State of Michigan

In the Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DAVID URBAN,

Defendant-Appellant.

Supreme Court 156458

Court of Appeals 332734

Trial Court 15-020176-FH

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Plaintiff-Appellee's Supplemental MOAA Brief

ORAL ARGUMENT REQUESTED

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Counter-statement of jurisdiction

Plaintiff-Appellee does not dispute the Michigan Supreme Court's jurisdictional authority.

Counter-statement of questions presented

Issue I

> (1) [W]hether the Court of Appeals in *People v Coy*, set forth the appropriate standard for the admission of a potential DNA match when it held that "some qualitative or quantitative interpretation must accompany evidence of the potential match[?]"

Defendant-Appellant Answer: No.

Plaintiff-Appellee Answer: Yes.

Issue II

(2) [I]f not, what standard should govern the admission of a potential DNA match[?]

Defendant-Appellant Answer: *Coy* should be narrowed.

Plaintiff-Appellee Answer: *Coy* is the appropriate standard.

Issue III

(3) [W]hether, under the appropriate standard, the potential DNA match was properly admitted in this case, where the expert's report indicated that the match supported to a "reasonable degree of scientific certainty[?]

Defendant-Appellant Answer: No.

Plaintiff-Appellee Answer: Yes.

People v Urban, Michigan Supreme Court Order, July 6, 2018 (Docket No. 156458).

Introduction

James Urban refused to let his girlfriend, Monica Hammond, leave his home for four hours. During this time Urban assaulted and terrorized her.

At trial, DNA evidence was introduced which indicated three items had blood from Monica, and one item had blood from Urban. Urban never challenged that he and Monica were present in his home, nor that they had argued and the argument had gotten physical. Rather, his defense was that Monica was lying about the extent of his violence.

In compliance with *People v Coy*, the reliability of the DNA-test results were supported by qualitative statements that the matches were "to a reasonable degree of scientific certainty." The actual frequency analysis, which was not presented to the jury, placed the accuracy of the test results as 1 in octillions (10^{27}) to 1 in decillions (10^{33}), depending on the population group with which they were compared.

This Court has asked us to consider whether *Coy* is the proper foundational standard for admission of DNA evidence, and whether that standard was followed in Urban's case. While Urban advocates a narrowing of the *Coy* standard, to exclude qualitative analysis, this Court should decline such change. This Court should DENY Urban's application, and if inclined to consider changing the standard, wait to consider the appropriate DNA-foundational base with a case having a sufficient record for review.

Counter-statement of facts

James Urban had been dating Monica Hammond for four months. Monica was

living between his home and her mother's home, when Monica decided she needed to move-out to her own place. One night, on Memorial Day weekend, although she wanted to stay at her mother's, she relented and went to Urban's. That night, Monica was tired and went to bed. Urban stayed-up – drinking Captain Morgan's rum. Monica awoke to find Urban passed-out in bed with her – ashtray between his legs and the Captain Morgan's bottle in his hand.

Urban's house was a depressing place, Urban having painted obscenities on the wall. Monica wanted to leave. She wanted to return to her mother's house. This angered Urban, and they argued.[1]

Urban gets violent

Urban quickly escalated the argument, jumping on Monica, hitting her, breaking a mirror over her head by striking it with the Captain Morgan's bottle, and kicking her. He then briefly left the room – returning with a handgun and shotgun. Urban told Monica that he was going to drink the rest of his bottle, smoke the rest of his cigarettes, then kill her and himself.[2]

This announcement began a four-hour ordeal in which Urban treated Monica like a dog, struck her in the head, arms, and legs, threatened to rape her, and forced her to load the handgun magazine so her fingerprints would be on the bullet he was planning to use to kill himself. At the end of the four hours, Urban took off his pants

[1] Jury Trial Transcript, Volume I of V, February 8, 2016, at 132-148; Appendix 14b-30b; Trial Exhibit 54; Appendix 106b.
[2] Jury Trial Transcript, Volume I of V, at 148-153; Appendix 30b-35b; Trial Exhibit 1; Appendix 101b.

and underwear, in preparation to rape Monica. When he tripped on his clothes, Monica was able to escape.[3]

Urban is convicted and sentenced

Urban was charged with Unlawful Imprisonment, Felonious Assault with a gun, Felonious assault with a bottle, Felony Firearm, and Aggravated Domestic Violence.[4] Following a four-day trial, the jury returned with guilty verdicts for Unlawful Imprisonment, Felonious Assault with a bottle, and the lesser included Domestic Violence.[5] Judge Janice Cunningham sentenced Urban to seven to fifteen-years on the most serious charge.[6]

DNA Evidence

During the investigation, several items were analyzed for DNA. Of these items, five were compared to DNA samples collected from Urban and Monica. Forensic Scientist Katie Urka analyzed samples from a handgun, tank top, bedroom door, black leggings, and pillowcase. Urka determined the samples from the tank top, black legging, and bedroom door "matched" Monica, the sample from the pillowcase "matched" Urban, and the sample from the handgun gave inconclusive results. The results of those comparisons were admitted, without objection, during trial.[7]

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[3] Jury Trial Transcript, Volume I of V, at 153-156, and 164-189; Appendix 35b-38b, and 46b-71b; Trial Exhibits 7, 8, 12, and 19; Appendix 102b-105b.
[4] MCL 750.349b; MCL 750.82; MCL 750.227b; 750.81a(2).
[5] Jury Trial Transcript, Volume V of V, February 12, 2016, at 13.
[6] Judgment of Sentence, March 31, 2016; Sentence Transcript, March 31, 2016, at 54.
[7] DNA Laboratory Report, October 22, 2015; Trial Exhibit 111; Appendix 59a-61a; Jury Trial Transcript, Volume II of V, February 9, 2016, at 100-101; Appendix 9a-10a.

Part of Urka's testing procedure included Random Match Probability calculations. In order to provide results that were more accessible to jurors and others in the criminal justice system, at the time the report was completed, Michigan State Police Forensic Science Division policy required the inclusion of a qualitative statement on reports when the frequency in the population was rarer than 1 in 7 Trillion (7,000,000,000,000).[8] Urka calculated the numeric frequency in which the DNA patterns would be found within the population, through Random Match Probability, but since it surpassed the required threshold, her report included the qualitative statement,

> In the absence of identical twins or close relatives, it can be concluded to a reasonable degree of scientific certainty that the DNA profile from [an item] and from [either Urban or Monica's sample] is from the same individual.[9]

This modest statement, giving benefit to Urban, actually cloaked a probability frequency match of incomprehensible proportion. The tank top, bedroom door, and black leggings samples all match Monica Hammond. The probability of selecting an unrelated individual matching the tank top, bedroom door, and black leggings is calculated as a Random Match Frequency of 1 in 10.33 nonillion (10,330,000,000,000,000,000,000,000,000,000) for the Caucasian population; 1 in 1.369 decillion (1,369,000,000,000,000,000,000,000,000,000,000) for the Black population; and 1 in 53.85 octillion (53,850,000,000,000,000,000,000,000,000) for the

[8] Affidavit of Kristin Schelling; Appendix 126b; In 2016 this policy changed and currently numeric statistical analysis is reported. *Id.*
[9] DNA Laboratory Report, October 22, 2015; Trial Exhibit 111; Appendix 59a-61a.

Hispanic population.[10] For the pillowcase, Urban's DNA was consistent with the sample at an even rarer frequency of 1 in 18.62 nonillion (18,620, 000,000,000,000,000,000,000,000,000) for the Caucasian population; 1 in 43.1 decillion (43,100,000,000,000,000,000,000,000,000,000,000) for the Black population; and 1 in 24.5 nonillion (24,500,000,000,000,000,000,000,000,000,000,000) for the Hispanic population.[11]

Considering the world population at the time of this test was just under 7.4 billion (7,383,008,820), and the United State's population was a mere 321 million (321,418,820); these match frequency calculations eliminate the possibility that any other person on Earth, aside from an identical twin, would match the tested sample.[12]

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[10] Affidavit of Kristin Schelling; Appendix 126b; Attachment A: Random Match Probability Calculation for Monica Hammond; Appendix 128b-129b; Attachment C: Hill, Carolyn, *et al*; *U.S. Population Data for 29 Autosomal STR Loci*, Forensic Science International: Genetics 7 (2013); Appendix 132b-133b. This article was corrected by correspondence last year by Steffen, Carolyn, *et al*; *Corrigendum to 'U.S. Population Data for 29 Autosomal STR Loci*,' Forensic Science International: Genetics 31 (2017); Appendix 120b-124b; resulting in minor changes in the analysis for Black and Hispanic populations. Since the correction is not significant to this appeal, the original calculations based on the 2013 research are used. Power of 10 numeric chart; Appendix 1b;

[11] Affidavit of Kristin Schelling; Appendix 126b; Attachment B: Random Match Probability Calculation for James Urban; Appendix 130b-131b; Hill, Carolyn, *et al*; *U.S. Population Data for 29 Autosomal STR Loci*, Forensic Science International: Genetics 7 (2013); Appendix 132b-133b. This article was corrected by correspondence last year by Steffen, Carolyn, *et al*; *Corrigendum to 'U.S. Population Data for 29 Autosomal STR Loci*,' Forensic Science International: Genetics 31 (2017); Appendix 120b-124b; resulting in minor changes in the analysis for Black and Hispanic populations. Since the correction is not significant to this appeal, the original calculations based on the 2013 research are used. Power of 10 numeric chart; Appendix 1b;

[12] Worldometers, *Population* <www.worldmeters.info/world-population/> (accessed August 24, 2018); United States Census Bureau, *American FactFinder*

Urban appeals

On appeal, Urban claimed evidence was improperly admitted, Urban's trial attorney, Steven Freeman, was ineffective, and Judge Cunningham erred in scoring offense variables. These claims were rejected by the Court of Appeals who found that the expert's qualitative statement of the significance of the DNA matches, included in her report, satisfied the foundational requirements of *People v Coy*.[13]

Urban applies for leave

In his Supreme Court application, Urban abandoned all claims of error – including his many claims of ineffectiveness by Freeman – except his challenge to the application of the *Coy* standard. Urban asked this Court to grant the appeal based on his desire to narrow the *Coy* standard to exclude qualitative expert analysis, and only permit the foundation to be established through numeric, quantitative, interpretation.[14]

Court grants MOAA

This Court granted oral arguments to consider the merits of Urban's application – asking the parties to consider three questions,

> (1) [W]hether the Court of Appeals in *People v Coy*, set forth the appropriate standard for the admission of a potential DNA match when it held that "some qualitative or quantitative interpretation must accompany evidence of the potential match[?]"

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?scr=bkmk> (accessed August 24, 2018); Power of 10 numeric chart; Appendix 1b.

[13] *People v Urban*, 321 Mich App 198, 203-205; 908 NW2d 564 (2017); Appendix 108b-109b; published version included in Plaintiff-Appellee's Appendix for convenience; *People v Coy*, 243 Mich App 283, 301-302; 620 NW2d 888 (2000).

[14] Urban's Application for Leave to Appeal, September 12, 2017, at 2-3; Appendix 117b-118b.

> (2) [I]f not, what standard should govern the admission of a potential DNA match[?]
>
> (3) [W]hether, under the appropriate standard, the potential DNA match was properly admitted in this case, where the expert's report indicated that the match supported to a "reasonable degree of scientific certainty[?]"[15]

As discussed below, this Court should not modify the *Coy* standard because it properly sets a foundational requirement that permits the use of scientifically relevant expert interpretation that remains relevant in this ever-changing field of science.

Since there was no objection to the admission of the DNA evidence, and there is no trial-court record for this Court to review when considering the merits of modifying the holding in *Coy*. If this Court desires to change the standards for admission of DNA evidence, it should deny this application and review a case in which there is a trial court record sufficient to permit a complete analysis. The impact of the DNA evidence in this case was minimal, and the qualitative manner in which the match probability was reported was advantageous for Urban. Basing a significant change in evidentiary jurisprudence on such a non-existent record is unwarranted.

Since the *Coy* standard has stood the test of time, the record for review is limited, and Urban was not prejudiced; this Court must demonstrate judicial restraint and DENY Urban's application.

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[15] *People v Urban*, Michigan Supreme Court Order, July 6, 2018, (Docket No. 156458).

Argument

Issue I

Whether the Court of Appeals in *People v Coy*, 243 Mich App 283, 302 (2000), set forth the appropriate standard for the admission of a potential DNA match when it held that "some qualitative or quantitative interpretation must accompany evidence of the potential match?"

Prosecutor's answer: Yes.

Counter-statement of standard of review

Preliminary questions of law, related to the admission of evidence, are reviewed de novo.[16]

Coy standard necessary

Probability or statistical analysis is required as foundation for DNA evidence to comply with the requirements of MRE 702. MRE 702 permits expert testimony when such knowledge will assist the jury to understand evidence "having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable."[17]

In *Coy*, the DNA testing involved allele-analysis at 12 separate loci.[18] Because of the number of locis reviewed at the time of *Coy*, it was essential to put any test results into context for the jury – qualifying the result with the statistical possibility of a different person having a matching DNA profile at the analyzed loci. Without this foundational information, the testimony does not "assist the trier of fact to

[16] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).
[17] MRE 401; MRE 702; *Coy*, *supra* 13, at 294-298.
[18] *Coy*, *supra* 13, at 292.

understand the evidence."[19]

To ensure that the jury is properly informed of the context of a DNA-test result, *Coy* established that such evidence may only be admitted if accompanied with "some qualitative or quantitative interpretation . . . of the potential match."[20]

Coy refrained from requiring only numeric results

Urban's current argument, urging narrowing the foundational basis for DNA evidence, ignores the holding of *Coy*. While the *Coy* Court established the need for "some generally accepted or scientifically sound profile frequency or probability estimate," it refrained from dictating the format of the evidence.

> We emphasize that we do not now declare or delineate the appropriate articulations for expressing the extent or meaning of a potential match, but merely hold that some qualitative or quantitative interpretation must accompany evidence of the potential match.[21]

To explain their reason for permitting quantitative **and** qualitative results, the *Coy* Court included footnote 13 – a footnote referencing a discussion of the options for defining the significance of a DNA-match authored by the National Research Council.[22] The *Coy* Court heavily relied on this report to make its decision. The report indicated that there were different methods of providing this analysis to jurors – qualitative and quantitative – resulting in courts who have considered the issue

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[19] *Id.*, at 294-298; MRE 702.
[20] *Coy*, *supra* 13, at 302.
[21] *Id.*, at 302.
[22] "For a discussion concerning the pros and cons of the various manners of expressing the meaning of a potential match, see National Research Council, *supra* at 192-202." *Id.*, at 302 n 13; National Research Council, *The Evaluation of Forensic DNA Evidence* (1996), at 192-202; Appendix 3b-13b.

coming to conflicting results.[23]

Reasons against numerical results include,

- Uniqueness – Advancing science will reach a point in which the method of testing will no longer require match-clarification.[24]

- A qualitative articulation of match probability may be fairer and more accessible to jurors than merely a numerical statement.[25]

- Numerical articulation is prejudicial because,

> [T]he jury will be awed by small numbers and ignore other aspects of the case, that the jury will misconstrue the probability of a random match as the probability that the defendant is not the source of the incriminating DNA, and that the statement of a probability ignores the possibility of a match being declared due to sample mishandling or other blunders.[26]

The prejudicial concern is particularly interesting. As noted, there is a legitimate concern that jurors will overvalue quantitative evidence to the detriment of other evidence (ie. the "CSI effect"), misinterpret the probability of a random match, and that the inclusion of the possibility for error – when such error is extremely rare – introduces a statistically impossible constraint on the admission of the evidence.[27]

As a result of all of these concerns, the National Research Council urged research regarding juror and judicial response to DNA probability evidence.[28] Based

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[23] *Id.*, at 192-193; Appendix 3b-4b.
[24] *Id.*, at 193-194; Appendix 4b-5b.
[25] *Id.*, at 195 n 85; Appendix 6b; *citing State v Bloom*, 516 NW2d 159, 166-167 (Minn 1994).
[26] National Research Council, at 196; Appendix 7b.
[27] *Id.*, at 196-199; Appendix 7b-10b; CJI 4.3 Circumstantial Evidence (Jury instruction directing jurors to "consider all the evidence [they] believe.")
[28] National Research Council, at 199; Appendix 10b.

on the concerns articulated by the National Research Council, and the lack of research defining the impact on jurors, the *Coy* court wisely declined to articulate the method with which experts were to characterize the weight of the DNA evidence. Instead setting a base requirement for admission – some form of qualitative or quantitative analysis is required as foundation for DNA-evidence admission.[29] Leaving to cross-examination the clarification of that analysis when relevant to the case or theory of defense.

Current testing methods provide mind-boggling results

While the *Coy* Court considered the admission of DNA-testing involving the analysis of alleles at 12 loci, Monica's and Urban's DNA were analyzed at 24 loci. While both testing methods produce accurate and reliable results, the testing method reviewing more loci permits frequency calculations of greater significance.

At the time of *Coy*, the scientific community was concerned about the infallibility of a probability match in the range of one in millions or billions (1 in 1,000,000 to 1 in 1,000,000,000).[30] Such statistical analysis is dwarfed by the test-results in this case – with a probability frequency in the range of 1 in octillions to decillions (1 in 1,000,000,000,000,000,000,000,000,000 to 1 in 1,000,000,000,000,000,000,000,000,000,000,000).[31] Such a substantial shift in

[29] *Coy*, *supra* 13, at 302.
[30] National Research Council, at 197 n 91; Appendix 8b; Power of 10 numeric chart; Appendix 1b.
[31] Affidavit of Kristin Schelling; Appendix 126b; Attachment A: Random Match Probability Calculation for Monica Hammond; Appendix 128b-129b; Attachment B: Random Match Probability Calculation for James Urban; Appendix 130b-131b; Power of 10 numeric chart; Appendix 1b.

analysis, in a relatively short-period of time, demonstrates the wisdom of the *Coy* decision.

Information about this science should be a foundational requirement of DNA evidence. However, as it is rapidly evolving, this Court should not hinder the ability of the expert to do their job and characterize the possibility of similar results. As such, this analysis should be permitted on a qualitative basis to ensure accessibility to lay jurors, and to account for scientifically-based changes in procedures.

With probabilities that now eclipse the world population, it is curious that Urban is demanding that DNA evidence involved in his case should have been reported with numeric-frequency calculations. Solidifying to a lay juror the rarity of the profiles. In light of the quantitative analysis, Urka's qualitative statement of a match "to a reasonable degree of scientific certainty" was a substantial benefit to Urban.

Van Hoek concedes *Coy* does not require numeric analysis

During oral arguments before the Court of Appeals, while arguing that a numeric match analysis was necessary, Peter Van Hoek conceded that *Coy* is not limited only to quantitative interpretation. Rather, he agreed that *Coy* does not requires the recitation of a number to communicate the accuracy of the test result.

> Judge Boonstra: Why isn't it sufficient that in addition to the testimony of the expert, the expert's report was admitted into evidence. And although it didn't contain the numbers you're talking about . . .
>
> Van Hoek: Right.
>
> Judge Boonstra: It did say, "In the absence of identical twins or close

relatives, it can be concluded to a reasonable degree of scientific certainty that the DNA profile from [the major donor to a particular item and the DNA from another item was] from the same individual."

Van Hoek: I understand. But again, *Coy* doesn't say in the alternative, without the numbers, the expert can come in and say to the degree of scientific certainty this is a match. The numbers are what gives it the certainty. And the jurors, again, don't really understand what that means.

Judge Boonstra: But *Coy* says there has to be some quantitative, *or qualitative analysis*.

Van Hoek: Mhmm. But, I don't. But in an opinion like that, that's really, the statement in the report that this was a match to scientific certainty is really no different than the witness coming in and saying "yes, I'm a scientist, I'm trained in this stuff, and this was a match." That doesn't tell the jurors much of anything other than the witnesses' opinion is what her opinion is as a scientist. It's the numbers that make a difference. It is the fact that that that match means something a lot more than just, "I compared these two things and they look . . ." You know , "I think that this came from the defendant. That's my scientific . . . I mean even [inaudible] lay people . . .

Judge Boonstra: Well it was beyond that, it said "can be determined to, *concluded* to a reasonable degree of scientific certainty."

Van Hoek: Yeah. Again I think if *Coy* said that language is okay than they wouldn't have put that in their opinion.

Judge Boonstra: Well *Coy* says there must be "some analytic or interpretive evidence concerning the likelihood or significance of a DNA profile."

Van Hoek: Well I just that that conclusionary statement that it's scientifically certain is not enough, because I don't think jurors really understand that. Jurors, people understand numbers. I don't know if they

> understand what that means. What scientific certainty means. Because it's sort of an ambiguous phrase that maybe other scientists understand, but not jurors.
>
> . . .
>
> Judge Krause: All right, so here's the thing, let me just ask you this about the DNA, because I actually had one of the first PCR cases, as a lawyer, in the state had to do a hearing to get it admitted and all that. So I'm pretty familiar with DNA.
>
> I'm trying to understand why you're saying that "in the absence of identical twins or close relatives, it can be concluded to a reasonable degree of scientific certainty that the DNA profile [of the major donor to the item, and from the item,] is from the same individual" is not enough. **Are you saying that *Coy* indicates that there has to be a number? And if you're saying that, on what page does *Coy* say there has to be a number?**
>
> Van Hoek: **Well I don't think, I'm not saying that *Coy* says there has to be a number.**
>
> Judge Krause: Okay.[32]

While Van Hoek argues today and previously before the Court of Appeals that numerical statistical results are required, he has conceded this point with Judge Krause by being unable to cite the part of the *Coy* decision supporting his contention.

This Court must decline to alter *Coy*

Coy does not require recitation of a confusing numeric figure to establish a foundation for the admission of DNA evidence. Rather they left the determination of the type of foundational analysis to the experts. It would be short-sided for this Court

[32] Michigan Court of Appeals, Oral Argument, July 11, 2017, at 2:51 to 7:01; *emphasis added*.

to ignore the ever-changing nature of DNA analysis – based on a complete lack of trial-record addressing this issue – to narrow this holding. This Court must DENY Urban's application.

Issue II

> If *Coy* did not set forth the appropriate standard, what standard should govern the admission of a potential DNA match?

Prosecutor's answer: *Coy* set the appropriate standard.

The *Coy* decision is appropriate because it requires some interpretation by an expert, but does not limit that interpretation to a specific type. As technology in the filed advances, experts' articulation of the reliability of such testing may change. Even in this field of science, we have seen a shift in testing procedures to a point in which some jurisdictions do not require any interpretation of the match. This is because "once profile frequency reaches a certain level of infinites-imalness, there is no scientific basis for requiring statistical testimony to accompany match testimony."[33] This was the very point noted by the *Coy* panel in declining to set a rigid numeric interpretation requirement.[34]

Coy sets the appropriate standard because it provides a base requirement while being flexible enough to withstand changes in a quickly advancing field of science.

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[33] *Young v Maryland*, 879 A2d 44 (Md 2005)
[34] *Coy*, *supra* 13, at 302 n 13; *citing* National Research Council, at 192-202; Appendix 3b-13b.

Issue III

Whether, under the appropriate standard, the potential DNA match was properly admitted in this case, where the expert's report indicated that the match was supported to a "reasonable degree of scientific certainty?"

Prosecutor's answer: Yes.

Counter-statement of issue preservation

Freeman had no objection to the admission of the DNA evidence at trial.[35] As a result, Urban's claim was not preserved for appellate review.

Counter-statement of standard of review

The review of the unpreserved claims are for plain error effecting substantial rights.[36] "Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence.'"[37] "Where there has not been an objection, this Court cannot review the admission of evidence absent a showing of manifest injustice.'"[38]

Findings of fact by the trial court are reviewed for clear error.[39] Such error occurs when "the reviewing court is left with a definite and firm conviction that a

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[35] Jury Trial Transcript, Volume II of V, February 9, 2016, at 100-101; Appendix 9a-10a; DNA Laboratory Report, October 22, 2015; Trial Exhibit 111; Appendix 59a-61a.
[36] *Urban*, *supra* 13, at 203; Appendix 108b; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).
[37] *Urban*, *supra* 13, at 203; Appendix 108b; *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009); *citing Carines*, *supra* 36, at 763; *People v Grant*, 445 Mich 535, 548; 520 NW2d 123 (1994).
[38] *People v O'Brien*, 113 Mich App 183, 203; 317 NW2d 570 (1982); *citing People v Sands*, 82 Mich App 25, 35-36; 266 NW2d 652 (1978).
[39] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

mistake was made."[40]

Preliminary questions of law, related to the admission of evidence, are reviewed de novo.[41]

DNA evidence properly admitted

To have a proper evidentiary foundation, DNA-match evidence must be accompanied by "some qualitative or quantitative interpretation . . . of the potential match."[42] In this case, the admission of the match results – memorialized in Urka's laboratory report – were accompanied by the analysists qualitative expression of the frequency of the match.[43]

> In the absence of identical twins or close relatives, it can be concluded to a reasonable degree of scientific certainty that the DNA profile from [an item] and from [either Urban or Monica's sample] is from the same individual.[44]

Further, the laboratory report was admitted without objection, and Urban's trial attorney agreed to the validity of the test results.[45]

While Urban now wants a numeric result to have been presented to the jury, that is not the standard established by *Coy*. Such questioning would not have benefited Urban's defense. And, as conceded by Urban's appellate counsel, such a

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[40] *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016); *citing People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013).
[41] *Lukity*, *supra* 16, at 488.
[42] *Coy*, *supra* 13, at 302.
[43] DNA Laboratory Report, October 22, 2015; Trial Exhibit 111; Appendix 59a-61a.
[44] *Id*.
[45] Jury Trial Transcript, Volume II of V, February 9, 2016, at 100-101; Appendix 9a-10a; Jury Trial Transcript, Volume IV of V, February 11, 2016, at 41-43; Appendix 90b-92b.

numeric result is not required.[46]

Coy requires "interpretive evidence concerning the likelihood or significance of a DNA profile match." That requirement was met with the admission of Urka's laboratory report.[47] There was no error in the court admitting this evidence.

No prejudice to Urban

As discussed above, quantitative analysis of the admitted DNA results were completed at the time of Urka's original testing. This analysis established frequency probability with 1 in octillions to decillions – amounts drastically exceeding the world population. To Urban's benefit, the jury was instead conservatively informed through the report that the match was accurate "to a reasonable degree of scientific certainty." This qualitative statement may be one of the greatest scientific understatements, only surpassed by Watson and Crick's own humble description of DNA. "This structure has a novel feature which are of considerable biological interest."[48]

When considering frequency numbers dwarfing our own nation's astonishing debt, the inclusion of the Michigan State Police's understated analysis was beneficial to Urban and any effort to discredit the results – if he had tried to do so.[49]

However, Freeman did not try to discredit the DNA results. He used them successfully to obtain exoneration on gun assault charges. Urban's theory of defense never suggested that Monica and he had not been together at the time of the crime

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[46] Oral argument, Michigan Court of Appeals, July 11, 2017, at 2:51 to 7:01.
[47] *Coy*, *supra* 13, at 301.
[48] Watson, J D; Crick, F H C, *A structure for Deoxyribose Nucleic Acid* (April 25, 1953).
[49] U.S. National Debt Clock <www.usdebtclock.org> (accessed August 24, 2018).

and did not have a physical fight. Rather, he conceded that they argued and fought, but disagreed about the extent of the violence.

> I suggested to you Monday my client insisted on a trial because he believes he has been overcharged. I didn't use the word innocent. And, frankly, I don't like that word anyway, even if that's what the law says. Presumed to be innocent. Well, guess what? When you get that jury verdict form, it's not gonna say innocent and guilty. It's not. I've seen it. It says not guilty or guilty. That's what it says, all right?
>
> **I'm not suggesting to you my client is innocent in the sense that he wasn't there or he didn't see or he didn't know or he didn't participate or, in some way, cause something.** I'm not suggesting that to you. For you see, I wasn't there, so I don't know what happened and I don't know what didn't happen. And my dear friend and colleague was not there. She does not know what happened and she does not know what did not happen. Neither were you. You weren't there either, so you don't know. You don't know what happened, you don't know what didn't happen.
>
> It is the position of the defense – I alluded to this during opening – the reason were here, the reason were having a trial is my client is convinced he has been overcharged, overcharged, okay?[50]

And later in his closing, Freeman explained,

> When you see the pictures of my client and you see the pictures of her – listen to me. Listen to me. Yeah, I'm his lawyer. **Something happened. It was more than a heated discussion. It was a brawl.** They've both got scratches. They've both got bruises. They've – I mean, you looked at them quickly. But when you look at it again, all right, they're – they've both got marks on 'em, arms, legs, both of 'em. **It was a cat fight. It was probably more than that**.[51]

Freeman didn't challenge the validity of the DNA evidence. Rather he embraced its accuracy arguing that Monica was using it to exaggerate the severity of their fight.[52]

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[50] Jury Trial Transcript, Volume IV of V, at 44; Appendix 93b; *emphasis added*.
[51] *Id*., at 48; Appendix 97b; *emphasis added*.
[52] *Id*., at 29; Appendix 78b.

Ah, we did get some DNA, though. We got some DNA. We got some scientific evidence here that is supposed to prove to you, beyond a reasonable doubt, that my client committed each of these five felony offenses. Let's go through what we do have; all right?

Well, **we got a man's white tank top that's got three teeny, weeny specs of Monica's blood on it**, which is, according to her, not him, according to her – you'll read it in your – it's what you heard yesterday. You've got the transcript, okay. Well, I grabbed this -- well, I don't know. You know, she calls it a wife beater. Yeah, I put it on my head to stop the bleeding. Oh, my gosh, stop the bleeding. This is – I'm bleeding. I've got to stop this bleeding.

What would you imagine that shirt would look like? You don't have to be a doctor. Come on, what would that shirt look like? A white shirt, okay. Would it look like that one? But, that was her blood. Does that prove how it got there? Does that prove how she sustained that particular abrasive injury? No. It proves that there was three drops of blood on that shirt, that's what it proves.

What else do we have? **Black leggings. Well, of course, she was wearing them. What else? What she was wearing -- yup.**

The pink pillowcase, I remember the pink pillowcase. And I remember there was a teeny, weeny spot on that pink pillowcase. Remember what I suggested earlier: Do not go by my memory. You go by your memory. If your memory is different than mine, then you go by your memory, not mine. Okay? Okay.

This is my memory. My memory is that the prosecutor put an expert witness on the stand and wanted to talk to you about that pink pillowcase and wanted to tell you what they did. They took a little snip, and they put it in the thing, and they sent it to serology, and so on and so on; right? That's my memory of that pink pillowcase. But, my memory of that pink pillowcase, also, is that **it was defense that asked that witness, Well, whose blood was it?** Well, there's the (inaudible - coughing). **It was Mr. Urban's blood.** My memory is that I asked that question.

Well, we have more, more forensic evidence to support the government's claim that my client committed all five of these crimes: **Swabs of the stain on the back of the bedroom door. We know that's her blood.** The black t-shirt she was wearing, of course it's her blood. Kinda like he's wearing. Talked about tan shorts, them getting anything from the tan shorts. That was what my guy was wearing. Now, black belt, nope. Underwear, nope. Black slacks, nothing.

Ah, we already talked about the pink pillowcase. That's it. That's it.

> Nope, that's all the forensic evidence. That's all of the laboratory testing and all of the lab report testing results you have in support of her claim that my client committed these five crimes, that's it.
>
> So, for all intents and purposes, you have her testimony, okay?[53]

Freeman made no effort to discredit the DNA evidence as part of his trial strategy. As a result, inclusion of qualitative as opposed to numeric analysis of the testing had no impact on the jury's decision. Freeman agreed that the matches were accurate and successfully used them to support Urban's defense that Monica exaggerated their fight and he should not be convicted of all the charges.[54]

Since Freeman agreed that the DNA evidence was accurate, Urban's claim that he was prejudiced by them, because it corroborated her version of events, is without merit.[55] Particularly since strategic error cannot later be used as an appellate parachute.[56]

Any error harmless

If this Court chooses to ignore the plain language of *Coy*, limit DNA-foundation to numeric analysis, and determine that Urka's lab results were improperly admitted; this Court must recognize that as part of the theory of defense, Freeman not only did not object to the admission of the lab results, but agreed that they were accurate.

Further, since a timely objection would have resulted in testimony of

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[53] *Id*., at 41-43; Appendix 90b-92b; *emphasis added*.
[54] *Id*., at 44; Appendix 93b.
[55] Urban's Supplemental Brief, August 17, 2018, at 22.
[56] *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). The Court of Appeals determined Freeman was not ineffective and this Court has not asked the parties to brief the issue. *Urban*, *supra* 13, at 206-214; Appendix 109b-112b; *People v Urban*, Michigan Supreme Court Order, July 6, 2018.

staggering frequency analysis numbers – surpassing a mere assertion of "reasonable certainty," any error in admission was harmless.

For those reasons, the admission of the DNA evidence did not "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence."'[57]

"Where there has not been an objection, this Court cannot review the admission of evidence absent a showing of manifest injustice."'[58] Urban was not prejudiced by the inclusion in Urka's report of this qualitative statement, and there is no manifest injustice.

Conclusion

This Court should support the wisdom of the *Coy* Court by continuing to permit a broad-range of analysis to be utilized as foundation for DNA results. To do otherwise is to limit the ability for judge and jury to rely on science and the most up-to-date experts in this field.

If this Court choses to change the standard for the admission of DNA results, considering the heavy reliance on *Coy* by both scientific and legal communities, this change should only have a prospective impact. To do otherwise is to cause extensive litigation with no benefit.

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[57] *Urban*, *supra* 13, at 203; Appendix 108b; *Shafier*, *supra* 37, at 219-220; *citing Carines*, *supra* 36, at 763; *Grant*, supra 37, at 548.
[58] *Urban*, *supra* 13, at 203; Appendix 108b; *Shafier*, supra 37, at 219-220; *citing Carines*, *supra* 36, at 763; *Grant*, supra 37, at 548.

Respectfully submitted,

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September 5, 2018

Brent E. Morton