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STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 161589

v.

Court of Appeals
No. 344603

Roberto Dupree,

Macomb Circuit
No. 15-3884-FC

Defendant-Appellant.

PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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PROOF OF SERVICE

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COUNTER-ISSUES PRESENTED

ISSUE I

DID THE TRIAL COURT PLAINLY ERR IN SCORING 15 POINTS FOR OV 1, 5 POINTS FOR OV 2, AND 10 POINTS FOR OV 4 IN CALCULATING THE MINIMUM SENTENCE RANGE?

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

ISSUE II

WAS THE DEFENDANT DENIED HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL?

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

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COUNTER-STATEMENT OF FACTS

In December of 2012, Mohamed Zamzani ("Zamzani") was working in a family-owned smoke shop at 37557 Harper in a Clinton Township strip mall. (Tr. 5-17-18, 117-119). The smoke shop is a family business that primarily sold cigarettes, cigarettes, and lottery tickets. (Tr. 5-17-18, 118). It is open from 9 a.m. until 8 p.m. (Tr. 5-17-18, 118). The smoke shop has both external and internal surveillance cameras. (Tr. 5-17-18, 119-121).

On the morning of December 15, Zamzani was working alone at the cash register. (Tr. 5-17-18, 118-121). An individual entered the store and asked Zamzami "for cigars." (Tr. 5-17-18, 122-123). The individual was "[a] black man" of "[m]edium height." (Tr. 5-17-18, 122). He was wearing "sunglasses and a hat." (Tr. 5-17-18, 122). The individual "was talking on the phone with somebody else." (Tr. 5-17-18, 123). As soon as Zamzani "tr[ied] to show him the cigars," the individual "pulled out [a] gun" and told Zamzani: "[D]on't move!" (Tr. 5-17-18, 123-124). The individual pointed the gun "[r]ight to [Zamzani's] face." (Tr. 5-17-18, 124).

Zamzani raised his hands in the air. (Tr. 5-17-18, 124). At this point, two more individuals ("[o]ne black and one white") entered the smoke shop, pushed Zamzani to the back door of the store near the storage area, and "tape[d]" him up with duct tape as he lay on the ground. (Tr. 5-17-18, 124-127, 129). The white male individual was bald and "[a] little bit heavy." (Tr. 5-17-18, 125, 137, 140). Zamzani's assailants "asked [him]

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for the keys for the back door" and Zamzani gave them his keys. (Tr. 5-17-18, 127-128). The individual with gun remained Zamzani and "tried to take the money from [his] pocket." (Tr. 5-17-18, 127). Also, he hit Zamzani in the head with his gun, instructing him not to move. (Tr. 5-17-18, 129). Ultimately, Zamzani's assailants attempted to leave through the back door, which was a steel commercial door. (Tr. 5-17-18, 127-128). Zamzani's keys, however, did not include the key needed to unlock the big lock on this door. (Tr. 5-17-18, 128). Instead, they left the smoke shop through the front door. (Tr. 5-17-18, 129). After a few moments, Zamzani got the duct tape off him and "call[ed] the police right away." (Tr. 5-17-18, 129-130, 137-138).

The assailants made a "mess" of the smoke shop. (Tr. 5-17-18, 133, 139). They took all the money contained in the cash register, totaling between $500.00 and $1,000.00. (Tr. 5-17-18, 143-144). Zamzani sustained an injury to his head for which he did not seek medical attention. (Tr. 5-17-18, 136). Zamzani had not seen any of his assailants prior to this date. (Tr. 5-17-18, 136-137).

Sergeant Deena Terzo ("Sergeant Terzo") of the Clinton Township Police Department ("CTPD") was on road patrol when, at about 10:30 a.m., she received a call from dispatch for the "armed robbery" at the smoke shop on Harper. (Tr. 5-18-18, 92-93). Sergeant Terzo was the first CTPD officer to arrive at the crime scene. (Tr. 5-18-18, 93). She spoke with Zamzani inside the store. (Tr. 5-17-18, 144-145; Tr. 5-18-18, 94-96).

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Zamzani "had some abrasions and a bump on his left forehead near his hairline." (Tr. 5-18-18, 105).

With Zamzani, Sergeant Terzo watched the footage of the armed robbery from the external and internal surveillance cameras. (Tr. 5-18-18, 95-96, 105). Sergeant Terzo "observed one male who pointed a gun at [Zamzani]." (Tr. 5-18-18, 96). This individual "looked thin, around 25 to 30 years of age, black male." (Tr. 5-18-18, 96). He has "no gloves on" and "no mask on." As Sergeant Terzo watched, "within a couple seconds, two male came into the store and went behind the counter area." (Tr. 5-18-18, 96). One of these individuals was "heavyset . . . around 250 to 300 pounds." (Tr. 5-18-18, 97). Sergeant Terzo had difficulty telling "from the video if it was a black male or lightskinned or some type of ethnic descent." (Tr. 5-18-18, 97). The third individual was "a medium build black male, approximately thirty-ish or so." (Tr. 5-18-18, 97). The heavyset individual "had nothing covering him" and was bald. (Tr. 5-18-18, 97). (Tr. 5-18-18, 125). The heavyset individual wore a type of rubber or latex glove. (Tr. 5-18-18, 125-126, 128, 130). The third individual wore a glove with "a white color on the top of the hand" and "a black or dark color" on the palm. (Tr. 5-18-18, 125). Sergeant Terzo secured the scene, summoned an evidence technician, and requested a K-9 from another police department. (Tr. 5-18-18, 98-100).

Soon, Deputy David Quartuccio ("Deputy Quartuccio") of the Macomb County Sheriff's Office, a K-9 handler, arrived at the crime scene with his German Shepherd,

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Baxter. (Tr. 5-18-18, 139-148). Deputy Quartuccio started Baxter tracking "just outside the [front] door" of the smoke shop where he "was informed that the suspect[s] w[ere] fleeing on foot." (Tr. 5-18-18, 151, 194-195). Baxter headed "slightly north" and "turned and started to head eastbound across the front of the buildings towards Harper." (Tr. 5-18-18, 195, 215-216). Baxter was "pulling [Deputy Quartuccio] . . . to the scent" and was "on track." (Tr. 5-18-18, 195, 215-216). Baxter passed in front of two or three storefronts and "switched over to grass and continued in a northeast direction." (Tr. 5-18-18, 196, 215-216). In this area, just northeast of the smoke shop, Baxter picked up "[s]ome latex gloves" with his mouth. (Tr. 5-18-18, 197-198, 215). Deputy Quartuccio immediately commanded Baxter to drop the gloves and did. (Tr. 5-18-18, 198). Baxter "continue[d] tracking" but he stopped soon thereafter because "[t]here was no more scent." (Tr. 5-18-18, 198-199). Deputy Quartuccio notified a CTPD officer about the latex gloves. (Tr. 5-18-18, 200-201).

CTPD Officer Paul Collins ("Officer Collins"), an evidence technician, responded to the crime scene that morning. (Tr. 5-18-18, 227-232). Officer Collins photographed the entire area, both outside the smoke shop around the strip mall and inside the smoke shop itself. (Tr. 5-18-18, 234). He took photographs of Zamzani's injuries. (Tr. 5-18-18, 234-235). Officer Collins took photographs of the duct tape used to bind Zamzani and collected it as evidence. (Tr. 5-18-18, 236-237). He viewed a $20.00 bill on the counter

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by the cash register, which was "slightly open." (Tr. 5-18-18, 241, 249-250). Officer Collins dusted this area for latent fingerprints. (Tr. 5-18-18, 265-267).

As he processed the crime scene, another CTPD officer informed Officer Collins that "the K-9 officer arrived at the scene" and that "they had hit on an item." (Tr. 5-18-18, 252). Officer Collins viewed a pile of "off-white" rubber gloves on the ground. (Tr. 5-18-18, 252). Officer Collins took photographs of the gloves and collected them as evidence. (Tr. 5-18-18, 253-257). Subsequently, at the police station, he swabbed the gloves, as well as the duct tape, "[t]o try to collect DNA evidence." (Tr. 5-18-18, 237, 258-261).

Later, on December 21, 2012, with Zamzani's assistance, CTPD Detective Jeffrey Barbera ("Detective Barbera"), using his cellular telephone, recorded eight video clips and five still images from the footage of the armed robbery from the external and internal surveillance cameras. (Tr. 5-17-18, 145-146; Tr. 5-18-18, 81; Tr. 5-22-18, 71-78). Back at the police station, Detective Barbera transferred the video clips from his cellular telephone to his computer where it was later saved onto a disc and placed into evidence. (Tr. 5-22-18, 75-78).

Monica Barylski ("Barylski"), a forensic scientist in the Biology Unit of the Michigan State Police's Northville crime laboratory, received the swabs from the duct tape and the rubber gloves, as well as a buccal swab from Zamzani. (Tr. 5-22-18, 119-129). She extracted DNA from the duct tape swabs but it was "insufficient for

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comparison purposes." (Tr. 5-22-18, 129). Barylski extracted DNA from the rubber glove swabs that was "consistent with a mixture of DNA from at least two individuals," including "a major DNA profile from an unidentified male." (Tr. 5-22-18, 129-130). She "compare[d] that major DNA profile, which was from an unidentified male, to the buccal swab from Mohamad Zamzani and he was excluded as being the major donor to that sample." (Tr. 5-22-18, 130-131). The sample from the minor donor "was not sufficient for [DNA] comparison." (Tr. 5-22-18, 130).

In October of 2014, CTPD Detective Bryan Gilbert ("Detective Gilbert") took over the investigation into this armed robbery. (Tr. 5-22-18, 152-154). Detective Gilbert soon "developed a lead on a suspect" named Roberto Dupree ("Dupree"). (Tr. 5-22-18, 154). Detective Gilbert collected photographs from the Secretary of State ("SOS") of Dupree and compared to those to the video clips collected by Detective Barbera. (Tr. 5-22-18, 154-156). Dupree was "a heavier set, light complected black male." (Tr. 5-22-18, 155). SOS records described Dupree as 5' 8" and "250-some pounds." (Tr. 5-22-18, 158). Ultimately, in mid-2016, Detective Gilbert obtained a search warrant for Dupree's DNA, procuring buccal swabs from him. (Tr. 5-22-18, 157-158). Detective Gilbert forwarded Dupree's buccal swab to the Michigan State Police for DNA comparison. (Tr. 5-22-18, 159-161).

Andrea Young ("Young"), a forensic scientist in the Biology Unit of the Michigan State Police's Northville crime laboratory, received Dupree's buccal swab and generated

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a DNA profile. (Tr. 5-22-18, 209-214; Tr. 5-23-18, 9-10). Young compared the DNA profile from this sample to the DNA profile from the rubber gloves swabs generated by Barylski a few years earlier. (Tr. 5-22-18, 214-215; Tr. 5-23-18, 13-14). Dupree "matched the major donor types from the rubber glove swabs." (Tr. 5-23-18, 15-20).

The prosecution charged Dupree with Armed Robbery (MCL § 750.529). After a trial before Macomb County Circuit Court Judge Carl J. Marlinga ("Judge Marlinga") in May of 2018, a jury convicted Dupree as charged. (Tr. 5-24-18, 189-191). On June 28, 2018, Judge Marlinga sentenced Dupree, as a fourth-offense violent habitual offender, to a term of 30 to 60 years' imprisonment. (Tr. 6-28-18, 15-17).

Dupree appealed as of right. The Michigan Court of Appeals appealed his conviction and sentence. See Opinion (2/6/20)- COA No. 344603. Dupree subsequently filed an application for leave to appeal with this Court. This Court considered the application for leave to appeal and "DIRECT[ED] the Macomb County Prosecuting Attorney to answer the application for leave to appeal within 28 days of the date of this order," indicating that, '[i]n particular, the prosecutor shall address Issues III and VII in the defendant's application for leave to appeal." See Order (4/2/21)- MSC No. 161589.

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ISSUE I

THE TRIAL COURT DID NOT PLAINLY ERR IN SCORING 15 POINTS FOR OV 1, 5 POINTS FOR OV 2, AND 10 POINTS FOR OV 4 IN CALCULATING THE MINIMUM SENTENCE RANGE.

STANDARD OF REVIEW

Unpreserved claims of scoring error are review for plain error affecting the defendant's substantial rights. *People v. Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Under the plain error standard of review, the defendant must show that an error occurred, the error was plain, and the plain error affected his substantial rights. *Id.*

ARGUMENT

At the sentencing hearing, Judge Marlinga, without objection, scored 15 points for Offense Variable ("OV") 1 ["Aggravated Use of Weapon"], 5 points for OV 2 ["Lethal Potential of Weapon Possessed or Used"], and 10 points for OV 4 ["Psychological Injury to Victim"] in calculating the minimum sentence range for the defendant's conviction for

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Armed Robbery. See Sentencing Information Report- Macomb CC No. 15-3884-FC. Judge Marlinga determined that the minimum sentence range was 11 ¼ to 37 ½ years. (Tr. 6-28-18, 3-4). Subsequently, Judge Marlinga sentenced the defendant to a term of 30 to 60 years' imprisonment. (Tr. 6-28-18, 15-17). On appeal, the defendant maintains that the trial court plainly erred in its scoring of these OVs and asks for re-sentencing.

a. OV 1

At the sentencing hearing, Judge Marlinga scored 15 points for OV 1 in calculating the minimum sentence range for the defendant's Armed Robbery conviction. The pertinent statute, MCL § 777.31(1)(c), mandates that the trial court score 15 points if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing instrument." Moreover, "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." MCL § 777.31(2)(b).

On appeal, the defendant argues that Judge Marlinga plainly erred in scoring OV 1 because he did not have a gun and no one else has been charged or convicted of the armed robbery. Although it is undisputed that the defendant did not possess the gun during the armed robbery and that neither of his accomplices have ever been apprehended (and thus "assessed . . . points" under MCL § 777.31(2)(b)), the trial court

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appropriately scored 15 points for OV 1. Indeed, it would be nonsensical for the trial court to OV 1 depending on whether all the offenders have been convicted. As the Court of Appeals observed in *People v. Libbett*, 251 Mich App 353, 367; 650 NW2d 407 (2002):

> When reading M.C.L. § 777.31 in its entirety, it is clear that the Legislature intended for the sentencing courts to first accurately determine the highest number of points that are to be scored under M.C.L. § 777.31(1)(a)-(e) and then to assess the same number of accurately scored points to multiple offenders in the same case under M.C.L. § 777.31(2)(b). If we were to read subsection 2(b) in isolation, as defendant suggests, then we would not be giving effect to subsection 1, which requires that the court first accurately score the offense variable by assigning the highest number of attributable points that apply.

In the same regard, as the Court of Appeals wrote in the case at bar:

> We agree that defendant did not possess a weapon during the armed robbery of the smoker's store, but we reject his argument that the trial court erred in scoring 15 points for OV 1 because no other offender has been identified, charged, or convicted of the armed robbery. The sentencing guidelines do not require that the other offender be identified, charged, and convicted before any of the offenders may be assessed points under OV 1. That defendant was the first, and might be the only, offender identified, charged and convicted of the armed robbery is irrelevant for purposes of scoring OV 1. Further, a person convicted of committing a crime under an aiding-and-abetting theory "shall be punished as if he had directly committed such offense." MCL 767.39. Scoring the sentencing guidelines is an integral part of determining the punishment for one convicted of a crime.

Under the circumstances, the trial court did not plainly err in scoring 15 points for OV 1.

b. OV 2

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The defendant makes a similar argument regarding the trial court's scoring of 5 points for OV 2. The pertinent statute, MCL § 777.32(2)(d), directs the trial court to score 5 points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." Again, "[i]n multiple offender cases, if 1 offender is assessed points for the possessing a weapon, all offenders shall be assessed the same number of points." MCL § 777.32. For the identical reasons set forth above in discussing OV 1, the trial court did not commit plain error in scoring 5 points for OV 2.

c. OV 4

As indicated, Judge Marlinga scored 10 points for OV 4 in calculating the minimum sentence range for his Armed Robbery conviction. The relevant statute, MCL § 777.34(1)(a), provides that a trial court must score 10 points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." A trial court must "[s]core 10 points if the serious psychological injury may require professional treatment." MCL § 777.34(2). Further, "[i]n making this determination, the fact that treatment has not been sought is not conclusive." MCL § 777.34(2).

Here, Zamzani, working along in his family's smoke shop, was assaulted with a gun pointed in his face, robbed, pistol-whipped, tied up with duct tape, and left lying in the rear of the strore. During his testimony, Zamzani told the jury that, at the time of the armed robbery, he thought it was "time for [him] to die." (Tr. 5-18-18, 85). He testified that he thought about the armed robbery "too much" for "almost six months." (Tr. 5-18-

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18, 85). In the Presentence Investigation Report ["PSIR"], Zamzani stated that the armed robbery "shook him up and made him nervous and scared for at least six months after the instant offense occurred." See PSIR, 4- Macomb CC No. 15-3884-FC. Zamzani "stated that he was nervous every time someone walked into his store and was fearful he would be robbed again." See PSIR, 4- Macomb CC No. 15-3884-FC. He indicated that he was "glad they found one of the suspects, but wished they were able to find the other two, so that no one will have to go through what he did." See PSIR, 4- Macomb CC No. 15-3884-FC. Zamzani "suffered lacerations and a bruise on his head; however, he did not seek medical treatment because he had to keep his store open." See PSIR, 4- Macomb CC No. 15-3884-FC. Given the foregoing, the trial court did not plainly err in scoring 10 points for OV 4. See *People v. Earl*, 297 Mich App 104, 110; 822 NW2d 271 (2012) (holding that OV 4 was properly scored at 10 points where bank robbery complainant stated she suffered from sleeplessness and was afraid of being victimized again by a customer).

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ISSUE II

THE DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

STANDARD OF REVIEW

Whether a defendant was denied a speedy trial is a mixed question of fact and law. *People v. Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to review de novo. *People v. Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

ARGUMENT

The defendant argues that he has been deprived of his right to a speedy trial in violation of MCR 6.004(A), as well as the state and federal Constitutions. Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. In determining whether a defendant has been denied this right, this Court applied a four-part balancing test. *Williams*, 475 Mich at 261-262. The four factors include: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant." *Id*. If the total delay, which runs from the date of the defendant's arrest until the time that trial commences, is under 18 months, then the burden is on the defendant to show that he suffered prejudice. *People v. Cain*, 238 Mich App 95, 112; 605

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NW2d 28 (1999). If the delay is over 18 months, however, prejudice is presumed and the burden is on the prosecution to rebut the presumption. *Id*.

Here, the prosecution does not dispute that the pretrial delay was lengthy—approximately two and a half years elapsed between the defendant's arrest and his trial. Moreover, the defendant asserted his right to a speedy trial, leading to a hearing before Judge Marlinga in August of 2017. On the other hand, this long pretrial delay is nearly entirely attributable to the defendant. As the assistant prosecuting attorney correctly observed at the speedy trial hearing in August of 2017:

> Judge, we've walked through the entire disposition of the case. Never once did I say that the Prosecution asked for an adjournment. Never once did I say that there was a delay on behalf of the Prosecution. Every single delay was either at the request of the Defendant, Defense Counsel, if the Court made an adjournment. So there's no, there's been no delays that have been brought on by the Prosecution so the reasons for the delay, which would be the second factor, all of them lie within the Defendant's requests, the Defendant's actions or the defense counsels' actions, looking to withdraw. (Tr. 8-31-17, 29-30).

Ultimately, as the Court of Appeals noted in its opinion in the case at bar, the prejudice to the defendant "is critical to the analysis of whether defendant's speedy trial rights were violated."

Here, the defendant points primarily to instances of prejudice. First, he argues in his pleadings that "he could not obtain discovery regarding the complete video of the robbery." Detective Barbera testified that, on December 21, 2012, using his cellular telephone and with Zamzani's assistance, he recorded eight video clips and five still

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images from the footage of the armed robbery from the external and internal surveillance cameras. (Tr. 5-17-18, 145-146; Tr. 5-18-18, 81; Tr. 5-22-18, 71-78). Back at the police station, Detective Barbera transferred the video clips from his cellular telephone to his computer where it was later saved onto a disc and placed into evidence. (Tr. 5-22-18, 75-78). He told the jury that he "was unable to burn it to a disc for example or put it directly to a thumb drive." (Tr. 5-22-18, 72). Detective Barbera testified that it was not practical for him to seize the smoke shop's entire surveillance system. (Tr. 5-22-18, 73-74). According to Detective Barbera, taking the video clips and the still images was "the best way to preserve the evidence." (Tr. 5-22-18, 74). Zamzani testified that, subsequent to the armed robbery, upgraded his surveillance system. (Tr. 5-17-18, 120-121).

Given the foregoing, the defendant did not sustain any prejudice as it relates to "discovery" any video of the armed robbery because the CTPD never obtained the video from Zamzani's surveillance system and the surveillance system had been replaced long before the defendant was even charged with this crime. Moreover, the defendant fails to explain how "discovery" of this video would have altered the trial in any meaningful way. Nothing in the testimony of the defendant and Sergeant Terzo—who both reviewed the video from the surveillance system immediately after the armed robbery—gives any indication whatsoever that the video would have aided the defense. As the Court of

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Appeals noted, "the jury was able to view the video images and . . . judge for itself whether defendant was pictured in the video."

Next, the defendant asserts that he was prejudiced by the purported disappearance of the original DNA swabs from the rubber gloves found outside the smoke shop after the armed robbery. Again, however, the lengthy pretrial delay is unrelated to the fact that the original DNA swabs were not available to for retesting. The parties only learned that the original DNA swabs were "no longer available" for retesting in September of 2016, less than one year after the defendant's arrest. In other words, the lengthy pretrial delay did not cause this issue. More significantly, however, as the Court of Appeals emphasized in its opinion: "Defendant's DNA expert testified that she was able to obtain sufficient DNA to perform an independent analysis by combining the DNA extracted from the original swabs with DNA she extracted from the glove found in the vicinity of the robbery." Under the circumstances, the defendant sustained no prejudice whatsoever resulting from the lengthy pretrial delay.

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RELIEF REQUESTED

The prosecution requests that this Honorable Court **DENY** the defendant's application for leave to appeal.

Respectfully Submitted,

PETER LUCIDO (P41237)
Prosecuting Attorney

JOSHUA D. ABBOTT (P53528)
Chief Appellate Attorney

By: Joshua D. Abbott
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DATED: April 29, 2021