TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

CASE NO.: 16-5524 **DIVISION "H"**

STATE OF LOUISIANA

VERSUS

SHAWN BRISCOE AND LANCE MCINTYRE

FILED: 9/20/2022 Tuminello
DEPUTY CLERK

WRITTEN REASONS FOR JUDGMENT

This matter came before the Court on September 19th, 2022 and September 20th, 2022 for an initial *Daubert* Hearing on the State's introduction of certain Cybergenetics DNA Evidence. Pursuant to the Court's ruling, the Court's reasonings read into the Record on September 20, 2022, are filed into the Record as *Written Reasons for Judgment.*

I. PROCEDURAL HISTORY

Before getting to the merits of the *Daubert* Hearing itself, this Court would first like to address how we got here procedurally. This Court feels compelled to address the procedural history of this case since it was confirmed on the Record on September 19th, 2022 that the facts relayed to the Fifth Circuit in the recent *Writ Application* were not entirely accurate. This Court has reviewed the Minute Entries in the Record and gone through the audio recordings of the Record to ensure that the following procedural facts are accurate.

The victim in this case was allegedly murdered on August 13th, 2016, and the Defendants were indicted by a grand jury on December 1st, 2016. This case was inherited by this Court from the previous Judge in Division H, despite the case first being set for trial on June 15th, 2020. During its first week on the Bench, this Court set "a firm trial date" for September 20th, 2021, almost a year ago. It is unclear from the Record and the Court's own recollection as to why this matter did not proceed to trial on that date. However, after such "firm trial date" did not proceed, the Defendant, Mr. Briscoe filed a *Motion for Bond Reduction* on September 22nd, 2021 and a *Motion to Quash for Failure to Charge Under Prescription Period* on October 29th, 2021. The Defendants later filed a *Motion to Suppress,* and the Court set this matter for trial on May 16th, 2022 after all motions were addressed.

Due to a transition of Assistant District Attorneys in Division H, this matter could not proceed to trial as scheduled on May 16th, 2022. This Court accommodated the State and granted a continuance until August 22nd, 2022.

At some point before August 22nd, 2022, this Court became aware of the District Attorney's Office's decision to again re-shuffle Assistant District Attorneys among Divisions. The Court also became aware that such transfer would begin on the date this matter was set for trial – leaving this case without a prosecutor to try it. After a discussion with the parties and under the impression that a possible plea bargain was in the works, this Court tentatively agreed to set the matter for trial on November 14th, 2022.

On the morning of August 22nd, 2022, as reflected by the Record, it became apparent to the Court and all parties that this case needed to be tried before November 14th, 2022. On that day, Defense Counsel for Mr. Briscoe stated she would object to **ANY** continuance and notified the Court that the prescription period discussed in Mr. Briscoe's *Motion to Quash* could be reraised. Defense Counsel also cited to the numerous continuances requested over the six (6) years this case has been pending. Further, both Defense Counsel requested another *Motion to Reduce Bond*, and stated on the Record that they were re-making such Motion to hopefully prompt the State to finally proceed to trial on this case. Immediately after that Motion was made, the State requested a sooner trial date, and after confirming with all parties' schedules, the Court specially set this trial for September 19th, 2022.

On August 31st, 2022, nine (9) days after that discussion and more than six (6) years after the murder itself, the State notified Defense Counsel that they would be seeking additional testing of DNA evidence. On September 13th, 2022, seven (7) days before trial, the State provided Defense Counsel with an additional DNA Report from Cybergenetics. On September 14th, 2022, Defense Counsel brought the untimeliness of the DNA Report to the Court's attention at the Court's *Dress Rehearsal for Trial.*

After a discussion on the DNA Report itself; its untimeliness; and the fact the State had yet to lay a proper predicate, the Court stated that the DNA Report would be excluded based on the current information. The State then began to accuse this Court of prejudicing the victim in this case by excluding the evidence. This Court then offered to hold a *Daubert* hearing to grant all sides the opportunity to examine this evidence. The State then accused this Court of prejudicing

the Defendants. Such accusations were made against this Court despite the State admitting to the Fifth Circuit and on the Record on September 19th, 2022 that its late disclosure of DNA evidence has prejudiced these Defendants.

After considering the entire discussion in its entirety and reviewing the Fifth Circuit's decision in *State v. Johnson*, where the Fifth Circuit stated that a *Daubert Hearing* could be conducted at any time before the witness in question testifies, this Court decided the best way to proceed would be to hold a *Daubert* Hearing. *State v. Johnson,* 52 So. 3d 110 (La. App. 5 Cir. 2010). In light of that ruling, all parties requested a continuance. Such continuance was denied by this Court, with oral reasons provided on the Record. The Fifth Circuit reversed that decision, finding that due to the "late disclosure of evidence", this trial should be continued to a later date.

Upon reading the Fifth Circuit's reasons for granting the parties' *Writ*, this Court became concerned that the Fifth Circuit may have relied on improper information in making its decision, which was made without the benefit of a transcript. First, in its reasons, the Fifth Circuit references a *Motion in Limine* filed by the Defendants. Upon review of the Written and Oral Record from September 14th, 2022, a written *Motion in Limine* was never filed nor was the term, *Motion in Limine* ever used. Second, the Fifth Circuit stated that the "State intends to pursue additional testing", another incorrect fact. On September 19th, 2022, the State affirmed on the Record that it did not and does not intend to pursue any additional DNA testing other than what has already been provided. Third, the Fifth Circuit stated that a *Daubert* Hearing had already been set - another incorrect fact, since despite the Court offering to have the *Daubert* Hearing on Friday, September 16th, 2022 at 2 pm; over the weekend on September 17th or 18th; or on the week of trial, beginning on September 19th, a *Daubert* Hearing was not officially set. Lastly, this Court notes that the State's formal *Notice of Intent* to introduce this information was not filed until after September 14th, 2022, and although submitted to the Fifth Circuit to review, this Court was not provided the entirety of the State's Exhibits regarding Cybergenetics before issuing its rulings on September 14th, 2022.

Considering the Fifth Circuit's belief that a *Daubert* Hearing was already set, this Court felt obligated to begin the *Daubert* inquiry as soon as possible. This Court also notes that its steps in setting this hearing follow the guidelines dictated by Louisiana Law Review Article, Volume 54, Number 5, *Admissibility of Expert Testimony after Daubert and Foret: a Wider Gate, A More Vigilant Gatekeeper*, which states that,

> The major change initiated by Daubert is to establish a gatekeeping role for trial judges – to require them to make a preliminary assessment on expert testimony, which may require an evidentiary hearing. The judge must assess four aspects of expert testimony: (1) the qualifications of the expert; (2) the reliability of the expert testimony; (3) the 'helpfulness' of the testimony to the trier of fact; and (4) the prejudicial effect of the testimony.

This Court notes the Defense has made several requests to have their own expert to examine this new DNA Evidence. However, considering (1) the age of this case; (2) the late disclosure of this DNA Evidence; and (3) the lack of knowledge as to what the evidence at issue even was, this Court decided it needed to at least conduct an initial *Daubert* inquiry into what exactly this evidence is in order to properly fulfill its duties as the "gatekeeper" for expert testimony. After six (6) years of pending litigation, this Court also felt compelled to conduct an initial *Daubert* inquiry via Zoom to prevent the taxpayers from paying to fly this last-minute expert in and forcing the Defense to spend money on an expert unnecessarily.

The Record will reflect the parties repeated objections to this initial *Daubert* inquiry. This Court has and always will encourage all Counsel to strongly advocate for their clients, but the Court is deeply concerned that both sides have spent more time lecturing this Court on the meaning of "justice" and requesting for continuances rather than assisting the Court with its obligations to facilitate this case expeditiously and appropriately. With that said, this Court found the hours of testimony and the questioning from both sides to be incredibly enlightening and informative as to whether this Court should admit the Cybergenetics DNA evidence.

II. *DAUBERT* LAW

In rendering its decision, this Court considers the following legal authority.

In *State v. Foret*, 628 So.2d 1116, 1122-23 (La. 1993), the Louisiana Supreme Court adopted the four non-exclusive factors established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). Those are,

> (1) the "testability" of the scientific theory or technique;
> (2) whether the theory or technique has been subjected to peer review and publication;
> (3) the known or potential rate of error; and
> (4) whether the methodology is generally accepted in the scientific community.

Subsequently, in *Cheairs v. State ex rel. Dept. of Transp. & Dev.*, 03-0680 (La. 12/3/03), 861 So.2d 536, 542–43 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548 (11th Cir. 1998)), the Louisiana Supreme Court held that admission of expert testimony is proper only if all three of the following factors are established:

(1) the expert is qualified to testify competently regarding the matters he intends to address;
(2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
(3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Further, in 2014, the legislature amended Article 702 of the Code of Evidence to codify *Daubert*, *Foret*, and *Cheairs*, which states,

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(2) The testimony is based on sufficient facts or data;
(3) The testimony is the product of reliable principles and methods; and
(4) The expert has reliably applied the principles and methods to the facts of the case.

Very recently, in *Lebauve, et al. v. Louisiana Medical Mutual Ins. Co.*, 2022 WL 1101720 (La. 2022), the Louisiana Supreme Court held that the entirety of the abovementioned factors are longstanding principles recognized in *Daubert.* Since semantics have become particularly important in this case, this Court notes in writing such factors, the Louisiana Supreme Court and the Louisiana Legislature used the word "and", requiring all of these factors to be met in order for an expert to testify.

III. *DAUBERT* ANALYSIS OF THE CYBERGENETICS DNA REPORT

This is not the first time that the Cybergenetics program, Trueallele, has been subject to a *Daubert* Hearing or even a review of its admissibility. Although both the State and the Defense have argued that they have not had enough time to grapple with this Cybergenetics evidence, the Court has found time to do its own research, despite having a full docket.

This Court is deeply concerned about this evidence when considering Louisiana Code of Evidence Article 702(1) – "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." and the 3rd Factor in the *Cheairs* Test – "the testimony assists the trier of fact… to understand the evidence or to determine a fact in issue." Upon listening to the entirety of the witness's testimony, this Court believes that it is obvious that the complexity of this evidence is not going to help the jury in deciding the facts of this case and only confuse them.

Additionally, in review of a number of cases across several jurisdictions that have wrestled with the reliability of this specific program, this Court is uncomfortable with allowing this evidence. The witness testified to an article regarding the use of Cybergenetics in New York.

However, in the *Journal of Modern Scientific Evidence: The Law and Science of Expert Testimony,* scholars have found New York's use of Cybergenetics within its police department problematic due to their lack of comprehension of the software. (Section 30:34, *Special Topics – Probabilistic Software).* In *Morton v. State of Maryland*, the Court of Special Appeals of Maryland reversed a conviction due to the lower court's admission of evidence from Cybergenetics. 242 Md. App. 537 (2019). However, this Court also notes, as testified by the Witness, that many jurisdictions have admitted and accepted Cybergenetics' evidence without issue – including Louisiana in *State v. Ellis*, 276 So. 3d 633 (La. App. 5 Cir. 2019) and *State v. Anthony*, 309 So. 3d 912 (La. App. 5 Cir. 2020).

The witness also addressed the current litigation around the various holdings regarding the Cybergenetics source code. In *State v. Pickett*, the Supreme Court of New Jersey found it problematic that a defendant did not have Trueallele's software source code. 466 N. J. Super 270 (2021). In *United States v. Ellis*, the Federal Western District of Pennsylvania also ruled that a defendant was entitled to Cybergenetics' source code in order to adequately prepare for trial. 2021 WL 1600711 (2021). However, this Court notes, a New York Court did not find it problematic that a defendant did not have access to the Trueallele source code in *People v. Wakefield*, 2022 WL 1217463 (2022). In considering these cases against the *Foret* and *Daubert* factors of "testability" and "potential rate of error", this Court believes that due to a lack of cohesive rulings across the Country, admitting this evidence raises the probability of reversible error. Such potential for reversibility was acknowledged by the Witness. Under its obligations to both the Defendants and the Victim in this case, the Court cannot in good faith allow this evidence with such potential of reversibility.

Additionally, in its own research, the Court notes that Washington and Lee University, School of Law did an entire study in 2015 entitled, *The Admissibility of Trueallele: A Computerized DNA Interpretation System.* In that study, the legal scholars encourage Courts to consider "fairness" just as much as it considers "accuracy" when analyzing Trueallele against *Daubert.*

This Court does not think that it is "fair" to these Defendants to bring in this evidence **AT THE LAST MINUTE**. Remarkably, such sentiment is shared by Defense Counsel and the State. Further, at this point in the case, this Court does not believe that additional weeks, months, or even an expert could meaningfully help the Defense grapple with the complexities of this information, particularly since (1) it is unclear if a Defense expert could even have access to the foundational

portions of this program; (2) the Witness testified that the findings in its Report are hard for even experts in forensic science to understand; (3) the Witness could not tell the Defense what particular kind of expert would be beneficial to review this evidence; and (4) the Witness affirmed that the match strength between these Defendants and the tested DNA evidence was "not that big of a deal."

The Court is also concerned that the even the State is unable to grapple with the complexities of this information. The first time the State spoke to this Witness was approximately ten (10) days ago. This Court notes that the State did not even bring copies of the witness's CV to this Hearing, blaming the Court for the Hearing's expeditious setting. At one point, the witness posed a question essential to the data in this case to the Prosecutor, and the Prosecutor could not immediately answer. If the State was not prepared to present this evidence, it should not have attempted to introduce it.

The Court finds it further concerning that up until this initial *Daubert* Hearing, there were terms and findings regarding this DNA evidence that were not disclosed or mentioned to not only the Defense, but the Court. Today, the Defense admitted that after Yesterday's testimony, they were concerned that they would need to retain an expert not only in DNA evidence but in mathematics. It is this Court's firm belief that had the Court not begun its initial *Daubert* Hearing when it did, the Defense would be blindsided two weeks from now and another continuance would have to be requested. After six (6) years of this case pending and with this evidence not only being untimely disclosed but continuing to create untimely disclosures, it is wholly unfair to the pursuit of justice for the State to introduce this evidence.

IV. LOUISIANA CODE OF EVIDENCE ARTICLE 403

In addition to *Daubert,* Defense argued that admitting this evidence provokes Louisiana Code of Evidence Article 403 which states, that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

This Court is concerned that admitting this particular evidence would be far more prejudicial than it would be probative and finds it compelling that JPSO does not use this Cybergenetics' program but a different program. It is also concerning that in the witness' discussion of the JPSO software, he admitted that additional testing is not typically done with additional programs on old

data, like this case. Again, after considering the witness' testimony, this Court agrees that it is likely this evidence would confuse and potentially mislead the jury.

V. LOUISIANA CODE OF CRIMINAL PROCEDURE ARTICLE 729.5

Louisiana Code of Criminal Procedure Article 729.5 has been exhaustively mentioned over the last two (2) days and states that in consideration of late disclosure of evidence, this Court may prohibit a party from introducing into evidence the subject matter not disclosed.

It has been stated by (1) both Defense Counsel; (2) the Fifth Circuit; and (3) the State itself that these Defendants were prejudiced by the State's late disclosure of this evidence. After such statements on the Record and the Fifth Circuit's acknowledgment, it is unfathomable how the Court could proceed and admit this evidence under Louisiana Code of Criminal Procedure Article 729.5.

VI. THE COURT'S RULING ON THE CYBERGENETICS EVIDENCE

Therefore, after the Court's thorough review of the evidence and in consideration of the factors outline in Louisiana Code of Evidence Art. 403 and 702; *Daubert*; *Foret*; *Cheairs*; and *Lebauve*; and Louisiana Code of Criminal Procedure Article 729.5, it is this Court's ruling that the Cybergenetics DNA Evidence is excluded, and this case should proceed to trial.

VII. TRIAL SETTING

This Court continuously prides itself on its transparency. With that in mind, before taking a recess on September 19th, 2022 and continuing the *Daubert* Hearing today on September 20th, 2022, this Court informed the parties that depending on the Court's ruling, the parties should be prepared to go to trial on September 20th, 2022. All parties objected.

The Defense argued that due to the Fifth Circuit's ruling, they did not prepare over the weekend for trial. The State moved to seek a writ despite this Court not even issuing a judgment and cited the Fifth Circuit's ruling that trial be set within "a reasonable time." Such citation is frankly laughable since the Prosecutors admitted multiple times that it did not even read the Fifth Circuit's ruling until required by this Court. Again, it is this Court's greatest desire for all parties to be strong advocates for their clients, but this Court is also deeply concerned that that Fifth Circuit's ruling has created a false impression that this trial should be extended for another six (6) years or whenever folks have time to pick up the file again. This file is not going on the back burner for another six (6) years or even another six (6) weeks, and it is unreasonable to expect this Court to do anything but ensure that this trial be set expeditiously.

With that said, this Court can appreciate the need for a couple of days to meet with witnesses and clients before trial. Therefore, it is this Court's ruling that trial will be set for September 26th, 2022 at 8 am.

This Court believes that there is an argument that the Fifth Circuit's reasons are now moot considering (1) the reasons were based on inaccurate facts; and (2) the evidence at issue is now excluded. However, this Court notes that it took into consideration the following facts before determining that September 26th, 2022 would be "a reasonable trial date."

(1) This case has been pending for almost six (6) years.

(2) The Defendants have been incarcerated, waiting for trial for six (6) years, which this Court believes to be problematic considering Code of Criminal Procedure Article 701: The Right to a Speedy Trial.

(3) After a cursory review of the Record, this case has been continued for various reasons at least twenty-six (26) times.

(4) From review of the Record, after three and a half (3 ½) years, this Case was first set for trial more than two (2) years ago on June 15th, 2020 before the previous Judge.

(5) The last motion hearing in this case was heard on May 2nd, 2022, and before the Fifth Circuit's decision on the parties' *Writ Application*, the Court granted two (2) continuances for the State since that date.

(6) On August 31st, 2022, all parties determined that because this case has been pending for six (6) years, a trial could not wait until November 14th, 2022.

(7) Last week and before the Fifth Circuit's *Writ Decision*, on September 14th, 2022, the State repeatedly stated on the Record that it was ready to proceed to trial.

(8) The State stated today, on September 20th, 2022 on the Record that it continued to prepare for trial over this past weekend.

(9) On September 19th, 2022, Yesterday morning, Defense Counsel stated on the Record that had the evidence at issue been excluded, trial would have proceeded and begun on September 19th, 2022.

(10) The evidence at issue that was subject to the Fifth Circuit granting the parties *Motion to Continue* has now been excluded.

(11) This Court has done everything in its power to ensure that all sides have a fair trial. Over the last week in order to help facilitate this matter, the Court Reporter, the Minute

Clerk, and the Law Clerk have all pulled all-nighters and worked overtime to ensure that from the Court's end, this six (6) year old case is ready to proceed to trial. Proposed Jury Charges, Verdict Form, and the Trial Court's comments before and after *Voir Dire* were also sent to all parties on September 15th, 2022.

Lastly, it is ordered that these reasons be filed into the Record as *Written Reasons for Judgment* and referenced in this Hearing's Minute Entry. For clarity's sake, my rulings regarding the new trial date and the Cybergenetics DNA Evidence are now subject to the Fifth Circuit's review. If either side seeks to take a Writ, the return date shall be tomorrow, September ~~21st~~ 23rd, 2022 at 5:00 P.M. To prevent the misinformation that occurred in the previous *Writ Application*, it is also ordered that any *Writ Application* shall include the Court's *Written Reasons for Judgment* as well as the transcript from September 14th that was not available to the Fifth Circuit before issuing their last decision in this case.

READ INTO THE RECORD and SIGNED in Open Court, in Gretna, Louisiana this 20th day of September, 2022.

JUDGE DONALD L. FORET