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Case Number 530,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KASHIEM THOMAS,	)	
	)	
***Appellant*,**	)	**No. 530, 2024**
v.	)	
	)	**On Appeal from the**
STATE OF DELAWARE,	)	**Superior Court of Delaware**
	)	**In and for New Castle County**
	)	**ID No. 1703001172**
***Appellee*.**	)	

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
DUC 1703001172

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. WITHDRAWAL OF THE *DAUBERT* CHALLENGE WAS OBJECTIVELY UNREASONABLE AND PREJUDICIAL, WAS NOT AN AUTONIMOUS DECISION FOR A DEFENDANT ALONE TO MAKE AND, IN ANY EVENT, MR. THOMAS' ASSENT OR DECISION TO FORGO THE MOTION WAS NOT INFORMED.

As argued in Mr. Thomas' Opening Brief and contrary to the State's Answering Brief, it was objectively unreasonable to withdraw the *Daubert* challenge where a second analyst moved the location of the gunshots from the street to the sidewalk, contrary to the defense theory, consistent with the state theory, and turning Mr. Thomas from crossfire victim to defendant based on faulty science. While the State is correct that the parties have not cited cases finding "deficient performance" of trial counsel for failing to pursue a ShotSpotter *Daubert* challenge,[1] Mr. Thomas and Amici have cited numerous cases that highlight why failure to pursue *Daubert* was unreasonable in this case. As noted in the Innocence Project's Amicus Brief, which Mr. Thomas adopts entirely, Paul Greene's subjective analysis differed from Simone Ellison's even though they used the same audio recordings, time stamps, GPS maps, equipment, computers, and software to draw their conclusions. This calls Paul Greene's **methodology** into question. "The very fact that he reached a different conclusion from the other ShotSpotter analyst, Ellison, lays bare the uncertainty potential for error, and limitations of his

[1] Answering Brief at page 29.

analysis."[2] For the reasons cited in both Mr. Thomas' Opening Brief and in the Amicus Brief, it is reasonably likely that the trial court would have excluded the ShotSpotter data entirely or, at the very least, limited the expert opinion to exclude an identification the exact location of the gunfire, i.e. the sidewalk versus the street. The degree of specificity opined by Greene here was critical, more specific than the accuracy guarantee advertised by ShotSpotter, and, argued by Amici, that degree of specificity is not supported by even the limited empirical data that does exist.[3]

Prejudiciously, the conclusion drawn from the data was changed in a critical way that resulted in Mr. Thomas being converted from a victim of crossfire to a shooter himself. It is important to keep in mind that Mr. Thomas was not seen with a shotgun on surveillance video (a shotgun also was not likely concealed in his clothing due to its size) or found to have any weapon when police arrived. The State admitted that the GSR evidence was not likely to weigh heavily in the jury's determination of guilt or innocence. No witness identified Mr. Thomas as the shooter. The evidence that placed a gun in Mr. Thomas' hand was the opinion testimony of Paul Greene. It was Greene's placement of the shots on the sidewalk

[2] Amicus Brief at page 18.
[3] Amicus Brief at page 18-19.

where Mr. Thomas was found after he was shot that the jury must have relied upon to infer that he possessed and fired a firearm.

State v. Hill, relied upon by the State, does not refute this as it is distinguishable. Hill did not challenge the underlying triangulation methodology upon which the ShotSpotter location opinion was based.[4] The motion *in limine* in Mr. Thomas' case did, as it should have, challenge Greene's methodology. The *Hill* court also relied upon a non-scientific fact: that the victim was found in the purported location of the gunfire. This thought process is the "circular reasoning" cautioned by Amici.[5]

Further, the *Hill* court describes the identified location as an address - not such a specific opinion as the matter of feet between the road and the sidewalk in Mr. Thomas' case. The same distinction exists in *J.A.R. v. State*.[6] *United States v. Pena* is also distinguishable - as the defendant in that case, as in *Hill*, did not dispute methodology.[7] Additionally, the *Pena* court distinguished its facts from those in *Godinez*. In *Godinez*, already cited by Mr. Thomas,[8] the court held that it was abuse of discretion to deny a *Daubert* hearing where ShotSpotter opinion changed "after Chicago police contacted ShotSpotter and asked them to search for

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[4] *State v. Hill*, 851 N.W.2d 670, 690 (Neb. 2014).
[5] Amicus Brief at pages 8-9.
[6] *J.A.R. v. State,* 374 So.3d 25, 28-29 (Dist. Ct. App. Fla. 2023).
[7] *United States v. Pena*, 2024 WL 4132379, *2 (E.D.N.Y. 2024).
[8] Opening Brief at pages 33-34.

additional audio clips" leading to changes in analyst opinion.[9] The *Pena* court explained that its evidence did not implicate methodology, as it did in *Godinez*. Like *Godinez*, Mr. Thomas' case does implicate the methodology: the method employed by Greene in arriving at his conclusion. In its Answering Brief, the State does not engage with *Godinez* at all.

In its Answering Brief, the State argues that Mr. Thomas "cannot claim ineffective assistance of counsel after having agreed to an informed strategy."[10] In support of the argument, the State cites a series of cases that have a theme in common: when courts have denied relief in cases where a defendant's chosen trial strategy failed, the decision to pursue that strategy was found to have been an **informed** decision.[11] Mr. Thomas' decision or assent to forgo the *Daubert* challenge was not informed and, therefore, does not bely a finding that trial counsel's performance was objectively unreasonable.

As a threshold issue, and in distinction from most of the cases cited by the State, the decision to withdraw the motion *in limine* was not a decision that Mr. Thomas had the autonomy to make unilaterally. In *Copeland*, the trial court held

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[9] *United States v. Pena*, 2024 WL 4132379, *2 (E.D.N.Y. 2024) (citing *United States v. Godinez*, 7 F4th 628 (7th Cir. 2021)).
[10] Answering Brief at page 30.
[11] *Cabrera v. State*, 173 A.3d 1012 (Del. 2017); *State v. Copeland*, 2024 WL 2787692 (Del. Super. May 30, 2024); *State v. Coverdale*, 2018 WL 259775 (Del. Super. Jan. 2, 2018); *State v. Womack*, 2025 WL 2797120 (Del. Super. Sept. 30, 2025); *State v. Wright*, 653 A.2d 288 (Del. Super. 1994).

that the defendant made an informed decision to keep a jury in lieu of a bench trial.[12] In *Womack*[13] and *Wright*,[14] the trial court held that the defendant made an informed decision not concede guilt on lesser charges to the jury. In *Coverdale*,[15] the trial court found that the defendant made an informed decision not to pursue a lesser included offense.

The decisions in those cases, whether to plead guilty or not guilty and whether to have a trial by jury, are fundamental decisions that only a defendant can make. Even though they are "indeed strategic choices that counsel might be better able to make, because the consequences of them are the defendant's alone, that are too important to be made by anyone else. Moreover, counsel cannot undermine the defendant's right to make these personal and fundamental decisions by ignoring the defendant's choice and arguing affirmatively against the defendant's chosen objective."[16] "In *Jones v. Barnes*, the United States Supreme Court recognized that a criminal defendant has 'ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury'… 'such choices

[12] *State v. Copeland*, 2024 WL 2787692 (Del. Super. May 30, 2024).
[13] *State v. Womack*, 2025 WL 2797120 (Del. Super. Sept. 30, 2025)
[14] *State v. Wright*, 653 A.2d 288 (Del. Super. 1994).
[15] *State v. Coverdale*, 2018 WL 259775 (Del. Super. Jan. 2, 2018).
[16] *Cooke v. State*, 977 A.2d 803, 842 (Del. 2009).

'implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant.'"[17]

In Mr. Thomas' case, the decision of whether to pursue the *Daubert* challenge was not an autonomous decision for him alone to make. As acknowledged by prior postconviction counsel, "to the extent that trial counsel had a legitimate *Daubert* issue as to the ShotSpotter technology, a three-month continuance hardly seems a steep price to pay to litigate the issue. It would have been reasonable for counsel to override Mr. Thomas' desire to keep his trial date and argue the motion."[18]

The State argues that Mr. Thomas' assent or decision to forgo the *Daubert* challenge was informed, but this is incorrect. The State relies upon an argument that "trial counsel's explanation of the advantages and disadvantages of withdrawing the *Daubert* motion is owed a strong presumption of professional reasonableness and sound trial strategy."[19] However, as evidenced by the correspondence and transcripts memorializing the conversations of trial counsel and Mr. Thomas with the trial court, compared to the transcript of Paul Greene's cross-examination at trial, it must be concluded that Mr. Thomas' decision to

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[17] *Cooke v. State*, 977 A.2d 803, 841 (Del. 2009) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)).
[18] B36-B37.
[19] Answering Brief at page 32.

assent to trial counsel's withdrawal of the motion was not informed. Moreover, the strategy employed at trial was objectively unreasonable, predicated upon objectionable D.R.E. 403 evidence limiting cross-examination and without the benefit of testimony by either of the State's two motion *in limine* witnesses nor by Simone Ellison.

There is no indication in the record that Mr. Thomas was informed that the challenge to Paul Greene would be different at trial than it would have been at a *Daubert* hearing or that objectionable "mini-trial," Rule 403 evidence of cases from other jurisdictions would be required to effectively challenge the scientific acceptance of ShotSpotter technology. Nor is it clear that Mr. Thomas knew the qualitative difference between using Ellison's report as impeachment material versus presenting her for affirmative expert opinion.

Referencing Greene's expert opinion, trial counsel told the trial court "I can deal with that situation on cross-examination at trial."[20] While it is true that Mr. Thomas was informed that Greene would "still be" subject to cross-examination at trial,[21] and while it is true that it "is fair cross-examination on whether or not this is reliable science,"[22] the record does not detail the exact pros and cons discussed between trial counsel and Mr. Thomas that would make him well informed.

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[20] A194.
[21] A166-A169.
[22] A675-A672.

In fact, there is an inference that can be reasonably gleaned from the record that Mr. Thomas was under the belief that Greene's testimony would be challenged exactly the same way at trial that it would have been at a *Daubert* hearing. The inference may be drawn from the statements made by trial counsel at trial in response to the sustained objections that are identified in Mr. Thomas' Opening Brief.[23] When the trial court sustained the Rule 403 objection and told trial counsel that they were stuck with the Greene's denial of knowledge about exclusion in an unrelated case, trial counsel asked the judge: "I can't bring in evidence showing that it has [been excluded]? Because there's a case where - actually, there's testimony - it's actually in the motion [*in limine*] that I filed. It's actually attached as an exhibit showing that it was not accepted in California and that the Court struck it down on not accepted in the scientific community ground."[24] Since this was the trial strategy that trial counsel employed, it must be inferred that this was the trial strategy that was discussed with Mr. Thomas when considering whether to forgo the *Daubert* challenge. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[25] "Such Rule 403 rulings have long been common and recognized as

[23] Opening Brief at pages 39-40. A667-A669.
[24] A669.
[25] *Strickland v. Washington*, 446 U.S. 668, 688 (1984).

appropriate in Delaware."[26] That being the case, Mr. Thomas' assent or decision to forgo the *Daubert* challenge was not informed.

[26] Exhibit 1 at page 35 (citing *Bryant v. State*, 1999 WL 507300 (Del. June 2, 1999), *Tilghman v. Delaware State University*, 2014 WL 703869 (Del. Super. Feb. 10, 2014), *et al.*)).

II. THE ISSUE OF TRIAL COUNSEL'S FAILURE TO CALL SIMONE ELLISON AS A WITNESS AT TRIAL IS NOT WAIVED BECAUSE THE INTEREST OF JUSTICE REQUIRES CONSIDERATION OF THE CLAIM AND THERE IS PLAIN ERROR.

In *Burton v. State*,[27] the Court considered a post-conviction matter where the defendant litigated the motion in Superior Court *pro se* and then counsel entered an appearance on appeal. Mr. Burton's appendix on appeal contained material not included in the record below. The Court remanded the matter for consideration of the new evidence by the trial court - even though the Court will not generally consider facts and circumstances not fairly presented to the trial court. In doing so, the Court held that "some leeway should be granted if, in the interests of justice, the new evidence ought to be considered."[28] The Court relied upon prior precedent that held that some degree of leniency should be granted for *pro se* appeals and litigants.[29] Here, Mr. Thomas litigated his motion before the Superior Court *pro se*. While he did not squarely present this argument to the lower court, he did touch upon the factual circumstances involving Simone Ellison and her absence. It is in the interest of justice that the Court should consider this argument.

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[27] *Burton v. State*, 2009 WL 537194 (Del. 2009).
[28] *Burton v. State*, 2009 WL 537194 (Del. 2009).
[29] *Burton v. State*, 2009 WL 537194 (Del. 2009) (citing *Yancey v. National Trust Company, Limited*, 712 A.2d 476 (Del. 1998) and *In re Estate of Hall*, 882 A.2d 761 (Del. 2005)).

"Plain errors are 'material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.'"[30] The record must be adequate to consider whether plain error occurred, the error must exist under current law, and the error must jeopardize the fairness and integrity of the trial process.[31] All elements exist here. It was plain error for the postconviction court to ignore that trial counsel rendered ineffective assistance of counsel by failing to call Ellison as a witness at trial when trial counsel was relying affirmatively upon Ellison's opinion to argue for acquittal and relied upon that trial strategy to waive the aforementioned *Daubert* hearing.

The State argues that Mr. Thomas has not presented anything to overcome the presumption that trial counsel's strategic decision (not to call Ellison to testify) was reasonable.[32] If trial counsel's strategy was to urge the jury to accept Ellison's conclusion,[33] that the shots were fired from the street and not from where Mr. Thomas' body was located without a weapon on the sidewalk, then it is axiomatic that trial counsel should have called Ellison to testify to the conclusion.

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[30] *Suber v. State*, 2026 WL 184867 (Del. 2026).
[31] *Suber v. State*, 2026 WL 184867 (Del. 2026).
[32] Answering Brief at page 39.
[33] A1009-A1012.

There is no reason to believe that Ellison would have rehabilitated Greene had she testified, as the State contends.[34] Further, contrary to the State's argument,[35] it is reasonable to conclude that Ellison would have testified consistently with her report at trial, as expert witnesses generally do. Prejudice exists here because there is a reasonable probability of a different result had Ellison testified. The jury did not hear Ellison testify to her methodology or conclusions, and instead heard Greene discredit her as a junior analyst. As argued by Amici, jurors are impressed by the trial court's qualification of a witness as an expert. Greene was so qualified to Mr. Thomas' jury when he told them not to trust Ellison. The verdict is not worthy of confidence.

As acknowledged by trial counsel, the State, and the trial judge, the ShotSpotter evidence was critical. As argued in Mr. Thomas' Opening Brief, the difference between Ellison's and Greene's conclusions was critical. This case hinged upon the credibility of an absent expert where there is a disputed methodology, a contested diagnosis, and a novel scientific theory. The jury never heard from Ellison, the expert who did the actual work and drew the actual conclusion that was consistent with both the defense theory and the evidence in the record supporting the occurrence of a drive by shooting (the passing of a vehicle in

[34] Answering Brief at page 41.
[35] Answering Brief at page 42.

the street and the absence of a firearm on Mr. Thomas). Instead, they heard Greene say that results may vary, that he could not replicate Ellison's results, that Ellison is a junior analyst, and that he is the ShotSpotter authority.

People v. Ackley[36] and *United States v. Tarricone*[37] are more applicable here than the State concedes. Those cases involve trial counsel who failed to consult and secure experts to testify consistently with their respective defense theories at trial. The experts that trial counsel in Mr. Thomas' case consulted were relevant to a *Daubert* motion - but neither of those experts had developed an opinion relevant to the ShotSpotter data in Mr. Thomas' case specifically. Those two witnesses were not called to testify at trial in any event. It does not appear that trial counsel consulted with Ellison. However, trial counsel was certainly aware of Ellison's relevant testimony and should have called her to testify if the strategy was, in fact, to rely on her opinion.

In *State v. Hunter*, [38] cited by the State,[39] the Superior Court found that trial counsel was not ineffective for failing to call an expert because, in that case, trial counsel's strategy was *not* to discredit the State's SANE nurse. In *Hunter*, trial counsel noted that the SANE nurse did not provide any testimony to corroborate

[36] *People v. Ackley*, 870 N.W.2d 858 (Mich. 2015).
[37] *United States v. Tarricone*, 996 F.2d 1414 (2d. Cir. 1993).
[38] *State v. Hunter*, 2017 WL 5983168 at *2 (Del. Super. Sept. 29, 2017).
[39] Answering Brief at pages 39 and 40.

abuse, the SANE nurse noted no injuries or physical evidence, and instead the SANE nurse was helpful in discrediting the complaining victim. The decision not to discredit the SANE nurse was therefore a reasonable, informed, strategic decision. Mr. Thomas' case is the opposite. Trial counsel's strategy here was to discredit Greene, whose testimony was critical to the finding of guilt. "'The absence of expert testimony constitutes ineffective assistance where such testimony could provide a substantial ground of defense or is necessary to rebut critical expert testimony relied upon by the Commonwealth.'"[40] Clearly, Ellison's testimony, assumed to be consistent with her report, would have been critical to rebut Greene. It fell below an objective standard of reasonableness not to call her to testify. Mr. Thomas was prejudiced because the error changed the outcome at trial. The interest of justice requires reversal.

[40] *Commonwealth v. Rios*, 258 N.E. 3d 303, 317 (Mass. 2025) (citing *Commonwealth v. Jacobs*, 174 N.E. 3d 1200 (Mass. 2021)).

III. THE STATE CONFLATES THE STANDARD IN *NAPUE* WITH DEFINITION THAT APPLIES IN THE CONTEXT OF A CRIMINAL CONVICTION FOR THE OFFENSE OF PERJURY AND THERE IS RELIEF FROM PROCEDRUAL DEFAULT.

During Paul Greene's cross-examination, the following exchange occurred between him and defense counsel:[41]

- Q: "Did someone call you up and say, Mr. Greene we would really like you to testify in our court case?"
- A: "No, ma'am."
- Q: "Then how did you know to be here? I assume that you got a subpoena?"
- A: "No, ma'am. I did not. Miss Ellison received a subpoena, and I did not get to finish that explanation earlier during direct, but I will now. So, Miss Ellison, who was pregnant and likely to give birth, handed the subpoena to me and asked me to take care of it. So, I contacted the prosecutor's office, asked for the pertinent incident details and the court dates, and then, I performed my own analysis."
- Q: "So, you contacted the State when you got Miss Simone Ellison's subpoena because you knew that was going to be a problem?"
- A: "Yes, ma'am."

[41] A679-A680

Shortly thereafter, the State interrupted and requested a sidebar, during which it made the following statements to the trial court:

- "I don't know if he's just -- if it's a misunderstanding, but the State feels its important to put on the record that we did reach out to him in reference to his testimony."[42]
- "It put's the State in a position where we feel if he's misrepresenting something to you, then we need to --"[43]

Neither the State nor the postconviction court engaged with the elements of a due process *Napue v. Illinois*[44] violation. The elements of *Napue* are outlined in Mr. Thomas' Opening Brief.[45] Those elements of a *Napue* violation do not include, as the State suggests, "willful intent to provide false testimony."[46] This was noted recently in a dissenting opinion in this Court in *Burrell v. State*,[47] quoting the Third Circuit: "We do not believe, however, that the prosecution's duty to disclose false testimony by one of its witnesses is to be narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of

[42] A682
[43] A683
[44] *Napue v. Illinois*, 360 U.S. 264 (1959).
[45] Opening Brief at page 49.
[46] Answering Brief at page 46.
[47] *Burrell v. State*, 332 A.3d 412, FN 30 (Del. 2024).

perjury. Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading…when it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury."[48]

Hence, the postconviction court's reliance upon the definition of "swears falsely," "when the person intentionally makes a false statement…while giving testimony,"[49] does not apply to Mr. Thomas' *Napue* claim. Likewise, neither does the State's reliance upon *United States v. Dunnigan*,[50] in which the Court considered the definition of perjury in the context of criminal liability pursuant to 18 *U.S.C.* § 1621. What does matter for this due process violation is that the State knew about the falsity.[51] Based on the information presented at sidebar, the State clearly had such knowledge.

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[48] *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974).
[49] Exhibit 1 at page 33, FN 139 (citing 11 *Del. C.* 1221-1223).
[50] *United States v. Dunnigan*, 507 U.S. 87 (1993).
[51] See *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("known to be such"); *Lambert v. Blackwell*, 387 F.3d 210, 255-56 (3d Cir. 2004) ("knowingly used").; *Romeo v. State*, 2011 WL 1877845 at *3 (Del. May 13, 2011) ("or the State knowingly used, a false statement").

Mr. Thomas did raise this issue in his arguments to the postconviction court.[52] Even if he had not, a *Napue* violation is a due process violation, depriving Mr. Thomas of a substantial right to satisfy a plain error standard of review, defined *supra*.

Mr. Thomas admits that the claim was not raised by his trial counsel nor by his appellate counsel. However, he submits that the claim is not barred by Rule 61(i)(3) as there is cause for relief and prejudice. Cause for relief generally requires some external impediment preventing the claim from having been previously raised.[53] The issue is not addressed directly in trial counsel's affidavits. In appellate counsel's affidavits, they do not specifically recall considering the issue on appeal.[54] In any event, appellate counsel asserted that the State's failure to correct the falsity "was actually helpful to the defense…it is most likely for that reason that I did not consider this scenario as a potential issue for appeal."[55] It was ineffective of counsel not to raise the false testimony issue.[56] It was objectively

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[52] A1521-A1526.
[53] *Younger v. State*, 580 A.2d 552 (Del. 1990) (citing *Murray v. Carrier*, 477 U.S. 478 (1986).
[54] B109.
[55] B110-B111.
[56] *Outten v. State*, 720 A.2d 547, 556 (Del. 1998) (citing *Murray v. Carrier,* 447 U.S. 478, 498 (1986) ("the court then gave as examples of such objective impediments: i) a showing that the factual or legal basis for a claim was not reasonably available to counsel; ii) interference by officials made compliance impractical; or iii) the default was the result of ineffective assistance of counsel).

unreasonable to fail to correct the falsity at trial as the fact that law enforcement reached out to Greene about his testimony - as opposed to the swapped testimony being the result of Ellison's pregnancy - played into the defense theory of the case. Likewise, it was unreasonable not to pursue the falsity on appeal because it speaks to Greene's credibility which was central to the argument in support of the motion for judgment of acquittal which was the subject of the appeal. There is prejudice because the fact that the State reached out to Mr. Greene about his testimony would have reasonable affected the judgment of the jury as to Greene's credibility to Mr. Thomas' benefit - and it was Greene's credibility that led to the conviction.

CONCLUSION

For each of the reasons cited herein, independently and collectively, Thomas is entitled to a new trial. In the alternative, he is entitled to remand for a *Daubert* hearing.

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