**Cause No. 01-24-00624-CR**

**IN THE COURT OF APPEALS**
**FOR THE FIRST DISTRICT OF TEXAS**



**JARELL BARROW**
*Appellant*

**v.**

**THE STATE OF TEXAS**
*Appellee*

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On Appeal from Cause No. 1721922
From the 351st District Court of Harris County, Texas

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# APPELLANT'S BRIEF

**Oral Argument Requested**

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## IDENTITY OF PARTIES AND ATTORNEYS

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|---|---|
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## STATEMENT OF THE CASE

On May 6, 2021, Jarell Barrow was charged with the murder of Emmanuel Browne (1 C.R. at 12). On July 27, 2021, Jarell Barrow was formally indicted. (1 C.R. at 20). Jarell Barrow's jury trial in the 351st District Court of Harris County, Texas began on August 8, 2024 and concluded on August 15, 2024. (2 C.R. at 513-515). Jarell Barrow was convicted of capital murder and was sentenced to life in prison without the possibility of parole. (2 C.R. at 468). On August 15, 2024, Jarell Barrow filed timely notice of appeal. (2 C.R. at 474).

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested in this case. Ground two of this appeal involves scientific issues involving the as-applied reliability of DNA evidence and involves a 702 hearing in an incomplete posture. Oral argument would allow discussion of the relevant technical issues related to the reliability of this evidence.

## ISSUES PRESENTED

I. **Issue One:** There is insufficient evidence that Jarell Barrow was either attempting or committing the offense of robbery when Emmanuel Browne was shot

II. **Issue Two:** In light of the specific concerns raised by the defense's DNA expert, the trial court erred by admitting DNA evidence without

requiring the State to establish the as-applied reliability of its DNA in this case

III. **Issue Three:** The trial court erred by failing to grant a mistrial after Detective Tyler speculated "[i]f you shoot someone at close range, two times, you're intending to kill him," unduly intending to influence the jury

## SUMMARY OF THE ARGUMENT

**Issue One: There is insufficient evidence that Jarell Barrow was either attempting or committing the offense of robbery when Emmanuel Browne was shot**

The State relied almost exclusively on surveillance footage to establish the events of Emmanuel Browne's shooting. However, the surveillance video does not establish whether Jarell Barrow and/or James Duplechain were either committing or attempting to commit a robbery when Emmanuel Browne was shot. Absent proof of the commission or attempt to commit a robbery in this case, there is insufficient evidence to prove that Jarell Brown committed the offense of capital murder.

**Issue Two: In light of the specific concerns raised by the defense's DNA expert, the trial court erred by admitting DNA evidence without requiring the State to establish the as-applied reliability of its DNA in this case**

The trial Court ended the Rule 702 hearing in this case and admitted the State's DNA evidence before the State had an opportunity to address specific

concerns raised by the defense's DNA expert. During the Rule 702 hearing, trial counsel offered evidence, through Dr. Salih, that there was uncertainty in the number of contributor calculations, the use of a default drop-in rate that was not experimentally verified, the laboratory's insufficiently documented decision not to use validly-generated data in this case, the lack of documentation indicating that the laboratory validated its methodology on evidentiary samples with high degrees of allele sharing, and the failure to document software manufacture ESR's involvement in forensic analyses. Without hearing evidence to rebut these issues, despite Dr. Salih's testimony that these deficiencies affected the validity of the results in this case, the trial Court admitted the DNA evidence. This truncated proceeding resulted in a misapplication of Rule 702, as the State was relieved of its burden of proof in demonstrating that the DNA analysis performed in this case was reliable as-applied.

**Issue Three: The trial court erred by failing to grant a mistrial after Detective Tyler speculated "[i]f you shoot someone at close range, two times, you're intending to kill him," unduly intending to influence the jury**

After Detective Tyler testified that "[i]f you shoot someone at close range, two times, you're intending to kill him", trial counsel objected, requested an instruction to disregard, and requested a mistrial. In light of

Detective Tyler's speculation, consistently painting Jarell Barrow in the worst possible light, Detective Tyler's statement seems an intentional attempt to improperly persuade the jury to convict. The curative instruction issued by the trial Court could not "unring the bell" of Detective Tyler's testimony, and a new trial should have been granted.

## STATEMENT OF FACTS

Emmanuel Browne ran a mobile phone repair service. (4 R.R. at 26). On April 29, 2021, Emmanuel Browne drove his car and equipment to the Yellowstone Apartment complex and parked in the parking lot. (4 R.R. at 24, Exhibit 114). James Duplechain, and moments later, Jarell Barrow, approached Emmanuel Browne. (Exhibit 114). Both James Duplechain and Jarell Barrow handed Emmanuel Browne a cell phone. (Exhibit 114). Emmaneul Browne handed a cell phone back to Jarell Barrow then started working on James Duplechain's phone. (Exhibit 114). Jarell Barrow and James Duplechain left, returning a after some time elapsed (Exhibit 114). Repairs seemingly completed; Emmanuel Browne returned James Duplechain's phone. (Exhibit 114).

Jarell Barrow and Emmanuel Browne passed Jarell Barrow's phone back and forth in what appears to be an attempt to negotiate agreement on repairs to the phone. (Exhibit 114). After this back-and-forth continued for some

time, Jarell Barrow pulled what appeared to be a firearm out of his pants. (Exhibit 114). Jarell Barrow appeared to threaten Emmanuel Browne with the firearm and Emmanuel Browne raised his hands. (Exhibit 114). Jarell Barrow opened the driver's side door, all the while continuing to direct attention inside Emmanuel Browne's car. (Exhibit 114). James Duplechain pushed Jarell Barrow back, in a possible effort to deescalate the situation. (Exhibit 114). At this point, Jarell Barrow moved to the driver's side rear door and grabbed the handle. (Exhibit 114). Emmaneul Browne quickly grasped at the driver's door, and Jarell Barrow points the gun at Emmanuel Browne. (Exhibit 114). Jarell Barrow pushed the front driver side door open wide and picked up what later appeared to be the same cell phone handed to Emmanuel Browne by Jarell Barrow from inside the car. (Exhibit 114); (8 R.R. at 41-42). By the time Jarell Barrow left the car, Emmanuel Browne slumped over the steering wheel. (Exhibit 114). Jarell Barrow and James Duplechain fled the scene. (Exhibit 114). Soon after the event, a bystander called 911. (Exhibit 120). Emmanuel Browne was found dead, having been fatally wounded by two bullets. (Exhibit 165).

## I. There is insufficient evidence that Jarell Barrow was either attempting or committing the offense of robbery when Emmanuel Browne was shot

### A. Standard of review

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

*Jackson v. Virginia*, 443 U.S. 307 (1979).

### B. A claim that the evidence is legally insufficient may be raised for the first time on appeal

Regardless of whether the issue of sufficiency of the evidence is raised in the trial court, "[a] claim regarding the sufficiency of the evidence need not be preserved for review at the trial level and is not waived by the failure to do so." *Rankin v. State*, 46 S.W.3d 899, 901 (Tex. Crim. App. 2001).

### C. Standing alone, the ambiguous surveillance video and DNA evidence does not establish that Jarell Barrow attempted to rob Emmanuel Browne

#### 1. Any inference made by the jury must be factually supported in order to support a conviction

Courts are generally required to defer to factfinders, and permit the factfinders the discretion to "draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) *citing*

*Jackson v. Virginia*, 443 U.S. 307 (1979). However, there are limits to the inferences the factfinder may draw from the evidence. "[J]urors may not base their decision on mere speculation or unsupported inferences." *Edward v. State*, 635 S.W.3d 649, 655 (Tex. Crim. App. 2021). Ultimately, there must be factual support for any inference or presumption the juror may reach. *Hooper*, 214 S.W.3d at 15-16.

**2. The State did not put on any direct evidence of Jarell Barrow's attempt to rob Emmanuel Browne**

The trial record established that the State pursued a wide range of investigatory leads and theories, however the State offered no proof to substantiate its theory of the case:

1) The State had a statement from Jarell Barrow and could have admitted that statement at trial.[1] (7 R.R. at 121). TEX. RULE EVID 801(e)(2)(A). However, the State did not offer this evidence at trial.
2) The State had access to James Duplechain and could have compelled his testimony. TEX. RULE EVID 801(e)(2)(E); *Ex parte Shorthouse*, 640 S.W.2d

[1] The State sought to exclude evidence of the Jarell Barrow's statement at trial. (7 R.R. at 121-136). During jury argument, the State made a potentially misleading claim that it had been prevented from offering evidence of the statement by the "rules of the Court." (8 R.R. at 111).

924, 928 (Tex. Crim. App. 1982). There is no record that the State sought to offer James Duplechain's testimony.

3) The State had access to Emmanuel Browne's cell phone and could have admitted evidence on the phone through a qualified expert. (State's Exhibit 108). TEX. R. EVID. 702, 705. Had the State expected any relevant digital forensic evidence from James Duplechain or Jarell Barrow, it could have issued search warrants and subpoenas to obtain that information.

4) If the State believed that there were relevant Cash App or Venmo records and phone application logs that showed unusual transactions or app usage, the State would have subpoenaed that information. (8 R.R. at 117); *Use Screen Time on your iPhone or iPad*, APPLE (Sept. 16, 2024) *available at* https://support.apple.com/en-us/108806.

5) Evidence that Jarell Barrow had committed other similar robberies according to a common plan would have been admissible at trial. TEX. R. EVID. 404(b). The State offered no Rule 404(b) evidence at trial.

6) Evidence that Jarell Barrow had stolen property belonging to Emmanuel Browne would have been admissible at trial. TEX. R. EVID. 401.There was no evidence offered that the State issued any search warrant or made

any other attempt to link Jarell Barrow to Emmanuel Browne's property.

The State was unable to develop any evidence which directly established that Jarell Barrow ever formed the intent to commit a robbery.

### 3. The DNA evidence is insufficient to establish that Jarell Barrow committed or attempted to commit robbery

In addition to the surveillance video, the State claimed that DNA evidence was proof that Jarell Barrow was attempting or committing a robbery:

> Not only is the defendant's DNA on the complainant's phone, the codefendant's DNA is on his phone as well. I don't know how it got there, but I know it's there. Both of them. What I think is likely is that they were trying to get Emmanuel to send him his virtual money from Cash App or Zelle.

(8 R.R. at 117). However, by the prosecutor's own admission, this claim was pure speculation unsupported by the evidence offered at trial. To the contrary - the testimony provided by DNA analysts Torres-Perez and Georges with the Houston Forensic Science Center did not lend support to any specific theory of transfer. This likely did not come as a surprise to any of the parties – mobile phones are a vector of all sorts of biological material, both from an individual

and others,[2] and DNA analysis cannot yet address questions regarding competing theories of transfer. *See e.g. Final Report on Complaint No. 23.67; Tiffany Roy; (Timothy Kalafut, Ph.D.; Evaluation Of Biological/DNA Results Given Activity Level Propositions)*, TEX. FORENSIC SCIENCE COMM'N (2024) *available at* *https://fsc.txcourts.gov/ComplaintPublic/PreviewStatusAttachment?id=1424*.

DNA analyst Torres-Perez, acknowledged that the sort of repeated interaction between James Duplechain, Jarell Barrow, and Emmanuel Browne shown in the surveillance video could or would lead to DNA transfer. (7 R.R. at 83). DNA Analyst Torres-Perez further acknowledged that indirect DNA transfer could occur if Emmanuel Browne touched the phone recovered from the scene. (7 R.R. at 84). The prosecutor made no attempt to re-direct DNA Analyst Torres-Perez after this testimony.

DNA analyst Georges testified consistently with DNA Analyst Torres-Perez. DNA analyst Georges testified that DNA transfer could transfer between Jarell Barrow and a cell phone, between the cell phone and Emmanuel Browne, and then Emmanuel Browne to the phone recovered from

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[2] See R. Simmonds, D. Lee, & E. Hayhurst, *Mobile phones as fomites for potential pathogens in hospitals: microbiome analysis reveals hidden contaminants*, 104 J. HOSPITAL INFECTION 207, 208 (2020)

the scene. (7 R.R. 103-105). Once again ceding this point, the prosecutor made no attempt to re-direct DNA analyst Georges after this testimony. In combination, the testimony of DNA analysts Torres-Perez and Georges provided no support for the prosecutor's speculative claim that Jarell Barrow's DNA or James Duplechain's DNA got on the phone during an attempt to extort money from Emmanuel Browne.

**4. The surveillance video does not "speak for itself"**

The central factual issue in dispute at trial was whether the surveillance video documented a robbery that turned into a shooting or, alternatively, whether a dispute between Jarell Barrow and Emmanuel Browne devolved into a shooting. (8 R.R. at 103, 116-117). Without offering evidence of Cash App or Zelle transactions, the State claimed that Jarell Barrow was trying to force Emmanuel Browne to pay him. (8 R.R. at 117). Though Barrow and James Duplechain ran off in different directions, though there was no evidence that the driver of the white car even interacted with James Duplechain, and though there was no evidence documenting a plan or linking some other party to the shooting, the State claimed that the white car was a getaway car.[3] (8 R.R .at

[3] *See* State's Exhibit 114

117). Without providing evidence that Jarell Barrow or James Duplechain took Emmanuel Browne's belongings or rummaged through Emmanuel Browne's car for valuables, the State claimed that Barrow and Duplechain "saw stuff in [Emmanuel Brown's] car and were trying to get what was in there." (8 R.R. at 115). Time after time, the prosecution proposed theories unsupported by any factual basis to persuade the jury that Jarell Barrow was attempting or committing a robbery.

As the State's evidence fails to lay out a factual basis to support the conclusion that there was a robbery in progress, the State's interpretation of the video evidence amounts to speculation. Evidence is legally insufficient when it relies upon guesswork and unsupported inferences:

> In examining the evidence, factfinders are not permitted to make conclusions based on unsupported inferences or to guess at the possible meaning of a piece of evidence. While such a guess may be a reasonable one, it is not sufficient to support a finding of an element beyond a reasonable doubt because it is not based on facts.

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192.168.1.142_ch5_20210429110508_20210429111742.mp4 at 6:25 (depicting the person claimed to be Jarell Barrow running towards a hole in the fence),
192.168.1.142_ch1_20210429110459_20210429111709.mp4 at 6:27 (depicting the person claimed to be James Duplechain jumping the fence and the white car driving down Alice street).

*Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015) (citation omitted). Without any factual basis to support the State's theory of robbery, the record is insufficient to prove the robbery element pled in the indictment and is insufficient to prove capital murder. The evidence at trial does not clearly delineate whether it is more likely that Emmanuel Browne was killed in a robbery, a dispute, accidentally, in an act of perceived self-defense, or even as an act of vengeance.

**D. Relief Requested**

Where the State offers insufficient evidence to prove an aggravating factor, but offers sufficient evidence to prove only a lesser-included offense, the Court should reform the judgment to reflect the lesser offense and remand the case for a new punishment hearing. *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012). If this Court concludes that there is insufficient evidence that capital murder occurred in this case and another error occurred during Jarell Barrow's trial, this Court should remand for a new trial for the lesser-included offense of murder, as double jeopardy bars retrial for capital murder. *Ex parte Duran*, 581 S.W.2d 683, 685 (Tex. Crim. App. 1979). Alternatively, should this Court conclude that only this point of error

should be sustained, the Court should remand the trial for a new punishment hearing for the lesser-included offense of murder. *Bowen*, 374 S.W.3d at 432

## II. In light of the specific concerns raised by the defense's DNA expert, the trial court erred by admitting DNA evidence without requiring the State to establish the as-applied reliability of its DNA in this case

### A. Standard of Review

An appellate court reviews a claim that expert evidence was improperly admitted for abuse of discretion:

> We come finally to the question of whether the trial court abused its discretion in admitting the DNA evidence in the instant case. That is, we must determine whether the trial court's decision was "within the zone of reasonable disagreement" given the evidence presented at the suppression hearing and given the requirements of Rule 702.

*Kelly v. State*, 824 S.W.2d 568, 574 (Tex. Crim. App. 1992).

> In general, a trial court abuses its discretion under two sets of circumstances. First, a trial court abuses its discretion when it makes a decision that is arbitrary, unreasonable, or without reference to guiding rules or principles. Second, because a trial court has no discretion to misinterpret or misapply the law, the trial court also abuses its discretion when it does not analyze the law correctly or apply the correct law to the facts.

*Rivera v. State*, 639 S.W.3d 280, 286 (Tex. App.—Houston [1st Dist.] 2021, pet. ref'd) (citations omitted).

### B. Counsel Preserved Error

Counsel contested the admissibility of the DNA evidence in the case. (1 C.R. at 424). After initiating a formal hearing on whether the "DNA in this case is admissible under Rule 705, 702, and the case law," the trial court overruled trial counsel's objection to the admission of the State's DNA evidence. (5 RR 1-130; 6 R.R. at 9).

### C. The State's DNA evidence was admitted before the State offered evidence that refuted the specific concerns raised by expert witness Dr. Salih

#### 1. Dr. Salih raised specific concerns regarding the DNA evidence in the case

During the hearing on the admissibility of the State's DNA evidence in this case, trial counsel offered the testimony of Dr. Salih, a Ph.D in Microbiology, Industrial Microbiology, and Molecular Biology and the forensic technical leader and laboratory director of the DNA Reference Lab. (5 R.R. at 78). Dr. Salih raised several different concerns regarding the analysis and methodology used by the Houston Forensic Science Center in this case, and explained how those concerns may impact the reliability of the analysis in this case.

##### a. Number of contributors

Testifying that "determining the number of contributors is a big issue," Dr. Salih testified that the decision to report the number of contributors on

the swab from the exterior rear driver side door (item 6.3.1) as two contributors was incorrect, as the State failed to account for the possibility that any of the seven alleles observed in the electropherogram could indicate the presence of up to four contributors. (5 R.R. at 99-100); (Exhibit 164), (Defendant's Exhibit 2, 11 R.R. at 185-187).

**b. Failure to document ESR's involvement in casework**

Dr. Salih noted that the interpretation of the DNA evidence relied heavily on a computer program (STRMix) and that the company that developed the computer program (ESR) can and does become formally involved in casework. (5 R.R. at 102-103). Dr Salih observed that there was no documentation that reflected whether and/or how ESR employees were involved in any particular case or laboratory process. (5 R.R. at 103). Dr. Salih testified that procedures documenting and listing ESR employees who are involved in casework should have been included in the laboratory's standard operating procedures. (5 R.R. at 103).

**c. Unexplained decisions to ignore amplified data and submit samples for reamplification**

Reviewing Houston Forensic Science Center's standard operating procedures, Dr. Salih testified that:

> when you cross out electropherogram or evidence, No. 1, you have to initial it, date it, and tell the reason why you are crossing it

> out. Is it something that is not useful data that you do not want to use or people to use or what is the reason for crossing it out[?]

(5 R.R. at 103). Dr. Salih noted that electropherograms for the interior rear driver side door (item 6.1.1) and stain from the cell phone (item 9.1.1) had been crossed out. (5 R.R. at 103); (Exhibit 164). Dr. Salih testified that there was inadequate documentation explaining why the laboratory had disregarded the data and reamplified the sample. (5 R.R. at 103); (Defendant's Exhibit 2, 11 R.R. at 191-192).

**d. Lack of experimentally verified drop-out rate**

DNA analysts for both the prosecution and defense testified that a phenomenon called drop-out[4] can occur when there is a low amount of DNA or degraded DNA is present in a sample. (5 R.R. at 28, 85). Dr. Salih testified that validating and quantifying the frequency of drop-out that occurs in a sample is highly important and other laboratories establish the frequency of

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[4] Neither the prosecution or defense explained what "drop-out" means. Drop-out is a random phenomenon associated with low amounts of DNA, degraded DNA, and mutations in DNA sequences that impact DNA typing. When drop-out occurs, one or more alleles belonging to a DNA source are not present in the electropherogram or are below reporting thresholds. Allele Dropout, *STR Data Analysis and Interpretation for Forensic Analysts*, NATIONAL INSTITUTE OF JUSTICE (2023) *available at* https://nij.ojp.gov/nij-hosted-online-training-courses/str-data-analysis-and-interpretation-forensic-analysts/data-troubleshooting/allele-dropout

dropout experimentally. (5 R.R. at 105). According to Dr. Salih, the Houston Forensic Science Center does not – the laboratory simply uses the default drop-out rate furnished by the software without experimental validation. (5 R.R. at 105). Dr. Salih explained that failure to measure the drop-out rate is a serious problem, as missing allelic information can drastically affect decisions onwhether to include or exclude a person as a potential contributor to a DNA profile. (5 R.R. at 105, 107).

**e. Lack of documentation reflecting that validation was performed on samples containing a high degree of allele sharing**

Dr. Salih noted that there was a high degree of allele-sharing in this case, and noted that allele sharing can impact the strength of association (likelihood ratio) reported by STRmix. (5 R.R. at 107-108, 113-114). Dr. Salih highlighted that allele sharing was an important, fundamental problem inherent to DNA profile interpretation and impacts the reliability of STRmix. (5 R.R. at 90, 108-109). When reviewing the validation studies performed by the Houston Forensic Science Center, Dr. Salih concluded that the validation study simply ignored the problem of allele sharing in this case. (5 R.R. at 108).

**2. Dr. Salih's concerns were valid and recognized by the scientific community**

According to multiple scientific articles published by members of ESR involved in the development of STRMix, calculations of the number of

contributors impact STRmix's ability to accurately resolve minor and trace contributors:

> Bright et al. reported that when assigning an LR using the probabilistic genotyping software STRmix™, an incorrectly assigned NoC does not affect the weight of evidence assigned to a clear major contributor, however when over-assigned it may decrease the LR assigned to known minor and trace contributors to the mixture as well as increase the LR for non-donors.

Catherine McGovern et al., *Performance of a method for weighting a range in the number of contributors in probabilistic genotyping*, 48 FORENSIC SCIENCE INT'L: GENETICS 102352 (2020).[5] STRmix's formal acknowledgment of the limitations of its software should carry great weight in showing that number of contributor calculations are an important part of DNA analysis.

Formal FBI minimal quality assurance standards that apply to all forensic DNA laboratories indicate that Dr. Salih's concerns are serious considerations which must be addressed by a DNA laboratory. These standards require laboratories to "maintain all analytical documentation generated by technicians and/or analysts related to case analyses." 11.1,

[5] Citing JoAnne Bright et al., *Searching mixed DNA profiles directly against profile databases*, 9 FORENSIC SCI. INT'L. GENETICS 102 (2014), JoAnne Bright et al., *The effect of the uncertainty in the number of contributors to mixed DNA profiles on profile interpretation*, 12 FORENSIC SCI. INT'L. GENETICS 208 (2014).

*Quality Assurance Standards for Forensic DNA Testing Laboratories*, F.B.I. (2020). In addition, these standards require laboratories to perform a wide variety of validation studies to "reliability and potential limitations of the method[s]" utilized by the laboratory. 8.3, *Quality Assurance Standards for Forensic DNA Testing Laboratories*, F.B.I. (2020).

Finally, industry-wide standards indicate that Dr. Salih's concerns must be addressed. Standards developed by the Human Forensic Biology Subcommittees of the Organization of Scientific Area Committees and finalized by the American Academy of Forensic Sciences – Academy Standards Board require laboratories to validate the effects of artifacts like drop-out during internal validation of systems like STRmix:

> Internal validation studies shall include evaluating user input parameters that vary run to run. The effects of artifacts (e.g., stutter) and parameters that relate to the statistical algorithm (e.g., run time parameters for the software system that can vary from system to system) shall also be evaluated

4.1.4, *Standard 018 1st Ed.: Standard for Validation of Probabilistic Genotyping Systems*, ANSI/ASB (2020). These industry standards also require DNA laboratories to perform internal validation using case-type samples, including samples exhibiting drop-out and allele-sharing. *Id.* at 3.2, 4.1.3.

Internal validation (called "validity as applied" by the PCAST report), is a requisite element for establishing that a forensic methodology that is reliable in principle is reliably applied in practice. *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, EXECUTIVE OFFICE OF THE PRESIDENT PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY 56 (2016). A demonstration that a methodology is valid as applied is fundamental to satisfying the requirements of *Kelly*. *See Id.* at 5. ("Validity as applied means that the method has been reliably applied in practice. It is the scientific concept we mean to correspond to the legal requirement, in [Federal] Rule 702(d), that an expert 'has reliably applied the principles and methods to the facts of the case.'").

### 3. The Court admitted the DNA evidence in this case without requiring the State demonstrate that the DNA analysis was reliably performed in this case

Before admitting scientific evidence, at trial, the proponent of the evidence must satisfy three global requirements:

> (a) the underlying scientific theory must be valid;
> (b) the technique applying the theory must be valid; and
> (c) the technique must have been properly applied on the occasion in question.

*Kelly*, 824 S.W.2d at 573. Dr. Salih did not question whether forensic DNA analysis is a product of legitimate, valid scientific theory or whether the

forensic techniques that apply forensic DNA analysis are reliable. The admissibility hearing focused entirely on whether or not the DNA analysis performed in this case was properly applied by the Houston Forensic Science Center analysts in this case.

The record before the trial Court did not squarely address Dr. Salih's claims. Only the *ipse dixit*[6] of DNA analyst Head supported the assertion that "[a] threshold is not needed for dropout because we model dropout as part of validation and is hardcoded into STRmix." (5 R.R. at 27). The State's witnesses broadly claimed that the methodology employed by the laboratory was supported by validation. *See e.g.* (5 R.R. at 21). However, the State offered no specific testimony:

1) directly addressing the reliability of the number of contributors calculation performed in this case,
2) whether or how the Houston Forensic Science Center accounted for allele-sharing in its validation studies,
3) why data was discarded and reamplified in this case,

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[6] "[A] trial judge need not admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Vela v. State*, 209 S.W.3d 128, 136 (Tex. Crim. App. 2006)

4) and what undocumented involvement ESR had in this or other cases.

Although the State planned on presenting additional testimony to support the admission of the DNA evidence in this case, the Court decided to admit the DNA evidence without further testimony. (6 R.R. at 9). No evidence of specific validation tests performed, the parameters evaluated, or explanation of how those specific validation tests demonstrate the reliability of the analytical methods employed was before the Court at the time the Court decided to admit the DNA evidence. 8, *Quality Assurance Standards for Forensic DNA Testing Laboratories*, F.B.I. (2020). Without record-based evidence of the reliability of the DNA analyses performed in this case, in light of the specific, factually-grounded complaints by Dr. Salih, the DNA evidence should have been excluded unless and until the State made a showing that the analyses were performed in a reliable manner. *See State v. Dominguez*, 425 S.W.3d 411, 420-21 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (where there was no expert evidence that the State's dog "scent lineup" evidence was reliable, the trial court properly excluded evidence of the "scent lineup.").

**4. The Court's decision to admit the DNA evidence without any specific evidence addressing Dr. Salih's concerns evinces a retreat from the rule in *Kelly***

Scholars performing analysis in cases employing *Daubert*, Federal Rule 702, and its state equivalents have noted that forensic evidence is applied unevenly.[7] Frequently, the prosecution's forensic evidence is admitted without being held to Rule 702's rigorous standards. A consequence of not rigorously applying Rule 702 in criminal cases may be the persistence of "junk science" in American courtrooms. Jim Hilbert, *The Disappointing History of Science in the Courtroom: Frye, Daubert, And the Ongoing Crisis of "Junk Science" in Criminal Trials*, 71 OKLAHOMA LAW REVIEW 759 (2019).

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[7] Articles exploring and quantifying the differences of the application of rule 702 and *Daubert* in criminal and civil cases and involving forensic evidence offered by the prosecution and defense include:

1. D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99 (2000)
2. Margaret A. Berger, *Expert Testimony in Criminal Cases: Questions Daubert Does Not Answer*, 33 Seton Hall L. Rev. 1125 (2003);
3. Paul C. Giannelli, *The Supreme Court's "Criminal" Daubert Cases*, 33 Seton Hall L. Rev. 1071, 1073 (2003);
4. David L. Faigman, *Admissibility Regimes: The "Opinion Rule" and Other Oddities and Exceptions to Scientific Evidence, the Scientific Revolution, and Common Sense*, 36 Sw. U. L. Rev. 699 (2008);
5. Erica Beecher-Monas, *Reality Bites: The Illusion of Science in Bite-Mark Evidence*, 30 Cardozo L. Rev. 1369, 1370 (2009);
6. Joseph Sanders, *Applying Daubert Inconsistently? Proof of Individual Causation in Toxic Tort and Forensic Cases*, 75 Brook. L. Rev. 1367, 1368 (2010); and
7. Brandon L. Garrett and M. Chris Fabricant, *The Myth of the Reliability Test*, 86 Fordham L. Rev. 1559 (2018)

Rule 702 places the burden of proof on the proponent of the evidence to show that forensic evidence is reliable before that evidence can be offered at trial. *State v. Medrano*, 127 S.W.3d 781, 784 (Tex. Crim. App. 2004). On the record before the Court, there was no basis for the Court to conclude that the DNA evidence utilized was sufficiently reliable. In keeping with the role of the gatekeeper, the Court is required to ensure "unreliable evidence should never make it to the jury." *Vela v. State*, 209 S.W.3d 128, 135-36 (Tex. Crim. App. 2006). Scientific evidence is only suitable to assist the jury when it is sufficiently reliable to help the jury reach accurate results. *Kelly*, 824 S.W.2d at 572. Relieving the State of its burden to demonstrate the reliability of an analytical method as-applied places potentially unreliable and unscrutinized information before the jury, and defeats the intent and purpose of Rule 702. *Id.*

### D. The erroneous admission of the DNA evidence in this case harmed Jarell Barrow

While the DNA evidence in this case was of dubious forensic value due to the possibility of transfer and the inability of DNA evidence to support one theory of the case over another, the State invested heavily in the DNA evidence as direct evidence that Jarell Barrow committed or attempted to commit a robbery. Offering two separate witnesses and three separate

reports, all focusing on DNA and serological evidence, the State spent a significant amount of time at trial discussing the DNA evidence. (7 R.R. at 61-106); (State's Exhibit 160-164). During closing argument, the prosecutor claimed that DNA evidence on Emmanuel Browne's was evidence that Jarell Barrow and James Duplechain were committing or attempting to commit a robbery. (8 R.R. at 117). The only other evidence that the State argued proved that a robbery occurred in this case was the surveillance video, which does not clearly support either the State's theory of the case or trial counsel's theory of the case. See *supra* at § I(C)(4). There were no statements by Jarell Barrow or James Duplechain, digital evidence from the phones involved in the case, any 404(b) evidence of plan and intent, or other evidence that would otherwise support the State's theory that Jarell Barrow was robbing Emmanuel Browne. In a case with only tenuous evidence supported the State's theory of robbery, even weak evidence likely played a crucial role with the jury.

### E. Relief Requested

As the admission of DNA evidence harmed Jarell Barrow's substantial rights, the case should be reversed for a new trial. TEX. R. APP. P. 44.2(b).

## III. The trial court erred by failing to grant a mistrial after Detective Tyler speculated "[i]f you shoot someone at close range, two times, you're intending to kill him," unduly intending to influence the jury

### A. Standard of Review

The proper standard of review for a denial of a motion for mistrial is abuse of discretion. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). The trial court's decision is reversible "when the trial judge's decision was so clearly wrong as to lie outside the zone within which reasonable persons might disagree." *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

**B. Trial counsel preserved error by objecting to Detective Tyler's testimony and by requesting a mistrial**

During Detective Tyler's commentary-laden description of the events occurring in the surveillance video, Detective Tyler opined that Jarell Barrow intended to kill Emmanuel Browne. Trial counsel preserved error by immediately objecting to this testimony, requesting a curative instruction, and requesting a mistrial.

> A. Right now he's standing over him and he's looking at him. He's about to reach -- right there he reaches down to get what I believe is the cell phone, and he's about to shoot Emmanuel. He's already been shot, he's leaned over bleeding, he's about to shoot him again close range. If you shoot someone at close range, two times, you're intending to kill him.
>
> MR. FAZEL: Excuse me, Your Honor. I object to that. That's speculation. That's impeding on the jury's decision-making. I ask that -- first, I object.
>
> THE COURT: Sustained.
>
> MR. FAZEL: Now, I ask that it be stricken from the record and the jury to be instructed to disregard.

> THE COURT: Please disregard the witness's last statement. Only the jury can decide legal questions and what the facts show in this case.
>
> MR. FAZEL: I need to ask for a mistrial.
>
> THE COURT: Understood. Overruled.

(6 R.R at 86).

### C. Detective Tyler's speculative testimony was calculated and capable of influencing the jury, despite the curative instruction provided by the Court

#### i. Detective Tyler's testimony was speculative and calculated to place Jarell Barrow in the worse possible light

Generally, improper testimony by law-enforcement officers is not considered to be so extreme as to withstand any curative instruction from the court. *Prince v. State*, No. 01-13-00269-CR, 2015 Tex. App. LEXIS 8884, at *19-20 (Tex. App.—Houston [1st Dist.] Aug. 25, 2015, no pet.) (mem. op, not designated for publication). A mistrial is a strong remedy and is disfavored by the legal, which presumes that instructions to the jury are efficacious. *Waldo v. State*, 746 S.W.2d 750, 753 (Tex. Crim. App. 1988).

A mistrial must be granted when the objected-to evidence leaves the jury with an indelible impression. Testimony cannot be rendered harmless when:

> the evidence was so clearly calculated to inflame the minds of the jury or is of such damning character as to suggest it would be impossible to remove the harmful impression from the jury's mind.

*Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992). However, a witness's deliberate attempts to inject appropriate information before the jury can serve as evidence that a witness deliberately intended to improperly

inflame the jury. *Walker v. State*, 610 S.W.2d 481, 483 (Tex. Crim. App. 1980), *superseded by statute on other grounds as noted by Barber v. State*, No. 01-90-00633-CR, 1991 Tex. App. LEXIS 1815, at *4-5 (Tex. App.—Houston [1st Dist.] July 18, 1991, no writ) (mem op., not designated for publication).

Detective Tyler's testimony was calculated to incriminate Jarell Barrow, even though Detective Tyler was unable to point to any objective evidence to support his opinions. Detective Tyler's unfounded negative inferences and assumptions about Jarell Barrow included:

- Detective Tyler's speculation that James Duplechain and Jarell Barrow redirected Ms. Holiday from the scene of the shooting. (6 R.R. at 81). Ms. Holiday testified that this never happened. (7 R.R. at 57)
- Detective Tyler's speculation that James Duplechain was carrying a gun and provided the gun to Jarell Barrow. (6 R.R. at 81).
- Detective Tyler's speculation that Jarell Barrow had a pistol to Emmanuel Barrow's head, even when the pistol could not be seen clearly during video playback (6 R.R. at 80).
- Detective Tyler's claim that "you don't see Emmanuel [Browne] arguing with them." (6 R.R. at 82). Detective Tyler later revised this claim, admitting that he did not know what Emmanuel Browne and Jarell Barrow were saying. (6 R.R. at 129).
- Detective Tyler's claim that "there's no indication of self-defense" from Emmanuel Browne. (6 R.R. at 82). Detective Tyler walked back this testimony, acknowledging that Emmanuel Browne's hands were not visible during critical phases of the incident. (6 R.R. at 130).

- Detective Tyler's claim that Jarell Barrow "took something from Emmanuel's car. It looked like a cell phone. I don't know who's [*sic*] cell phone it was." (6 R.R. at 88).
- Detective Tyler claimed that Jarell Barrow were looking around for possible witnesses. (6 R.R. at 91-92). This testimony was walked back during cross examination. (6 R.R. at 125).

**ii. Detective Tyler's improper testimony was likely to influence the jury**

Detective Tyler's speculation that "[if] you shoot someone at close range, two times, you're intending to kill him" was the most important and inflammatory of Detective Tyler's speculative claims. The opinion was not rationally based on Detective Tyler's perception and was not helpful to the jurors' ability understanding any factual issue. *C.f.* TEX. R. EVID. 701; *Ex parte Nailor*, 149 S.W.3d 125, 134 (Tex. Crim. App. 2004) (police officer's opinion that the accused had not been attacked by the complaining witness based on personal observations that accused did not have any cuts, bruises, or injuries.) Detective Tyler's opinion regarding intent was pure speculation and was intended to incriminate Jarell Barrow. As law enforcement officers handling the most serious criminal cases, homicide detectives are held in high regard and interest by the public. Some (or all) jurors might defer to the opinions of seasoned professionals who have much more experience investigating homicide cases than they do. The comment squarely addressed an element of the offense and had the capacity to persuade an impressionable juror, even after an instruction to disregard.

### D. Jarell Barrow was harmed by Detective Tyler's improper testimony, given the lack of any clear evidence showing Jarell Barrow's intent

In the context of this case, where the evidence of Jarell Barrow's intent was almost exclusively limited to the surveillance video in the case, the impact of the improper testimony was amplified. See *supra* at § I(C). Without any statements by Jarell Barrow or James Duplechain, and digital evidence from the phones involved in the case, any 404(b) evidence of plan and intent, or other similar evidence, there was no external evidence that could guide the jury's deliberations. Given the weaknesses of the State's case, the jury was more likely to be sensitive to Detective Tyler's opinion. The lack of any other evidence the jury could use to infer intent made it "impossible to remove the harmful impression from the minds of the jurors." *Kemp*, 846 S.W.2d at 308.

### E. Relief Requested

As Detective Tyler's speculative opinion likely indelibly and improperly influenced the jury, the case should be reversed and a new trial be granted. TEX. R. APP. P. 44.2(b).

## PRAYER

Jarell Barrow prays that this Court acquit him of capital murder and remand him for trial on the lesser included charge of murder. Alternatively,

Jarell Barrow prays this this Court remand him for a new trial on capital murder or a new punishment hearing on murder.

Respectfully Submitted,

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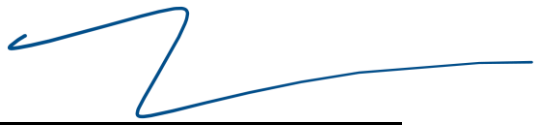
**CERTIFICATE OF SERVICE**

I certify that a copy of the Appellate Brief has been electronically served upon the State of Texas on February 6, 2025.



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