate at this time. At 11:53 am. the Court retired the jurors for deliberation phase of the trial. At 1:07 pm. all parties present in Court. The jurors have (2) questions. Chambers conference with both counsel. The Court made statements. The State and Defense made statements. At 1:11 pm. the jurors entered in Court. The State and Defense waived polling. Mr. LaPlace, foreperson entered in Court with questions. At 1:14 pm. the Court re-read the definition of the charge "Armed Robbery w/ Firearm" to the jurors. At 1:16 pm. the Court retired the jurors to continue with deliberations.

At 2:04 pm. all parties present in Court. The two alternate juros brought in the Court room. At 2:06 pm. the jurors entered in Court. The State and Defense waived polling. Juror # 123 Mr. Chase LaPlace, foreperson entered in Court with verdict form in hand. The Court reviewed the form then handed to the Clerk to read into the record:

For charge ARMED ROBBERY WHILE THE OFFENDER WAS ARMED W/ FIREARM , The JURY found the accused guilty. For charge ARMED ROBBERY WHILE THE OFFENDER WAS ARMED W/ FIREARM , The JURY found the accused guilty. The Defense objected to verdict. The Clerk orally polled the jurors verdicts as to both counts all

twelve voted "Yes, this is their verdict". The Court written polled the jurors also. At 2:16 pm. the Court retired the jurors and thanked them for their service. The Defense moved for Post Verdict Acquittal. The State submitted with arguments. The Court Denied, Defense objected. The Defense stated to file Appeal. The Court placed HOLD and ordered pre-sentence investigation report (faxed commitment to probation & parole). This matter set for sentencing on November 30, 2022 at 9:00 am. The accused signed notice.

NOVEMBER 30, 2022

This matter came before the Court for Sentencing, pursuant to previous assignment. The accused was present in court (Jail), counsel not present filed continuance. Ms. MORGAN JOHNSON, Assistant District Attorney, was present for the State of Louisiana. Probation & parole needs more time to complete pre-sentence investigation report. Maintained hold and held @ parish prison. The Sentencing was fixed for 02/02/2023 at 09:00 AM. The accused signed notice. Notify Counsel of the next court date.

FEBRUARY 2, 2023

This matter came before the Court for Sentencing, pursuant to previous assignment. The accused was present in court (Jail) represented by ROBERT W TUCKER, SR. ROKEYA J. MORRIS, Assistant District Attorney, was present for the State of Louisiana. The Defense filed Motions: 1) Vedict Judgment of Acquittal, Denied. 2) Transcript for Discovery to Defense, Denied. 3) To appoint Appelate Project as counsel, Granted. 4) Motion to relieve Mr. Tucker as counsel, Granted. The Court recieved (3) letters from the accused mother; sister and from the accused filed into the record. The Defense counsel addressed the Court before sentencing.

For charge ARMED ROBBERY WHILE THE OFFENDER WAS ARMED W/ FIREARM , The Court sentenced the accused to be confined in the custody of the Secretary of the DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, State of Louisiana, for a period of 25 year(s) at hard labor, WITHOUT BENEFIT PROBATION, PAROLE OR

twelve voted "Yes, this is their verdict". The Court written polled the jurors also. At 2:16 pm. the Court retired the jurors and thanked them for their service. The Defense moved for Post Verdict Acquittal. The State submitted with arguments. The Court Denied, Defense objected. The Defense stated to file Appeal. The Court placed HOLD and ordered pre-sentence investigation report (faxed commitment to probation & parole). This matter set for sentencing on November 30, 2022 at 9:00 am. The accused signed notice.

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Attachment B Exhibit A

SUSPENSION OF SENTENCE. The accused is to be given credit for time served as a result of his arrest on this charge only, from arrest to bond and from conviction or remand to imposition of sentence.

The Court advised the accused of his right to appeal his conviction and his sentence within thirty days from this date and his right to post-conviction relief within two years from the finality of the judgment of conviction and sentence. The Court further advised the accused that a Motion to Reconsider Sentence is to be filed within thirty days from this date. The Court ordered this sentence to run Concurrent WITH EACH OTHER.

For charge ARMED ROBBERY WHILE THE OFFENDER WAS ARMED W/ FIREARM , The Court sentenced the accused to be confined in the custody of the Secretary of the DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, State of Louisiana, for a period of 25 year(s) at hard labor, WITHOUT BENEFIT PROBATION, PAROLE, OR SUSPENSION OF SENTENCE. The accused is to be given credit for time served as a result of his arrest on this charge only, from arrest to bond and from conviction or remand to imposition of sentence.

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THE COURT ADDED + 5 YEARS (FOR WEAPON) TO RUN CONSECUTIVE TO THE 25 YEARS SENTENCE.

A TRUE COPY OF THE MINUTES OF COURT

THIS 12th DAY OF Sept,

20 23

Deputy Clerk for
Doug Welborn, Clerk of Court
Parish of East Baton Rouge
State of Louisiana

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STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2023-KA-0939

STATE OF LOUISIANA
APPELLEE

VS.

B.J. MCELVEEN
APPELLANT

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA
DOCKET NO. 09-18-0487, CRIMINAL SECTION VII
HONORABLE LOUISE HINES, JUDGE PRESIDING

ORIGINAL BRIEF ON APPEAL FILED ON BEHALF OF
THE STATE OF LOUISIANA, APPELLEE

HILLAR C. MOORE, III
DISTRICT ATTORNEY

BY: CRISTOPHER J.M. CASLER, LA BAR #29549
ASSISTANT DISTRICT ATTORNEY
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
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Exhibit B

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VS.

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DOCKET NO. 09-18-0487, CRIMINAL SECTION VII
HONORABLE LOUISE HINES, JUDGE PRESIDING

ORIGINAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the present matter by virtue of Article V, Sections 2 and 10 of the Louisiana Constitution of 1974.

STATEMENT OF THE CASE

Defendant, B.J. McElveen, was charged with two counts of armed robbery. (R. p. 20.) After a jury trial, he was found guilty as charged. (R. pp. 102-115, 436-438.) Defendant's motion for post-verdict judgment of acquittal and his motion for new trial were denied. On February 2, 2023, defendant was sentenced to twenty-five years at hard labor without benefit of probation, parole, or suspension of sentence on each of the armed robbery convictions, run concurrent, and to five years on each count, consecutive to the twenty-five, because of the use of a firearm. (R. pp. 448-450.)

Defendant filed the instant appeal raising seven assignments of error. The state was granted an extension of time, until on or before June 25, 2024, to file its

Exhibit B

brief. The State of Louisiana, through undersigned counsel, files the following brief in response to defendant's appeal.

ASSIGNMENTS OF ALLEGED ERRORS

On appeal, in assignments of error Nos. 1 – 7, defendant asserts:

1. There is insufficient evidence to support BJ McElveen's armed robbery convictions.

2. The introduction of the DNA report and Zachary Shawhan's testimony violated BJ McElveen's right to confront and cross-examine adverse witnesses.

3. The trial court erroneously included a jury instruction on flight.

4. Trial counsel rendered constitutionally deficient performance for failing to effectively litigate against the admissibility of the DNA report, failing to present evidence of innocence, and failing to render effective representation during sentencing.

5. The trial court erred by failing to grant a hearing on Mr. McElveen's Motion for New Trial.

6. The trial court's failure to observe the mandatory 24-hour sentencing delay constitutes an error patent.

7. The trial court erred when it imposed an unconstitutionally excessive sentence of thirty years on a first offender.

ISSUES PRESENTED FOR REVIEW

1. Whether the evidence is sufficient to support defendant's convictions?

2. Defendant's allegation that the introduction of the DNA report and Zachary Shawhan's testimony violated his right to confront and cross-examine adverse witnesses.

3. Defendant's claim that the trial court erroneously included a jury instruction on flight.

4. Defendant's allegations that he was denied effective assistance of counsel.

5. Defendant's claim that the trial court erred by failing to grant a hearing on Mr. McElveen's Motion for New Trial.

6. Whether the failure to observe the 24-hour sentencing delay requires remand for re-sentencing?

7. Defendant's claim that the trial court erred when it imposed an unconstitutionally excessive sentence of thirty years on a first offender.

STATEMENT OF FACTS

On the morning of July 23, 2018, the victims, Erika Elie-Jackson and Cornetta Washington, had just arrived to work at Capital One Bank when two individuals forced their way into the building. At gunpoint, the perpetrators demanded that the victims open the vault. The perpetrators then proceeded to remove money and items, placing a significant amount of cash into a camouflage backpack. The perpetrators fled the scene on foot with approximately $120,000. Along the perpetrators' escape route and in a nearby area, officers located various items, including clothing consistent with that worn by the perpetrators, a bank bag, bundles of cash, a gun, and a camouflage backpack. Defendant was subsequently identified as a suspect and ultimately turned himself in.

SUMMARY OF ARGUMENT

Here, the evidence and testimony presented at trial, when viewed pursuant to the *Jackson* standard in the light most favorable to the prosecution, is sufficient to support defendant's convictions. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

At trial, the state presented testimony of the victims regarding the circumstances and details of the incident. Additionally, the state presented surveillance video depicting the events as they occurred, including showing the perpetrators placing a large amount of the cash into a camouflage backpack. Officers located various items along the perpetrators' escape route and in and around a nearby field, including items of clothing, bundles of cash, a bank bag, a gun, and the camouflage backpack. Further, Zach Shawhan testified that defendant could not be excluded as a contributor of biological material collected from the camouflage backpack and informed regarding the significance of that conclusion. (R. pp. 375-396.)

As the triers of fact, the jurors were free to accept or reject, in whole or in part, the testimony of any witness and to determine the weight to be given evidence. *See e.g. State v. Richardson,* 459 So.2d 31, 38 (La. App. 1st Cir.1984). Based on the evidence and testimony presented in the instant case, any rational trier of fact could have concluded the state proved beyond a reasonable doubt that defendant committed the offenses of armed robbery. The jury's verdict is not irrational and should not be disturbed on appeal. *See e.g. State v. Johnson*, 1999-2114 (La. App. 1 Cir. 12/18/00), 800 So.2d 886, 893–94, *writ denied*, 802 So.2d 641 (La. 2001). Defendant's first assignment of error is without merit.

In Assignment of Error No. 2, defendant has not shown this Court's previous ruling on the issue of the introduction of the DNA report and expert testimony was patently erroneous or produced unjust results. As such, further consideration of the issue is not warranted. *See e.g. State v. Hunter*, 13-82 (La. App. 5 Cir. 7/30/13), 121 So.3d 782, 785; *State v. Louis*, 05-141 (La. App. 5 Cir. 7/26/05), 910 So.2d 464, 467.

Defendant's allegations, in Assignment of Error No. 3, are insufficient to show error in the trial court's inclusion of an instruction on flight. *See e.g. State v. Hollins*, 2023-0785 (La. App. 1 Cir. 3/19/24).

In Assignment of Error No. 4, defendant's allegations are insufficient to support a finding that he was denied effective assistance of counsel. *See e.g. Burt v. Titlow*, 571 U.S. 12, 22–23, 134 S.Ct. 10, 17, 187 L.Ed.2d 348 (2013).

Defendant's claim, in his fifth assignment of error, that the trial court failed to grant a hearing on his motion for new trial is arguably not properly before this Court, and is also insufficient to show error or violation of his rights. *See* La. C.Cr.P. art. 841; *see also generally State v. McKinnies*, 2013-1412 (La. 10/15/14), 171 So.3d 861.

In Assignment of Error No. 6, defendant has not shown that the trial court's failure to observe the 24-hour sentencing delay requires this Court to vacate defendant's sentences and remand for re-sentencing. *See e.g. State v. Major*, 2019-0621 (La. App. 1 Cir. 11/15/19), 290 So.3d 1205, 1214–15, *writ denied,* 2020-00286 (La. 7/31/20), 300 So.3d 398.

Regarding defendant's seventh assignment of error, review of defendant's excessive sentence arguments are procedurally barred. *See* La. C.Cr.P. art. 881.1. Additionally, defendant's sentences for armed robbery are in the lower range of sentencing and are not unconstitutionally excessive. *See e.g. State v. Scie,* 13-634 (La. App. 5 Cir. 1/15/14), 134 So.3d 9, 12–13.

Thus, and for the reasons more fully explained herein, defendant's convictions and sentences should be affirmed.

ARGUMENT

Assignment of Error No. 1 - *Sufficiency of the Evidence*

In his first assignment of error, defendant contends there is insufficient evidence to support his armed robbery convictions.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). *See* La. C.Cr.P. art. 821(B); *State v. Mussall,* 523 So.2d 1305, 1308-09 (La.1988). When circumstantial evidence is used to prove the commission of an offense, La. R.S. 15:438 requires that assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. *See State v. Wright,* 98-0601, p. 2 (La. App. 1st Cir., 2/19/99), 730 So.2d 485, 486, *writs denied,* 99-0802 (La.10/29/99), 748 So.2d 1157, and 2000-0895 (La.11/17/00), 773 So.2d

732. This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *State v. Ortiz,* 96-1609, p. 12 (La.10/21/97), 701 So.2d 922, 930, *cert. denied,* 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998). When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. *State v. Holts,* 525 So.2d 1241, 1244 (La. App. 1st Cir.1988).

Armed robbery is 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. La. R.S. 14:64. La. R.S. 14:64.3 provides for a firearm enhancement whereby an additional mandatory five-year sentence at hard labor without benefit of parole, probation, or suspension of sentence is to be served consecutively to the sentence imposed under the provisions of La. R.S. 14:64.

At trial, Erika Elie-Jackson testified that, on July 23, 2018, she arrived at work at Capital One Bank. She waited for a second person to arrive then went into the building. In accordance with protocol, she checked the perimeter, disarmed the building, then waited for the second person to come in. (R. p. 269.) She testified that her co-worker, Cornetta Washington, then proceeded into the building followed immediately by two men. (R. p. 269.) She indicated they pushed her to the floor and said get down on the floor. Jackson stated that she was then dragged to the area of the vault. (R. p. 270.) According to Jackson, they were held at gun point and ordered to open the vault. Jackson explained that the vault was in dual control so it required two codes. Jackson indicated the vault timed out between entry of the two codes and it appeared the perpetrators thought the victims were playing – that one of the perpetrators said something like y'all want to play and kind of cocked the gun to her

head. (R. p. 271.) Jackson stated she informed the perpetrators that the victims had to open it together, and they were allowed to put the combo in again and open the vault. Jackson indicated that, after the vault was opened, she was instructed to open the vault inside the vault. She stated she was terrified, she followed instructions because she didn't want to die, and she did what they said because there was gun to her head. (R. pp. 271-279.) When the perpetrators left, she called 911. (R. p. 275.) She testified she did not get a good look at the perpetrators, but they spoke and/or used words like a person from New Orleans. (R. pp. 276-277.) She indicated that the video was a fair and accurate representation of what happened. (R. p. 280.)

Cornetta Washington indicated that, on the date of the incident, she was the observer or the second person. She indicated she stayed in her car, watched Jackson go in first, and, after receiving the signal, proceeded to go inside. (R. pp. 281-283.) She informed that, upon entering the building, she was followed by two men. Washington indicated she was pushed to the ground and the perpetrators told them to get down. (R. p. 285.) Washington stated that one of the men headed towards Jackson and dragged Jackson to the area of the vault where Washington was. (R. pp. 285-286.) She remembered one of the men had on a red watch and talked like someone from New Orleans and that one had a gray sweater and a book sack. (R. pp. 285-286.) She testified she was aware the bank had surveillance footage and that the video is what was being viewed at trial. (R. p. 286.) Washington confirmed it takes two codes to open vault and that it had initially timed out because she hadn't entered her code. (R. p. 284.) After the vault was opened, Jackson opened the other vault. (R. p. 289.) Washington indicated that a bag was provided because the perpetrators had asked for something to put the money in. (R. p. 289.) She testified that, after the perpetrators left, she looked out the door and saw them going toward UCB Bank. Washington informed that, outside of the garbage bags, the perpetrators had also placed money in their pants and into a book sack. (R. p. 290.) She indicated

the book sack is seen on the video and that she saw the perpetrators with the book sack as they headed towards UCB. (R. p. 290.) Washington explained that she complied with the perpetrators because she wanted to live, she feared for her life, she saw the gun put to Jackson's head, and she wanted to get home to her kids. (R. pp. 286-289.)

Officers located various items along the perpetrators' escape route and in and around a nearby field, including items of clothing, bundles of cash, a bank bag, a gun, and the camouflage backpack. (R. pp. 169-185, 220-266.)

Lieutenant Foster indicated that based on the investigation, defendant was subsequently identified as a suspect. (R. pp. 308-311.) In particular, Foster indicated the evidence showed one of the perpetrators touching the backpack with his non-gloved hand. (R. p. 311.) Foster indicated the backpack was submitted to the crime lab and they were able to get an identification that led to defendant. (R. p. 311.) Foster indicated defendant had fled the state, but subsequently turned himself in. (R. pp. 311-312.)

Foster explained that that other leads were investigated and attempts were made to identify the other perpetrator. (R. pp. 314-317.) In particular, Foster testified that law enforcement had received a tip that that one of the perpetrators was Baylon Trim and the other was BJ, but nothing ever came back to Baylon Trim. (R. pp. 318-319.) Foster also indicated that, based on victim statements, the perpetrators were possibly from New Orleans and he located information suggesting defendant was from the New Orleans area. (R. pp. 319-321.) Foster testified that just over $120,000 had been taken, but most of the money had been returned to Capital One Bank. (R. p. 333.)

Zach Shawhan, having been qualified as an expert, testified regarding biological material collected in connection with the case. (R. pp. 357-360.) In particular, Shawhan testified that defendant could not be excluded as the contributor

of biological material from the camouflage backpack and explained the significance of that conclusion. (R. pp. 376-396.)

After hearing the evidence and testimony presented, the jury, by unanimous verdict, found defendant guilty as charged of two counts of armed robbery.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. Thus, an appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. *State v. Taylor,* 97–2261 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the trier of fact. *See State v. Calloway,* 07–2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

As the triers of fact, the jurors were free to accept or reject, in whole or in part, the testimony of any witness and to determine the weight to be given evidence. Viewing the evidence presented in this case in the light most favorable to the State, any rational factfinder could have found that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of armed robbery and defendant's identity as a perpetrator of that offense against the victims. The jury's determination is not irrational under the facts and circumstances presented. *See State v. Ordodi,* 2006–0207 (La.11/29/06), 946 So.2d 654, 662.

Assignment of Error No. 1 lacks merit.

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Assignment of Error No. 2 – *Alleged confrontation violation.*

Defendant claims the introduction of the DNA report and Zachary Shawhan's testimony violated his right to confront and cross-examine adverse witnesses.

As a general matter, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a qualified expert may testify in the form of an opinion. La. C.E. art. 702. Under La. C.E. art. 704, a trial judge may admit expert testimony that "embraces an ultimate issue to be decided by the trier of fact," but the expert witness is not permitted to testify to the ultimate issue of a defendant's guilt. *State v. Irish,* 2000-2086, pp. 5-6 (La.1/15/02), 807 So.2d 208, 212, *cert. denied,* 537 U.S. 846, 123 S.Ct. 185, 154 L.Ed.2d 73 (2002).

As the jury trial in this matter was proceeding in the district court - with Mr. Shawhan having been qualified as an expert in the field of DNA forensics and testifying regarding scientific analysis performed in connection with the case - the trial court, sua sponte, objected that introduction of reports prepared in connection with the case would violate defendant's right of confrontation. (R. pp. 619-624.) The trial court maintained its position, and ultimately, defendant joined in the trial court's objection. (R. p. 640.) Thereafter, the trial court ruled that the lab reports were inadmissible and Mr. Shawhan was prohibited from testifying regarding scientific analysis. (R. pp. 628-660.)

This Court granted the state's application for review as follows:

> **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)).

State v. McElveen, 2022-1066 (La. App. 1 Cir. 9/29/22).

By this assignment of error, defendant effectively seeks to have this Court reconsider its prior ruling. However, defendant fails to show this Court's previous ruling was patently erroneous or produced unjust results. As such, it appears further consideration of this issue is not warranted. *See e.g. State v. Hunter*, 13-82 (La. App. 5 Cir. 7/30/13), 121 So.3d 782, 785; *State v. Louis*, 05-141 (La. App. 5 Cir. 7/26/05), 910 So.2d 464, 467.

Defendant's second assignment of error lacks merit.

Assignment of Error No. 3 – *Alleged erroneous jury instruction.*

Defendant alleges the trial court erroneously included a jury instruction on flight. He suggests detective Foster testified that he had already fled the state. However, defendant maintains he was a musician who travelled frequently, and suggests there is no indication he went to Texas with the knowledge he was wanted by the authorities.

The trial court provided the following instruction on flight:

> 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 the defendant is guilty. However, flight may be considered along with all other evidence. You must decide whether such flight was due to a consciousness of guilt or to other reasons unrelated to guilt.

(R. p. 425.)

An instruction on flight is permitted in criminal cases where it is supported by the evidence. *See e.g., State v. Wells*, 2011-0744 (La. App. 4th Cir. 4/13/16), 191 So.3d 1127, 1140, *writ denied*, 2016-0918 (La. 4/24/17), 219 So.3d 1097.

In this case, after robbing the bank, the perpetrators fled on foot. Lieutenant Foster informed defendant was subsequently identified as a suspect and indicated the FBI ascertained information that determined defendant was in Texas. Foster testified defendant had already fled the state, and they talked to family members, they got him to turn himself in. (R. pp. 311-312.)

There was sufficient evidence to warrant a flight instruction. The trial court's instruction on flight is neither erroneous nor prejudicial. *See e.g. State v. Hollins*, 2023-0785 (La. App. 1 Cir. 3/19/24); *State v. Smith*, 03-786 (La. App. 5 Cir. 12/30/03), 864 So.2d 811, 820, *writ denied,* 2004-0380 (La. 6/25/04), 876 So.2d 830, and *writ denied,* 2004-0419 (La. 6/25/04), 876 So.2d 830.

Defendant's third assignment of error lacks merit.

Assignment of Error No. 4 – *IAC*

Defendant claims counsel was ineffective for: failing to effectively litigate against the admissibility of the DNA report; failing to present evidence of innocence; and failing to render effective representation during sentencing.

Defense trial counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden to show that counsel's performance was deficient rests squarely on petitioner. *See e.g. Burt v. Titlow*, 571 U.S. 12, 22–23, 134 S.Ct. 10, 17, 187 L.Ed.2d 348 (2013).

Claims of ineffective assistance of counsel are evaluated by the two-prong test set forth in *Strickland v. Washington. Strickland v. Washington,* 466 U. S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both that counsel's performance was

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deficient and that the deficiency prejudiced the defense. *Celestine v. Blackburn,* 750 F.2d 353 (5th Cir. 1984). One claiming ineffective assistance of counsel must identify specific acts or omissions and general statements and conclusionary charges will not suffice. *Knighton v. Maggio,* 740 F.2d 1344 (5th Cir. 1984).

There is a strong presumption that the conduct of counsel falls within a wide range of responsible, professional assistance. *State v. Myers,* 583 So.2d 67 (La. App. 2nd Cir. 1991). Hindsight is not the proper perspective for judging the competence of counsel's trial decisions, and an attorney's level of representation may not be determined by whether a particular strategy is successful. *State v. Brooks*, 505 So.2d 714 (La. 1987). In evaluating whether counsel's alleged error has prejudiced the defense, it is not enough for the defendant to show that an error had some conceivable effect on the outcome of the proceeding; rather, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988). Claims of ineffective assistance of counsel may be disposed of for either reasonable performance of counsel or lack of prejudice and, if one is found dispositive, it is not necessary that the court address the other. *Murray v. Maggio,* 736 F. 2d 279 (5th Cir. 1984).

Generally, ineffective-assistance-of-counsel claims are more properly raised in an application for post-conviction relief where the district court can conduct a full evidentiary hearing on the matter, if one is warranted. *See State v. Leger,* 05–0011, p. 44 (La.7/10/06), 936 So.2d 108, 142; *see also State v. Small,* 13–1334, p. 13 (La. App. 4 Cir. 8/27/14), 147 So.3d 1274, 1283. Nevertheless, where the record contains evidence sufficient to decide the issue, and it is raised on appeal by an assignment of error, courts may consider the issue in the interest of judicial economy. *See Leger,* 05–0011, p. 44, 936 So.2d at 142.

Alleged failure to effectively litigate against the admissibility of the DNA report.

Defendant suggests counsel was ineffective for failing to litigate the admissibility of the DNA report.

As indicated previously, issues concerning admissibility of the lab report and expert testimony were previously considered. (R. pp. 619-660.) *See State v. McElveen*, 2022-1066 (La. App. 1 Cir. 9/29/22). Defendant fails to demonstrate that any action/inaction on the part of counsel fell below standards of reasonableness demanded of attorneys in criminal cases and/or that there is a reasonable probability that, but for any alleged deficiency, the results of the proceeding would have been different.

Defendant's allegations are insufficient to support a finding that counsel was ineffective concerning the lab reports or related testimony.

Alleged failure to present evidence of innocence.

Defendant suggests counsel failed to provide notice of alibi and/or failed to call defendant's mother.

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, rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. *See State v. Folse,* 623 So.2d 59, 71 (La. App. 1st Cir. 1993). To prevail on a claim of ineffective assistance of counsel based on the failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense. *See generally State v. Reeves*, 2018-0270, p. 6 (La. 10/15/18); 254 So.3d 665, 671–72. Complaints of uncalled witnesses are not favored because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. *See State v. Castaneda*, 658 So.2d 297, 306 (La. App. 1 Cir., 1995)

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citing *United States v. Green,* 882 F.2d 999, 1003 (5th Cir.1989) (A defendant who asserts a claim of ineffective counsel based upon a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of a trial.); *see also generally Alexander v. McCotter*, 775 F.2d 595, 602 (C.A.5 (Tex.),1985) (indicating that presentation of witnesses is within the ambit of trial strategy, speculation as to what a witness would testify is uncertain, and showing must be made that uncalled witnesses would have testified favorably). Additionally, a defense attorney's examination of witnesses falls within the ambit of trial strategy for the purposes of evaluating an ineffectiveness claim. *See e.g. State v. Williams,* 98–1146 (La. App. 5 Cir. 6/1/99), 738 So.2d 640, 652, *writ denied.* 99–1984 (La.1/7/00), 752 So.2d 176.

It is noted that, prior to opening statements, defense counsel informed regarding a possible alibi to which the state responded that there had been no notice. (R. p. 144.) Defense counsel indicated defendant had refused to speak with him on several occasions and defense counsel informed about the possible alibi as soon as he found out. (R. pp. 144-145.) The trial court informed that, absent notice, it could not be discussed in opening statements, but that, if notice was filed, then the issue would be considered at that time. (R. pp. 144-146.) Defense counsel informed he did not have a problem with that. (*Id.*) It is also noted that, at the close of the state's case, defense counsel informed that defendant's mother did not come that day. Defense counsel indicated he had talked to defendant and a decision had been made that she would not be called to testify. (R. pp. 396-399.)

On appeal, defendant does not suggest that he provided written notice of his intention to offer a defense of alibi stating the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. *See generally* La. C.Cr.P. art. 727 (regarding notice of intention to offer a defense of

alibi); R. p. 24 (requesting notice of intent to offer a defense of alibi). Additionally, defendant does not specifically explain what his counsel was (or should have been) aware of at a particular time that should have caused him to file notice of alibi or to call any alleged witnesses.

Defendant fails to demonstrate that defense counsel had knowledge of his alibi defense and/or the availability of allegedly favorable witnesses at any particular time, much less that the failure to file notice of alibi or call a particular witness constitutes deficient performance. Similarly, defendant has not identified facts sufficient to support a finding that there is a reasonable probability that, but for any alleged deficiency, the results of the proceeding would have been different.

Alleged failure to render effective representation during sentencing.

Defendant suggests that, despite an abundance of available mitigation and presence of individuals willing to testify, counsel only presented letters and asked for leniency, and failed to object or seek reconsideration.

Defendant's sentences for armed robbery are in the lower range of sentencing and are not unconstitutionally excessive. *See e.g. State v. Scie,* 13-634 (La. App. 5 Cir. 1/15/14), 134 So.3d 9, 12–13.

Defendant's instant allegations are insufficient to support that counsel's performance was deficient relative to sentencing and/or that he was prejudiced as a result of any alleged deficiency. *See Burt v. Titlow*, 571 U.S. 12, 22–23, 134 S.Ct. 10, 17, 187 L.Ed.2d 348 (2013) (observing that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment and the burden to show that counsel's performance was deficient rests squarely on the defendant).

In sum, defendant's allegations, in Assignment of Error No. 4, are insufficient to support a finding that he was denied effective assistance of counsel.

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Assignment of Error No. 5 – *Alleged failure to have a hearing on defendant's motion for new trial.*

Defendant maintains the trial court erred by failing to grant a hearing on his motion for new trial. He claims his motion made numerous claims requiring a hearing. He suggests discovery of new evidence is among the grounds for new trial and he might have been denied his right to self-representation. He suggests that, at minimum, a hearing was required so his mother could testify.

At the outset, defendant did not raise this issue in the trial court. As such, it is arguably not properly before this court for review. *See* La. C.Cr.P. art. 841.

Defendant's allegations in his motion for new trial failed to show a valid ground for a new trial or that injustice had been done. (R. pp. 116-117) *See* La. C.Cr.P. art. 854 (stating that a motion for a new trial based on ground (3) of art. 851 shall contain allegations of fact, sworn to by the defendant or his counsel, showing the names of the witnesses who will testify and a concise statement of the newly discovered evidence); *see also generally State v. Moran*, 54,281 (La. App. 2 Cir. 5/25/22), 338 So.3d 1229, 1241–42, *reh'g denied* (June 23, 2022), *writ denied*, *stay denied*, 2022-00935 (La. 10/12/22), 348 So.3d 75, and *cert. denied,* 143 S. Ct. 815, 215 L.Ed.2d 68 (2023).

Defendant's instant allegations are insufficient to show any error in the trial court's denial of his motion for new trial. *See* La. C.Cr.P. art. 851, *et seq.*; *State v. McKinnies*, 2013-1412 (La. 10/15/14), 171 So.3d 861; *State v. King*, 2015-1283 (La. 9/18/17), 232 So.3d 1207.

Assignment of Error No. 6 – *24 hour sentencing delay.*

Defendant claims the trial court sentenced defendant immediately following the denial of his motion for new trial and his motion for post-verdict judgment of acquittal. Defendant contends the trial court's failure to observe the mandatory 24-

hour sentencing delay constitutes an error patent where defendant challenges his penalty on appeal.

La. C.Cr.P. art. 873 provides:

> If a defendant is convicted of a felony, at least three days shall elapse between conviction and sentence. If 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. If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.

Here, defendant was convicted on September 30, 2022. A presentence investigation was ordered and sentencing was initially set for November 30, 2022. Sentencing was subsequently continued until February 2, 2023. (R. pp. 13-16.) On that date, prior to imposing sentence, the trial court denied defendant's motions for new trial and post verdict judgment of acquittal.

However, an error in failing to observe the statutory sentencing delay may be found harmless. *State v. Kisack*, 16-0797 (La. 10/18/17), 236 So.3d 1201, 1205–06; *State v. Collins*, 2021-1048 (La. App. 1 Cir. 2/25/22), *writ denied,* 2022-00519 (La. 5/24/22), 338 So.3d 1193. For example, failure to observe the 24-hour delay period has been considered harmless where: there is a sufficient delay between the date of conviction and the date of sentencing; there is no indication that the sentence is hurriedly imposed; and there is no argument or showing of actual prejudice by the failure to observe the twenty-four hour delay. *See generally State v. Key*, 23-167 (La. App. 5 Cir. 12/27/23), 379 So.3d 96, 125. Additionally, courts have found harmless error where a mandatory life sentence is imposed or when the defendant does not challenge his sentence on appeal and does not claim prejudice due to the lack of the delay. *See generally State v. Smith*, 2023-334 (La. App. 3 Cir. 12/6/23), 375 So.3d 654, 660.

Based on defendant's allegations, he did not object or file a motion to reconsider sentence. Thus, defendant is precluded from challenging his sentence on

appeal. *See State v. Sorina*, 2022-0545 (La. App. 1 Cir. 11/4/22), 354 So.3d 704, 710. Additionally, there was a sufficient delay between the date of conviction and the date of sentencing, there is no indication that the sentence is hurriedly imposed, and there is no showing of actual prejudice by the failure to observe the twenty-four hour delay. The failure to observe the delay in this case is harmless and, therefore, does not necessitate a remand for resentencing. *See e.g. State v. Major*, 2019-0621 (La. App. 1 Cir. 11/15/19), 290 So.3d 1205, 1214–15, *writ denied,* 2020-00286 (La. 7/31/20), 300 So.3d 398.

Assignment of Error No. 7 - *Excessive sentence.*

Defendant suggests the trial court erred when it imposed an unconstitutionally excessive sentence of thirty years on a first offender.

At the outset, it is noted that, under La. C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Because defendant failed to file a motion to reconsider sentence setting forth specific grounds for excessiveness, he is precluded from having his challenge to the sentence reviewed on appeal. *See e.g. State v. Sorina*, 2022-0545 (La. App. 1 Cir. 11/4/22), 354 So.3d 704, 710.

Additionally, defendant's sentence is not unconstitutionally excessive. The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. *State v. Sepulvado,* 367 So.2d 762, 767 (La.1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. *State v.*

Andrews, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. *State v. Holts,* 525 So.2d 1241, 1245 (La.App. 1st Cir.1988).

La. C.Cr.P. art. 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. *See State v. Brown,* 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569. The articulation of the factual basis for a sentence is the goal of La. C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. C.Cr.P. art. 894.1. *See State v. Lanclos,* 419 So.2d 475, 478 (La.1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. *State v. Jones,* 398 So.2d 1049, 1051–52 (La.1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. *State v. Thomas,* 98-1144 (La.10/9/98), 719 So.2d 49, 50 (per curiam).

Armed robbery is punishable by imprisonment at hard labor for not less than ten years and not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. Also, La. R.S. 14:64.3, provides for a firearm enhancement whereby an additional mandatory five-year sentence at hard labor without benefit of parole, probation, or suspension of sentence is to be served consecutively to the sentence imposed under the provisions of La. R.S. 14:64.

Here, the trial court sentenced defendant to twenty-five years on each of his armed robbery convictions, run concurrent, and to five years on each count consecutive to the twenty-five because of the use of a firearm. (R. pp. 446-451.)

The sentences are in the lower range of sentencing and are neither grossly disproportionate to the severity of the offenses committed nor an abuse of the trial court's discretion. Defendant's sentences for his convictions for armed robbery under La. R.S. 14:64 and 15:438.3 are not unconstitutionally excessive. *See e.g. State v. Scie,* 13-634 (La. App. 5 Cir. 1/15/14), 134 So.3d 9, 12–13. There is no showing of any error or abuse of the trial court's discretion in the imposition of defendant's sentences. Defendant's seventh assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, the State of Louisiana respectfully submits that defendant's convictions and sentences should be affirmed by this Honorable Court.

RESPECTFULLY SUBMITTED,

HILLAR C. MOORE, III
DISTRICT ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed, pre-paid postage, and/or emailed, this date, to counsel for Appellant, Jane Hogan, Louisiana Appellate Project, 310 North Cherry Street, Hammond, Louisiana 70403, (985) 542-7730, jane@hoganattorneys.com.

Baton Rouge, Louisiana, this ~25th~ day of June, 2024.

/s/ Cristopher J.M. Casler, #29549
Assistant District Attorney

DOCKET NUMBER: 2023 KA 939

STATE OF LOUISIANA

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA,
Appellee

VERSUS

BJ MCELVEEN,
Appellant

Application for Rehearing
Filed on Behalf of Appellant, BJ McElveen,
Conviction and Sentence from the 19th Judicial District Court
East Baton Rouge Parish Docket No. 09-18-0487, Section 7
Honorable Louise Hines

APPLICATION FOR REHEARING

A CRIMINAL PROCEEDING

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Exhibit C

INTRODUCTION

BJ McElveen respectfully requests rehearing of this Court's (2-1) plurality opinion, issued on December 30, 2024. Pursuant to Uniform Rule 2-18, *et seq.,* this Court should grant rehearing as to BJ McElveen's second assignment of error, because: (1) the Supreme Court's recent decision of *Smith v. Arizona,* unquestionably bars the admission of DNA results generated by a non-testifying analyst; (2) this Court applied the wrong harmless error standard in evaluating the Confrontation Clause violation; and (3) under the correct legal standard, the State cannot prove beyond a reasonable doubt that Mr. McElveen's conviction was not attributable to the inadmissible DNA reports and testimony.

STATEMENT OF RELEVANT FACTS

BJ McElveen's armed robbery convictions stand solely on the results of DNA testing performed by unconfronted forensic analysts. The State never called those analysts at trial, and instead introduced their crucial evidence through a representative of the Louisiana State Police (LSP) Crime Lab who performed no testing, observed no testing being performed, and did not author the lab report. In fact, this lab representative freely admitted that he was "simply a technical reviewer" whose work on this case began and ended with making sure that the work of the unconfronted analysts "upheld our policies and procedures" and further admitted he could "really only testify to our results and our policies and procedures." R. 392.

DNA analysts Tabitha Mizell and F. Nicole Proctor generated two DNA reports, which were introduced into evidence during Zachary Shawhan's testimony, as State's Exhibit S-26, over objection, following this Court's mid-trial ruling. *State v. McElveen,* 22-KW-1066 (La. App. 1 Cir. 9/29/22). The initial report is dated August 6, 2018, and describes the result of an examination completed on July 31, 2018. Of note, the report describes Exhibit 1A as a "DNA profile obtained from the swab taken from the straps, zipper, and zipper pulls of the backpack" used in the

Exhibit C

robbery. Exhibit S-26, 8/6/18 Report, p. 1. This profile consisted of a "mixture from more than three contributors, with a major mixture of two contributors." Id. According to the report, 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." Exhibit S-26, 8/6/18 Report, p. 2.

Tabitha Mizell and F. Nicole Proctor released a supplemental DNA report on September 10, 2018, from an examination they conducted on August 29, 2018. Exhibit S-26, 9/10/18 Report, p. 1. According to this report, Mr. McElveen "cannot be excluded as a major contributor to the DNA profile obtained from the straps, zipper, and zipper pulls of the backpack." Id., p. 2. The report further contained a statistical analysis that concluded it was 2.63 billion times more likely that Mr. McElveen's DNA was contained in the mixture of Exhibit 1A, then of two random individuals. Id., p. 3.

On the third day of trial, the court ruled that the DNA reports were inadmissible hearsay and any testimony pertaining to the report would also be inadmissible unless the State called either Tabitha Mizell or F. Nicole Proctor to testify. R. 12. The State objected to the ruling and sought an emergency writ, which this Court granted, holding the DNA reports were not testimonial pursuant to *Williams v. Illinois,* 567 U.S. 50 (2012). *State v. McElveen,* 22-KW-1066 (La. App. 1 Cir. 9/29/22).

DNA Analyst Zachary Shawhan proceeded to testify, throughout 25 pages of the record, to the findings of the supplemental report. R. 371-96. Mr. Shawhan's testimony was clearly limited to reciting the conclusions and findings from the DNA report, as he admitted that his work in this case was only that of a technical reviewer, and that he performed no testing, no observation of testing, and authored no report.

> Counsel: Based on these reports that you have in front of you and the ones that you went through and the ones that somebody else prepared, can you say with any amount of certainty that whoever prepared

the DNA material or collected it from the scene followed all of your protocols?

Shawhan: As an analyst for Louisiana State Police Crime Lab, I can really only testify to our results and our policies and procedures.

Counsel: What other interaction have you had in this case?

Shawhan: I'm simply a technical reviewer in this case, which means I evaluated the entire DNA analysis process and made sure it upheld our policies and procedures. That's the interaction I've had with this case.

R. 392.

On appeal, Mr. McElveen argued the admission of the supplemental DNA report and Mr. Shawhan's testimony violated Mr. McElveen's right to confrontation. In a plurality opinion, this Court committed factual and legal error by finding that Mr. Shawhan was a "participant" in the DNA examination and therefore properly testified about the DNA report's conclusion. This Court also committed legal error by failing to properly apply *Smith v. Arizona,* as noted by the dissent, and applying the incorrect harmless error standard. For these reasons, this Court should grant rehearing, order additional briefing on the intervening decision of *Smith,* and ultimately vacate Mr. McElveen's conviction and remand for a new trial.

1. Pursuant to *Smith v. Arizona,* the admission of the DNA report, as well as the testimony about the conclusions drawn by a non-testifying DNA analyst were inadmissible.

While this case was pending on appeal, the United States Supreme Court decided *Smith v. Arizona*, 602 U.S. 779, 783 (2024), and held that a testifying expert cannot restate the substance of someone else's lab work as support for his own "independent opinion." *Id.* at 798–99. Thus, under *Smith,* the DNA reports produced by Tabitha Mizell and F. Nicole Proctor were clearly inadmissible without subjecting these analysts to cross-examination. Mr. Shawhan's surrogate testimony about the supplemental report's conclusions and Detective Foster's testimony about

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an initial presumptive lead generated by a non-testifying analyst, are equally inadmissible under *Smith.*

i. Mr. Shawhan did not participate in the DNA examination and therefore his testimony was that of a surrogate analyst, which must be evaluated in light of *Smith.*

The plurality opinion commits factual error by finding that the introduction of the supplemental DNA report and Mr. Shawhan's testimony pertaining to its results were properly admitted because he was "a participant in the process." *State v. McElveen,* 23-KA-939 at *19 (La. App. 1 Cir. 12/30/24). This misconstrues Mr. Shawhan's role as a technical reviewer of the examinations performed by F. Nicole Proctor and Tabitha Mizell. When asked to describe his actions in this case, Mr. Shawhan testified that he "reviewed the entire case file" to determine that the analysts complied with established protocols. R. 655. It is undisputed that Mr. Shawhan did not conduct any examination of Mr. McElveen's DNA or the backpack, and on cross-examination confirmed that as a "technical reviewer" he could only testify about the Crime Lab's policies and procedures, and the results generated by Ms. Proctor and Ms. Mizell. R. 392.

John Mai, another Crime Lab employee, aptly described the work of a technical reviewer as someone who is not present when a test is performed who then later "can look over…notes" to make sure someone else's DNA test complied with policies and procedures. R. 345.[1]

As recognized by the dissent, Mr. Shawhan's testimony as a technical reviewer, who did not perform or observe the testing, is identical to the issue

[1] Mr. Mai testified: "[W]e do have the ability to review each other's work….in our lab…we review each other's work. While I'm not present to – exactly like an eagle eye over somebody, I can look over their notes, I can make sure if they documented something, it should be documented, or something that should be documented is noted….that is also part of that review process. **I want to make sure, as a reviewer, as somebody that's not there at the exact moment when something is done**, that any notes, any documentation that's taken…is necessary in our case folder that it can be reviewed at a later date and confirmed that it is done properly according to our procedures and protocols." R. 345 (emphasis added).

presented in *Smith,* as Arizona argued that "a surrogate analyst can testify to all the same substance—that is, someone else's substance—as long as he bases an 'independent opinion' on that material." *Smith,* at 798-993. The *Smith* Court rejected this argument, finding that this would "allow every testimonial lab report [] come into evidence through any trained surrogate, however remote from the case", without allowing defendants the "right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted." *Id.* at 799. This would result in an "end run" around the Court's Confrontation Clause jurisprudence. *Id.* Applying *Smith,* the DNA reports and Mr. Shawhan's testimony were clearly inadmissible and violated Mr. McElveen's Sixth Amendment right to confrontation.

ii. Under *Smith,* the presumptive CODIS match and correlating testimony is inadmissible.

At the time of Mr. McElveen's trial and appellate briefing, *Williams v. Illinois,* 567 U.S. 50 (2012), had yet to be abrogated by *Smith,* and the Louisiana Supreme Court cautioned that *Williams* should apply "no more broadly than the particular circumstances that led to the convergence of the votes…and that are substantially similar to those in the present case." *State v. Bolden,* 108 So.3d 1159, 1161 (La. 10/26/12). Pursuant to *Williams*, there is no Confrontation Clause violation when a DNA expert testifies that in his opinion the DNA profile developed from a sample taken from a defendant matches the DNA profile developed by another, 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, the tests are conducted by an accredited laboratory, and the report of the test results itself is not introduced as a certified declaration of fact by the accredited laboratory.

Mr. McElveen conceded in his brief that pursuant to *Williams,* the initial DNA report, which merely stated an investigative lead was developed after entering the

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backpack DNA swab into CODIS, would not violate Mr. McElveen's confrontation rights. This is no longer the case, as *Smith* now holds that "[w]hen an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth…[a]nd if those are testimonial…the Confrontation Clause will bar their admission." *Smith v. Arizona,* 602 U.S. at 783.

Applying *Smith,* Detective Foster's testimony pertaining to the alleged results of the initial DNA testing is inadmissible, as it was only relevant and probative for its truth if it assumed the truth of the absent witness' statement. As *Smith* is a new rule of law, announced after Mr. McElveen's trial, he should not be faulted for failing to object to Detective Foster's testimony under *Smith* and should be allowed to fully brief this issue on appeal.

It is also notable that the expert, Mr. Shawhan, testified that he reviewed the Crime Lab's "entire file" in preparation for his testimony, but did not testify that there was a presumptive match to Mr. McElveen.[2] Thus, the only testimony about an alleged, initial presumptive match came from Detective Foster, who admitted that he was unqualified to testify about DNA. R. 316.

As applicable law was announced while this case was pending on direct review, Mr. McElveen prays this Court grant rehearing and permit supplemental briefing in light of *Smith.*

2. This Court failed to apply the *Chapman* analysis in evaluating whether the admissibility of the DNA evidence through a surrogate analyst amounted to harmless error.

The lead opinion noted that even if the supplemental DNA report and Mr. Shawhan's testimony were inadmissible under *Smith,* any resulting error was

[2] Detective Foster also claimed that he learned four days after the robbery, on "Friday evening," that the Crime Lab was "able to get an identification that led to Mr. McElveen. R. 311. However, the initial DNA report does not corroborate that Mr. McElveen was generated as an initial identification, and the report also notes that the initial DNA examination was completed the following Tuesday, July 31, 2018.

harmless.[3] In conducting a harmless error analysis, this Court failed to apply the *Chapman* standard.

In *Chapman v. California*, 386 U.S. 18 (1967), the United States Supreme Court established the standard for harmless error review for federal constitutional error in both state and federal courts. Under that test, the State bears the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24; *see also State v. Gibso*n, 391 So.2d 421, 426-27 (La. 1980), *State v. Kent,* 382 So.3d 69, 78 (La. 3/22/24). The United States Supreme Court has clarified that the critical inquiry is whether the verdict rendered was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275(1993); *see also United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008) ("A defendant convicted on the basis of constitutionally inadmissible Confrontation Clause evidence is entitled to a new trial unless it was harmless in that there 'there was [no] reasonable possibility that the evidence complained of might have contributed to the conviction.'").

In citing *Delaware v. Van Arsdall,* 475 U.S. 673 (1986), this Court improperly applied the harmless error analysis utilized for a Confrontation Clause violation stemming from the denial of a defendant's right to impeach a witness. *See also United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008) (discussing

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[3] With no basis in the record, the lead opinion also erroneously suggests that Mr. McElveen may have waived his right of confrontation under La. R.S. 15:501. *State v. McElveen,* p.19–20 n.14. This is incorrect, as the record does not contain a notice of intent to offer proof by certificate filed by the State at least 45 days prior to trial, as is mandatory under the statute. La. R.S. 15:501(A) ("the party seeking to introduce a certificate made in accordance with R.S. 15:499 shall, not less than forty-five days prior to the commencement of the trial, give written notice of intent to offer proof by certificate."). While the lead opinion acknowledges that "the record does not reflect the State filed formal notice," it also suggests that the State's double error—in failing to call the testifying analysts and failing to comply with the mandatory language of the statute—may nonetheless be waived by mere provision of the report in discovery.

This is clearly incorrect and cannot be squared with the plain text of the statute. The statute is unambiguous in requiring the State to give notice. It is only upon the receipt of the notice that triggers the requirement of the defense to demand the testimony of the analyst. La. R.S. § 15:501(B).

In suggesting that Mr. McElveen bore an additional, extra-statutory burden to take steps to ensure that the State's witnesses appear in court, the lead opinion further departs from the reasoning of *Smith*, which reaffirmed that the "Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Smith v. Arizona*, 602 U.S. 779, 792 n.3 (2024) (cleaned up).

different applications of *Chapman* depending on the type of Confrontation Clause error). In contrast, the present case involves the admission of evidence tainted by a Confrontation Clause violation, rather than a curtailment of cross-examination. Thus, this Court should not have looked to the strength of the other evidence, nor shifted the burden to Mr. McElveen to prove he is entitled to relief, but rather determine whether the State proved beyond a reasonable doubt that Mr. McElveen's verdict is surely unattributable to the admission of the DNA reports and corresponding testimony.

3. Under the correct legal standard, the State cannot prove that the error in admitting the surrogate DNA analyst's testimony did not contribute to Mr. McElveen's verdict beyond a reasonable doubt.

Under the correct *Chapman* standard, the State has the burden to prove beyond a reasonable doubt that Mr. Shawhan's testimony did not contribute to Mr. McElveen's conviction. *See United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir. 2008) ("Accordingly, the government must demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction."). The State cannot meet this burden because quite literally the only incriminating evidence against Mr. McElveen was that his DNA was found on the exterior of a backpack used in a robbery.

While this Court referenced an anonymous tip that Baylon Trim and "BJ" committed the robbery, as well as the fact Mr. McElveen was arrested in Texas, the true foundation of the State's entire case is the DNA evidence. This is apparent from the outset, as the State told the jury during opening statements that the armed robbery was "almost the perfect crime," but that Mr. McElveen "gets sloppy and he leaves something behind." R. 157. The State then told the jury that it would see "who, what, when, and where there was DNA left. You'll hear testimony from DNA experts, police officers, witnesses, and two victims[.]" R. 158.

The State had the burden of proving Mr. McElveen's identity. There were no witnesses to this crime, and the victims could not identify Mr. McElveen. Thus, the only evidence of identity came from the conclusions drawn by the non-testifying F. Nicole Proctor and Tabitha Mizell. While Detective Foster testified as a non-DNA expert that there was a presumptive match to Mr. McElveen, the true weight of the State's case came from Mr. Shawhan, the final witness called prior to deliberations. Not only did Mr. Shawhan testify for over 25 pages of the record, but the State referenced Mr. Shawhan's testimony five times[4] throughout its closing arguments:

As acknowledged by the State during closing arguments, the DNA evidence is the only evidence that proves Mr. McElveen touched a backpack that was used in a robbery. Mr. Shawhan's expert testimony—based on another expert's testimonial evidence—established that Mr. McElveen could not be excluded as a major contributor to the backpack swab. This goes to the core of proving Mr. McElveen's identity, an essential element of which the State bears the burden of proof. While Mr. Shawhan could testify as a technical reviewer about the general policies and procedures of the Crime Lab, the only person who could testify whether those policies and procedures were followed in this case were the analysts who conducted the testing. Absent the testimony of Ms. Mizell and Ms. Proctor, there is no way of

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[4] You heard all that testimony from the DNA expert. And one of the things he repeatedly said was that BJ McElveen cannot be excluded as a major contributor to the DNA profile. He said that the likelihood ratio was 2.9 billion. That is very far away from the number one. I may not have been good at counting the other day, but I know that one and 2.9 billion are very far away from each other. And he stated that they used the straps, the zippers, and the zipper pulls. R. 403.

You guys have plenty of common sense. You saw the robbery. You saw the camo backpack several times. You saw the DNA that was all over the backpack, the backpack that was found 30 to 45 minutes after the robbery, found near the bank. The backpack was also submitted to the Crime Lab the very next day. R. 405.

And BJ is seen on that video with his ungloved hand touching that backpack, touching the strap that went to the DNA lab the very next day, and he's the major contributor on there. R. 406.

That backpack that was found 30 or 45 minutes after the crime, the backpack that is being worn by one of the assailants in this picture, that backpack which the DNA said that -- you saw the report --Mr. McElveen cannot be excluded as a major contributor to the DNA profile swab from the straps, the zipper, and the zipper pulls. What is he holding? The strap of that backpack, and that is why, without -- without a glove on a his hand, and that is why his DNA is all over that backpack. R. 418.

The Crime Lab report states that he cannot be excluded, because he was the person who was touching that backpack on July 23, 2018, committing this crime. Also, the DNA report talks about the ratio. Again, 2.9 billion is very far from one. There's your identity - there's your identity, as one of the obligations that the State has to prove. R. 419 (emphasis added).

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knowing whether the tests were conducted according to protocol and produced reliable results.

The fact that the prosecutor repeatedly highlighted the evidence that violated the right to Confrontation in closing argument is enough to warrant reversal under *Chapman* because the State cannot credibly argue that there was no possibility that the evidence it highlighted contributed to the verdict. *See United States v. Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) ("Here, because the government's closing argument relied on the very evidence that offends the Confrontation Clause, we cannot see how the government can conclusively show that the tainted evidence did not contribute to the conviction.") (cleaned up); *see also United States v. Alvarado-Valdez*, 521 F.3d 337, 342-43 (5th Cir. 2008) (same).

PRAYER

BJ McElveen respectfully prays that this Honorable Court grant rehearing, vacate its prior opinion, and permit further briefing in light of *Smith.* Mr. McElveen further prays that this Court vacate his convictions and remand for a new trial.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2025, I caused a copy of the foregoing Application for Rehearing to be sent to the following parties via electronic and/or U.S. Mail, postage pre-paid:

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Jane Hogan

Exhibit C

THE COURT:

All right. We do have Mr. McElveen in court and counsel for both sides, so we're going to start immediately.

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

MR. THERIOT:

State waives polling, Your Honor.

MR. TUCKER JR.:

Defense waives polling, Your Honor.

THE COURT:

All right. You may be seated. All right. Good morning, ladies and gentlemen. Glad to see everybody back. I apologize for the late start. I'm not happy about it, but some things happened, we couldn't start on time, so I apologize for making y'all come up here, you know, at 8:45. I know all y'all were here on time and brought up, so I apologize for the delay, okay? We're going to get started immediately. State, call your next witness.

MR. THERIOT:

Yes, Your Honor. State would call Det. Chuck Foster to the stand.

LT. CHUCK FOSTER,

AFTER HAVING BEEN DULY SWORN, DID TESTIFY AS FOLLOWS:

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

BY MR. THERIOT:

Q. Good morning. Could you, please, give your name to the members of the jury?

A. Lt. Chuck Foster.

Q. And who are you employed with?

A. East Baton Rouge Sheriff's Department.
Q. Is there a certain department that you're with in the Sheriff's Office?
A. The Armed Robbery and Burglary Division.
Q. How long have you been in that capacity?
A. I've been in the Armed Robbery and Burglary Division for 13 years.
Q. Okay. And you were in that capacity July 23, 2018?
A. Yes, sir.
Q. Is there an investigation that you become involved in on that date?
A. That is correct.
Q. And take us -- what was the genesis of that investigation?
A. We were dispatched to a bank robbery on Coursey Boulevard at American Way.
Q. And in the course of your investigation, did you review surveillance footage, photos, things of that nature?
A. Yes, sir.
Q. Was there a clear identification made by either of the two victims?
A. During the investigation, yes, but not at the scene, no.
Q. Okay. And was there some description that they gave to help you try to further your investigation?
A. I'm sorry?
Q. Was there any descriptions given by the two victims that helped further your investigation towards --
A. Yes.
Q. -- identity?
A. Yes, there was.
Q. And could you highlight points that you were looking

for?

A. Well, I'll go with the first -- I have to talk about the first perpetrator. We had one perpetrator that went in that was armed with a firearm wearing dark, navy blue clothing and long pants. The other perpetrator was wearing a lighter sweatshirt of some sort, blue jeans, and he also had a camouflage backpack in his custody and a red watch and a red glove, I think on his left hand.

Q. Okay. And going towards the individual with the backpack, was there any identifiers that were given to you that helped go towards leads or any of that nature?

A. Yes. The backpack was submitted to the State Police Crime Lab that -- the next morning. The Crime Lab processed that particular backpack for contact DNA to see if we can get -- after it was actually discovered, they processed the backpack for contact DNA to see if we can get a lead on whoever was in possession of it.

Q. And -- and in investigating a case such as this, is there designation as to who's handling the case or who has what role?

A. Yeah. Everybody plays an intricate part. I mean, there's so many moving parts. Specifically, for this particular investigation, we had so many different scenes where we had money found, we had backpacks found, a gun found, clothing found, and this was all at various locations in the Coursey/Southpark area, if you're familiar with that in East Baton Rouge Parish. So, we had deputies -- detectives assigned to those locations until the Crime Scene detective came there to take custody of those items. I was actually at the bank, itself. I spoke to both of the actual victims, along with Det. Danny Edwards. We always have a coagent just in case something happens where we need someone

else to take over.
Q. Well, were you the head, lead detective in this case?
A. I was, yes.
Q. And you admitted before about sending the backpack to the Crime Lab?
A. Sir.
Q. You had discussed before about sending the backpack to the Crime Lab?
A. Yes, sir.
Q. Were you become aware of where the backpack was located?
A. It was somewhere underneath a bed cover it was found. I never went to that actual scene, because we had another detective there, and I couldn't be at both places at the same time, naturally. So, we had a detective -- I mean, a deputy that found it. She called a detective, they went out there and secured it to make sure nobody touched it. When Crime Scene got there -- excuse me -- when Crime Scene technician got there and actually opened the backpack, they can clearly see the money and a gun sitting in the backpack, which was a camouflage backpack. That particular backpack matched the exact backpack that was in the video that I did see at the scene.
Q. And are you familiar with the distance between the backpack at the scene and where it was found underneath the cover?
A. Cannot give you the exact distance, due to the fact that I didn't actually respond to the actual area where it was taken, but it was walking distance. It's literally across the street from where the bank was. It's very close proximity.
Q. Okay. And you're familiar with the timeframe between

the robbery at Capital One and the backpack being found by law enforcement?

A. I can't give you an estimated time relative to that, but it was within 45 minutes that it was located after the actual dispatch of the robbery.

Q. All right. So, 45 minutes and in walking distance away, the backpack's found?

A. That is correct.

Q. And I want to go towards what's previously been admitted and published as S3.9.

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

BY MR. THERIOT:

A. I see it now.

Q. Can you see this right here?

A. Yes, sir.

Q. Hold on a second. The screen split on me. Okay. Can you see here?

A. I can see it.

Q. I had to drag it.

A. Yeah, that's fine. I can see it.

MR. THERIOT:

Everybody still see --

BY MR. THERIOT:

Q. So, speak about what individual touching the backpack?

A. Sir?

Q. Which individual in the video you speak of touching the backpack you said --

A. The one -- the tall one on the right-hand side actually had it in his hand. He handed it to the one that's actually in the safe -- the vault right now. You see, he has it now. He's strapping it on.

Q. And is there anything you notice about how he's touching it?

A. I'm sorry?

Q. Is there anything noticeable about how he's touching the backpack when he's putting it on?

A. How I noticed him touching it?

Q. No. Anything noticeable about how he's putting the backpack on?

A. Yeah. His left -- his left hand didn't appear to have a glove and he grabbed it from the right side and strapped it on. Is that what you're asking?

Q. He touched it with his non-gloved hand?

A. Yes.

Q. And you said you sent it to the Crime Lab the next day?

A. The next day. The DNA paperwork was completed the next day and submitted to the Crime Lab.

Q. And I guess the million-dollar question is: What -- what led to you connect Mr. BJ McElveen to this robbery?

A. The contact DNA that was obtained -- the whole backpack was actually submitted. Instead of us swabbing it ourself, I submitted the entire backpack. That way, the Crime Lab can actually do it themselves to, hopefully, get some type of result. They actually swabbed the zipper and the actual straps of the backpack, and they did -- they were able to get an identification that led to Mr. McElveen. That was four days later. I got that -- the bank robbery happened on a Monday. I got the information on the perpetrator on Friday -- Friday evening, at that.

Q. And was there ever a -- did you ever go to get an additional reference swab from Mr. McElveen?

A. I did during the investigation. Obviously, he wasn't in custody the day I actually had him identified. He was,

from what I understand, FBI assisted me tirelessly with this case. They ascertained information that determined that he was in the state of Texas. He had already fled the state, and they talked to family members, they got him to turn himself in, so back -- I think it was around August the 2nd or 3rd, he turned himself in. I had a warrant for his DNA, just to compare it to the DNA results that were found, and I was able to ascertain it then, so --

Q. And how did you -- you say you take a reference. How did you take a reference from Mr. McElveen?

A. Two oral DNA swabs. It's just like a Q-tip, basically, just a long Q-tip. Dentist -- something the dentist would use to swab. We put it in a box, and it all gets sent to the Crime Lab for comparison, obviously.

Q. Now, going over the investigation, were there other leads or anything you were following to try to further identify the perpetrators of this robbery?

A. Oh, there was a lot of moving parts pertaining to this. First of all, when I did my initial investigations --

MR. TUCKER SR.:

Excuse me. Can we approach, Your Honor?

THE COURT:

Sure. Hold on one second, Detective.

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

MR. TUCKER SR.:

Good morning.

THE COURT:

Good morning.

MR. TUCKER SR.:

Your Honor, I want to make an objection here and request that the State ask a specific question, as allowing the witness to pontificate

about things that he hasn't been asked already. In other words, he's allowing him to just pontificate, as opposed to asking specific questions.

MR. THERIOT:

The objection yesterday was to try to work on not leading, so it is more open-ended. What was your next step? I mean, that's not a leading question, and I'm not having him give a colloquy. I said what's your next step. I mean, that's his answer. I can't -- I can't lead and I can't -- now, he wants me ask specific questions.

THE COURT:

Well, let's be specific, but obviously, you can't lead.

MR. THERIOT:

Yeah. So --

THE COURT:

While you're up here, Bob, I was talking to your son. Unacceptable y'all being late like this. Y'all are keeping these people.

MR. TUCKER SR.:

I understand.

THE COURT:

Y'all are wasting their damn time.

MR. TUCKER SR.:

I understand.

THE COURT:

And I'm not happy about it.

MR. TUCKER SR.:

I'm not, either, and I'm terribly sorry.

THE COURT:

Well, been trying to call you. Your phone's off. We couldn't get in touch with you.

MR. TUCKER SR.:

My phone -- my phone died.

THE COURT:

We can't address the situation. Well --

MR. TUCKER SR.:

And I had a bit of a medical accident this morning.

THE COURT:

-- I'm glad to see you, but you should communicate with this Court.

MR. TUCKER SR.:

I would have, but --

THE COURT:

Okay? Let's go.

MR. TUCKER SR.:

Thank you. Sincerely on that.

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

BY MR. THERIOT:

Q. Det. Foster, I was asking were there other leads you looked into in this case?

A. Yes, sir.

Q. Was there a lead that took you to the Chimes across the street?

A. Yes.

Q. Okay. And what was the purpose of you going to the Chimes across the street?

A. To -- we received a CrimeStoppers tip that led me to go to the Chimes. Someone called in saying they believed an employee that worked at the Chimes in the kitchen area may

have been one of the perpetrators responsible for the robbery. This was the same day of the robbery. It was that Monday, approximately after 4:00 PM, I want to say, is when I got the tip. So, I went straight to the Chimes, myself and Sgt. Payer at the time, who's now Capt. Payer. We went to the Chimes. I located the person that they described. They stated that he was wearing the same clothing. Apparently, they saw the footage already on the twelve o'clock news. They also stated he had a camouflage backpack and that they believed he was, in fact, the taller of the perpetrators in the video. Well, when I got there and actually saw this man, he clearly did not fit the description. He was not wearing the same clothes, okay? They said the same shoes. He did not have the same type of shoes. His shoes were in extremely bad shape. He just had gotten to work after noon, after lunch. He was on Delaware Street prior to that where he lives. The victims, both, told me that both of the male perpetrators that actually did the robbery, they believed to be young, late teens, early twenties, based on their voice. This man clearly did not have a young voice. He was in his mid-thirties, I want to say. I'm going by memory here. So, I pretty much vetted him. He answered all of our questions, and I did not believe, by talking to him and based on his description, that he was anywhere involved. I also saw other cooks who were laughing, so I felt somewhat that they may have been having us go and mess with this man for their fun, but who knows, you know. I think that's cruel if they called in a major tip for something of this nature, but I still had to go and vet it out to make sure he wasn't, in fact, the perpetrator. I did identify him and get all the information, in the event that I did have to go back and do

some more research regarding that particular person later -- at a later date, but at that time, I did not think he was the perpetrator, and I still, to this day, am a hundred percent sure he is not the perpetrator.

Q. And obviously --

MR. THERIOT:

One second, I apologize. May I approach, Your Honor?

THE COURT:

Sure.

BY MR. THERIOT:

Q. Det. Foster, do you recognize the item that I'm handing to you that I wish to mark later as State Exhibit 23.

A. Yes. Yes, I sure do.

Q. And what is what we wish to mark as State Exhibit 23?

A. These are the contact DNA swabs that I received from Mr. McElveen after he was in custody. This was back in August, and these were submitted the following day.

Q. And do you know -- submitted. What do you mean submitted?

A. They were actually put in our Evidence to be sent back to the Crime Lab just so they can actually go run these actual swabs that I received from his person against the evidence one more time, just to make sure there was not a mistake. That's all. I don't -- I can't elaborate any further on DNA, as far as the analysis aspect, because I'm not an expert pertaining to that.

Q. But, these are swabs --

A. But, these are 100-percent mine, yes.

Q. You placed them in Evidence?

A. Yes. That's my initials, as well, on that envelope.

MR. THERIOT:

Your Honor, I'd like to offer, file, and introduce what would be State Exhibit 23 --

THE COURT:

Yeah.

MS. MORRIS:

I think it might be 25.

THE COURT:

We already have a 23, and so --

MR. THERIOT:

I'm sorry, Your Honor, 25, state Exhibit 25.

THE COURT:

Mr. Tucker, any objection?

MR. TUCKER SR.:

No, sir.

THE COURT:

All right. It will be admitted.

BY MR. THERIOT:

Q. Now, Det. Foster, we've seen the video. There's clearly two people involved in this robbery.

A. Yes, sir.

Q. Were there attempts to try to identify the second individual?

A. Yes, sir.

Q. Is there a reason why you could never come to effectuate an arrest on the second individual?

A. I, actually, did effect an arrest on the second individual. We had another CrimeStoppers tip that led me to the identification. That particular tip, I wanted to keep the integrity of the CrimeStoppers intact, though. I can't elaborate a whole lot on that, or I will definitely give away the actual person who called this in, and I don't want to do that and I will not do that. But, that particular

person knew very specific details of this robbery that was not shared to the public. The only people who knew these details were, in fact, the law enforcement officers who were investigating this and the perpetrators who actually committed the actual crime. I don't want to -- so, I'm not going to kick that a lot. However, they did identify a Baylon Trim that was going to be one of the perpetrators. The person that they said was Baylon Trim, they clearly stated was the one that was squatting in front of the vault. The other perpetrator, they stated, was they knew him, as well, but they did not know his last name, they only knew him by the first name of BJ. At that particular time, when I actually received that tip, none of that evidence had been released to anyone relative to Mr. BJ McElveen's name, because he was still not in custody. A warrant was written and a DNA warrant was written, but all that stuff was actually in my custody. No one knew that, except for me and the FBI and other agents with our office, so for the fact that they actually said BJ is the first name of the other guy and this other guy was -- I was like I'm on the right track here with the DNA evidence and the fact that they just gave me the first name of the guy we do have identified from the DNA evidence, so I feel good about that. There's not many BJs, you know, that I've come across in East Baton Rouge Parish in my 29 years of working here, so I was feeling pretty confident about that.

Q. Is there a reason why there's no further action taken against, you said, Baylon Trim, the second person --

A. He was actually incarcerated, but we never, ever could get the final piece of evidence to actually get him to get a conviction. We never got DNA from him. He was -- his DNA was taken. I did do a warrant and get DNA from him. It was

submitted to the Crime Lab, as well, but nothing ever came back to him, and he's also the one that was actually gloved up. That navy blue jacket, or pullover, we believe is the one that we found, it was found in the area where the money was found. We found numerous -- money in numerous areas. Obviously, from the scene, it was dropped throughout their path. And then, of course, you can obviously tell it was hidden, based on the areas it was located. I believe that they did this because of the high police presence. When this armed robbery took place, the victims of the bank, they immediately dialed 9-1-1 and hit their alarm, so you had responding agencies all over East Baton Rouge Parish responding. Baton Rouge City Police and our East Baton Rouge Sheriff's deputies all came into that scene. Only a few went to the bank, secured the bank, made sure the victims didn't need any type of care. Everybody else scattered about, trying to look for the perpetrators who were last seen fleeing on foot, so there was a high -- a big, heavy police presence. I believe that was the reasoning for them shedding certain clothing and, of course, hiding the money and the gun that was also located at a later date, or at a later time that night -- that morning.

Q. Is it fair to say, million-dollar question, is that the DNA results from the Crime Lab helped go towards identity of Mr. BJ McElveen?

A. Only Mr. BJ McElveen. Nothing actually was able to link the other perpetrator involved.

Q. Okay. And you've seen the video of one person touching the backpack who doesn't have a glove on?

A. That is correct.

Q. Was there another information regarding, from the victims, regarding the voice that helped also take you

towards Mr. McElveen?

A. Yes, sir. Actually, both victims stated this at certain times. We -- we separated the victims. Soon as I got there, the victims were separated. We asked them not to communicate until, you know, we actually talked to them. Det. Edwards talked to one of them while on scene. I talked to Ms. Jason [sic] while on scene. When I talked to Ms. Jason while on scene, clearly, she stated that -- when I asked her, you know, is there anything that would help me identify this guy at a later time, anything that he said or, you know, did, you know, that's just not characteristic with an average person she comes across, she goes well, I can tell you, I believe he's from New Orleans. And I said well, what do you mean? She goes well, because he talked as if he was from New Orleans. And I said well, what does someone from New Orleans talk like? She said I can't explain it to you, but you just got to know. She goes and I know, and she said, you know, I have friends out there, I deal with people from there. She said it was the verbiage that he used and pronunciation of his words that made me believe that he is from New Orleans. She goes I'm pretty certain of it. Well, the other -- actual, unto my knowing at that time, the other bank teller told the same thing to Sgt. Edwards relative to -- that she believed that the perpetrator, one of them, at least one, but she believed both, were from the New Orleans area. So, during this -- during this actual investigation, just to let you know, that Friday after I received a name from the actual match, I did some research, you know, obviously, to see who Mr. BJ McElveen was, because I never was familiar with his name. I learned during that investigation that he was, in fact, from the New Orleans area, so I was like wow, because being mindful when they

first said that, I didn't have a lot of weight on that, to be honest with you, just because I never had somebody say hey, he's from New Orleans area based on his accent, because I never really can tell a distinctive accent, unless someone has that -- it's not an accent that I'm thinking. It was the verbiage that he used, so you know, other than that northern accent, these guys didn't have that, to my opinion. I wouldn't be able to distinctively know, but she knew that, if that makes any sense on what I'm trying to elaborate on.

Q. Well, if you could elaborate what in your course led you to find or believe that Mr. McElveen was from the New Orleans area?

A. Sir?

Q. What did you -- you said you looked and you saw some things that led you to believe he was from the New Orleans area. What were those things in your investigation?

A. Well, he had identification and whatnot, everything led back to where he was from New Orleans, basically. That's what I read. And reports and stuff of that nature, I saw that he was from the New Orleans area, yes. That's where he claimed to be from.

Q. Det. Edwards [sic], we talked about leads that you followed, excluding people or going towards -- the DNA results from the Crime Lab, sent in the backpack, the video showing someone's hand, and the New Orleans connection. Were there any other steps that you took, or really is this breaking the case, the DNA hit?

A. This pretty much breaks it down from what we had. I know we had another -- after the actual DNA reference swab was taken from Mr. McElveen, everything was ran again and it did confirm that he was, in fact, the recipient or the person whose DNA was, in fact, on the backpack, but you have

to talk to the experts pertaining to that a little more.

Q. Okay. Well, thank you very much, and I will tender for redirect. Please answer any questions defense counsel has for you.

A. Yes, sir.

MR. TUCKER SR.:

Very good.

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

BY MR. TUCKER SR.:

Q. Good morning.

A. Good morning, sir.

Q. All right. Let's do a little talking here.

THE COURT:

Mr. Theriot, could you pull this back --

MR. THERIOT:

Yeah.

THE COURT:

-- so that counsel can see Lieutenant?

MR. TUCKER SR.:

Thank you.

BY MR. TUCKER SR.:

Q. Can you see me now?

A. Yes, sir, I can see you fine.

Q. All right. Now, relative to this backpack, you did not collect the backpack from the scene; is that correct?

A. That is correct. I did not collect it.

Q. All right. And who collected it?

A. The Crime Scene technician that went out there. I think it was Jason Fitzpatrick.

Q. Okay. And you just testified that it was four days before you got the documents or material from Dy. Fitzpatrick; is that correct?

A. No, sir.
Q. Well --
A. Might have been a misunderstanding on your part.
Q. On my part? What did you testify about four days?
A. The DNA was actually submitted the next day. It was sent to the Crime Lab the following day, okay? What I testified to for that Friday, that was when I got the results from the Crime Lab, that particular Friday.
Q. So, that was four days from the collection?
A. That was four days from the day of the robbery, yes. So, that was -- the robbery happened on a Monday.
Q. When did they collect the backpack?
A. Monday.
Q. And when --
A. That was the day of the robbery.
Q. And so, four days lapsed before what happened?
A. I'm sorry?
Q. You said it happened on a Friday.
A. No. It did not happen on a Friday. The identification was told to me on a Friday.
Q. Okay.
A. That's when the Crime Lab actually made contact with us to let me know they had a positive identification.
Q. How long did the Crime Lab have the material?
A. They had it since Tuesday.
Q. Okay.
A. Which was the day after the robbery.
Q. Okay. And you got it on a --
A. Sir?
Q. And what day did you get it?
A. I got notice --
Q. No. Did you ever get it back in your physical

possession?

A. Did I ever get what exactly back in my physical possession?

Q. The material that you sent to the State Crime Lab?

A. No, sir. There is a DNA consumption form, okay?

Q. Yes.

A. So, when they use that, that means they're taking that DNA out of that, and it's going to be entered into the system. There's nothing -- there's nothing to give me back.

Q. All right.

A. Now, in this particular case, I submitted the entire backpack. And what I mean by submitted --

Q. I read it.

A. -- I did the form.

Q. I read it.

A. Okay.

Q. Now, let's talk about the call to Chimes. The call to Chimes was done through a CrimeStoppers situation; is that correct?

A. Yes.

Q. Okay. And you just testified that you thought that maybe the people at Chimes were playing a prank on this -- in this case -- or on that individual?

A. I believe that that was a possibility, yes.

Q. And he had a backpack?

A. He did.

Q. Just like the one that's in this case?

A. He did not.

Q. Okay. It was a little different?

A. It was definitely different. Yes, sir.

Q. But, it was a camouflage backpack?

A. It was not camouflage, actually. It was multicolored.

It was black with colors on it, but it was not camouflage. It definitely did not fit the description of the backpack seen in the video.

Q. Now, the people at the Chimes, when they called over to you, did they say he had a camouflage backpack?

A. They did.

Q. Okay. Did you receive any other tips relative to this identification of this individual?

A. Yes, sir. The second tip was another crime scene tip -- or CrimeStoppers tip that I received. It was actually pertaining to Baylon Trim. They were identifying him. They gave me very specific facts of this particular case when identifying Baylon Trim as their perpetrator that they seen as the person kneeling in that video. And they told me the other person, they only knew him as BJ. That's pretty much where that was pretty much completed. I didn't -- I'm not going to elaborate any further relative to that one. That's the main information that we received. They gave me all the information on Baylon Trim, who is not in court today. They told me his whereabouts --

Q. All right.

A. -- and we went and got him that day.

Q. All right. They gave you Baylon Trim.

A. That's correct.

Q. Did any other tips come in, other than CrimeStoppers, relative to this case?

A. No, sir. Other than the DNA, no, sir. Not that I recall, no.

Q. So, is it fair to say that in your CrimeStoppers calls, the one that talked about the guy at Chimes and the one that you relay to a backpack, would you say that those two calls are inconsistent with each other? One was valid, one may or

may not be?

A. That is correct. I guess you would say that, that one was pretty valid, and one definitely was not valid.

Q. May or may not be.

A. Right. And that's normal. We have that a lot.

Q. Okay. So, as it goes, as confidential informants go, in all of your experience, isn't it -- is it the credibility of an informant to be judged by its track record and its ability to have given good information in the past? That's a yes or no question.

A. I'm not really understanding the question, to be honest with you.

Q. Question is: As a general rule, a confidential informant, in order to be credible, must have demonstrated a history or propensity for giving good tips, accurate tips, clear tips.

A. If you are referring to a particular person, yes.

Q. Yes. That is the general rule to give credibility to an informant, right?

A. Yes. I'm --

Q. And in this particular case, we have a CrimeStoppers informant and another CrimeStoppers informant, and is it fair to say that from your testimony just now, the two were inconsistent with each other? One, maybe; the other one, maybe; but one, particularly, was inaccurate?

A. One particularly was definitely inaccurate.

Q. Thank you. So, the gentleman at the Chimes, you never took any fingerprints or DNA from him?

A. I did not.

Q. You didn't -- you didn't swab his backpack or his mouth or anything like that?

A. I did not. And may I add something to that?

Q. No. Thank you. Now, you've seen photographs of where these materials, the shirt and all these other materials, were recovered from by the other members of the investigative team.

A. Yes, sir.

Q. And you heard it described as the cut or alleyway or a high-traffic area; is that correct?

A. I don't recall how they described it, but it's an area that was from the bank that went across a field and it's located behind Southpark, behind several residences on Southpark Drive.

Q. Have you seen photographs of it?

A. I saw photographs of certain evidence that was collected, but not the actual -- what you're referring to as a cut, I never saw photographs of the cut, no, sir. I saw the field, the photographs from the field area.

Q. So, do you know whether or not a number of people travel through there as a shortcut?

A. I have -- I have no idea, sir.

Q. You have no idea. And you've seen the photographs?

A. I did see photographs that were taken the day of the robbery.

Q. Just offhand, do you remember what items you submitted over to the Crime Lab?

A. Backpack, a glove, and several contact swabs. I do not remember exactly where the contact swabs were obtained from, but I know I sent the entire backpack, a red-and-black glove that was found, but like I said, the rest of the stuff, I recall, was contact DNA from other items that was collected.

Q. Okay. Contact DNA.

A. Yes, sir.

Q. That kind of DNA, contact, can you tell me the

difference between -- well, what is your appreciation of contact DNA?

A. Contact DNA, for me, let's say this water bottle that I'm using here, for instance, is something of evidence and I want to get a contact swab from it, I will -- I may remove the -- just depending on where it is, I may swab the outside, I may swab the rim with one particular swab, put that in a box, write where it came from, submit it into Evidence.

Q. Very good. I just rubbed my son's suit.

A. Yes, sir.

Q. Should there be contact DNA on my hands?

A. Sir?

Q. I just touched my son's --

A. There is -- there is possibility that you can transfer your DNA by rubbing --

Q. I could. Now, let me ask --

A. -- by rubbing, yes.

Q. -- you this --

THE COURT:

Mr. Tucker, allow him to finish his answer before we ask the next question, okay?

MR. TUCKER SR.:

Yes, sir. He had answered sufficiently for me, though.

THE COURT:

Well, if he's still talking, that means he's still answering. Wait for him to end, and then you can ask your next question.

MR. TUCKER SR.:

Yes, sir.

BY MR. TUCKER SR.:

A. I had just -- I had finished, as you -- I'm sorry. I apologize.

Q. All right.

A. When you asked that particular question, I stated that there is a possibility that, yes, your DNA can be actually on his back.

Q. All right. Now, when you swab -- when you do a brachial swab, you are actually taking cells containing DNA from an individual; is that correct, a secretion or one of those.

A. I take -- usually when we do it, it's two swabs we'll take. We'll put them in the same box, and it's oral saliva samples is what I would call it. That's what we submit.

Q. So, that is a direct --

A. From the actual source, correct.

Q. Right. From the actual source.

A. Yes, sir.

Q. Okay. And you go on and place it into Evidence based on protocol?

A. That is correct.

Q. And if that protocol is followed and not broken, then that is the most accurate collection of DNA available?

A. I'm not following exactly what you're asking, I'm sorry, unless you --

Q. Do you think a brachial swab of an individual, follow all of your protocols, and box it up properly, that would be a pure sample of secretional DNA; is that correct?

A. That is a pure sample of what I call a reference swab.

Q. All right. So, you created a reference swab. So, there's no question where that came from and what it is?

A. Right. I mean, that means I'm looking at someone and I'm getting the actual buccal swab from them.

Q. Right. Contact DNA, you just testified, I may or may not have picked up DNA from touching my son's head.

A. That is correct.

Q. Very good.

A. I'm pretty sure that that would be the proper understanding for you.

MR. TUCKER SR.:

At this time, Your Honor, we'll tender the witness.

LT. FOSTER:

Thank you, sir.

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

BY MR. THERIOT:

Q. Lt. Foster, you're clearly not here as a DNA expert, correct?

A. I'm definitely not a DNA expert.

Q. But, you followed the reports from the lab and DNA experts in regards to your investigation?

A. Yes, sir.

Q. And you sent the entire backpack to the Crime Lab?

A. Right. I sent the entire backpack, because they're the experts in that, and they're going to know exactly where -- what areas that they should actually obtain a buccal swab -- or I mean, I say a buccal swab -- an actual contact swab from, which is key areas that someone would be most, you know, commonly, actually touch -- zippers, the straps, stuff of that nature.

Q. Okay. And we watched the video of the one handed glove touching that portion of the backpack?

A. The non-glove hand, you mean?

Q. Again, one glove on, one glove off.

A. Yes, yes, yes.

Q. Non-glove hand touching that portion?
A. That is correct.
Q. And that was sent the next day?
A. I'm sorry?
Q. That backpack was sent the next day to the Crime Lab?
A. Yeah. All that's -- I had to wait for the Crime Scene technician. Obviously, he had a lot of evidence. I waited for him to complete his stuff, to enter it into Evidence. Once that was done, I used the Evidence computer to see exactly what he entered into Evidence, and I will go ahead and make a list to the Crime Lab. I'll do the actual reports to send to the Crime Lab just saying this item, this item, this item should be sent and actually have them do the analysis on those items. And as they -- as they check items, as we go on and they check items, if we get something, I may send more later. If we don't get anything, I'll keep sending additional evidence as we go.
Q. There was a question from Defense about confidential informant. Is there a difference between a confidential informant and an anonymous CrimeStoppers tip?
A. Yes.
Q. What would that be? Elaborate.
A. Well, a CrimeStoppers -- CrimeStoppers is a system that's built, you know, to get any type of leads from the general public without identifying them. An actual -- someone that I would use as a confidential informant is someone that has given me good information, personally, has reached out to me, saying Lt. Foster, I'm such-and-such, we have this, this guy did this, this, and this, and I vetted that, and that guy must have did this, this, and this. Let me arrest him. That's someone who gave me really good information. This particular CrimeStoppers tip --

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Q. Well, let me stop you there.
A. Sorry.
Q. So, in this case, was this a confidential informant, or was this an anonymous CrimeStoppers tip?
A. That's correct.
Q. So -- one or the other? I'm sorry.
A. I'm sorry. Say again.
Q. Was this a confidential informant or an anonymous CrimeStoppers tip?
A. This was an anonymous CrimeStoppers tip.
Q. So, people that just -- general public that you're not familiar with in the past?
A. That is correct.
Q. Defense asked about -- I know we touched on -- but the gentleman at the Chimes with the backpack, and you say you were able to determine that it was not the correct backpack.
A. Yes, sir.
Q. What led you to make that conclusion?
A. Well, because we had the correct backpack already. No one knew that, but we actually already had it in custody. They just obviously saw this video clip, not knowing that we had already recovered property, because we didn't release that. So, we already actually had the backpack that we believed was used in the commission of this robbery that had the money, had a firearm that we seen clearly on that video in the backpack, so we were pretty certain we had the right backpack when we recovered it.
Q. Were there things inside this backpack you had the -- to believe it was the right backpack?
A. One hundred percent.
Q. What was in that backpack?
A. The -- we had numerous bills and the wrappers from the

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bank, as well as a Glock .40-caliber pistol right on top of the money.

Q. And were you able, in the course of your investigation, to determine the amount of money taken?

A. Sir?

Q. Were you able to determine the exact amount of money taken from Capital One?

A. Yes, sir.

Q. What was that?

A. The bank employees, when they originally gave me the rough estimate, they said $120,000. After we actually -- after they did their complete check everything, I think it was $123,600 -- going by memory, I think it was $123,600.

Q. And we've shown pictures of that. Was that all able to be returned to Capital One?

A. All but $1400 -- just over $1400 was unaccounted for.

Q. Again, that's from -- other officers inside the backpack?

A. That is correct. Be mindful, I mean, there was money that was dropped. There was a bank across the street from the Capital One on Coursey, the UCB Bank -- I'm going by memory there. I think that's the correct name for it. There was money dropped in that parking lot, as well as other areas. We found a -- the little liner bag that was used, obviously, in the video with money in it at another location, as well as the backpack that you see in the video, we found that, as well, underneath a truck bed cover, I believe it was, and it was also with the rest of the money and the firearm.

Q. And going back towards -- your investigation, is Mr. Trim, you had an idea, but there was just not enough to --

A. Just not enough evidence to actually -- to get any further results, let's put it like that.

Q. In the course of your investigation, are you going off of just what some people may be telling you, or are you trying to follow the breadcrumbs, follow the evidence?

A. We're just trying to follow the evidence.

Q. And in this case, did the evidence point to Mr. McElveen?

A. All the evidence that we collected pointed to Mr. McElveen.

Q. Is it fair to say the DNA break in this case, was the break towards the identification?

A. That was the -- what helped us prolong this investigation, yes.

MR. THERIOT:

Thank you very much, Detective. No further questions at this time. I still have -- well, he's the case agent, Your Honor, but I still have his number if the Defense wishes to call him back to the stand.

THE COURT:

All right. Thanks, Lieutenant. Appreciate it.

LT. FOSTER:

That's it? Thank you, sir.

MR. TUCKER SR.:

Yes, thank you, Your Honor. Would we still have him available for my -- all right. Thank you.

THE COURT:

Mr. Shawhan, would you raise your right hand, sir?