IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA **v.** **DARIUS TAUREAN CALDWELL,** **Defendant.**	**CRIMINAL ACTION FILE** **NO. 1:16-CR-355-MHC-JSA**

ORDER

This case comes before the Court on Defendant Darius Taurean Caldwell ("Caldwell")'s Motion for New Trial Pursuant to Federal Rule of Criminal Procedure 33(a) ("Mot.") [Doc. 172].

I. BACKGROUND

On January 23, 2018, Caldwell was charged in a five-count Superseding Indictment [Doc. 88] with two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (Counts One and Three), two counts of brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 942(c)(1)(A), 924(c)(1)(A)(ii), and (c)(1)(C)(i) (Counts Two and Four), and one count of possession of a firearm after being convicted of a felony in violation of 18 U.S.C. § 922(g)(1) (Count Five). On April 12, 2018, following a jury trial that began on April 9, 2018, Caldwell was convicted of all Counts. Jury Verdict

[Doc. 115]. On August 2, 2018, the Court sentenced Caldwell to a total of 384 months and one day imprisonment, to be followed by five years of supervised release. J. in a Criminal Case [Doc. 138].

On August 13, 2018, Caldwell appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit. Notice of Appeal [Doc. 139]. In a letter dated November 13, 2018, the Federal Bureau of Investigation ("FBI")'s General Counsel's Office informed the Assistant United States Attorney who prosecuted this case that certain statements made by the FBI Forensic Examiner (the "Examiner") during the trial regarding DNA likelihood ratios deviated from "recommended language." Letter from Richard McNally, Section Chief, Science and Technology Branch, Office of General Counsel, Federal Bureau of Investigation, to Bret R. Hobson, Assistant United States Attorney, United States Attorney's Office (Nov. 13, 2018) ("FBI Letter") [Doc. 172-1]. On November 20, 2018, the United States disclosed this letter to Caldwell's counsel. Mot. ¶ 8. On January 11, 2019, the Eleventh Circuit Court of Appeals granted Caldwell's motion to hold his appeal in abeyance pending the outcome of a motion for relief in this Court. Order, United States of America v. Darius Taurean Caldwell, No. 18-13426-FF (11th Cir. Jan. 11, 2019) [Doc. 169]. Caldwell filed the instant Motion on February 28, 2019.

II. LEGAL STANDARD

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." FED. R. CRIM. P. 33(a). Unlike a motion for judgment of acquittal under Rule 29, Rule 33 allows the district court to weigh the evidence and consider the credibility of witnesses, although to grant such a motion, "[t]he evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." Butcher v. United States, 368 F.3d 1290, 1297 (11th Cir. 2004) (citations omitted). To succeed on a Rule 33 motion based on newly discovered evidence, a defendant must demonstrate the following conditions:

> (1) the evidence must be discovered following trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to issues before the court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

United States v. Barton, 909 F.3d 1323, 1337 (11th Cir. 2018) (citing United States v. DiBernardo, 880 F.2d 1216, 1224 (11th Cir. 1989)).

The decision whether to grant a new trial is within the sound discretion of the trial judge, United States v. Champion, 813 F.2d 1154, 1170 (11th Cir. 1987), but courts should exercise "great caution" when granting new trials, United States v. Sjeklocha, 843 F.2d 485, 487 (11th Cir. 1988) (citations omitted), and should do

so only in "exceptional cases." United States v. Martinez, 763 F.2d 1297, 1313 (11th Cir. 1985) (citation and quotation omitted). "[A] Rule 33 motion is an uphill climb. Such motions 'are highly disfavored in the Eleventh Circuit and should be granted only with great caution.'" Barton, 909 F.3d at 1337 (quoting United States v. Campa, 459 F.3d 1121, 1151 (11th Cir. 2006)). The court "may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." Martinez, 763 F.2d at 1312-13.

III. ANALYSIS

At trial, the Examiner testified that the FBI tested "the DNA from a bandana from a gym bag, a wig from a gym bag, and a Smith and Wesson pistol from a gym bag" as well as "a known sample from Darius Caldwell." Tr. of July Trial (Apr. 11, 2018) ("Tr. Vol. 3") [Doc. 164] at 74. The Examiner described the results as follows on direct examination:

- From the bandana, I depicted [sic] a mixture of male DNA from three individuals. I found—I concluded that Mr. Caldwell was included as a possible contributor to the DNA from the bandana. And the likelihood ratio that was calculated from that exceeded that 700 billion number.[1]

[1] The Examiner had just testified that "I can say someone is the source of the DNA if that likelihood ratio exceeds 700 billion. So the reason we use that number as a threshold is because it's approximately 100 times the population of the Earth. So that is a conservative number for me to be able to conclude that someone is the source of the DNA from an evidence item." Tr. Vol. 3 at 74.

So I concluded that Mr. Caldwell was the source of one of the contributors of the mixture from the bandana.

- From the wig, I obtained a mixture of male and female DNA from three individuals. The likely—and I concluded that Mr. Caldwell was a possible contributor and be included as a possible contributor to DNA from the wig. The likelihood ratio that was calculated from that was 480,000. So that means that the DNA profile from the wig is 480,000 times more likely that Mr. Caldwell and two unknown, unrelated individuals are contributors, as opposed to originally from three unknown individuals. So that provides very strong support that Mr. Caldwell is a contributor to the mixture on the wig.

- From the pistol, I obtained a mixture of male and female DNA, this time of four individuals. Again I had determined that Mr. Caldwell was included as a possible contributor to that mixture, and the likelihood ratio that was calculated from that was 4.6 million. So that means that the DNA I obtained from the Smith & Wesson pistol was 4.6 million times more likely if Mr. Caldwell and three unknown, unrelated individuals are contributors, as opposed to if they originated from four unknown, unrelated individuals. So that provides extremely strong support that Mr. Caldwell is a contributor to the mixture from the Smith & Wesson pistol.

Id. at 74-76 (emphasis added). On re-direct examination, the Examiner testified that:

- For the bandana, I determined that there was a mixture of three individuals, a male mixture of three individuals. And I determined that Mr. Caldwell was included as a possible contributor to that mixture. The likelihood ratio was calculated, it exceeded 700 billion. Again, that's a hundred times the population of the Earth. So I concluded that Mr. Caldwell was the source of one of those contributors to the bandana.

- For the wig, I obtained a mixture of male and female DNA. Again, that was a mixture of three individuals, and I determined that Mr. Caldwell was a possible contributor to be [sic] that mixture as well. And the likelihood ratio calculated from that was 408,000 [sic]. So that means that the DNA from the wig was 480,000 times more likely if Mr. Caldwell and two unknown, unrelated individuals or [sic] contributors than if they originated from three unknown, unrelated individuals. And that provides very strong support that Mr. Caldwell is a contributor to the DNA from the wig.

- The DNA from the guns [sic], I obtained a mixture of male and female DNA again. This time, it was a mixture of four individuals and Mr. Caldwell was included as a possible contributor to that mixture. The likelihood ratios I calculate from that was 4.6 million. So that means that the DNA from the gun is 4.6 million times more likely that Mr. Caldwell was a contributor of three unknown, unrelated contributors as opposed to if they originated from four unknown, unrelated contributors. So that means that that provides extremely strong support that Mr. Caldwell is a contributor to the DNA that I obtained from the Smith & Wesson pistol.

Id. at 125-26 (emphasis added).

The Examiner deviated from the recommended language when she provided the likelihood ratios using the word "if" instead of the word "that." See FBI Letter.

> The meaning of a likelihood ratio statement can change if not stated precisely or if inadvertently transposed. For example, a likelihood ratio of 1000 means that the DNA results are 1000 times more likely if the person of interest is a contributor than if an unknown, unrelated individual is a contributor, not that it is 1000 times more likely that the individual is a contributor to the DNA evidence rather than an unknown, unrelated individual. The subtle difference technically changes the meaning.

Id. The Examiner deviated from the recommended language by using the word "that" on three occasions: when discussing the likelihood ratio for the wig on direct examination, when discussing the likelihood ratio for the gun on redirect examination, and when explaining what a likelihood ratio is using a hypothetical involving collecting DNA from a knife handle. See Tr. Vol. 3 at 73, 75, 126; see also FBI Letter. The Examiner used the recommended language when discussing the likelihood ratios for the gun on direct examination and the wig on redirect examination. Tr. Vol. 3 at 76, 125; see also FBI Letter. The likelihood ratios were also correctly represented in the FBI Laboratory Report admitted into evidence at trial. FBI Letter; see also Laboratory Report ("Report") [Doc. 120-14] (Def.'s Ex. 29) at 3-4.

Caldwell claims that he is entitled to a new trial based upon the newly discovered evidence that the "Examiner had testified erroneously regarding the likelihood that Mr. Caldwell was a contributor of DNA to the handgun, the bandana, and the wig." Mot. ¶¶ 5-6.

A. Whether the Evidence was Discovered Following Trial

It is undisputed that the FBI's General Counsel's Office notified the Assistant United States Attorney of the Examiner's deviation from the recommended language after Caldwell's trial. However, the United States implies

that the Examiner's trial testimony itself is the evidence. See Resp. to Def.'s Mot. for New Trial ("Resp.") [Doc. 176] at 14. The United States asserts that because the Examiner testified at trial and because the defense team had a copy of the Report which correctly phrased the Examiner's conclusions, Caldwell "thus knew at trial that the expert's testimony deviated from her report a few times." Id. However, the fact that Caldwell heard the live testimony and had a copy of the Report does not establish that Caldwell knew the Examiner's testimony deviated from the FBI's recommended language on likelihood ratios. There is no indication that Caldwell was aware of the FBI's recommended language. Caldwell was not informed of that the Examiner's testimony deviated from the FBI's recommended until November 20, 2018. Accordingly, Caldwell has shown that the evidence was discovered following trial.

B. Whether Caldwell Showed Due Diligence to Discover the Evidence

The United States contends that Caldwell and his counsel "could have discovered, understood, and explored further at trial on cross-examination" the difference between the Examiner's language in her Report and in her direct examination testimony. See Resp. at 15. The United States contends that Caldwell's failure to "discover these minor deviations at trial" is "from a lack of due diligence." Id.

The Examiner deviated from the recommended language at trial three times. She used the recommended language at trial twice. The United States's characterization of these deviations as "minor and immaterial" and the FBI Letter's description of them as "subtle difference[s] [that] technically change[] the meaning" supports Caldwell's argument: It would have been challenging for Caldwell and his counsel to notice that the Examiner used the word "that" instead of the word "if" when describing the likelihood ratios. More importantly, there is no indication that Caldwell or his counsel knew at the time of trial that the Examiner's testimony deviated from the FBI's recommended language. This Court has not located any state or federal court decision referencing the FBI's recommended language to be used when describing DNA likelihood ratios. Nor has the Court located any public FBI or United States Department of Justice ("DOJ") document providing this recommended language. The United States tendered, and the Court qualified, the Examiner "as an expert in the field of forensic DNA analysis." Tr. Vol. 3 at 56, 68. Caldwell and his counsel could not reasonably be expected to object to or cross-examine the Examiner on deviations from the FBI's recommended language that the FBI's General Counsel's Office found during a subsequent internal review. Nothing indicates that Caldwell failed to show due diligence here.

C. Whether the Evidence Is Merely Cumulative or Impeaching

The United States contends that "the information about the FBI's assessment would have merely impeached the expert's testimony . . . ." Resp. at 16. It also contends that "[w]ere this information about the FBI's assessment presented at trial, it would not have changed the expert's conclusions . . . , her numbers . . . , or how she described the strength of the support for inclusion . . . ." Id. It is true that the Examiner still would have testified that Caldwell was the source of the DNA on the bandana, and that there was strong support and extremely strong support that he was a contributor to the DNA on the wig and gun, respectively. The Examiner still would have testified that she determined that Caldwell was a contributor to the DNA mixtures on the bandana, wig, and gun. However, although the numbers in the likelihood ratios would not have changed, "the meaning of a likelihood ratio statement can change if not stated precisely or if inadvertently transposed." See FBI Letter. Three times—once when giving an example, and twice when discussing physical evidence—the Examiner incorrectly stated the likelihood ratio. Stating the likelihood ratio using the word "that" instead of "if" "technically changes the meaning." Id. Accordingly, the Court is not convinced that evidence of these deviations from recommended language is merely impeaching.

D. Whether the Evidence Is Material to Issues Before the Court

The United States contends that "the fact that the FBI considers three instances of the DNA expert's testimony to be minor deviations from recommended language does not change a material fact in evidence before the Court."[2] Resp. at 17. However, as explained in part III.C, incorrectly stating the likelihood ratio changes its meaning. The effect of these incorrect statements was to communicate to the jury that it was 480,000 and 4.6 million times more likely that Caldwell was a contributor to the DNA evidence, as opposed to that the DNA results were 480,000 and 4.6 million times more likely if Caldwell was a contributor. See FBI Letter.

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[2] The United States repeatedly characterizes the Examiner's deviations as "minor" and "not an error." See Resp. at 1-2, 11-12, 15-17. The FBI Letter does not describe the deviations as such. See FBI Letter. According to an internal email sent to the Assistant United States Attorney from the Chief of the Forensic Science Law Unit at the FBI's General Counsel's Office, the Examiner's testimony "included statements which the Department of Justice has determined to be 'minor deviations from recommended language'" and "DOJ has indicated this is not an error but we wanted to bring it to your attention." Email from Paula H. Wulff, Chief, Forensic Science Law Unit, Office of the General Counsel, Federal Bureau of Investigation, to Bret R. Hobson, Assistant United States Attorney, United States Attorney's Office (Nov. 14, 2018) [Doc. 176-1]. Other than parroting this language, the United States makes no attempt to explain who at the DOJ made these determinations and how and why they did so. Moreover, the DOJ's determination is not controlling—this Court, not the United States, determines whether the interests of justice require a new trial.

"We are mindful both that DNA evidence is powerful and it could be highly prejudicial." Barton, 909 F.3d at 1338. "We have stated before that 'DNA testing can provide powerful new evidence unlike anything known before.' Given the persuasiveness of such evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner." McDaniel v. Brown, 558 U.S. 120, 136 (2010) (quoting Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62 (2009)). The FBI's General Counsel's Office internally reviewed the Examiner's testimony and brought their identified deviations from the recommended language to the United States Attorney's Office's attention. This evidence is material—it directly impacts the strength of the Examiner's testimony.

E. Whether the Evidence Is of Such a Nature that a New Trial Would Probably Produce a New Result

Caldwell contends that the Examiner's deviations from the recommended language would probably result in a new result at trial because no eyewitness testimony put him at or near the first-robbed bank at the time of the robbery and the United States's other identification evidence, a security video, depicted "fleeting and distant images of an African-American man in dark clothing." Def. Caldwell's Reply in Supp. of His Mot. [Doc. 179] at 5. According to Caldwell, "the jury's decision to convict was necessarily influenced by the DNA evidence presented at trial" which "misstated the likelihood that Mr. Caldwell may have

contributed DNA to the physical items in question." Id. The United States contends that it "presented overwhelming independent evidence of Mr. Caldwell's guilt" and that the Examiner's deviations from the recommended language do not significantly undermine the remainder of her testimony. See Resp. at 17-20.

The jury convicted Caldwell of robbing both the Noa Bank in Doraville, Georgia, on or about August 24, 2016, and the Bank of America in Smyrna, Georgia, on or about September 7, 2016. See Jury Verdict; Superseding Indictment (Counts One and Three). A senior teller from the Bank of America in Smyra testified that at around 10 a.m. on September 7, 2016, she was working at the bank when it was robbed by a black male. Tr. of Jury Trial (Apr. 9, 2018) ("Tr. Vol. 1") [Doc. 162] at 64, 69-70. The teller testified that the robber wore a dark-colored inside-out T-shirt with a Steeler's logo, had a blue bandana on his face, was approximately 5'9" tall with a slight to medium build, and had "something on his head" that "was not natural to his head." Id. at 70, 82. A victim customer testified that the robber seemed to be a young man in his late teens or mid-20s and "was not a tall person." Id. at 111. A surveillance photograph, Government Exhibit 42 [Doc. 119-30], shows the robber wearing blue jeans with small white spots on the lower left calf.

The robber carried a gun, which he pointed at the teller, and a black bag. Tr. Vol. 1 at 70, 111. The robber forced the teller to load up the bag with the bank's money. Id. at 70-71. Along with the money, the teller threw an electronic tracking device into the bag. Id. at 71-72. Another surveillance photograph, Government Exhibit 8 [Doc. 119-9], depicts the robber with a somewhat distinctive high forehead and wearing a blue and white bandana over his face pointing a black and silver handgun at the teller, who is dropping money into a black gym bag with a shoulder strap. The robber was in the bank for approximately one minute and escaped out the back door of the bank on foot. Tr. Vol. 1 at 71, 76.

Approximately ten minutes after the robbery, responding police officers discovered Caldwell hiding behind the chimney of a house less than a quarter mile from the bank. Tr. of Jury Trial (Apr. 10, 2018) ("Tr. Vol. 2") [Doc. 163] at 39, 42, 44-45. Still images from the officer's body cameras show that Caldwell has a somewhat distinctive high forehead and was wearing a dark-colored inside-out T-shirt with the Steelers logo and blue jeans with a white mark on the rear of the left leg. See, e.g., Gov't Ex. 16 [Doc. 119-13]; Gov't Ex. 19 [Doc. 119-16]; Gov't Ex. 85 [Doc. 119-63]; Gov't Ex. 86 [Doc. 119-64]. About ten feet from where Caldwell was hiding, officers found a black gym bag with a strap. Tr. Vol. 2 at 80, 99, 103-04. Inside the bag was a black and silver handgun, a black

dreadlock wig, a blue and white bandana, all of the money stolen from the Bank of America, and the electronic tracking device. See, e.g., Id. at 80, 122-27; Gov't Ex. 26 [Doc. 119-23]; Gov't Ex. 28 [Doc. 119-25]; Gov't Ex. 31 [Doc. 119-28].

A detective drove the teller to where police had found and detained Caldwell and conducted a show-up.[3] Tr. Vol. 1 at 92-93. The teller identified Caldwell as having the same height and build, same skin tone, same race, and wearing the same T-shirt as the robber. Id. at 96; Tr. Vol. 2 at 107-11. At the time he was booked into jail, Caldwell was 31 years old, 5'8" tall, and 160 pounds with slight to medium build. Tr. Vol. 2 at 171-72. Later that day, the FBI took custody of Caldwell and the evidence, including the bandana, wig, and gun that the officers had found in the gym bag. Id. at 129, 148-52, 182-83. The FBI sent these items to the FBI laboratory for DNA testing. Id. at 150-52, 182. Upon first encountering Caldwell, an FBI special agent recognized him from surveillance video of the robbery of the Noa Bank in Doraville, Georgia, two weeks earlier. Id. at 186-87.

A customer service representative from the Noa Bank in Doraville, Georgia, testified that around after 12 p.m. on August 24, 2016, she was working at the bank

[3] A show-up is an identification procedure in which law enforcement present a single suspect to an eyewitness and then ask the eyewitness whether the suspect is the perpetrator.

when it was robbed. Tr. Vol. 3 at 136-38. She described the robber as a man wearing something dark covering his face under his eyes and stated that he entered the bank alone, ran straight to the teller line, and aimed his gun at a teller. Id. at 138-40. She testified that she is 5'2" and the robber was about 10 to 15 centimeters taller than her. Id. at 141. A second bank employee testified that the robber was holding a black bag in one hand and a gun in the other hand and had black curly hair. Id. at 143-44. This employee testified that she did not see a logo or trademark on the bag and that she could only see the mask from behind, which she had told the FBI was green and khaki and red in color. Id. at 145-46. A third victim witness, the head teller, testified that the robber was alone and pointed a gun at him. Id. at 148. The head teller put his money on top of the teller station counter and the robber put it into his bag. Id. The head teller described the robber as "very short," "5'3" or something." Id. at 150. He testified that he is 5'5" and the thinks that the robber was shorter than him. Id. at 150-51.

The jury viewed surveillance video from a computer store located in the same building as the Noa Bank. Tr. Vol. 2 at 193, 198-99; see Gov't Ex. 73 [Doc. 117-7]. The FBI special agent investigating the Noa Bank robbery testified that the video depicts an individual wearing a dark shirt and jeans, carrying a black bag, walking toward the bank. See id. at 200. He also testified that about six

minutes later, the video depicts this individual, dressed the same and now wearing what appears to be a blue bandana on his face, running in the opposite direction. See id. at 199-200. The jury also viewed still photographs from the computer store surveillance video, which the FBI special agent testified showed: (1) this man wearing a dark gray T-shirt, dark pants, dark shoes, carrying a dark-colored bag walking in the direction of the bank; (2) something white on the back of the man's shirt; and (3) what appears to be the same man, wearing the same clothing and carrying the bag, and what having appears to be a blue and white bandana covering his face from the nose down, running away from the direction of the bank. Id. at 202-03; see also Gov't Exs. 70-72 [Docs. 119-52, 119-53, & 119-54].

The jury viewed surveillance videos from Noa Bank. Tr. Vol. 2 at 204-05; see Gov't Ex. 6 [Doc. 117-1]. These videos depict an African-American man with a somewhat distinctive high forehead wearing a dark-colored T-shirt, dark pants, and dark shoes, and a blue and white bandana covering his face, walking through the front door and up to the teller counter carrying a black bag with a strap in his left hand and a gun in his right hand. Gov't Ex. 6. These videos show the robber placing the bag on the counter and pointing a gray and black pistol at the teller (and twice toward someone or something to his right). Id. The jury also viewed still photographs from these surveillance videos. Tr. Vol. 2 at 205-06; see also

Gov't Exs. 74-77 [Docs. 119-55, 119-56, 119-57, & 119-58]. The FBI special agent described as significant the following in the photographs:

- The robber carried a black bag in his left hand.
- The robber wore dark colored pants and a dark gray T-shirt that had a white emblem consistent with a print tag on the back of the shirt between the shoulder blades. This shirt appears consistent with the shirt worn by the Bank of America robber.
- The robber wore a blue and white bandana that appears identical to the one worn by Bank of America robber.
- The robber's hair style was consistent with Caldwell's at the time of his arrest: a one-inch thick Afro, all around.
- The robber is the same race, same build, and same height at Caldwell.
- The robber had a high forehead, a high hairline consistent with Caldwell.
- The robber used a silver and black automatic handgun with a silver slide and a black receiver, consistent with the Bank of America robber.

Tr. Vol. 2 at 207-08.

The FBI special agent further testified that he reviewed all of the surveillance footage closely and observed that the robber in both the Bank of America and Noa Bank robberies carried the handgun "in what I would consider a strange manner" where he "held the firearm with all four fingers, and thumb" so that "all four of these fingers, including his index finger, where below the trigger

guard." Id. at 208-09. He explained that "[t]ypically the way you would hold a gun is your index finger would either be on the trigger or on the trigger guard or above the trigger guard to allow you not to have to manipulate your gripe [sic] to pull the trigger." Id. at 209. The FBI special agent "found that strange" and "also consistent with both robberies." Id. at 210.

In summary, the jury had overwhelming non-DNA evidence that Caldwell robbed the Bank of America. The jury also had significant non-DNA evidence that Caldwell also robbed the Noa Bank. Furthermore, nothing about the newly-discovered evidence changes the Examiner's conclusions—it only changes the meaning of the likelihood ratios. The Examiner testified that Caldwell was a contributor to the DNA mixtures on the bandana, wig, and gun. The Examiner also testified that Caldwell was the source of the DNA on the bandana, and that there was strong support and extremely strong support that he was a contributor to the DNA on the wig and gun, respectively. The jury also had the Examiner's testimony, following the recommended language, that the DNA results she obtained from the pistol were 4.6 million times more likely if Mr. Caldwell and three unknown, unrelated individuals are contributors, and that the DNA results she obtained from the wig were 480,000 times more likely if Mr. Caldwell and two unknown, unrelated individuals are contributors. Finally, the jury had the Report

containing the Examiner's conclusions, which also followed the recommended language.

Accordingly, the Court finds that the newly-discovered evidence that the Examiner deviated from the recommended language by incorrectly describing the likelihood ratios when giving an example, when discussing the wig on direct examination, and when discussing the gun on redirect examination, is not of such a nature that it would probably produce a new result. See McDaniel, 558 U.S. at 136 ("Given the persuasiveness of [DNA] evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner. . . . Regardless, ample DNA and non-DNA evidence in the record adduced at trial supported the jury's guilty verdict . . . ."); Barton, 909 F.3d at 1338 ("We are mindful both that DNA evidence is powerful and it could be highly prejudicial. Nevertheless, the other evidence of [defendant]'s guilt was overwhelming.").

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant Darius Taurean Caldwell's Motion for New Trial Pursuant to Federal Rule of Criminal

Procedure 33(a) [Doc. 172] is **DENIED**.

IT IS SO ORDERED this 24th day of June, 2019.

MARK H. COHEN
United States District Judge