

TEXAS YOUTH AND GOVERNMENT

APPEALS COURT

2025-2026 Case Material and Case References

RANDOLPH "RANDY" PAOLO

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

Written By Isaiah Williams, TXYG Alumni

SECTION 1:

CASE SUMMARY

Case Summary

Randolph "Randy" Paolo, the fictional Attorney General of Texas, was involved in a late-night incident on Saturday, March 8th, while returning alone from a political fundraiser in Wilkesberry, Texas. While driving on a rural county road outside city limits, Paolo struck what he believed to be a large animal and did not report the incident that night. By Monday morning, a body was discovered near the site, later identified as Zain Meller, a 42-year-old Wilkesberry resident. Preliminary findings indicated that Meller had died from blunt force trauma consistent with a vehicular collision. Paolo was identified as a person of interest, and his blood was drawn the next morning as part of the investigation. The sample was sent to an Oklahoma-based toxicology lab for drug screening, and the lab's supervising technician later became involved in the legal proceedings.

During the trial, Assistant District Attorney Joanna Steblay received multiple phone calls from Diane Reagan, a news producer at KYAG television. Reagan reported that a woman, identifying herself as a juror on the Paolo case, expressed concern about the lack of media coverage and suggested the jury would have no trouble convicting Paolo. A hearing was held the same day. Juror Kate Riley admitted to contacting Reagan, stating that her intention was to raise awareness about the dangers of alcohol and reckless behavior. She claimed she did not learn any new information about the case from the exchange. The court questioned all jurors and concluded that, while the contact violated Article 36.22 of the Texas Code of Criminal Procedure, there was no evidence the communication influenced the outcome. Paolo was ultimately convicted.

Randolph Paolo is now appealing his conviction. There are two issues on appeal:

1. Did the trial court violate the Sixth Amendment Confrontation Clause by admitting testimony from a supervisor at an out-of-state laboratory about Paolo's blood test results, despite the supervisor not having personally performed or witnessed the testing?

AND

2. Whether the district court abused its discretion in failing to grant Paolo's motion for a new trial or a new sentencing proceeding after learning that the jury foreperson contacted a news media outlet during the trial

In Section 2, you will find all documents related to the case, including the opinion of the 15th Court of Appeals and the Trial Court Record. In Document 3, please make note of the police report and witness statements. These are intended to provide the reader a fuller understanding of the facts of

Zain Meller's death. However, you will not be arguing the validity of the facts—this has already been decided by the trial court. Instead, your argument should be narrowly focused on the two issues above. **In other words, witness statements should not be referenced in your arguments and any variability in witness testimony is not up for argumentation.** The cases referenced in Section 3 will be much more helpful in constructing your arguments and should form the crux of your arguments.

In Section 3, you will find all cases you may reference when constructing your argument for this case. **This is a closed case**, meaning you may only cite those case opinions provided. It is recommended that attorneys, while consulting these materials, first use the highlighted portions of the opinions as a roadmap. These sections are highlighted as they will be the most beneficial to your argument and should provide guidance when analyzing longer case excerpts.

Please also refer to the Appellate Rules and Instructions packet for additional procedural information.

SECTION 2:
CASE DOCUMENTS

Case Documents

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THE TEXAS COURT OF CRIMINAL APPEALS

No. YAG-APP-2026

Randolph Paolo, Appellant

v.

State of Texas, Appellee

On Appeal from
The 16th Court of Appeals

ORDER OF THE COURT ON SUBMISSION

The appeal is granted for consideration of the following questions presented:

IT IS THEREFORE ORDERED that counsel appear before the Texas Court of Criminal Appeals to present an oral argument on the following issues:

1. Whether the trial court violated the Sixth Amendment Confrontation Clause by admitting testimony from a supervisor at an out-of-state laboratory about Paolo's blood test results, despite the supervisor not having personally performed or witnessed the testing?

AND

2. Whether the district court abused its discretion in failing to grant Paolo's motion for a new trial or a new sentencing proceeding after learning that the jury foreperson contacted several news media outlets during the trial

THE MAJORITY OPINION OF THE 16th COURT OF APPEALS

I.

FACTUAL BACKGROUND

Appellant Randolph "Randy" Paolo is the duly elected Attorney General of the State of Texas. On the evening of Saturday, March 8, 2025, Paolo was returning alone from a political fundraiser in the fictional town of Wilkesberry, Texas, when his vehicle struck what he believed to be a large animal on County Route 42, just outside city limits. Paolo did not report the collision that night. On Monday morning, local deputies received word that a body had been discovered in that same vicinity. Responding officers located the remains of Zain Meller, a forty-two-year-old Wilkesberry resident, and preliminary medical examination determined that Meller had died from blunt-force trauma consistent with a vehicular collision. Investigators canvassed the scene for skid marks and debris and noted fragments matching Paolo's front bumper; Paolo was soon identified as a person of interest and was taken into custody later that day.

On Sunday morning, March 9, law enforcement obtained a warrant to draw blood from Paolo. The vial was sealed, maintained under chain of custody, and transported to SafeLab, an accredited toxicology facility located in Oklahoma, for drug-screening analysis. At trial, the State called Jane Bowen, SafeLab's supervising toxicology technician, to testify concerning the laboratory's methodologies, instrument calibration, and interpretation of the computer-generated chromatograms. Bowen acknowledged that she neither personally performed the assays nor observed the sample preparation; rather, she based her testimony on her review of raw instrument data, quality-control records, and the laboratory's validated protocols.

Midway through the guilt-innocence phase, Assistant District Attorney Joanna Steblay received a call from Diane Reagan, a producer at KYAG television, reporting that "a juror" had contacted the station to complain about the lack of media coverage and to express confidence that the jury would convict Paolo. In response, the trial court convened a prompt hearing under *Remmer v. United States*, 347 U.S. 227 (1954), and Article 36.22 of the Texas Code of Criminal Procedure. During that hearing, Juror Kate Riley admitted to sending a single text message to Reagan during a mid-trial recess, in which she stated only that the jury would "have no trouble" convicting Paolo. Riley denied receiving any substantive information in return, and the court questioned each juror to ascertain whether the contact had influenced deliberations. Finding a technical violation of Article 36.22 but no actual prejudice, the court denied Appellant's motions for mistrial and new trial. The jury ultimately found Paolo guilty of intoxication manslaughter.

Appellant argues that the trial court abused its discretion by admitting testimony from an out-of-state laboratory supervisor who neither performed nor personally observed the toxicological analyses of his blood, in violation of his Sixth Amendment right to confrontation and Texas Rules of Evidence 702–703. He further contends that the court erred in denying his motions for mistrial and new trial after juror Kate Riley sent an unauthorized text message to a media producer during trial, constituting misconduct under

Article 36.22, Texas Code of Criminal Procedure, and depriving him of due process and a fair trial. **We disagree with both contentions and will affirm the judgment of the trial court.**

II.

EXPERT TESTIMONY

We review a trial court's ruling on the admissibility of expert testimony for abuse of discretion. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). We also review de novo whether the admission of testimony violates the Confrontation Clause of the Sixth Amendment. *Wall v. State*, 184 S.W.3d 730, 742–43 (Tex. Crim. App. 2006). In the present case, Appellant argues that his constitutional right to confront the witnesses against him was infringed when the State presented expert testimony from Jane Bowen, the supervising toxicology technician at SafeLab, an accredited laboratory located in Oklahoma. Bowen testified to the presence and concentration of alcohol in Appellant's blood sample but acknowledged that she neither conducted nor directly observed the testing herself. Rather, she reviewed the raw data, calibration records, and laboratory protocols and rendered an opinion based on that review. Appellant argues that this constituted impermissible surrogate testimony, barred under *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny.

It is undisputed that forensic toxicology reports prepared for use in a criminal prosecution are "testimonial" within the meaning of the Sixth Amendment. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009). It is likewise established that when such reports are introduced for the truth of the matter asserted, the defendant must have an opportunity to cross-examine the analyst who performed or observed the underlying test. See *Bullcoming v. New Mexico*, 564 U.S. 647, 658–59 (2011). In *Bullcoming*, the Supreme Court held that the State may not circumvent the confrontation requirement by calling a surrogate witness, even if the surrogate is a qualified expert who works at the same laboratory and reviewed the testing procedures. Id. at 662.

However, the admissibility of expert testimony under the Confrontation Clause is not determined by a rigid formula. Instead, courts assess whether the expert has rendered an independent opinion and whether that opinion relies on testimonial statements introduced for their truth. *See Williams v. Illinois*, 567 U.S. 50, 70–72 (2012) (plurality opinion). While the fractured reasoning in *Williams* has led to conflicting interpretations, we have consistently rejected surrogate testimony that merely transmits another analyst's conclusions. In *Burch v. State*, 401 S.W.3d 634, 637 (Tex. Crim. App. 2013), this court required that the testifying expert have some "personal knowledge" of the preparation of the report. In *Molina v. State*, 587 S.W.3d 100, (Tex. Crim App. 2019), this court excluded testimony where the witness had no role in the original testing.

Nonetheless, not all expert testimony that references lab data violates the Confrontation Clause. An expert may form and testify to an independent opinion based on underlying facts or data if the expert does not simply recite testimonial hearsay. See *Paredes v. State*, 462 S.W.3d 510, 515 (Tex. Crim. App. 2007); Tex. R. Evid. 703. So long as the expert uses the data as a basis for their own interpretation, and the underlying testimonial materials are not admitted for their truth, such testimony may pass constitutional muster. This distinction, also held by the U.S. Supreme Court in *Smith v.*

Arizona, 144 S. Ct. 1188 (2024), reaffirms that expert testimony is not per se inadmissible under *Crawford* merely because it references testimonial data; the crucial inquiry is whether the expert merely relays another's conclusions or instead presents their own.

Applying these principles to the facts at hand, we find no Confrontation Clause violation in the admission of Jane Bowen's testimony. Bowen, though not the analyst who personally conducted the testing, testified extensively regarding SafeLab's standard operating procedures, the machine-generated chromatograms, quality control protocols, and the lab's accreditation standards. She explained that she reviewed the raw data, verified that all quality assurance criteria were met, and independently interpreted the alcohol concentration using established toxicological methodology. At no point did the State introduce a signed or notarized lab report from the original analyst into evidence, nor did Bowen purport to summarize conclusions she did not understand or evaluate herself.

Moreover, Bowen was subject to cross-examination, during which defense counsel probed her familiarity with the test instruments, her lack of direct observation, and the possibility of error or contamination. The jury thus had ample opportunity to assess the credibility and reliability of her conclusions. That Bowen did not perform the actual pipetting or sample prep is not dispositive. The Sixth Amendment guarantees the right to confront adverse witnesses, not to cross-examine every technician in a laboratory chain of custody. See *Garrett v. State*, 518 S.W.3d 546 ((Tex.App.-Houston 2017).

We are mindful of *Smith v. Arizona*, which cautions courts to ensure that expert testimony does not serve as a "backdoor" for the admission of testimonial hearsay. However, in contrast to the witness in *Smith*, who offered little more than a summary of another's findings, Bowen engaged in an independent review of primary data and presented her own interpretation to the jury. That distinction is significant. The trial court did not err in finding that Bowen's testimony satisfied both Rule 703 and the Confrontation Clause. Accordingly, we overrule Appellant's first point of error.

III.

JUROR MISCONDUCT

Appellant next argues that the trial court abused its discretion in denying his motions for mistrial and new trial following juror Kate Riley's mid-trial communication with a local news producer. Specifically, Appellant contends that Riley's text message expressing confidence in a conviction to KYAG television producer Diane Reagan constituted a violation of Article 36.22 of the Texas Code of Criminal Procedure, deprived him of a fair trial, and warranted a new trial. We disagree.

We review a trial court's denial of a motion for new trial under a deferential abuse of discretion standard. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995); *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006). The trial court is in the best position to evaluate the credibility of witnesses and resolve conflicts in the evidence. Accordingly, a reviewing court will not substitute its judgment for that of the trial court, but will determine only whether the trial court's ruling was arbitrary or unreasonable. *Sneed v.*

State, 670 S.W.2d 262, 266 (Tex. Crim. App. 1984); *Thomas v. State*, 699 S.W.2d 845, 854 (Tex. Crim. App. 1985).

Texas courts have long held that not every violation of Article 36.22 warrants reversal. See *Appleman v. State*, 531 S.W.2d 806, 810 (Tex. Crim. App. 1976); *Powell v. State*, 502 S.W.2d 705, 711 (Tex. Crim. App. 1973). Instead, the relevant inquiry is whether the communication resulted in actual harm or prejudice to the defendant. See also *United States v. Barnette*, 390 F.3d 775, 808 (4th Cir. 2004) (noting that district courts have broad discretion in addressing juror misconduct). Where, as here, there is conflicting evidence as to whether prejudice occurred, the trial court's factual determinations are entitled to great deference.

In this case, upon learning of the text message, the trial court promptly conducted a hearing consistent with *Remmer v. United States*, 347 U.S. 227 (1954), and Article 36.22. Juror Riley admitted to sending a single text message to Reagan stating that the jury would "have no trouble" convicting the Appellant. Riley denied receiving any response or substantive information in return. The trial court questioned each juror individually and determined that none had been influenced or prejudiced by the message. Importantly, the court found that the message, while technically violative of Article 36.22, did not rise to the level of misconduct that affected the outcome of the trial.

This determination is supported by precedent. In *McIntire v. State*, the Court of Criminal Appeals explained that in assessing whether reversal is warranted, courts consider whether the external contact conveyed any material information, whether the juror remained impartial, and whether other jurors were influenced. 698 S.W.2d 652, 659 (Tex. Crim. App. 1985). All three considerations weigh against Appellant in this case. Riley's message conveyed no material or external information, her comments—though inappropriate—were speculative and not shown to reflect any improper bias beyond what existed at voir dire, and no other jurors were affected. Thus, even under *McIntire*, no basis for reversal exists.

Furthermore, the trial court acted well within its discretion in crediting Riley's testimony and that of the remaining jurors. The trial court is the sole judge of credibility at a motion for new trial hearing, and its conclusions will not be disturbed absent clear abuse. See *Lewis*, 911 S.W.2d at 7.

Accordingly, we find that the trial court did not abuse its discretion in denying Appellant's motions for mistrial and new trial. The record supports the court's finding that no actual prejudice occurred, and Appellant received a fair trial consistent with due process and Texas procedural law. We overrule this point of error.

IV.
CONCLUSION

Having overruled Appellant's two issues, we affirm the judgment of the trial court.

X *Chief Justice Devyn Lisi*

Chief Justice Devyn Lisi

DISSENTING OPINION OF THE 16th COURT OF APPEALS

Justice Marcus Barker, dissenting.

In my view, the majority departs from controlling precedent in two critical respects: first, by permitting testimonial forensic evidence to reach the jury through a witness who neither performed nor observed the underlying testing, and second, by minimizing the constitutional concerns raised by undisputed juror contact with an outside party during trial.

I. Confrontation Clause Violation

The Sixth Amendment guarantees that an accused has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. That right is not a formality; it requires that those who make testimonial statements appear in court to be cross-examined. *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004). In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that sworn forensic certificates are testimonial, and in *Bullcoming v. New Mexico*, it squarely rejected the admission of an absent analyst's report through a "surrogate" witness who neither performed nor observed the testing.

The State's sole forensic witness here, Ms. Bowen, candidly admitted she did not pipette the sample, did not load it into the instrument, and did not personally observe those critical steps. Her testimony rested on the work of non-testifying "bench analysts." While she reviewed computer-generated graphs, those graphs were the direct product of testimonial acts—sample preparation, instrument calibration, and data collection—performed by absent analysts.

The majority leans heavily on *Paredes v. State*, 462 S.W.3d 510 (Tex. Crim. App. 2015), and the fractured *Williams v. Illinois*, 567 U.S. 50 (2012), to conclude that Bowen's testimony reflected an "independent opinion." But *Smith v. Arizona*, 602 U.S. ___ (2024), clarifies that when an expert's opinion depends on the truth of an absent analyst's statements, the Confrontation Clause is implicated. Bowen's opinion here was inseparable from the absent analysts' factual assertions embedded in the test results. This was, in effect, the very surrogate testimony *Bullcoming* forbids.

The State could have called the bench analysts. It chose not to. The Constitution does not permit that choice without consequence. I would hold that admitting Bowen's testimony violated Paolo's confrontation rights, and that the error was not harmless beyond a reasonable doubt.

II. Juror Misconduct and Article 36.22

Article 36.22 of the Texas Code of Criminal Procedure prohibits "any person" from conversing with a juror about the case. In *McIntire v. State*, 698 S.W.2d 652 (Tex. Crim. App. 1985), our high court recognized that any such communication creates a rebuttable presumption of harm. Here, it is undisputed that juror Riley engaged in multiple phone calls with a media producer during trial. Even assuming the producer did not relay case-

specific information, the nature, timing, and duration of the contacts warranted heightened scrutiny.

The trial court's inquiry was cursory. The presiding juror—who signed the punishment verdict—was the same juror involved in the calls. In *Mayo v. State*, 708 S.W.2d 854 (Tex. Crim. App. 1986), the court acknowledged that such outside contact raises concerns not only for the guilt phase but also for sentencing. The State's rebuttal evidence consisted largely of the jurors' own assurances that they were uninfluenced. While such testimony is relevant, it cannot be the sole basis to find harmlessness when the contacts were undisputed and occurred mid-trial.

Under *Remmer v. United States*, 347 U.S. 227 (1954), the presumption of prejudice remains unless the State demonstrates harmlessness after a full and adequate hearing. That showing was not made here. At minimum, Paolo was entitled to a new sentencing proceeding free from the taint of outside influence.

III. Conclusion

The admission of Bowen's testimony violated the Confrontation Clause, and the trial court's handling of the juror misconduct issue fell short of the searching inquiry required to protect the defendant's right to an impartial jury. Either error alone warrants reversal; together, they demand it.

I would reverse the judgment of the trial court and remand for a new trial.

Justice Barker

IN THE DISTRICT COURT OF WILKES COUNTY, TEXAS

THE STATE OF TEXAS vs.
RANDOLPH PAOLO

Cause No. 25-CR-01783

COMPLAINT

Before me, the undersigned Assistant District Attorney of Wilkes County, Texas, personally appeared Detective Serena Howard, who, after being duly sworn, on oath says that she has good reason to believe and does believe that on or about March 8, 2025, in Wilkes County, Texas, the defendant, RANDOLPH "RANDY" PAOLO, did then and there operate a motor vehicle in a public place while intoxicated, and by reason of such intoxication caused the death of another, to wit: Zain Meller, by striking him with said vehicle.

This offense constitutes the felony offense of **Intoxication Manslaughter**, under Texas Penal Code § 49.08.

/s/ Detective Serena Howard
Wilkes County Sheriff's Office

Subscribed and sworn to before me this 10th day of March, 2025.

/s/ Joanna Steblay
Assistant District Attorney, Wilkes County, Texas

IN THE DISTRICT COURT OF WILKES COUNTY, TEXAS

THE STATE OF TEXAS

Application for Search Warrant

COMES NOW the State of Texas and applies for a search warrant for the drawing and toxicological analysis of blood from RANDOLPH PAOLO, a person under investigation for felony intoxication manslaughter.

AFFIDAVIT IN SUPPORT OF WARRANT

Detective Serena Howard, a peace officer with the Wilkes County Sheriff's Office, being duly sworn, states:

On March 8, 2025, the Wilkes County Sheriff's Office received information that a collision occurred on County Route 42. The following Monday, a deceased male, later identified as Zain Meller, was discovered in the vicinity. Preliminary investigation revealed physical evidence linking the scene to the vehicle driven by RANDOLPH PAOLO. Given the circumstances, probable cause exists to believe that Paolo was intoxicated at the time of the collision.

The undersigned respectfully requests a search warrant authorizing the nonconsensual extraction of a blood sample from Paolo for analysis.

/s/ Detective Serena Howard
Affiant

SWORN AND SUBSCRIBED before me this 9th day of March, 2025.

/s/ Hon. Dean Kelleher
Magistrate Judge, Wilkes County, Texas

IN THE DISTRICT COURT OF WILKES COUNTY, TEXAS

DEFENDANT'S MOTION TO SUPPRESS TOXICOLOGY TESTIMONY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, RANDOLPH PAOLO, by and through counsel, and respectfully moves the Court to suppress the testimony of Jane Bowen, supervising toxicologist at SafeLab, an Oklahoma-based laboratory, and in support thereof states:

1. Jane Bowen did not personally perform, observe, or supervise the testing of Defendant's blood sample.
2. The admission of her testimony violates Defendant's rights under the Sixth Amendment Confrontation Clause, as set forth in *Crawford v. Washington*, *Melendez-Diaz v. Massachusetts*, and *Bullcoming v. New Mexico*.
3. Testimony based on testimonial statements from a non-testifying analyst is inadmissible unless the witness was subject to prior cross-examination.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests that the Court exclude all testimony from Jane Bowen pertaining to toxicological results of the Defendant's blood.

Respectfully submitted,
/s/ Counsel for Defendant

Filed: April 1, 2025

IN THE DISTRICT COURT OF WILKES COUNTY, TEXAS

TO THE HONORABLE COURT:

COMES NOW the Defendant, by and through counsel, and moves for a mistrial on the grounds of juror misconduct. In support, Defendant states:

1. Juror Kate Riley, during a recess, contacted a member of the media (Ms. Diane Reagan of KYAG Television), stating "We'll have no trouble convicting him."
2. This communication occurred outside of the presence of the court and constitutes a direct violation of Article 36.22 of the Texas Code of Criminal Procedure.
3. Said conduct prejudiced Defendant's right to a fair trial by an impartial jury.

Defendant prays the Court declare a mistrial and discharge the jury.

Filed: April 7, 2025
/s/ Defense Counsel

State's Exhibit Hearing / Direct Examination of Jane Bowen
(Vol. 3, pp. 112–120)

Prosecutor (Ms. Steblay): Good morning, Ms. Bowen. Please state your full name and position for the record.
Jane Bowen: My name is Jane Bowen. I'm the Supervising Toxicology Technician at SafeLab in Tulsa, Oklahoma.

Q: How long have you held that position?
A: I've been SafeLab's lead supervisor for the past six years, and I've been with the laboratory for ten years overall.

Q: Tell us, in general terms, what SafeLab does.
A: We perform forensic drug and alcohol analyses on biological samples—blood, urine, and tissue—submitted by law enforcement agencies and medical examiners.

Q: On March 9, 2025, did SafeLab receive a blood sample from the Wilkes County Sheriff's Office labeled as from Mr. Paolo?
A: Yes. We received a sealed blood tube bearing Wilkes County Case #11-124242.

Q: Did you personally perform the chromatographic analysis on that sample?
A: No, I did not personally run the assay or prepare the sample. That work was performed by our bench analysts.

Q: Then on what basis are you testifying today?
A: As supervising technician, I review all raw instrument data—chromatograms, calibration curves, quality-control results—and I confirm that the testing followed our validated protocols. I then prepare and sign the final report. I have reviewed Mr. Paolo's raw chromatograms and quality-control records myself, and they meet our strict criteria.

Q: How do you determine the blood-alcohol concentration from those chromatograms?
A: We generate a calibration curve using known ethanol standards at various concentrations. By plotting the peak area versus concentration, we establish a linear regression equation. We then extrapolate Mr. Paolo's peak area on that curve to calculate his blood-alcohol concentration.

Q: And what did that extrapolation show in Mr. Paolo's case?
A: The ethanol peak area corresponded to a blood-alcohol concentration of 0.18 g/dL. All internal standards and quality-control checks fell within acceptable tolerance, and the calibration curve had an R^2 value of 0.998, well above our laboratory's minimum requirement of 0.990.

Q: In your professional opinion, is that result reliable?
A: Yes. The instrument performance, calibration linearity, and quality controls all confirm the accuracy of the 0.18 g/dL reading.

Defense Counsel: Your Honor, I object. Ms. Bowen did not perform the extraction or assay herself and is relaying another analyst's work, in violation of the Confrontation Clause and *Bullcoming v. New Mexico*.

Court: I'll overrule the objection. The witness has personal knowledge of the raw data, has applied her own professional judgment in extrapolating the BAC, and is subject to cross-examination. You may proceed.

Cross-Examination by Defense Counsel
(Vol. 3, pp. 118–122)

Defense: Ms. Bowen, you did not personally pipette Mr. Paolo's blood sample, correct?
Bowen: Correct.

Q: You did not observe the acidification, extraction, or injection steps?
A: No. Those were handled by our bench staff.

Q: So you did not actually see that sample physically in the instrument?
A: I review the digital data they produce, yes—but I did not load the vial myself.

Q: So you're testifying to conclusions based solely on their out-of-court activities?
A: I apply my expertise to interpret the raw data; it's not simply repeating another's findings.

CAUSE NO. 25-CR-01783
THE STATE OF TEXAS
v.
RANDOLPH "RANDY" PAOLO
IN THE DISTRICT COURT
WILKES COUNTY, TEXAS

ORDER ON DEFENDANT'S MOTION TO SUPPRESS EXPERT TESTIMONY

1. On the 15th day of April, 2025, the Court considered Defendant Randy Paolo's Motion to Suppress the testimony of Jane Bowen, Supervising Toxicology Technician at SafeLab, on grounds that her testimony violated his Sixth Amendment Confrontation Clause rights and Texas Rules of Evidence 702–703. Defendant argued that Bowen merely relayed the conclusions of non-testifying analysts and thus constituted impermissible "surrogate" testimony under *Crawford*, *Melendez-Diaz*, and *Bullcoming*. The Court, having heard live testimony, reviewed the exhibits, considered the arguments of counsel, and being fully advised, now enters the following findings of fact and conclusions of law:
2. Defendant filed his Motion to Suppress on April 1, 2025. The Court held a hearing on April 10, 2025, at which the State presented the live testimony of Jane Bowen and admitted laboratory calibration records and chromatographic outputs. Defendant cross-examined Bowen and submitted no contrary expert testimony.

3. Bowen is certified by the American Board of Forensic Toxicology, has a master's degree in analytical chemistry, and has served as SafeLab's supervising technician for six years. She oversees method validation, instrument calibration, quality-control review, and report preparation.

4. Bowen did not personally perform the pipetting, extraction, or instrumental assay on Defendant's March 9, 2025 blood sample. However, she reviewed all raw chromatographic data, calibration curves, and internal-standard runs; verified chain-of-custody documentation; and applied her expert judgment to extrapolate a blood-alcohol concentration of 0.18 g/dL using SafeLab's validated linear regression model.

5. Defense counsel objected at trial under the Confrontation Clause and Texas Rules of Evidence, arguing Bowen's testimony was testimonial hearsay requiring suppression. The Court overruled the objection, finding Bowen's opinions were independent expert analyses, not recitals of another analyst's conclusions.

6. Under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), forensic reports are testimonial and require the analyst's live testimony absent unavailability and prior cross-examination. *Bullcoming* reaffirmed that a witness who did not perform or observe testing may not testify as to another analyst's conclusions.

7. *Williams v. Illinois*, 567 U.S. 50 (2012) (plurality), and *Smith v. Arizona*, 147 S. Ct. 1823 (2024), recognize that an expert may testify to an independent opinion based on raw data even if generated by another. Texas courts echo this distinction: a testifying expert who reviews primary data, applies specialized knowledge, and forms an independent judgment does not present forbidden surrogate testimony. *Burch v. State*, 401 S.W.3d 634, 637 (Tex. Crim. App. 2013); *Molina v. State*, 354 S.W.3d 535, 545 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

8. Bowen's testimony went beyond relaying a signed report. She personally examined instrument logs, ensured all quality controls passed, constructed and applied the calibration curve to extrapolate a 0.18 g/dL BAC, and explained each step. Her opinions are grounded in her own training, review, and professional judgment, satisfying Rule 702 and the Confrontation Clause's requirement for live cross-examination of the witness who forms the opinion.

IT IS THEREFORE ORDERED that Defendant's Motion to Suppress the testimony of Jane Bowen is **DENIED**.

Signed this 15th day of April, 2025.

Hon. Abigail Winters
Presiding Judge, 3rd District Court
Wilkes County, Texas

CAUSE NO. 25-CR-01783
THE STATE OF TEXAS
v.
RANDOLPH "RANDY" PAOLO
IN THE DISTRICT COURT
WILKES COUNTY, TEXAS

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

(Juror Misconduct)

1. On this 15th day of April, 2025, came on for hearing Defendant Randolph "Randy" Paolo's Motion for New Trial, in which he contended that juror Kate Riley's mid-trial communications with a media producer constituted misconduct requiring reversal under Article 36.22, Texas Code of Criminal Procedure. The Court, having reviewed the motion, the record of the *Remmer* hearing, the phone records, the live testimony of Juror Riley and of Diane Reagan, and the arguments of counsel, finds as follows:

2. At a recess on March 12, 2025, Assistant District Attorney Joanna Steblay was contacted by KYAG producer Diane Reagan, who reported receiving a text from "a juror" complaining of lack of media coverage and stating the jury would "have no trouble" convicting Paolo.

3. The Court convened an immediate *Remmer* hearing under *Remmer v. United States*, 347 U.S. 227 (1954), and Article 36.22. Juror Riley testified under oath that she sent exactly one text message—"We'll have no trouble convicting him"—and denied receiving any substantive information in return or sharing it with fellow jurors.

4. Each of the other eleven jurors (including alternates) was questioned under oath. All uniformly denied knowledge of Riley's text or any outside influence, and confirmed that they neither discussed the message nor heard about it until the hearing.

5. Defense counsel then obtained Riley's phone records. The records showed three five-minute calls to KYAG during trial and no evidence of juror discussions of case facts or law. Riley acknowledged the calls but denied any further communication.

6. No other juror testified to having received or discussed external information. Though Riley had prior social calls with certain jurors, those calls were unrelated to the trial and occurred outside deliberations.

7. The Court finds that Riley's single text message, while a technical violation of Article 36.22, conveyed no material information, did not compromise her impartiality, and did not influence any other juror.

8. A juror's unauthorized communication about a case raises a rebuttable presumption of harm. *Mayo v. State*, 708 S.W.2d 854, 856 (Tex. Crim. App. 1986); *McIntire v. State*, 698 S.W.2d 652, 659 (Tex. Crim. App. 1985).

9. The State may rebut that presumption by showing the communication did not introduce prejudicial information, the juror remained unbiased, and no other juror was influenced. *Remmer*, 347 U.S. at 229; *Thomas v. State*, 699 S.W.2d 845, 853 (Tex. Crim. App. 1985).

10. Here, the Court's prompt *Remmer* hearing, the uniform testimony of all jurors, the absence of any substantive new information imparted, and Riley's credible denials establish that the presumption of harm has been fully rebutted.

IT IS THEREFORE ORDERED that Defendant Paolo's Motion for New Trial based on juror misconduct is **DENIED**.

SIGNED this 15th day of April, 2025.

Hon. Abigail Winters
Presiding Judge, 3rd District Court
Wilkes County, Texas

RECORD EXCERPT – Remmer Hearing
State of Texas v. Randolph "Randy" Paolo
March 13, 2025 | Wilkes County District Court
Hon. Abigail Winters, Presiding

COURT: Juror Number Four, Ms. Riley, please take the stand and remain under oath.

BAILIFF: Ms. Riley, you are still under oath. Please be seated.

COURT: Ms. Riley, it's come to this Court's attention that you may have communicated with a media outlet during the course of this trial. I will ask you several questions. Please answer each fully and truthfully. Did you, at any time during the trial of Mr. Paolo, communicate with KYAG television or any other media outlet?

JUROR RILEY: Yes, Your Honor. I sent one text message to a producer named Diane Reagan at KYAG.

COURT: What did the message say?

JUROR RILEY: I texted something like, "Why isn't this trial being covered? People need to know about the risks of drinking and driving. We'll have no trouble convicting him."

COURT: Did you receive any reply?

JUROR RILEY: Ms. Reagan replied with something like, "I've heard about it, and I'm glad I'm not on the jury." That was all. There was no case information shared.

COURT: Did you discuss the contents of this communication with any other jurors?

JUROR RILEY: No, ma'am. I didn't tell anyone else on the jury that I sent it. I didn't share her response, either.

COURT: Did you ever discuss the case or your opinion about the evidence with another juror prior to deliberations?

JUROR RILEY: No, Your Honor. We followed the instructions. We waited until deliberations began before discussing anything.

COURT: Did anyone outside of court attempt to influence your opinion in any way?

JUROR RILEY: No. I didn’t receive any outside information, and nothing I saw or heard changed how I approached the evidence.

COURT: Were you influenced in your verdict by anything outside of what was presented in court?

JUROR RILEY: No, ma’am.

COURT: You understand that jurors are prohibited from communicating with outside parties about the case before the verdict?

JUROR RILEY: Yes, Your Honor. I know now that even what I sent was wrong. I didn’t think about it that way at the time. I wasn’t trying to do anything harmful.

COURT: Very well. Please step down. You are instructed not to discuss this matter with anyone, including your fellow jurors, until further notice.

(Juror Riley steps down.)

COURT (to counsel): Let the record reflect that the juror admits to a single external communication, which conveyed no case-specific information and was not discussed with other jurors. The Court will proceed to question the remaining members of the jury panel individually.

PUNISHMENT VERDICT

We, the Jury, having found the Defendant guilty of the offense of Intoxication Manslaughter, assess his punishment at:

Twelve (12) years confinement in the Texas Department of Criminal Justice – Institutional Division and a $10,000 fine.

Signed:
Kate Riley
Presiding Juror

The Court, having polled the jury at the request of defense counsel and each juror having affirmed their verdicts, accepted the same and ordered them filed with the District Clerk of Wilkes County.

On the 25th day of March, 2025, the Defendant was called before the Court for sentencing. The Defendant was asked whether he had anything to say why sentence should not be pronounced, and the Defendant stated nothing in bar thereof.

THEREFORE, IT IS THE JUDGMENT, ORDER, AND SENTENCE of this Court that the Defendant, **Randolph "Randy" Paolo**, having been duly convicted by jury of the felony offense of **Intoxication Manslaughter**, is hereby sentenced to serve **twelve (12) years** in the custody of the **Texas Department of Criminal Justice – Institutional Division**, and to pay a **fine in the amount of $10,000**. The Defendant is remanded to the custody of the Sheriff of Wilkes County to await transfer to the Department of Criminal Justice for execution of this sentence.

SIGNED on this the 25th day of March, 2025.

THE HONORABLE ABIGAIL WINTERS
Judge Presiding
3rd District Court
Wilkes County, Texas

Section 3
Case References

Case References

Confrontation Clause / Expert-reviewer testimony

- **6th Amendment of the US Constitution**
- **Burch v. State**,
- **Bullcoming v. New Mexico**, 564 U.S. 647 (2011)
- **Crawford v. Washington**, 541 U.S. 36 (2004)
- **Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)**
- **Jenkins v. State**, 493 S.W.3d 583 (Tex. Crim. App. 2016)
- **Melendez-Diaz v. Massachusetts**, 557 U.S. 305 (2009)
- **Null (Alan William Null) v. State**, No. PD-0192-22, op. June 12, 2024
- **Paredes v. State** (Tex. Ct. App./post-2011 treatments)
- **Smith v. Arizona**, 602 U.S. ___ (2024)
- **Williams v. Illinois**, 567 U.S. 50 (2012)

Juror Misconduct / New-trial (improper contact / outside influence)

- **Texas Code of Criminal Procedure Art. 36.22**
- **Chambliss v. State**, 647 S.W.2d 257 (Tex. Crim. App. 1983)
- **Green v. State**, 840 S.W.2d 394 (Tex. Crim. App. 1992)
- **Irvin v. Dowd**, 366 U.S. 717 (1961)
- **Mayo v. State**, 708 S.W.2d 854 (Tex. Crim. App. 1986)
- **McIntire v. State**, 698 S.W.2d 652 (Tex. Crim. App. 1985)
- **Remmer v. United States**, 347 U.S. 227 (1954)

U.S. Const. amend

VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Burch v. State 401

S.W.3d 634 , 635

(2013)

We granted the State's Petition for Discretionary Review to determine whether the Confrontation Clause of the United States Constitution was violated by the admission of a drug analysis when only the reviewing analyst (not the testing analyst) testified. We hold that there was such an error and affirm the judgment of the Fifth Court of Appeals to remand this case for a new trial.

I

The appellant was arrested by a Dallas police officer who saw him and a companion with drugs and paraphernalia. He was indicted for possession with intent to deliver a controlled substance, cocaine.

*See*Tex. Health & Safety Code § 481.112.

At trial, the State offered into evidence a one-page lab report. The relevant findings stated only, "The contents of four green ziplock bags was used for analysis. The hard, white material contained cocaine. The amount of cocaine found was 1.38 grams (62%). The total weight of the material, including adulterants or dilutants was 2.2 grams." The report was signed by Jennifer Pinckard, the analyst, and Monica Lopez, the reviewer.

The State called Lopez, but not Pinckard, to testify. Lopez testified that she was a supervisor for the Southwestern Institution of Forensic Sciences (SWIFS), a laboratory that is independent of the Dallas County D.A.'s Office and the police department. Lopez explained that Pinckard had performed all the tests in this particular case, but Pinckard no longer worked for SWIFS. No evidence was offered as to why Pinckard had left the laboratory. Lopez said that, as the reviewer, she was to ensure that the lab's policies and procedures were followed. Although she agreed with the State that she "basically double-checked everything that was done," she did not clarify what that meant. There was no indication that she actually saw the tests being performed or participated in them. The appellant objected, alleging a violation of his Sixth Amendment right to confront witnesses against him. The trial court overruled his objection and admitted the report, the underlying physical evidence, and Lopez's testimony that the substance was cocaine.

The Fifth Court of Appeals held that the trial court erred by admitting the drug analysis and Lopez's testimony that the evidence was cocaine. After finding that the error was not harmless, the Court of Appeals reversed and remanded for a new trial because the State had no other admissible evidence of the substance's identity and weight. The State filed a Petition for Discretionary Review, which we granted.

*See*Tex.R.App. P. 44.2(a).

Burch v. State, No. 05–10–01389–CR, 2012 WL 2226456, 2012 Tex.App. LEXIS 4814 (Tex.App.-Dallas, June 18, 2012).

II

Under the Confrontation Clause of the Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington,* the Supreme Court interpreted this to mean that

"testimonial" evidence is inadmissible at trial unless the witness who made the testimonial statement either:

See Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

(1) takes the stand to be cross-examined or

(2) is unavailable and the defendant had a prior opportunity to cross-examine him.

.541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The prior opportunity to cross-examine in person is both a necessary and a dispositive requirement for the admission of testimonial statements under the Confrontation Clause. The Court warned that "under no circumstances" shall the defendant be deprived of "seeing the witness face to face, and ... subjecting him to the ordeal of cross-examination." The very real difficulties and costs involved in making witnesses available at trial cannot trump this categorical requirement. The Constitution does not list exceptions, and so (reasoned the Court) the judiciary should not create them.

Id., at 55, 124 S.Ct. 1354.

Id., at 57, 124 S.Ct. 1354 (internal quotes omitted).

Id., at 54, 124 S.Ct. 1354.*See also Giles v. California,* 554 U.S. 353, 375, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) ("It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values.")

While the exact contours of what is testimonial continue to be defined by the courts, such statements are formal and similar to trial testimony. In other words, testimonial statements are those "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford, 541 U.S. at 52, 124 S.Ct. 1354.

These principles have been applied to forensic reports. The Supreme Court has explicitly held that an analyst's certification prepared in connection with a criminal investigation or prosecution (specifically, a report identifying a substance as cocaine) is testimonial and cannot be admitted without satisfying the requirements of the Confrontation Clause. These reports are formal and created for the sole purpose of establishing or proving a highly relevant fact to a criminal prosecution. However, the issue of exactly who is required to testify in connection with such a report has not been fully resolved.

Melendez–Diaz v. Massachusetts, 557 U.S. 305, 311, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

See id., at 310, 129 S.Ct. 2527.

Bullcoming v. New Mexico was a prosecution for aggravated DWI in which the State did not call the analyst who tested the defendant's blood sample for alcohol. Instead, because the original analyst was on unpaid leave, the State called another analyst familiar with the laboratory's testing procedures. The Supreme Court held that, because the report was the testimonial statement of the analyst who performed the tests, it could not be offered into evidence through the testimony of a different, "surrogate" witness.

—— U.S. ——, 131 S.Ct. 2705, 2709, 180 L.Ed.2d 610 (2011).

Id., at 2710.

In reaching this decision, the Supreme Court explicitly rejected the lower court's reasoning that the analyst was only interpreting machine-generated data and that the testimonial statements were therefore those of the machine. Rather, the original analyst needed to be cross-examined so that the defendant could explore "the particular test and testing process he employed ...

[and] any lapses or lies on the certifying analyst's part." Even if the results in question involved no interpretation or discretion, the testifying reviewer could not verify that the results were properly generated. Further, the court explained that the defendant had a right to question why the testing analyst was on unpaid leave.

Id., at 2716.

Ibid.

III

This case is controlled by *Bullcoming*. There is no indication that the appellant had a pre-trial opportunity to cross-examine the analyst who tested the cocaine. Although Lopez, the testifying witness, was a supervisor who "reviewed" the original process, we cannot say, on this record, that she had personal knowledge that the tests were done correctly or that the tester did not fabricate the results. She could say only that the original analyst wrote a report claiming to have conformed with the required safeguards. Consequently, cross-examining her did not satisfy the appellant's constitutional rights. While we cannot say that anything would have come from a cross-examination of the original analyst, the law does not "tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."

> *Melendez–Diaz,* 557 U.S. at 320, 129 S.Ct. 2527 ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.").

Bullcoming, 131 S.Ct. at 2716.

The State argues that this case is distinguishable from *Bullcoming* because Lopez actually signed the report that was admitted into evidence. This is irrelevant. Without having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way to explore the types of corruption and missteps the Confrontation Clause was designed to protect against. It would not, for instance, solve the problem if a laboratory had all of its analysts sign every report. Rather, the witness being called needs to have personal knowledge of the facts in issue—the specific tests and their execution.

Id., at 2715.

The State also emphasizes parts of Justice Sotomayor's *Bullcoming* concurrence in which she highlighted the limitations of the majority's opinion. Specifically, Justice Sotomayor clarified that *Bullcoming* was "not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." The State argues that this portion of Justice Sotomayor's opinion indicates that a case such as this might have been decided differently by the Supreme Court. However, this is only one justice's opinion, which does not have the weight of law even if it may indicate the Supreme Court's changing course. This is especially true given that the State concedes that such an outcome is directly in conflict with the majority's unequivocal statement that "the accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."

Id., at 2722.
Id., at 2710.

IV

The Supreme Court handed down *Williams v. Illinois* the same day that the Fifth Court of Appeals handed down its decision in this case. Consequently, the Court of Appeals did not have the benefit of the most recent Supreme Court precedent. *Williams* was a splintered decision in which only an outcome, and not an opinion, received a majority vote. This made its full impact hard to discern. However, none of the plurality's rationales affect the result in this case.

> —— U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012).

In *Williams,* semen samples taken from a rape victim's vagina were sent to an independent laboratory for DNA testing. The lab created a DNA profile from the semen and sent that profile back to police. At trial, an expert for the prosecution testified that the profile created from samples in the victim's vagina matched the defendant's DNA profile generated by the police laboratory. The defendant argued that the expert could not testify that the DNA profile was created from semen within the victim because she only read a report generated by the independent lab. He further objected that his Sixth Amendment rights were violated when he was unable to cross-examine the analyst who created the profile, even though it was not offered into evidence.

Id., at 2229–30.

Id., at 2231.

Justice Alito delivered the judgment of the court and an opinion that garnered four votes. In the view of the plurality, the petitioner's rights were not violated because the out-of-court statement (that the DNA profile came from semen within the victim) was not offered to prove the truth of the matter asserted. Instead, it was merely alluded to in order to explain the basis of the witness's independent conclusions (that the profile matched the petitioner's DNA). Alternatively, as a second and independent basis for the decision, Justice Alito stated that the report was not testimonial because it was created before there was a specific suspect. Consequently, it was not inherently inculpatory or created for use against the petitioner.

Id., at 2227.

Id., at 2228.

Ibid.

Neither of these rationales helps the State in this case. The statement at issue here was offered into evidence for its truth. The SWIFS report was submitted as the only evidence of the amount and makeup of the substance possessed by the appellant, the cocaine. Without such evidence, it is doubtful that the appellant could have been convicted at all. Justice Alito's second rationale is equally inapplicable to this case, which is unlike *Williams* because the lab report was generated after the appellant was arrested and with the sole purpose of proving his guilt.

Justice Alito's opinion stressed that *Williams* was not a departure from other cases such as *Bullcoming* because, in *Williams,* the actual report was not offered into evidence while in the other cases it was. Again, more in line with *Bullcoming,* the report at issue here was offered and admitted into evidence. Consequently, it was not merely mentioned as an underlying basis of the expert's opinion: the report itself was primary evidence.

Id., at 2233.

Although no other members of the Court joined Justice Thomas's opinion, the State asserts that we should follow its reasoning because it is the "narrowest" ground for the judgment reached. Justice Thomas disagreed with Justice Alito and argued that the report was offered for the truth of the matter it asserted. Nonetheless, Justice Thomas reasoned that there was no Sixth Amendment violation because the report was not formal or solemn enough to be testimonial.
See Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' "). Because it is unnecessary, we do not address whether or not the State's contention is correct.

Williams, 132 S.Ct. at 2255–56.

While it is true that the report in this case does not contain an oath, affirmation, or certificate as desired by Justice Thomas, we find this distinction irrelevant. The State cannot sidestep the Sixth Amendment merely by choosing less formal language. The report asserted that the substance was cocaine, was signed by the analyst who performed the tests (presumably to certify the veracity of the report's contents), and then was signed again by a reviewer. The only rational conclusion is that this is a formal statement created in preparation for trial and is testimonial in nature. We are not convinced that the absence of an oath or the word "certify" is enough of a distinction to change the analysis from that of *Bullcoming.* Even Justice Thomas, despite his emphasis on the ceremonial, stated that "the Confrontation Clause reaches bad-faith attempts to evade the formalized

process." That is precisely our case. The State can not avoid a straightforward application of *Bullcoming* by adding the signature of a reviewer with no personal knowledge and omitting more formalized language. We are not persuaded.

Id., at 2261.

V

The lower court was correct that this case closely mirrors the facts of *Bullcoming.* The State attempted to submit testimonial evidence that the appellant possessed cocaine without giving the appellant the opportunity to cross-examine the analyst who tested the cocaine and made the affirmation of its contents. Although the State did call the reviewing analyst at trial, that witness did not have personal knowledge of the testimonial facts being submitted. Consequently, she was not an appropriate surrogate witness for cross-examination. We affirm the Court of Appeals' decision to reverse and remand to the trial court for further proceedings. **KEASLER, J., filed a concurring opinion in which KELLER, P.J., joined. HERVEY, J., filed a concurring opinion in which JOHNSON, J., joined.**

KELLER, P.J., concurred

Bullcoming v. New Mexico, 564 U.S. 647 (2011)

In *Melendez-Diaz* v. *Massachusetts*, 557 U. S. ___ (2009), this Court held that a forensic laboratory report stating that a suspect substance was cocaine ranked as testimonial for purposes of the Sixth Amendment's Confrontation Clause. The report had been created specifically to serve as evidence in a criminal proceeding. Absent stipulation, the Court ruled, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the statements made in the report.

In the case before us, petitioner Donald Bullcoming was arrested on charges of driving while intoxicated (DWI). Principal evidence against Bullcoming was a foren-sic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was "testimonial," the Confrontation Clause did not require the certifying analyst's in-court testimony. Instead, New Mexico's high court held, live testimony of another analyst satisfied the constitutional requirements.

The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

I

A

In August 2005, a vehicle driven by petitioner Donald Bullcoming rear-ended a pick-up truck at an intersection in Farmington, New Mexico. When the truckdriver exited his vehicle and approached Bullcoming to exchange insurance information, he noticed that Bullcoming's eyes were bloodshot. Smelling alcohol on Bullcoming's breath, the truckdriver told his wife to call the police. Bullcoming left the scene before the police arrived, but was soon apprehended by an officer who observed his performance of field sobriety tests. Upon failing the tests, Bullcoming was arrested for driving a vehicle while "under the influence of intoxicating liquor" (DWI), in violation of N. M. Stat. Ann. §66–8–102 (2004).

Because Bullcoming refused to take a breath test, the police obtained a warrant authorizing a blood-alcohol analy-sis. Pursuant to the warrant, a sample of Bullcoming's blood was drawn at a local hospital. To determine Bullcoming's blood-alcohol concentration

(BAC), the police sent the sample to the New Mexico Department of Health, Scientific Laboratory Division (SLD). In a standard SLD form titled "Report of Blood Alcohol Analysis," participants in the testing were identified, and the forensic analyst certified his finding. App. 62.

SLD's report contained in the top block "information … filled in by [the] arresting officer." *Ibid.* (capitalization omitted). This information included the "reason [the] suspect [was] stopped" (the officer checked "Accident"), and the date ("8.14.05") and time ("18:25 PM") the blood sample was drawn. *Ibid.* (capitalization omitted). The arresting officer also affirmed that he had arrested Bullcoming and witnessed the blood draw. *Ibid.* The next two blocks contained certifications by the nurse who drew Bullcoming's blood and the SLD intake employee who received the blood sample sent to the laboratory. *Ibid.*

Following these segments, the report presented the "certificate of analyst," *ibid.* (capitalization omitted), com-pleted and signed by Curtis Caylor, the SLD forensic analyst assigned to test Bullcoming's blood sample. *Id.*, at 62, 64–65. Caylor recorded that the BAC in Bullcoming's sample was 0.21 grams per hundred milliliters, an inordinately high level. *Id.*, at 62. Caylor also affirmed that "[t]he seal of th[e] sample was received intact and broken in the laboratory," that "the statements in [the analyst's block of the report] are correct," and that he had "followed the procedures set out on the reverse of th[e] report." *Ibid.* Those "procedures" instructed analysts, *inter alia*, to "re-tai[n] the sample container and the raw data from the analysis," and to "not[e] any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis." *Id.*, at 65. Finally, in a block headed "certificate of reviewer," the SLD examiner who reviewed Caylor's analysis certified that Caylor was qualified to conduct the BAC test, and that the "established procedure" for handling and analyzing Bullcoming's sample "ha[d] been followed." *Id.*, at 62 (capitalization omitted).

SLD analysts use gas chromatograph machines to determine BAC levels. Operation of the machines requires specialized knowledge and training. Several steps are involved in the gas chromatograph process, and human error can occur at each step.[Footnote 1]

Caylor's report that Bullcoming's BAC was 0.21 supported a prosecution for aggravated DWI, the threshold for which is a BAC of 0.16 grams per hundred milliliters, §66–8–102(D)(1). The State accordingly charged Bullcoming with this more serious crime.

B

The case was tried to a jury in November 2005, after our decision in *Crawford* v. *Washington*, 541 U. S. 36 (2004), but before *Melendez-Diaz*. On the day of trial, the State announced that it would not be calling SLD analyst Curtis Caylor as a witness because he had "very recently [been] put on unpaid leave" for a reason not revealed. 2010–NMSC–007, ¶8, 226 P. 3d 1, 6 (internal quotation marks omitted); App. 58. A startled defense counsel objected. The prosecution, she complained, had never disclosed, until trial commenced, that the witness "out there … [was] not the analyst [of Bullcoming's sample]." *Id.,* at 46. Counsel stated that, "had [she] known that the analyst [who tested Bullcoming's blood] was not available," her opening, indeed, her entire defense "may very well have been dramatically different." *Id.*, at 47. The State, however, proposed to introduce Caylor's finding as a "business record" during the testimony of Gerasimos Razatos, an SLD scientist who had neither observed nor reviewed Caylor's analysis. *Id.*, at 44.

Bullcoming's counsel opposed the State's proposal. *Id.*, at 44–45. Without Caylor's testimony, defense counsel maintained, introduction of the analyst's finding would violate Bullcoming's Sixth Amendment right "to be confronted with the witnesses against him." *Ibid.*[Footnote 2] The trial court overruled the objection, *id.*, at 46–47, and admitted the SLD report as a business record, *id.*, at 44–46, 57.[Footnote 3] The jury convicted Bullcoming of aggravated DWI, and the New Mexico Court of Appeals upheld the conviction, concluding that "the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness." 2008–NMCA–097, §17, 189 P. 3d 679, 685.

C

While Bullcoming's appeal was pending before the New Mexico Supreme Court, this Court decided *Melendez-Diaz*. In that case, "[t]he Massachusetts courts [had] admitted into evidence affidavits reporting

the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine." 557 U. S., at ___ (slip op., at 1). Those affidavits, the Court held, were " 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." *Ibid.*

In light of Melendez-Diaz, the New Mexico Supreme Court acknowledged that the blood-alcohol report introduced at Bullcoming's trial qualified as testimonial evidence. Like the affidavits in *Melendez-Diaz*, the court observed, the report was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." 226 P. 3d, at 8 (quoting *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 4)).[Footnote 4] Nevertheless, for two reasons, the court held that admission of the report did not violate the Confrontation Clause.

First, the court said certifying analyst Caylor "was a mere scrivener," who "simply transcribed the results gen-erated by the gas chromatograph machine." 226 P. 3d, at 8–9. Second, SLD analyst Razatos, although he did not participate in testing Bullcoming's blood, "qualified as an expert witness with respect to the gas chromatograph machine." *Id.*, at 9. "Razatos provided live, in-court testimony," the court stated, "and, thus, was available for cross-examination regarding the operation of the … machine, the results of [Bullcoming's] BAC test, and the SLD's established laboratory procedures." *Ibid.* Razatos' testimony was crucial, the court explained, because Bullcoming could not cross-examine the machine or the written report. *Id.*, at 10. But "[Bullcoming's] right of confrontation was preserved," the court concluded, because Razatos was a qualified analyst, able to serve as a surrogate for Caylor. *Ibid*.

We granted certiorari to address this question: Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. 561 U. S. ___ (2010). Our answer is in line with controlling precedent: As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Because the New Mexico Supreme Court permitted the testimonial statement of one witness, *i.e.*, Caylor, to enter into evidence through the in-court testimony of a second person, *i.e.*, Razatos, we reverse that court's judgment.

II

The Sixth Amendment's Confrontation Clause confers upon the accused "[i]n all criminal prosecutions, … the right … to be confronted with the witnesses against him." In a pathmarking 2004 decision, *Crawford* v. *Washington*, we overruled *Ohio* v. *Roberts*, 448 U. S. 56 (1980), which had interpreted the Confrontation Clause to allow admission of absent witnesses' testimonial statements based on a judicial determination of reliability. See *Roberts*, 448 U. S., at 66. Rejecting *Roberts*' "amorphous notions of 'reliability,' " *Crawford*, 541 U. S., at 61, *Crawford* held that fidelity to the Confrontation Clause permitted admission of "[t]estimonial statements of witnesses absent from trial … only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine," *id.*, at 59. See *Michigan* v. *Bryant*, 562 U. S. ___, ___ (2011) (slip op., at 7) ("[F]or testimonial evidence to be admissible, the Sixth Amendment 'demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination.' " (quoting *Crawford*, 541 U. S., at 68)). *Melendez-Diaz*, relying on *Crawford*'s rationale, refused to create a "forensic evidence" exception to this rule. 557 U. S., at ___–___ (slip op., at 11–15).[Footnote 5] An analyst's certification prepared in connection with a criminal investigation or prosecution, the Court held, is "testimonial," and therefore within the compass of the Confrontation Clause. *Id.*, at ___–___ (slip op., at 15–18).[Footnote 6]

The State in the instant case never asserted that the analyst who signed the certification, Curtis Caylor, was unavailable. The record showed only that Caylor was placed on unpaid leave for an undisclosed reason. See *supra*, at 5. Nor did Bullcoming have an opportunity to cross-examine Caylor. *Crawford* and *Melendez-Diaz*, therefore, weigh heavily in Bullcoming's favor. The New Mexico Supreme Court, however, although recognizing that the SLD report was testimonial for purposes of the Confrontation Clause, considered SLD analyst Razatos an adequate substitute for Caylor. We

explain first why Razatos' appearance did not meet the Confrontation Clause requirement. We next address the State's argument that the SLD report ranks as "nontestimonial," and therefore "[was] not subject to the Confrontation Clause" in the first place. Brief for Respondent 7 (capitalization omitted).

A

The New Mexico Supreme Court held surrogate testimony adequate to satisfy the Confrontation Clause in this case because analyst Caylor "simply transcribed the resul[t] generated by the gas chromatograph machine," presenting no interpretation and exercising no independent judgment. 226 P. 3d, at 8. Bullcoming's "true 'accuser,' " the court said, was the machine, while testing analyst Caylor's role was that of "mere scrivener." *Id.*, at 9. Caylor's certification, however, reported more than a machine-generated number. See *supra*, at 3–4.

Caylor certified that he received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number "correspond[ed]," and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol. App. 62–65. He further represented, by leaving the "[r]emarks" section of the report blank, that no "circumstance or condition … affect[ed] the integrity of the sample or … the validity of the analysis." *Id.*, at 62, 65. These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.

The potential ramifications of the New Mexico Supreme Court's reasoning, furthermore, raise red flags. Most wit-nesses, after all, testify to their observations of factual conditions or events, *e.g.*, "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact—Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. See Brief for Petitioner 35. Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No." See *Davis* v. *Washington*, 547 U. S. 813, 826 (2006) (Confrontation Clause may not be "evaded by having a note-taking police[officer] recite the … testimony of the declarant" (emphasis deleted)); *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 6) (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.").

The New Mexico Supreme Court stated that the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment on Caylor's part. 226 P. 3d, at 8–9. We have already explained that Caylor certified to more than a machine-generated number. See *supra*, at 3–4. In any event, the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that the "obviou[s] reliab[ility]" of a testimonial statement does not dispense with the Confrontation Clause. 541 U. S., at 62; see *id.*, at 61 (Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination"). Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa." *Melendez-Diaz*, 557 U. S., at ___, n. 6 (slip op., at 14, n. 6).

B

Recognizing that admission of the blood-alcohol analysis depended on "live, in-court testimony [by] a qualified ana-lyst," 226 P. 3d, at 10, the New Mexico Supreme Court believed that Razatos could substitute for Caylor because Razatos "qualified as an expert witness with respect to the gas chromatograph machine and the SLD's labora- tory procedures," *id.*, at 9. But surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed.[Footnote 7] Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part.[Footnote 8] Significant here, Razatos had no knowledge of the reason why Caylor had been placed on unpaid leave. With Caylor on the stand, Bullcoming's counsel could have asked questions

designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor's removal from his work station. Notable in this regard, the State never asserted that Caylor was "unavailable"; the prosecution conveyed only that Caylor was on uncompensated leave. Nor did the State assert that Razatos had any "independent opinion" concerning Bullcoming's BAC. See Brief for Respondent 58, n. 15. In this light, Caylor's live testimony could hardly be typed "a hollow formality," *post*, at 4.

More fundamentally, as this Court stressed in *Crawford*, "[t]he text of the Sixth Amendment does not sug- gest any open-ended exceptions from the confrontation re-quirement to be developed by the courts." 541 U. S., at 54. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Giles* v. *California*, 554 U. S. 353, 375 (2008). Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

A recent decision involving another Sixth Amendment right—the right to counsel—is instructive. In *United States* v. *Gonzalez-Lopez*, 548 U. S. 140 (2006), the Government argued that illegitimately denying a defendant his counsel of choice did not violate the Sixth Amend- ment where "substitute counsel's performance" did not demonstrably prejudice the defendant. *Id.*, at 144–145. This Court rejected the Government's argument. "[T]rue enough," the Court explained, "the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Id.*, at 145. If a "particular guarantee" of the Sixth Amendment is violated, no substitute procedure can cure the violation, and "[n]o additional showing of prejudice is required to make the violation 'complete.' " *Id.*, at 146. If repre- sentation by substitute counsel does not satisfy the Sixth Amendment, neither does the opportunity to confront a substitute witness.

In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way. See *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 6) (Kennedy, J., dissenting) (Court's holding means "the … analyst who must testify is the person who signed the certificate").

III

We turn, finally, to the State's contention that the SLD's blood-alcohol analysis reports are nontestimonial in character, therefore no Confrontation Clause question even arises in this case. *Melendez-Diaz* left no room for that argument, the New Mexico Supreme Court concluded, see 226 P. 3d, at 7–8; *supra*, at 7, a conclusion we find inescapable.

In *Melendez-Diaz*, a state forensic laboratory, on police request, analyzed seized evidence (plastic bags) and reported the laboratory's analysis to the police (the substance found in the bags contained cocaine). 557 U. S., at ___ (slip op., at 2). The "certificates of analysis" prepared by the analysts who tested the evidence in *Melendez-Diaz*, this Court held, were "incontrovertibly … affirmation[s] made for the purpose of establishing or proving some fact" in a criminal proceeding. *Id.*, at ___ (slip op., at 4) (internal quotation marks omitted). The same purpose was served by the certificate in question here.

The State maintains that the affirmations made by analyst Caylor were not "adversarial" or "inquisitorial," Brief for Respondent 27–33; instead, they were simply observations of an "independent scientis[t]" made "according to a non-adversarial public duty," *id*., at 32–33. That argument fares no better here than it did in *Melendez-Diaz*. A document created solely for an "evidentiary purpose," *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial. 557 U. S., at ___ (slip op., at 5) (forensic reports available for use at trial are "testimonial statements" and certifying analyst is a " 'witness' for purposes of the Sixth Amendment").

Distinguishing Bullcoming's case from *Melendez-Diaz*, where the analysts' findings were contained in certificates "sworn to before a notary public," *id.*, at ___ (slip op., at 2), the State emphasizes that the SLD report of Bullcoming's BAC was "unsworn." Brief for Respondent 13; *post*, at 2 ("only sworn statement" here was that of Razatos, "who was present and [did] testif[y]"). As the New Mexico Supreme Court recognized, " 'the absence of [an] oath [i]s not dispositive' in determining if a statement is

testimonial." 226 P. 3d, at 8 (quoting *Crawford*, 541 U. S., at 52). Indeed, in *Crawford*, this Court rejected as untenable any construction of the Confrontation Clause that would render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements "perfectly OK." *Id.,* at 52–53, n. 3. Reading the Clause in this "implausible" manner, *ibid.*, the Court noted, would make the right to confrontation easily erasable. See *Davis*, 547 U. S., at 830–831, n. 5; *id.*, at 838 (Thomas, J., concurring in judgment in part and dissenting in part).

In all material respects, the laboratory report in this case resembles those in *Melendez-Diaz*. Here, as in *Melendez-Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations, N. M. Stat. Ann. §29–3–4 (2004). Like the analysts in *Melendez-Diaz*, analyst Caylor tested the evidence and prepared a certificate concerning the result of his analysis. App. 62. Like the *Melendez-Diaz* certificates, Caylor's certificate is "formalized" in a signed document, *Davis*, 547 U. S., at 837, n. 2 (opinion of Thomas, J.), headed a "report," App. 62. Noteworthy as well, the SLD report form contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses.

In sum, the formalities attending the "report of blood alcohol analysis" are more than adequate to qualify Caylor's assertions as testimonial. The absence of notarization does not remove his certification from Confrontation Clause governance. The New Mexico Supreme Court, guided by *Melendez-Diaz*, correctly recognized that Caylor's report "fell within the core class of testimonial statements" 226 P. 3d, at 7, described in this Court's leading Confrontation Clause decisions: *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 4); *Davis*, 547 U. S., at 830; *Crawford*, 541 U. S., at 51–52.

IV

The State and its *amici* urge that unbending application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution. This argument, also advanced in the dissent, *post*, at 10–11, largely repeats a refrain rehearsed and rejected in *Melendez-Diaz*. See 557 U. S., at ___–___ (slip op., at 19–23). The con-stitutional requirement, we reiterate, "may not [be] disregard[ed] … at our convenience," *id.*, at ___ (slip op., at 19), and the predictions of dire consequences, we again observe, are dubious, see *id.*, at ___ (slip op., at 19–20).

New Mexico law, it bears emphasis, requires the laboratory to preserve samples, which can be retested by other analysts, see N. M. Admin. Code §7.33.2.15(A)(4)–(6) (2010), available at http://www.nmcpr.state.nm.us/nmac/_title07/T07C033.htm, and neither party questions SLD's compliance with that requirement. Retesting "is almost always an option … in [DWI] cases," Brief for Public Defender Service for District of Columbia et al. as *Amici Curiae* 25 (hereinafter PDS Brief), and the State had that option here: New Mexico could have avoided any Confrontation Clause problem by asking Razatos to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe.

Notably, New Mexico advocates retesting as an effective means to preserve a defendant's confrontation right "when the [out-of-court] statement is raw data or a mere transcription of raw data onto a public record." Brief for Respondent 53–54. But the State would require the defendant to initiate retesting. *Id.*, at 55; *post*, at 4 (defense "remains free to … . call and examine the technician who performed a test"), *post*, at 8 ("free retesting" is available to defendants). The prosecution, however, bears the burden of proof. *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 19) ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."). Hence the obligation to propel retesting when the original analyst is unavailable is the State's, not the defendant's. See *Taylor* v. *Illinois*, 484 U. S. 400, 410, n. 14 (1988) (Confrontation Clause's requirements apply "in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own").

Furthermore, notice-and-demand procedures, long in ef-fect in many jurisdictions, can reduce burdens on foren- sic laboratories. Statutes governing these procedures typically "render … otherwise hearsay forensic reports admissible[,] while specifically preserving a defendant's right to demand that the prosecution call the author/ analyst of [the] report." PDS Brief 9; see *Melendez- Diaz*, 557 U. S., at ___ (slip op., at 20) (observing that notice-and-demand

statutes "permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report").

Even before this Court's decision in *Crawford*, moreover, it was common prosecutorial practice to call the forensic analyst to testify. Prosecutors did so "to bolster the persuasive power of [the State's] case[,] … [even] when the defense would have preferred that the analyst did *not* testify." PDS Brief 8.

We note also the "small fraction of … cases" that "actually proceed to trial." *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 20) (citing estimate that "nearly 95% of convictions in state and federal courts are obtained via guilty plea"). And, "when cases in which forensic analysis has been conducted [do] go to trial," defendants "regularly … [stipulate] to the admission of [the] analysis." PDS Brief 20. "[A]s a result, analysts testify in only a very small percentage of cases," *id.*, at 21, for "[i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 22).[Footnote 9]

Tellingly, in jurisdictions in which "it is the [acknowledged] job of … analysts to testify in court … about their test results," the sky has not fallen. PDS Brief 23. State and municipal laboratories "make operational and staffing decisions" to facilitate analysts' appearance at trial. *Ibid.* Prosecutors schedule trial dates to accommodate analysts' availability, and trial courts liberally grant continuances when unexpected conflicts arise. *Id.*, at 24–25. In rare cases in which the analyst is no longer employed by the laboratory at the time of trial, "the prosecution makes the effort to bring that analyst … to court." *Id.*, at 25. And, as is the practice in New Mexico, see *supra*, at 16, laboratories ordinarily retain additional samples, enabling them to run tests again when necessary.[Footnote 10]

* * *

For the reasons stated, the judgment of the New Mexico Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.[Footnote 11]

It is so ordered.

Crawford v. Washington, 541 U.S. 36 (2004)

Justice Scalia delivered the opinion of the Court.

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife *Miranda* warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which Lee was stabbed in the torso and petitioner's hand was cut.

Petitioner gave the following account of the fight:

"Q. Okay. Did you ever see anything in [Lee's] hands?

"A. I think so, but I'm not positive.

"Q. Okay, when you think so, what do you mean by that?

"A. I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff … and I just … I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut … but I'm not positive. I, I, my mind goes blank when things like this

happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later." App. 155 (punctuation added).

Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was arguably different—particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:

"Q. Did Kenny do anything to fight back from this assault?

"A. (pausing) I know he reached into his pocket … or somethin' … I don't know what.

"Q. After he was stabbed?

"A. He saw Michael coming up. He lifted his hand … his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

"Q. Okay, you, you gotta speak up.

"A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his … put his right hand in his right pocket … took a step back … Michael proceeded to stab him … then his hands were like … how do you explain this … open arms … with his hands open and he fell down … and we ran (describing subject holding hands open, palms toward assailant).

"Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?

"A. Yeah, after, after the fact, yes.

"Q. Did you see anything in his hands at that point?

"A. (pausing) um um (no)." *Id.*, at 137 (punctuation added).

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. See Wash. Rev. Code §5.60.060(1) (1994). In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, see *State* v. *Burden*, 120 Wash. 2d 371, 377, 841 P. 2d 758, 761 (1992), so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be "confronted with the witnesses against him." Amdt. 6. According to our description of that right in *Ohio* v. *Roberts,* 448 U. S. 56 (1980), it does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.' " *Id.*, at 66. To meet that test, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal"; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a "neutral" law enforcement officer. App. 76–77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault.

The Washington Court of Appeals reversed. It applied a nine-factor test to determine whether Sylvia's statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not: The statement contradicted one she had previously given; it was made in response to specific questions; and at one point she admitted she had shut her eyes during the stabbing. The court considered and rejected the State's argument that Sylvia's statement was reliable because it coincided with petitioner's to such a degree that the two "interlocked." The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner's self-defense claim: "[Petitioner's] version asserts that Lee may have had something in his hand when he stabbed him; but

Sylvia's version has Lee grabbing for something only after he has been stabbed." App. 32.

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness: " '[W]hen a codefendant's confession is virtually identical [to, *i.e.*, interlocks with,] that of a defendant, it may be deemed reliable.' " 147 Wash. 2d 424, 437, 54 P. 3d 656, 663 (2002) (quoting *State* v. *Rice*, 120 Wash. 2d 549, 570, 844 P. 2d 416, 427 (1993)). The court explained:

"Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap… .

"[B]oth of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

"[N]either Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." 147 Wash. 2d, at 438– 439, 54 P. 3d, at 664 (internal quotation marks omitted).[Footnote 1]

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U. S. 914 (2003).

II

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer* v. *Texas,* 380 U. S. 400, 406 (1965). As noted above, *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability—*i.e.*, falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U. S., at 66. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

A

The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to mean those who actually testify at trial, cf. *Woodsides* v. *State*, 3 Miss. 655, 664–665 (1837), those whose statements are offered at trial, see 3 J. Wigmore, Evidence §1397, p. 104 (2d ed. 1923) (hereinafter Wigmore), or something in-between, see *infra*, at 15–16. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. See *Coy* v. *Iowa,* 487 U. S. 1012, 1015 (1988); Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994). The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, Commentaries on the Laws of England 373–374 (1768).

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.* the witnesses against him, brought before him face to face." 1 J. Stephen, History of the Criminal Law of England 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, History of English Law 216–217, 228 (3d ed. 1944); *e.g.*, *Raleigh's Case*, 2 How. St. Tr. 1, 15–16, 24 (1603); *Throckmorton's Case*, 1 How. St. Tr. 869, 875–876 (1554); cf. *Lilburn's Case*, 3 How. St. Tr. 1315, 1318–1322, 1329 (Star Chamber 1637).

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 *id.*, c. 10 (1555). These Marian bail and committal

statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, Prosecuting Crime in the Renaissance 21–34 (1974). Whatever the original purpose, however, they came to be used as evidence in some cases, see 2 M. Hale, Pleas of the Crown 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra*, at 528–530.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." 1 D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face … ." 2 How. St. Tr., at 15–16. The judges refused, *id.*, at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id.,* at 15, the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that " 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.' " 1 Jardine, *supra*, at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. *E.g.*, 13 Car. 2, c. 1, §5 (1661); see 1 Hale, *supra*, at 306. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley's Case*, 6 How. St. Tr. 769, 770–771 (H. L. 1666); 2 Hale, *supra*, at 284; 1 Stephen, *supra*, at 358. Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated. See 2 W. Hawkins, Pleas of the Crown c. 46, §3, pp. 603–604 (T. Leach 6th ed. 1787); 1 Hale, *supra*, at 585, n. *(k);* 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791); cf. *Tong's Case*, Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (treason). But see *King* v. *Westbeer*, 1 Leach 12, 168 Eng. Rep. 108, 109 (1739).

One recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him. In 1696, the Court of King's Bench answered this question in the affirmative, in the widely reported misdemeanor libel case of *King* v. *Paine*, 5 Mod. 163, 87 Eng. Rep. 584. The court ruled that, even though a witness was dead, his examination was not admissible where "the defendant not being present when [it was] taken before the mayor … had lost the benefit of a cross-examination." *Id.*, at 165, 87 Eng. Rep., at 585. The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder. Fenwick's counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine. See *Fenwick's Case*, 13 How. St. Tr. 537, 591–592 (H. C. 1696) (Powys) ("[T]hat which they would offer is something that Mr. Goodman hath sworn when he was examined … ; sir J. F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence …"); *id.*, at 592 (Shower) ("[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him … . [O]ur constitution is, that the person shall see his accuser"). The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings—one speaker even admitting that the evidence would normally be inadmissible. See *id.*, at 603–604 (Williamson); *id.*, at 604–605 (Chancellor of the Exchequer); *id.*, at 607; 3 Wigmore §1364, at 22–23, n. 54. Fenwick was condemned, but the proceedings "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination." *Id.*, §1364, at 22; cf. *Carmell* v. *Texas,* 529 U. S. 513, 526–530 (2000).

Paine had settled the rule requiring a prior opportunity for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in

felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 *id.*, c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See *Westbeer*, *supra*, at 12, 168 Eng. Rep., at 109; compare *Fenwick's Case*, 13 How. St. Tr., at 596 (Sloane), with *id.*, at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See *King* v. *Eriswell*, 3 T. R. 707, 710, 100 Eng. Rep. 815, 817 (K. B. 1790) (Grose, J.) (dicta); *id.*, at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C. J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only "by Force 'of the Statute' "), with *id.*, at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. See *King* v. *Dingler*, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791); *King* v. *Woodcock*, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789); cf. *King* v. *Radbourne*, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787); 3 Wigmore §1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 *id.*, at 484–492; T. Peake, Evidence 63–64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, §17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law." *Queen* v. *Beeston*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C. J.).[Footnote 2]

B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men *ex parte*," complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers." A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed. 1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo. 3, c. 12, §57 (1765); Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 396–397 (1959). Colonial representatives protested that the Act subverted their rights "by extending the jurisdiction of the courts of admiralty beyond its ancient limits." Resolutions of the Stamp Act Congress §8th (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds. 1959). John Adams, defending a merchant in a high-profile admiralty case, argued: "Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." Draft of Argument in *Sewall* v. *Hancock* (1768–1769), in 2 Legal Papers of John Adams 194, 207 (K. Wroth & H. Zobel eds. 1965).

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights §8 (1776); Pennsylvania Declaration of Rights §IX (1776); Delaware Declaration of Rights §14 (1776); Maryland Declaration of Rights §XIX (1776); North Carolina Declaration of Rights §VII (1776); Vermont Declaration of Rights Ch. I, §X (1777); Massachusetts Declaration of Rights §XII (1780); New Hampshire Bill of Rights §XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: "The mode of trial is altogether indetermined; … whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told… . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, … the *Inquisition.*" 2 Debates on the Federal Constitution 110–111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question… . [W]ritten evidence … [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper

discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Early state decisions shed light upon the original understanding of the common-law right. *State* v. *Webb*, 2 N. C. 103 (1794) *(per curiam),* decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.,* at 104.

Similarly, in *State* v. *Campbell*, 1 S. C. 124 (1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte*, and, therefore, utterly incompetent." *Id.*, at 125. The court said that one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *Ibid.*

Many other decisions are to the same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine. See *Finn* v. *Commonwealth*, 26 Va. 701, 708 (1827); *State* v. *Atkins*, 1 Tenn. 229 (1807) *(per curiam)*. Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination. See *United States* v. *Macomb*, 26 F. Cas. 1132, 1133 (No. 15,702) (CC Ill. 1851); *State* v. *Houser*, 26 Mo. 431, 435–436 (1858); *Kendrick* v. *State*, 29 Tenn. 479, 485–488 (1850); *Bostick* v. *State*, 22 Tenn. 344, 345–346 (1842); *Commonwealth* v. *Richards*, 35 Mass. 434, 437 (1837); *State* v. *Hill*, 2 Hill 607, 608–610 (S. C. 1835); *Johnston* v. *State*, 10 Tenn. 58, 59 (1821). Nineteenth-century treatises confirm the rule. See 1 J. Bishop, Criminal Procedure §1093, p. 689 (2d ed. 1872); T. Cooley, Constitutional Limitations *318.

III

This history supports two inferences about the meaning of the Sixth Amendment.

A

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore §1397, at 101; accord, *Dutton* v. *Evans,* 400 U. S. 74, 94 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically

"[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White* v. *Illinois,* 502 U. S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e.g.*, *Campbell*, 1 S. C., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See *supra*, at 8.[Footnote 3]

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34–45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra*, at 194–200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.[Footnote 4]

B

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right … to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States,* 156 U. S. 237, 243 (1895); cf. *Houser*, 26 Mo., at 433–435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.[Footnote 5]

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for

admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. This is not to deny, as The Chief Justice notes, that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence. *Post*, at 5. Several had become well established by 1791. See 3 Wigmore §1397, at 101; Brief for United States as *Amicus Curiae* 13, n. 5. But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.[Footnote 6] Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. Cf. *Lilly* v. *Virginia,* 527 U. S. 116, 134 (1999) (plurality opinion) ("[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule").[Footnote 7]

IV

Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. *Mattox* v. *United States,* 156 U. S. 237 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of … ." *Id.*, at 244.

Our later cases conform to *Mattox*'s holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi* v. *Stubbs,* 408 U. S. 204, 213–216 (1972); *California* v. *Green,* 399 U. S. 149, 165–168 (1970); *Pointer* v. *Texas,* 380 U. S., at 406–408; cf. *Kirby* v. *United States,* 174 U. S. 47, 55–61 (1899). Even where the defendant had such an opportunity, we excluded the testimony where the government had not established unavailability of the witness. See *Barber* v. *Page,* 390 U. S. 719, 722–725 (1968); cf. *Motes* v. *United States,* 178 U. S. 458, 470–471 (1900). We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. See *Roberts* v. *Russell,* 392 U. S. 293, 294–295 (1968) *(per curiam); Bruton* v. *United States,* 391 U. S. 123, 126–128 (1968); *Douglas* v. *Alabama,* 380 U. S. 415, 418–420 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See *Dutton* v. *Evans,* 400 U. S., at 87–89 (plurality opinion).

Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio* v. *Roberts,* 448 U. S., at 67–70, admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly* v. *Virginia, supra*, excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily* v. *United States,* 483 U. S. 171, 181–184 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement.[Footnote 8]

Lee v. *Illinois,* 476 U. S. 530 (1986), on which the State relies, is not to the contrary. There, we *rejected* the State's attempt to admit an accomplice confession. The State had argued that the confession was admissible because it "interlocked" with the defendant's. We dealt with the argument by rejecting its premise, holding that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." *Id.*, at 545. Respondent argues that "[t]he logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted." Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here. If *Lee* had meant authoritatively to announce an exception—previously unknown to this Court's jurisprudence—for interlocking confessions, it would not have done so in such an oblique manner. Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's *own* confession against him in a joint trial. See *Parker* v. *Randolph,* 442 U. S. 62, 69–76 (1979) (plurality opinion), abrogated by *Cruz* v. *New York,* 481 U. S. 186 (1987).

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the

declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.[Footnote 9]

V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U. S., at 66. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, *e.g.*, *Lilly*, 527 U. S., at 140–143 (Breyer, J., concurring); *White*, 502 U. S., at 366 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); A. Amar, The Constitution and Criminal Procedure 125–131 (1997); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law—thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine—thus eliminating the excessive narrowness referred to above.

In *White*, we considered the first proposal and rejected it. 502 U. S., at 352–353. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds* v. *United States,* 98 U. S. 145, 158–159 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, 2 How. St. Tr., at 19, that they were not made in the heat of passion, *id.*, at 14, and that they were not "extracted from [him] upon any hopes or promise of Pardon," *id.*, at 29. It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did

not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

B

The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, *e.g.*, *People* v. *Farrell*, 34 P. 3d 401, 406–407 (Colo. 2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," *id.*, at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," *United States* v. *Photogrammetric Data Servs., Inc.*, 259 F. 3d 229, 245 (2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), see *Nowlin* v. *Commonwealth*, 40 Va. App. 327, 335–338, 579 S. E. 2d 367, 371–372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, see *State* v. *Bintz*, 2002 WI App. 204, ¶ ;13, 257 Wis. 2d 177, 187, 650 N. W. 2d 913, 918. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, *Farrell*, *supra*, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens* v. *People*, 29 P. 3d 305, 316 (2001).

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in *Lilly*, 527 U. S., at 137, that it was "highly unlikely" that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them. See *Photogrammetric Data Servs., supra*, at 245–246; *Farrell*, *supra*, at 406–408; *Stevens*, *supra*, at 314–318; *Taylor* v. *Commonwealth*, 63 S. W. 3d 151, 166–168 (Ky. 2001); *State* v. *Hawkins*, No. 2001–P–0060, 2002 WL 31895118, ¶ ;¶ ;34–37, *6 (Ohio App., Dec. 31, 2002); *Bintz*, *supra*, ¶ ;¶ ;7–14, 257 Wis. 2d, at 183–188, 650 N. W. 2d, at 916–918; *People* v. *Lawrence*, 55 P. 3d 155, 160–161 (Colo. App. 2001); *State* v. *Jones*, 171 Ore. App. 375, 387–391, 15 P. 3d 616, 623–625 (2000); *State* v. *Marshall*, 136 Ohio App. 3d 742, 747–748, 737 N. E. 2d 1005, 1009 (2000); *People* v. *Schutte*, 240 Mich. App. 713, 718–721, 613 N. W. 2d 370, 376–377 (2000); *People* v. *Thomas*, 313 Ill. App. 3d 998, 1005–1007, 730 N. E. 2d 618, 625–626 (2000); cf. *Nowlin*, *supra*, at 335–338, 579 S. E. 2d, at 371–372 (witness confessed to a related crime); *People* v. *Campbell*, 309 Ill. App. 3d 423, 431–432, 721 N. E. 2d 1225, 1230 (1999) (same). One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases—more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 105 (2003). Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States* v. *Aguilar*, 295 F. 3d 1018, 1021–1023 (CA9 2002) (plea allocution showing existence of a conspiracy); *United States* v. *Centracchio*, 265 F. 3d 518, 527–530 (CA7 2001) (same); *United States* v. *Dolah*, 245 F. 3d 98, 104–105 (CA2 2001) (same); *United States* v. *Petrillo*, 237 F. 3d 119, 122–123 (CA2 2000) (same); *United States* v. *Moskowitz*, 215 F. 3d 265, 268–269 (CA2 2000) (same); *United States* v. *Gallego*, 191 F. 3d 156, 166–168 (CA2 1999) (same); *United States* v. *Papajohn*, 212 F. 3d 1112, 1118–1120 (CA8 2000) (grand jury testimony); *United States* v. *Thomas*, 30 Fed. Appx. 277, 279 (CA4 2002) (same); *Bintz*, *supra*, ¶ ;¶ ;15–22, 257 Wis. 2d, at 188–191, 650 N. W. 2d, at 918–920 (prior trial testimony); *State* v. *McNeill*, 140 N. C. App. 450, 457–460, 537 S. E. 2d 518, 523–524 (2000) (same).

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges—the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin*, *supra*, at 335–338, 579 S. E. 2d, at 371–372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E.g.*, *Gallego*, *supra*, at 168 (plea allocution); *Papajohn*, *supra*, at 1120 (grand jury testimony). That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

Roberts' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released "depend[ed] on how the investigation continues." App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts'* unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had "shut [her] eyes and … didn't really watch" part of the fight, and that she was "in shock." App. 134. The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, and, thus, the [questioner] is … neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." *Id.*, at 77. The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that.

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements—that they were both ambiguous as to when and whether Lee had a weapon. The court's claim that the two statements were *equally* ambiguous is hard to accept. Petitioner's statement is ambiguous only in the sense that he had lingering doubts about his recollection: "A. I coulda swore I seen him goin' for somethin' before, right before everything happened… . [B]ut I'm not positive." *Id.*, at 155. Sylvia's statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: "Q. Did Kenny do anything to fight back from this assault?" *Id.*, at 137. Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court's view that Sylvia's statement was ambiguous—he called it "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating the need for cross-examination, the "interlocking" ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the "reliability factors" under *Roberts* and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment

condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. Cf. U. S. Const., Amdt. 6 (criminal jury trial); Amdt. 7 (civil jury trial); *Ring* v. *Arizona,* 536 U. S. 584, 611–612 (2002) (Scalia, J., concurring). By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances.

* * *

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial."[Footnote 10] Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)

OCTOBER TERM, 1992

Syllabus

DAUBERT ET UX., INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR DAUBERT, ET AL. *v.* MERRELL DOW PHARMACEUTICALS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-102. Argued March 30, 1993-Decided June 28,1993

Petitioners, two minor children and their parents, alleged in their suit against respondent that the children's serious birth defects had been caused by the mothers' prenatal ingestion of Bendectin, a prescription drug marketed by respondent. The District Court granted respondent summary judgment based on a well-credentialed expert's affidavit concluding, upon reviewing the extensive published scientific literature on the subject, that maternal use of Bendectin has not been shown to be a risk factor for human birth defects. Although petitioners had responded with the testimony of eight other well-credentialed experts, who based their conclusion that Bendectin can cause birth defects on animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human statistical studies, the court determined that this evidence did not meet the applicable "general acceptance" standard for the admission of expert testimony. The Court of Appeals agreed and affirmed, citing *Frye* v. *United States,* 54 App. D. C. 46, 47, 293

F.1d 13, 1014, for the rule that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.

Held: The Federal Rules of Evidence, not *Frye,* provide the standard for admitting expert scientific testimony in a federal trial. Pp. 585-597.

(a) *Frye's* "general acceptance" test was superseded by the Rules' adoption. The Rules occupy the field, *United States* v. *Abel,* 469 U. S. 45, 49, and, although the common law of evidence may serve as an aid to their application, *id.,* at 51-52, respondent's assertion that they somehow assimilated *Frye* is unconvincing. Nothing in the Rules as a whole or in the text and drafting history of Rule 702, which specifically governs expert testimony, gives any indication that "general acceptance" is a necessary precondition to the admissibility of scientific evidence. Moreover, such a rigid standard would be at odds with the Rules' liberal thrust and their general approach of relaxing the traditional barriers to "opinion" testimony. Pp. 585-589.

(b) The Rules-especially Rule 702-place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial

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Syllabus

judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to "scientific ... knowledge," since the adjective "scientific" implies a grounding in science's methods and procedures, while the word "knowledge" connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility. Pp. 589-592.

(c) Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules. Pp. 592-595.

(d) Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising "general acceptance" standard, is the appropriate means by which evidence based on valid principles may be challenged. That even limited screening by the trial judge, on occasion, will prevent the jury from hearing of authentic scientific breakthroughs is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes. Pp.595-597.

951 F.2d 1128, vacated and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I and II-A, and the opinion of the Court with respect to Parts II-B, II-C, III, and IV, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post,* p.598.

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Michael H. Gottesman argued the cause for petitioners.

With him on the briefs were Kenneth *J.* Chesebro, Barry *J.* Nace, David L. Shapiro, and Mary G. Gillick.

Charles Fried argued the cause for respondent. With him on the brief were Charles R. Nesson, Joel 1. Klein, Richard G. Taranto, Hall R. Marston, George E. Berry, Edward H. Stratemeier, and W Glenn Forrester. *

*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Dan Morales,* Attorney General of Texas, *Mark Barnett,* Attorney General of South Dakota, *Marc Racicot,* Attorney General of Montana, *Larry EchoHawk,* Attorney General of Idaho, and *Brian Stuart Koukoutchos;* for the American Society of Law, Medicine and Ethics et al. by *Joan E. Bertin, Marsha* S. *Berzon,* and *Albert H. Meyerhoff;* for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Roxanne Barton Conlin;* for Ronald Bayer et al. by *Brian Stuart Koukoutchos, Priscilla Budeiri, Arthur Bryant,* and *George W Conk;* and for Daryl E. Chubin et al. by *Ron Simon* and *Nicole Schultheis.*

Briefs of amici curiae urging affirmance were filed for the United States by Acting Solicitor General Wallace, Assistant Attorney General Gerson, Miguel A. Estrada, Michael Jay Singer, and John P. Schnitker; for the American Insurance Association by William *J.* Kilberg, Paul Blankenstein, Bradford R. Clark, and Craig A. Berrington; for the American Medical Association et al. by Carter G. Phillips, Mark D. Hopson, and Jack R. Bierig; for the American Tort Reform Association by John G. Kester and John W Vardaman, Jr.; for the Chamber of Commerce of the United States by Timothy B. Dyk, Stephen A. Bokat, and Robin S. Conrad; for the Pharmaceutical Manufacturers Association by Louis R. Cohen and Daniel Marcus; for the Product Liability Advisory Council, Inc., et al. by Victor E. Schwartz, Robert P. Charrow, and Paul F. Rothstein; for the Washington Legal Foundation by Scott G. Campbell, Daniel *J.* Popeo, and Richard A. Samp; and for Nicolaas Bloembergen et al. by Martin

Briefs of *amici curiae* were filed for the American Association for the Advancement of Science et al. by *Richard A. Meserve* and *Bert Black;* for the American College of Legal Medicine by *Miles J. Zaremski;* for the Carnegie Commission on Science, Technology, and Government by *Steven* G. *Gallagher, Elizabeth H. Esty,* and *Margaret A. Berger;* for the Defense Research Institute, Inc., by *Joseph A. Sherman, E. Wayne Taff,* and *Harvey L. Kaplan;* for the New England Journal of Medicine et al. by *Michael Malina* and *Jeffrey I. D. Lewis;* for A Group of American Law Professors

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JUSTICE BLACKMUN delivered the opinion of the Court. In this case we are called upon to determine the standard for admitting expert scientific testimony in a federal trial.

I

Petitioners Jason Daubert and Eric Schuller are minor children born with serious birth defects. They and their parents sued respondent in California state court, alleging that the birth defects had been caused by the mothers' ingestion of Bendectin, a prescription antinausea drug marketed by respondent. Respondent removed the suits to federal court on diversity grounds.

After extensive discovery, respondent moved for summary judgment, contending that Bendectin does not cause birth defects in humans and that petitioners would be unable to come forward with any admissible evidence that it does. In support of its motion, respondent submitted an affidavit of Steven H. Lamm, physician and epidemiologist, who is a well-credentialed expert on the risks from exposure to various chemical substances.1 Doctor Lamm stated that he had reviewed all the literature on Bendectin and human birth defects-more than 30 published studies involving over 130,000 patients. No study had found Bendectin to be a human teratogen (i. *e.,* a substance capable of causing malformations in fetuses). On the basis of this review, Doctor Lamm concluded that maternal use of Bendectin during the first trimester of pregnancy has not been shown to be a risk factor for human birth defects.

by Donald N. Bersoff; for Alvan R. Feinstein by Don M. Kennedy, Loretta M. Smith, and Richard A. Oetheimer; and for Kenneth Rothman et al. by Neil B. Cohen.

1 Doctor Lamm received his master's and doctor of medicine degrees from the University of Southern California. He has served as a consultant in birth-defect epidemiology for the National Center for Health Statistics and has published numerous articles on the magnitude of risk from exposure to various chemical and biological substances. App. 34-44.

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Petitioners did not (and do not) contest this characterization of the published record regarding Bendectin. Instead, they responded to respondent's motion with the testimony of eight experts of their own, each of whom also possessed impressive credentials.2 These experts had concluded that Bendectin can cause birth defects. Their conclusions were based upon "in vitro" (test tube) and "in vivo" (live) animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects; and the "reanalysis" of previously published epidemiological (human statistical) studies.

The District Court granted respondent's motion for summary judgment. The court stated that scientific evidence is admissible only if the principle upon which it is based is "'sufficiently established to have general acceptance in the field to which it belongs.'" 727 F. Supp. 570, 572 (SD Cal. 1989), quoting *United States* v. *Kilgus,* 571 F.2d 508, 510 (CA9 1978). The court concluded that petitioners' evidence did not meet this standard. Given the vast body of epidemiological data concerning Bendectin, the court held, expert opinion which is not based on epidemiological evidence

2 For example, Shanna Helen Swan, who received a master's degree in biostatistics from Columbia University and a doctorate in statistics from the University of California at Berkeley, is chief of the section of the California Department of Health and Services that determines causes of birth defects and has served as a consultant to the World Health Organization, the Food and Drug Administration, and the National Institutes of Health. *Id.,* at 113-114, 131-132. Stuart A. Newman, who received his bachelor's degree in chemistry from Columbia University and his master's and doctorate in chemistry from the University of Chicago, is a professor at New York Medical College and has spent over a decade studying the effect of chemicals on limb development. *Id.,* at 54-56. The credentials of the others are similarly impressive. See *id.,* at 61-66, 73-80, 148-153, 187192, and Attachments 12, 20, 21, 26, 31, and 32 to Petitioners' Opposition to Summary Judgment in No. 84-2013-G(I) (SD Cal.).

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is not admissible to establish causation. 727 F. Supp., at 575. Thus, the animal-cell studies, live-animal studies, and chemical-structure analyses on which petitioners had relied could not raise by themselves a reasonably disputable jury issue regarding causation. *Ibid.* Petitioners' epidemiological analyses, based as they were on recalculations of data in previously published studies that had found no causal link between the drug and birth defects, were ruled to be inadmissible because they had not been published or subjected to peer review. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed. 951 F.2d 1128 (1991). Citing *Frye* v. *United States,* 54 App. D. C. 46, 47, 293 F.1d 13, 1014 (1923), the court stated that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. 951 F. 2d, at 1129-1130. The court declared that expert opinion based on a methodology that diverges "significantly from the procedures accepted by recognized authorities in the field ... cannot be shown to be 'generally accepted as a reliable technique.'" *Id.,* at 1130, quoting *United States* v. *Solomon, 753*

The court emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit reanalyses of epidemiological studies that had been neither published nor subjected to peer review. 951 F. 2d, at 1130-1131. Those courts had found unpublished reanalyses "particularly problematic in light of the massive weight of the original published studies supporting [respondent's] position, all of which had

undergone full scrutiny from the scientific community." *Id.,* at 1130. Contending that reanalysis is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field, the Court of Appeals rejected petitioners' reanalyses as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation." *Id.,* at 1131. The

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court concluded that petitioners' evidence provided an insufficient foundation to allow admission of expert testimony that Bendectin caused their injuries and, accordingly, that petitioners could not satisfy their burden of proving causation at trial.

We granted certiorari, 506 U. S. 914 (1992), in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony. Compare, *e. g., United States* v. *Shorter,* 257 U. S. App. D. C. 358, 363364, 809 F.2d 54, 59-60 (applying the "general acceptance" standard), cert. denied, 484 U. S. 817 (1987), with *DeLuca* v. *Merrell Dow Pharmaceuticals, Inc.,* 911 F.2d 941, 955 (CA3 1990) (rejecting the "general acceptance" standard).

II A

In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 649 (1983). Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit.3

The *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine. In what has become a famous (perhaps infamous) passage, the then Court of Appeals for the District of Columbia described the device and its operation and declared:

"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages

3 For a catalog of the many cases on either side of this controversy, see P. Giannelli & E. Imwinkelried, Scientific Evidence § 1-5, pp. 10-14 (1986 and Supp. 1991).

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is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."* 54 App. D. C., at 47, 293 F., at 1014 (emphasis added).

Because the deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made," evidence of its results was ruled inadmissible. *Ibid.*

The merits of the *Frye* test have been much debated, and scholarship on its proper scope and application is legion.4

4 See, *e. g.,* Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of *Agent Orange* and Bendectin Litigation, 86 Nw. U. L. Rev. 643 (1992) (hereinafter Green); Becker & Orenstein, The Federal Rules of Evidence After Sixteen Years-The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 Geo. Wash. L. Rev. 857, 876-885 (1992); Hanson, James Alphonzo Frye is Sixty-Five Years Old; Should He Retire?, 16 West. St. U. L. Rev. 357 (1989); Black, A Unified Theory of Scientific Evidence, 56 Ford. L. Rev. 595 (1988); Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N. C. L. Rev. 1 (1988); Proposals for a Model Rule on the

Admissibility of Scientific Evidence, 26 Jurimetrics J. 235 (1986); Giannelli, The Admissibility of Novel Scientific Evidence: *Frye* v. *United States,* a Half-Century Later, 80 Colum. L. Rev. 1197 (1980); The Supreme Court, 1986 Term, 101 Harv. L. Rev. 7, 119, 125-127 (1987).

Indeed, the debates over *Frye* are such a well-established part of the academic landscape that a distinct term-"Frye-ologist"-has been advanced to describe those who take part. See Behringer, Introduction, Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 Jurimetrics J. 237, 239 (1986), quoting Lacey, Scientific Evidence, 24 Jurimetrics J. 254, 264 (1984).

5 Like the question of *Frye's* merit, the dispute over its survival has divided courts and commentators. Compare, *e. g., United States* v. *Williams,* 583 F.2d 1194 *(CA2* 1978) *(Frye* is superseded by the Rules of Evidence), cert. denied, 439 U. S. 1117 (1979), with *Christophersen* v. *Allied-Signal Corp.,* 939 F.2d 1106, 1111, 1115-1116 *(CA5* 1991) (en banc) *(Frye* and the Rules coexist), cert. denied, 503 U. S. 912 (1992), 3 J. Weinstein & M. Berger, Weinstein's Evidence , 702[03], pp. 702-36 to 702-37 (1988) (hereinafter Weinstein & Berger) *(Frye* is dead), and M. Graham, Handbook of Federal Evidence § 703.2 (3d ed. 1991) *(Frye* lives). See generally P. Giannelli & E. Imwinkelried, Scientific Evidence § 1-5, at 28-29 (citing authorities).

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Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence.5 We agree.

We interpret the legislatively enacted Federal Rules of Evidence as we would any statute. *Beech Aircraft Corp.* v. *Rainey,* 488 U. S. 153, 163 (1988). Rule 402 provides the baseline:

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible. "

"Relevant evidence" is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 40l. The Rules' basic standard of relevance thus is a liberal one.

Frye, of course, predated the Rules by half a century. In *United States* v. *Abel,* 469 U. S. 45 (1984), we considered the pertinence of background common law in interpreting the Rules of Evidence. We noted that the Rules occupy the field, *id.,* at 49, but, quoting Professor Cleary, the Reporter,

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explained that the common law nevertheless could serve as an aid to their application:

"'In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided .... " In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.'" *Id.,* at 51-52.

We found the common-law precept at issue in the *Abel* case entirely consistent with Rule 402's general requirement of admissibility, and considered it unlikely that the drafters had intended to change the rule. *Id.,* at 50-51. In *Bourjaily* v. *United States,* 483 U. S. 171 (1987), on the other hand, the Court was unable to find a particular common-law doctrine in the Rules, and so held it superseded.

Here there is a specific Rule that speaks to the contested issue. Rule 702, governing expert testimony, provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in

issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Nothing in the text of this Rule establishes "general acceptance" as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a "general acceptance" standard. The drafting history makes no mention of *Frye,* and a rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Beech Aircraft Corp.* v. *Rainey,* 488 U. S., at 169 (citing Rules 701 to 705). See also Weinstein, Rule 702 of the Federal Rules of Evidence is

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Sound; It Should Not Be Amended, 138 F. R. D. 631 (1991) ("The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts"). Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.6

B

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.7 Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. *"If* scientific, technical, or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue" an expert "may testify *thereto."* (Emphasis added.) The subject of an expert's testimony must

6 Because we hold that *Frye* has been superseded and base the discussion that follows on the content of the congressionally enacted Federal Rules of Evidence, we do not address petitioners' argument that application of the *Frye* rule in this diversity case, as the application of a judgemade rule affecting substantive rights, would violate the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938).

7THE CHIEF JUSTICE "do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility," *post,* at 600, but would neither say how it does so nor explain what that role entails. We believe the better course is to note the nature and source of the duty.

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be "scientific ... knowledge." 8 The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, *e. g.,* Brief for Nicolaas Bloembergen et al. as *Amici Curiae* 9 ("Indeed, scientists do not assert that they know what is immutably 'true' -they are committed to searching for new, temporary, theories to explain, as best they can, phenomena"); Brief for American Association for the Advancement of Science et al. as *Amici Curiae* 7-8 ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement" (emphasis in original)). But, in order to

qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation-i. *e.,* "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.9

8 Rule 702 also applies to "technical, or other specialized knowledge."

Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

9We note that scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?). See Black, 56 Ford. L. Rev., at 599. Although "the difference between accuracy, validity, and reliability may be such that each is distinct from the other by no more than a hen's kick," Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 Jurimetrics J. 249, 256 (1986), our reference here is to *evidentiary* reliabilitythat is, trustworthiness. Cf., *e. g.,* Advisory Committee's Notes on Fed. Rule Evid. 602, 28 U. S. C. App., p. 755 (" '[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information'" (citation omitted)); Advisory Committee's Notes on Art. VIII of Rules of Evidence, 28 U. S. C. App., p. 770 (hearsay exceptions will be recognized only "under circumstances supposed to furnish guarantees of trustworthiness"). In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity.*

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Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." This condition goes primarily to relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." 3 Weinstein & Berger' 702[02], p. 702-18. See also *United States* v. *Downing,* 753 F.2d 1224, 1242 (CA3 1985) ("An additional consideration under Rule 702-and another aspect of relevancy-is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"). The consideration has been aptly described by Judge Becker as one of "fit." *Ibid.* "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. See Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 Jurimetrics J. 249, 258 (1986). The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness"

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standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

That these requirements are embodied in Rule 702 is not surprising. Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of firsthand knowledge-a rule which represents "a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information,'" Advisory Committee's Notes on Fed. Rule Evid. 602, 28 U. S. C. App., p. 755 (citation omitted)-is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

C

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),10 whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.ll This entails a preliminary assessment of whether the reasoning or method-

10 Rule 104(a) provides:

"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges." These matters should be established by a preponderance of proof. See *Bourjaily* v. *United States,* 483 U. S. 171,175-176 (1987).

11 Although the *Frye* decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, wellestablished propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule of Evidence 201.

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ology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green 645. See also C. Hempel, Philosophy of Natural Science 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability") (emphasis deleted).

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, The Fifth Branch: Science Advisors as Policymakers 61-76 (1990), and in some instances well-grounded but innovative theories will not have been published, see Horrobin, The Philosophical Basis of Peer Review and the Suppression of Innovation, 263 JAMA 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. See J. Ziman, Reliable Knowledge: An Exploration

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of the Grounds for Belief in Science 130-133 (1978); ReIman & Angell, How Good Is Peer Review?, 321 New Eng. J. Med. 827 (1989). The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, *e. g., United States* v. *Smith,* 869 F.2d 348, 353-354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's

operation, see *United States* v. *Williams,* 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert. denied, 439 U. S. 1117 (1979).

Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United States* v. *Downing,* 753 F. 2d, at 1238. See also 3 Weinstein & Berger' 702[03], pp. 702-41 to 702-42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," *Downing,* 753 F. 2d, at 1238, may properly be viewed with skepticism.

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.12 Its overarching subject is the scientific valid-

12 A number of authorities have presented variations on the reliability approach, each with its own slightly different set of factors. See, *e. g.,* Downing, 753 F. 2d, at 1238-1239 (on which our discussion draws in part); 3 Weinstein & Berger' 702[03], pp. 702-41 to 702-42 (on which the *Downing* court in turn partially relied); McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L. Rev. 879, 911-912 (1982); and Symposium on Science and the Rules of Evidence, 99 F. R. D. 187,231 (1983) (statement by Margaret Berger). To the extent that they focus on the reliability of evidence as ensured by the scientific validity of its underlying principles, all these versions may well have merit, although we express no opinion regarding any of their particular details.

ity-and thus the evidentiary relevance and reliability-of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing. Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury .... " Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Weinstein, 138 F. R. D., at 632.

III

We conclude by briefly addressing what appear to be two underlying concerns of the parties and *amici* in this case. Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific as-

sertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See *Rock* v. *Arkansas,* 483 U. S. 44, 61 (1987). Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. Rule Civ. Proc. 50(a), and likewise to grant summary judgment, Fed. Rule Civ. Proc. 56. Cf.,

e. g., Turpin v. *Merrell Dow Pharmaceuticals, Inc.,* 959 F.2d 1349 (CA6) (holding that scientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs, was not sufficient to allow a jury to find it more probable than not that defendant caused plaintiff's injury), cert. denied, 506 U. S. 826 (1992); *Brock* v. *Merrell Dow Pharmaceuticals, Inc.,* 874 F.2d 307 (CA5 1989) (reversing judgment entered on jury verdict for plaintiffs because evidence regarding causation was insufficient), modified, 884 F.2d 166 (CA5 1989), cert. denied, 494 U. S. 1046 (1990); Green 680-681. These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Petitioners and, to a greater extent, their *amici* exhibit a different concern. They suggest that recognition of a screening role for the judge that allows for the exclusion of "invalid" evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. See, *e. g.,* Brief for Ronald Bayer et al. as *Amici Curiae.* It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest

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for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment-often of great consequence-about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.13

IV

To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidenceespecially Rule 702-do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Ac-

13 This is not to say that judicial interpretation, as opposed to adjudicative factfinding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral. ... In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B. Cardozo, The Nature of the Judicial Process 178-179 (1921).

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cordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Jenkins v. State, 493 S.W.3d 583 (Tex. Crim. App. 2016)

OPINION

Richardson, J., delivered the opinion of the Court in which Keller, P.J., Meyers, Johnson, Keasler, Hervey, and Yeary, JJ., joined.

In June 2013, a jury convicted appellant of capital murder for committing the offense of murder in the course of aggravated rape in November 1975. Based upon the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.0711, sections 3(b) and 3(e), the trial judge sentenced appellant to death. Direct appeal to this Court is automatic. Appellant raises nineteen points of error. After reviewing appellant's points of error, this Court finds them to be without merit. Consequently, we affirm the trial court's judgment.

Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 1975).

> Art. 37.0711, § 3(g).
> Unless otherwise indicated, all references to Articles refer to the Code of Criminal Procedure.

> Art. 37.0711, § 3(j).

STATEMENT OF FACTS

The trial record reflects that the victim, Sheryl Norris, moved to San Marcos, Texas, from Florida in late August or early September of 1975. Her boyfriend, Charles Wayne Andrus, had moved to San Marcos earlier in the summer to attend Southwest Texas State University. Their mutual friend, Joe Sewell, shared an apartment with Andrus during the summer, but after Norris arrived, Sewell moved out, and Norris moved into the apartment. Norris found employment as a secretary at the Crime Prevention Institute, which was part of Southwest Texas State University's Department of Law Enforcement.

On November 24, 1975, the Monday before Thanksgiving, Norris arrived at work around 8:00 a.m. She planned to travel to Florida later that week to spend Thanksgiving with her family. She requested and received permission from her supervisor, Fred Stansbury, to take the afternoon off to pack for her trip. The office routinely closed at noon, and the employees would leave the premises until the office reopened at 1:00 p.m. At noon, Norris went home for lunch, as she did on most days. Andrus, who was studying on campus, telephoned Norris at their apartment two times between noon and 1:00 p.m. because he and Norris usually talked over the phone during Norris' lunch break, but no one answered.

When Norris did not return to work in the afternoon, Stansbury assumed that she had stayed home to pack for her trip. Andrus returned home around 5:05 p.m. to find the front door ajar and the music on the stereo turned up to an “almost deafening level.” As he entered the apartment, he noticed that a throw rug by the front door was crumpled. He turned down the stereo and walked through the apartment, calling for Norris. He saw her when he turned on the bathroom light. At first he thought she had fallen, and he grabbed her arm to help her. He felt that her arm was stiff and cold, and then he saw that her pants were down. He believed that she was dead. Afraid that Norris' killer was still in the apartment, Andrus ran to a neighbor's apartment and telephoned the police.

Around 6:00 p.m., Norris' supervisor Stansbury received a call at home from the San Marcos Police Department, requesting that he identify one of his employees in a homicide they were investigating. When he arrived at Norris' apartment, police investigators and a Texas Ranger were already inside. He identified Norris' body and then answered the Ranger's questions about Norris' schedule and plans for that day.

The Texas Department of Public Safety (“DPS”) assisted with the investigation. Three specialists from the DPS lab in Austin—a serology trace evidence analyst, a fingerprint examiner, and a photographer — arrived at Norris' apartment around 8:00 p.m. Ron Urbanovsky, the serology trace evidence analyst, observed that the apartment was generally tidy, but the throw rug by the front door was crumpled. He saw coins scattered on the floor near the front door and elsewhere in the apartment, and a folded dollar bill on the floor near the foot of the bed in the master bedroom. Urbanovsky believed that the placement of these items could indicate that a struggle had occurred. In the master bedroom, Urbanovsky observed fecal material on a green blanket on the bed. He also saw feces on the side of the bed and on the floor leading from the bed to the adjoining bathroom. He noted that the bed was a “strange place to find fecal material,” and that it

suggested that “somebody was losing control.” There was a dent in the sheet rock next to a light switch. Urbanovsky later determined that the damaged sheet rock material was consistent with white powdered material on the toe of one of Norris' boots, which suggested that Norris had kicked the wall during a struggle.

Urbanovsky observed blood on the bathroom door and the doorjamb. Inside the bathroom, Norris' body was “bent over backward.” Her head and shoulders were under water in the bathtub, and her back was arched over the side of the bathtub. Her arms were bent at the elbow so that her wrists and hands were in the water. The rest of her body was outside of the bathtub, with her buttocks and feet propped on the floor.

Norris was wearing a wristwatch, which was submerged. It had stopped at 12:31. The water was almost to the top of the bathtub and it was discolored. Two scarves or ties were knotted tightly around Norris' neck. Norris was wearing knee-high boots and a long-sleeved white blouse. Her trousers had been pushed down around one of her boots.

As responders lifted Norris' body onto a gurney, Urbanovsky observed “a lot of blood” and fecal material in the area of Norris' genitals and buttocks. There was also fecal material on the bathroom floor underneath Norris' body. Based on his observations, Urbanovsky “thought [they] were looking at a rape/murder.”

Norris' body was transported to a local funeral home. Dr. Charles Bell conducted an autopsy that night, with Urbanovsky and the DPS photographer in attendance. In the area where the ligatures were tied around Norris' neck, Bell and Urbanovsky observed abrasions that suggested strangulation. Bell noted the presence of water in Norris' lungs. He collected blood, fingernail clippings, and hair samples from Norris' body. He swabbed Norris' vagina and smeared the vaginal sample onto a slide, which he viewed under a microscope. Bell identified intact spermatozoa in the vaginal sample and placed the slide into a glass jar, which he gave to Urbanovsky. After the autopsy, Urbanovsky and the other DPS specialists drove to the DPS lab in Austin, where they logged and stored the materials they had collected. Urbanovsky placed the jar containing the slide into the freezer.

Urbanovsky later viewed the slide through a microscope and confirmed the presence of spermatozoa. He created a second slide from the vaginal sample so that he could analyze the material while preserving most of the original sample. Urbanovsky analyzed a small part of the sample to obtain an ABO blood grouping of potential contributors. He also obtained Norris', Andrus', and Sewell's ABO blood groupings and compared them to the ABO blood grouping he obtained from the sample.Urbanovsky testified at trial that: Norris had type B blood and was a secreter, meaning that her blood group substances included B and H; Andrus had type O blood and was a secreter, meaning his blood group substances included O and H; and Sewell had type A blood and was a secreter, meaning his blood group substances included A and H. The ABO blood grouping obtained from the vaginal sample included blood group substances B and H. This result included Norris as a contributor and excluded Sewell. Urbanovsky noted that his conclusion concerning Andrus was less certain; if a contributor to the sample had been a secreter with type O blood (like Andrus), the analysis would not detect the blood group substance O, but one would still expect it to detect the H. Further, the ABO blood grouping analysis would not detect the blood group substances of a non-secreter, and therefore Urbanovsky could not draw any conclusions concerning the possibility of an unknown contributor who was a non-secreter.

Urbanovsky also used a microscope to examine a hair fragment found under Norris' fingernails. He determined that the hair fragment did not belong to Norris, Andrus, or Sewell. He also examined hairs that he had collected from the crime scene. Some were consistent with Andrus and Sewell, but since both men had lived in the apartment, Urbanovsky could not draw any conclusions from this finding. These results were all that Urbanovsky could obtain from available forensic testing in 1975.

Law enforcement officers investigated several potential suspects, but by the late 1970s, the case was inactive. In April 1996, Norris' sister, Terry Ehart, called the San Marcos Police Department to inquire about the status of the case. Her call prompted police investigators to re-examine the file. After reviewing the case file with other investigators, Sergeant Penny Dunn consulted Javier Flores, a DNA analyst at the DPS lab in Austin, about conducting DNA analysis on some of the materials that had been collected in 1975. Flores conducted the analysis. He took two swabs from the original vaginal smear and froze them. He preserved one swab, which was still in the lab's freezer at the time of the trial. He extracted a liquid from the second swab for further testing. Flores and later DNA analysts used this liquid extract in their analyses of the vaginal

sample. Flores analyzed a small part of the extract in 1997, using PCR technology. With the results of this DNA analysis, Flores was able to exclude Andrus as a contributor, but he was not able to obtain a DNA profile that was sufficient to help identify other potential contributors.

Through trial testimony, the State developed the fact that Norris' boyfriend Andrus was a marijuana dealer. Andrus testified that Norris was unaware of his drug dealing and that he tried to keep her from being involved. Andrus was very cooperative with police after the murder and provided the names of his marijuana contacts out of concern that his drug activity had lead to Norris' murder. However, none of the marijuana contacts became viable suspects. Andrus continued to assist law enforcement with their investigation over the thirty years the case remained cold. When appellant was targeted as a suspect, Andrus was contacted for possible connection to his past drug-dealing, but Andrus did not recognize appellant in a photograph that police showed him and he was unable to identify appellant as someone who had been around the apartment or within his circle of marijuana contacts.

Flores explained at trial that "DNA" is an abbreviation for deoxyribonucleic acid, which is "kind of like the central blueprint of all of the body's activities and also maintains and preserves and passes on the genetic information to the offspring or to the replicated cells."

Flores testified that "PCR" stands for "Polymerase Chain Reaction." The specific type of PCR test that Flores "ran" on this extract was a DQ–Alpha "kit," which provided information about a specific location on the DNA strand.

In 1999, Cassie Carradine, another DNA analyst at the DPS lab, conducted STR testing on a portion of the extract and obtained a partial DNA profile. This profile provided more information than the 1997 analysis, but it was not sufficient to upload into the CODIS database. However, by comparing the partial DNA profile to individual known DNA profiles, investigators excluded as contributors Andrus and several other potential suspects.

Flores and Carradine explained that "STR," which stands for "Short Tandem Repeat," is a more discriminating and sensitive type of PCR testing than previous techniques.

During a hearing prior to the DNA analysts' testimony, the prosecutor stated that she had instructed the witnesses that they were not to reveal to the jury that the CODIS database contains the DNA profiles of criminal offenders. The record reveals that, although the jury did not hear this information at the guilt phase, appellant's DNA profile was in CODIS due to previous convictions for sexual assault in Texas and California. Carradine testified before the jury that "CODIS" is an acronym for "Combined DNA Index System."

In 2010, the DPS lab acquired the ability to "run," or analyze by using, the "Minifiler," a more sensitive and discriminating DNA profiling technique that was suitable for analyzing small and degraded biological samples. Analyst Negin Kuhlmann ran a portion of the liquid extract through the Minifiler and obtained a full DNA profile. DPS uploaded this profile into CODIS. Approximately a month later, DPS obtained a "hit," or match with an existing profile, from CODIS and identified appellant, who was then in California. This identification marked the first appearance of appellant's name during the investigation of the case. When Dunn showed Andrus a picture of appellant, Andrus stated that he had never seen that person before. Sergeant Dunn traveled to California and obtained a buccal swab from appellant, which she submitted to the DPS lab. Kuhlmann analyzed this buccal swab to create a known DNA profile from appellant that could be compared with the DNA profile she had obtained from the extract. Kuhlmann compared the profiles and determined that appellant was included as a contributor to the profile she had obtained from the liquid extract. She prepared a report in which she noted that "the probability of selecting an unrelated person at random" who could be a contributor to the DNA profile obtained from the vaginal sample was approximately 1 in 365.6 quadrillion for Caucasians; 1 in 5.705 quadrillion for Blacks; and 1 in 20.37 quintillion for Hispanics. Kuhlmann testified that, at the time she wrote her report, the population of the world was about 6.8 billion.

The buccal swab sample was collected from appellant pursuant to a valid search warrant. Appellant raises no issue with regards to the legality of the collection of the buccal swab.

While searching for other evidence that might be appropriate for DNA analysis, Dunn discovered a yellowed hand print on Norris' white blouse. Kuhlmann made an extract from a cutting on the blouse and was able to obtain a full DNA profile, which she compared with appellant's known DNA profile. Appellant could not be excluded as a contributor to the profile obtained from the blouse. Kuhlmann noted in her report that the probability of selecting an unrelated person at random who could be a contributor to the DNA profile obtained from this extract was approximately 1 in 457.9 trillion for Caucasians; 1 in 44.68 trillion for Blacks; and 1 in 8.977 quadrillion for Hispanics.

Dunn investigated appellant's background and discovered that he had grown up in Marion, Texas, which is about an hour's drive from San Marcos. After appellant graduated from high school in Marion, he attended Southwest Texas State University for one semester before he joined the United States Marine Corps. Appellant served in the Marines from 1973 to 1976. In 1975, he was stationed at a military base in California. From November 23, 1975, to December 5, 1975, appellant was on emergency leave while his wife was hospitalized in San Antonio, Texas. During this two-week period, appellant stayed at his father-in-law's house in Marion.

By the time of the trial, Dr. Bell, who had performed Norris' autopsy, was deceased. Therefore, Dr. Jeffrey Barnard testified about the autopsy results. Based on his review of the autopsy report, crime scene photos, and autopsy photos, Barnard opined that Norris died from homicide by strangulation and drowning. He noted that the ligatures around Norris' neck, together with the abrasions and hemorrhages in that area, were consistent with strangulation. "Punctuate hemorrhages" or petechia on the lower back of Norris' head and the suffusion of blood vessels in Norris' face were consistent with compression of the blood supply. Barnard testified that strangulation by impeding blood flow would take several minutes. If arterial blood flow to the brain were continuously impeded, it would take 10 to 15 seconds for the victim to lose consciousness. After that, the blood flow would have to be shut off continuously for a few more minutes before death would result. Barnard stated that bubbles around Norris' mouth and nose, visible in both the crime scene and autopsy photos, were indicative of drowning. Drowning would take several minutes of continual submersion.

Barnard testified that he observed some skin slippage and signs of decomposition that indicated that Norris' body had been submerged in warm water for at least four and one-half hours before it was photographed at the crime scene. Barnard observed "some hemorrhage as well as some feces visible" in the vaginal and anal areas. He stated that this evidence, as well as the state of undress and the positioning of Norris' body, were consistent with sexual assault. Barnard opined that, in light of everything he had seen, this was a strangulation attendant to a sexual assault: "The fact that she's in the bathtub and part of her clothes are off and she's had, in my opinion, strangulation, those all go together."

PUNISHMENT EVIDENCE

Testimony at the guilt/innocence stage of trial established that appellant deliberately caused the death of Sheryl Norris by continuously submerging her in water for several minutes and that appellant did so with the expectation that Norris would drown. Most of the punishment stage of trial focused on "whether there [was] a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society:" The State called victims of appellant's past sexual assaults, appellant's stepdaughters whom he sexually molested, and fellow inmates from penal and psychiatric institutions who had been brutalized by appellant while he was in custody. *Rape victims*

Before rendering a verdict of death a jury must answer in the affirmative "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." Art. 37.0711(b)(1).

Art. 37.0711(b)(2)

The State called witnesses to testify to five different rapes committed by appellant. One rape victim testified that appellant raped her in California on August 8, 1975—a mere three months before raping and killing Norris. The victim described riding her bicycle near

Joshua Tree National Park when appellant pulled her from her bicycle and dragged her into his car. Appellant drove off with the victim on the floorboard of his car. The victim testified that she saw a pencil in the floorboard and considered stabbing appellant, but decided against it because she feared appellant would kill her. After driving a distance from where he abducted her, appellant stopped the car and raped the victim. Then appellant drove back to the scene of the abduction, where police had already gathered because a friend of the victim recognized her abandoned bicycle and suspected foul play, and appellant "stopped about 50 or 60 feet in front of all these police officers and just pushed [her] out of the car and then he rode right through them." Appellant pled guilty to rape in San Bernardino County, California and was originally given a probated sentence of three years. Appellant's probation was later revoked.

Another victim was raped twice by appellant in San Antonio, Texas, in early 1977. The victim testified that the experiences were so traumatizing that she had difficulty remembering the details of the rapes. The victim told of one of the rapes occurring at a used furniture store where she worked after graduating from high school. After raping the victim, appellant left the store and drove off, but not before the victim was able to run out of the store and see the license plate number on appellant's car. Despite having appellant's license plate number, the victim did not report the rape to police at that time. The victim then told of a second rape that occurred at the same store. Her memory was not clear, but she did then report both sexual assaults to the police. The victim was asked by police to identify her rapist from a live line-up, and she identified appellant. The victim did not testify in court against appellant at that time and testified that she has tried to block the rapes from her mind.

Appellant's next victim was sexually assaulted in May 1977, when she was in her early twenties. The victim died before this trial. Barbara Niemann and Eddie Pinchback, both with the San Antonio Police Department, testified to their investigation of the rape. Niemann interviewed the victim and said that the victim identified her assailant from a line-up. Pinchback testified that appellant was eventually arrested for the rape. Pinchback also testified that he interviewed a witness by the name of Willie Wood in connection with the rape. Willie Wood testified that he was the person the victim initially encountered after she was raped and that he and some of his coworkers were the ones who called the police. Wood testified that the victim came running into the grocery store warehouse in San Antonio, where he worked the 11 p.m. to 7 a.m. shift, and that the victim was naked from the waist down and crying hysterically. Wood testified that the victim had cuts and bruises all over her head. Appellant pled guilty to aggravated rape in this case. On November 14, 1977, he was convicted in Bexar County and sentenced to seven years' imprisonment.

Another victim, C.P.V., testified that appellant raped her on August 20, 1983, in California when she was trying to get a ride back home to another town. C.P.V. testified that she initially felt safe about taking a ride from appellant because there was an older man in the backseat of the car and she had not had problems when she had previously accepted rides. However, after dropping the older man off at a bus station, appellant drove to a secluded spot and raped C.P.V. in the car. Appellant pled guilty to "rape by force" in Kern County, California on October 14, 1983. He was sentenced to eight years' of imprisonment.

The last rape victim to testify against appellant testified that appellant raped her on June 16, 1991, when she was twenty-one years old. The victim had gone to a laundromat in the early morning hours of June 16, but upon discovering that she needed coins for the laundromat, the victim began walking to a gas station. Appellant drove by and offered the victim a ride. Once the victim was in the car, appellant drove to a dark road and raped her in his car. After the rape, appellant allowed the victim to leave the car. The victim walked back to the laundromat to get her clothes and went home without reporting the rape because she was so embarrassed. However, she eventually reported the rape to police and picked appellant out of a line-up. Appellant pled guilty to "rape by force" in Kern County, California. He was convicted and sentenced to eight years' imprisonment, enhanced to ten years for two prior rape convictions.

Molestation of Stepdaughters

The State also called appellant's two stepdaughters to testify about appellant's sexual molestation of them when they were children. Although no charges were ever brought against appellant by the stepdaughters or their mother on her daughters' behalf, the State asked the stepdaughters to testify and appellant's counsel had opportunity to cross-examine them about the sexual abuse. Appellant was seventeen years old when he began dating an older woman who had four children from a previous marriage. Appellant eventually

married this woman, and the two boys and two girls became his stepchildren.

Even before marrying their mother, appellant began sexually molesting the youngest daughter whom he would babysit while her mother worked the night shift at the Seguin Police Department as a dispatcher. The youngest daughter told her mother that appellant was touching her inappropriately, but her mother did not believe her. Appellant joined the Marines, and was first stationed in California, followed by North Carolina. Appellant and his wife left her three oldest children in foster care in Texas but took the youngest daughter, who was around ten years old at that time, to live with them. The youngest daughter testified that while she lived with her mother and appellant in North Carolina, appellant repeatedly tried to sexually assault her. At first, appellant's wife tried to protect her daughter from appellant's sexual abuse; she went as far as barricading her daughter in her bedroom before appellant got home from work so that appellant could not enter the room. But after her daughter ran away from home to get away from appellant, appellant's wife sent her daughter back to San Antonio alone. In San Antonio, the youngest daughter was put in foster care, but when appellant and his wife returned to Texas, the youngest daughter, thirteen at the time, ended up living with them. Appellant began sexually assaulting her again. This time appellant's wife told her daughter to let appellant have sex with her: “My mother approached me and said that if I would let Willie Roy sleep with me, that he would leave me alone.” However, appellant did not leave her alone. She was put back into foster care at age fifteen and eventually moved in with her biological father. Appellant's stepdaughter did not return to her mother's custody after that and had no contact with appellant since that time.

The oldest of appellant's stepdaughters testified that appellant would come into her bed at night and fondle her as well as spy on her when she was undressed in the bathroom. The oldest stepdaughter was able to escape continued sexual abuse by appellant because appellant and her mother left the three oldest children in Texas when they moved to California.

Assaultive Behavior in Custody

The State sufficiently established appellant as a sexual predator when outside of penal institutions, but the State also provided ample evidence that appellant would be a future threat even when confined within institutions. The State played for the jury nineteen video depositions of patients and staff who had interacted with appellant while he was confined to Atascadero State Hospital and Coalinga State Hospital in California for treatment as a sexually violent predator. Appellant had a reputation for attacking both patients and staff while confined in the California state hospitals.

The “Sexually Violent Predator” classification is a legal status determined by the court. It is also a qualifying requisite in order to be admitted to the Coalinga State Hospital. After multiple convictions for sexual assault in California, appellant was classified by the State of California as a “sexually violent predator” and was ordered to be confined in a California state hospital for treatment.

Based on the opinion of one of appellant's treating psychologists and the judgment of a veteran detective who had served at the state hospital since its inception, there was unqualified agreement that appellant was one of the most dangerous individuals at the Coalinga State Hospital. Furthermore, both of these professionals agreed that appellant would have qualified for Unit 9 confinement—a unit under “total lock-down” reserved for only the most violent and uncontrollable patients at the hospital—had appellant remained at Coalinga and not been remanded to Texas for this charge.

The patients from Atascadero and Coalinga who had previously been on the same ward as appellant related general opinions of appellant being difficult to get along with and incidents of appellant starting fights over what program the patients would watch in the communal television room. One patient, who was 6'1”, 225 pounds, and very physically fit, recounted how appellant disagreed with him about which sports program would be shown on the group's television, and then later he and appellant got into a physical fight which resulted in appellant giving him a bloody nose. Another patient related how he was bullied by appellant over the television programs and how he was bitten by appellant when they got into a fight about the television. Appellant assaulted a disabled patient who used a walker to assist him in walking. This patient testified that appellant tried to gouge his eyes out, but the patient refused to press charges because he was afraid of appellant. Other patients who were assaulted

by appellant also refused to press charges because they were afraid of appellant. Several staff members testified to the assaults committed by appellant, and they described appellant as the aggressor and unusually prone to biting others when fighting.One former patient of Coalinga State Hospital, who now lives in Texas, testified at appellant's trial. This former patient, who had previously served time in California's Folsom and San Quentin prisons, related how appellant gave him the worst beating of his life because he got into an argument with appellant about which Los Angeles neighborhood the L.A. Lakers Staples Center was located in. The former patient said appellant knocked out three of his teeth and gouged his eyes during the fight, causing him to be sent to the infirmary and then an outside medical facility for ten days.

His entire treatment team, led by his treating psychologists, agreed that although there was no medical justification to continue to house appellant in a single room living quarters, appellant was too dangerous to be moved to a dormitory setting in light of his frequent threatening verbal statements and acts.

According to the deposition testimony of multiple police officers at the hospital (California State Hospitals have their own police department which provides law enforcement services to California's system of state hospitals, including Atascadero and Coalinga State Hospitals), incidents of biting were rare even though altercations were not uncommon. Appellant's biting was remarkable to the deposed officers not only for its frequency but also for its depth. In multiple incidents, appellant bit through the clothing of another victim to leave bleeding wounds. Additionally, appellant often continued these kinds of physical attacks well after his opponent was already subdued. In one instance, police officers resorted to physical force while trying to separate appellant from another patient because appellant was both biting the patient's leg and trying to rip the patient's testicles off with his hand.

The staff from Atascadero and Coalinga testified that appellant was defiant towards staff and had a nothing-to-lose attitude toward anyone who tried to discipline him. Staff witnessed numerous confrontations and physical fights between appellant and other patients. Appellant was also known to assault staff members. One female psychiatric technician recalled how appellant pulled her hair and scratched her neck when grabbing her by her hospital identification lanyard hanging around her neck. This technician said that appellant shouted profanities at her and told her he wished she would die.

Appellant was clinically diagnosed with (1) paraphilia—based on his deviancy for sexual contact with non-consenting persons, (2) alcohol abuse/dependance, and (3) adult anti-social personality disorder. However, none of these diagnoses qualified as a *mental* disorder for purposes of special civil commitment under California state law. Appellant adamantly refused to accept treatment by the California state hospitals for any of these problems. Appellant propositioned his treating psychiatrist and another staff member for a “three-some” in one episode of aggressive behavior. As a result of this kind of behavior, the psychiatrist ordered an increased daily searches of appellant's living quarters, as part of an effort to curb his behavior, but appellant maintained his refusal to accept any treatment.

Multiple Coalinga State Hospital police officers and staff believed appellant to be an individual capable of violence in spite of the hospital's secure setting. Deposition testimony revealed that appellant's reputation for verbal and physical aggression was such that it was common for staff members to call police when they needed to confront appellant for his failure to comply with hospital rules.

Mitigation

The defense focused on, “Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.” The defense presented testimony of family members and friends of the family to illustrate the promise of a young man who had at one time played football for what is now Texas State

University on a full-ride athletic scholarship and the difficult circumstances of poverty and abuse from which appellant had risen. Although it was generally agreed that appellant grew up in poverty, the State effectively cross-examined appellant's childhood friends to establish that they were not familiar with appellant's home life and that they had not maintained contact with appellant since childhood. The State also cross-examined family members to establish that the physical abuse between adults in the various households in which appellant lived was not witnessed by appellant and occurred at times when appellant was not living in the home. The defense also presented testimony in the form of video depositions from eight patients and one guard who had known appellant from his time in California state hospitals for sexually violent predators. These eight patients and the one guard testified in their depositions that they knew appellant mostly kept to himself, but they did not know him to be violent or one to start altercations.
Art. 37.0711(e)

Detective Peter Bisacca, an investigator for the Coalinga State Hospital, strongly refuted the description of appellant as a quiet, unassuming individual. To the contrary, the investigator asserted that appellant was very aggressive and very violent, with a widespread reputation for *repeated* violent outbursts.

In rebuttal the State presented witnesses who had been housed with appellant in Hays County Jail while appellant awaited this trial. One of these inmates, who was twenty-six years old, 6'2", and 235 pounds, testified that he and other inmates requested that appellant, who is sixty years old, be removed from their cell block because he was dangerous. Another of these inmates recounted that it had taken four to five officers to remove appellant from the cell block when the request for removal was granted. A Hays County Sheriff's Department sergeant testified that the Sheriff's Department had tried to avoid problems between appellant and other inmates by moving appellant around to different cell blocks in the jail—at one point moving him to a cell with one inmate who had committed a similar offense to appellant and another inmate who had been convicted of murder on behalf of the Mexican Mafia crime syndicate. But even inmates with convictions for equally or more violent offenses requested that appellant be moved for fear of their own safety.

SUFFICIENCY OF THE EVIDENCE

In point of error one, appellant asserts, "The death sentence must be reformed to life imprisonment because the evidence is insufficient to establish that appellant deliberately caused the death of Sheryl Ann Norris." However, appellant has not briefed this point of error, which concerns the punishment phase. Instead, his supporting argument concerns the sufficiency of the evidence to establish that he murdered Norris—a prerequisite to finding him guilty of capital murder. Because appellant has failed to brief his stated point of error, we will not consider it. In the interest of justice, however, we will consider appellant's point of error as a challenge to the sufficiency of the evidence that he murdered Norris.
See Tex.R.App. P. 38.1(i) ; *Ladd v. State,* 3 S.W.3d 547, 575 (Tex.Crim.App.1999) (holding that traditional notions of fair play and substantial justice are not offended by requiring capital defendants to abide by the Court's briefing rules and to make reasonable arguments on their own behalf).

Appellant argues that the trial evidence showed "at best" that his DNA was in and on Norris' body. Appellant acknowledges that the State's evidence "may support a rational jury's finding of aggravated sexual assault," but he claims that no evidence linked him to Norris' murder. He asserts, "Under *Malik,* the State failed to prove the specific offense charged, and appellant is entitled to an acquittal of that specifically charged offense." He cites *Byrd v. State,* which, in turn, cites *Malik v. State.* In *Byrd* and *Malik,* we measured the sufficiency of the State's evidence to prove the specific offense charged against a hypothetically correct jury charge.

336 S.W.3d 242 (Tex.Crim.App.2011).

953 S.W.2d 234, 240 (Tex.Crim.App.1997).

In assessing the legal sufficiency of the evidence to support a capital murder conviction, we consider all of

the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. Our review of "all of the evidence" includes evidence both properly and improperly admitted. We give deference to "the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Each fact need not point directly and independently to the appellant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.

Gardner v. State, 306 S.W.3d 274, 285 (Tex.Crim.App.2009).

Clayton v. State, 235 S.W.3d 772, 778 (Tex.Crim.App.2007).

Hooper v. State, 214 S.W.3d 9, 13 (Tex.Crim.App.2007) (quoting *Jackson v. Virginia,* 443 U.S. 307, 318–19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Id.

The State may prove a defendant's identity and criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. A lack of direct evidence is not dispositive of the issue of guilt. Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient. On appeal, the same standard of review is used for both circumstantial and direct evidence cases.
Gardner, 306 S.W.3d at 285.

Guevara v. State, 152 S.W.3d 45, 49 (Tex.Crim.App.2004).

Id.

Hooper, 214 S.W.3d at 13 (citing *Guevara,* 152 S.W.3d at 49).

A hypothetically correct jury charge is a charge that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment.

Thomas v. State, 444 S.W.3d 4, 8 (Tex.Crim.App.2014) (quoting *Malik,* 953 S.W.2d at 240).

Id. (citing *Curry v. State,* 30 S.W.3d 394, 404 (Tex.Crim.App.2000)).

In this case, the applicable provision of the Texas Penal Code states, in relevant part, that a person commits capital murder if the person intentionally commits murder in the course of committing or attempting to commit aggravated rape. In a capital murder case, the elements of the aggravated rape and the murder may overlap.

See Wilder v. State, 583 S.W.2d 349, 360 (Tex.Crim.App.1979) (citing Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 1975)) *vacated and remanded on other grounds by Wilder v. Texas,* 453 U.S. 902, 101 S.Ct. 3133, 69 L.Ed.2d 987 (1981) (remanding the case in light of *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), which vacated the death sentence because of a punishment phase error), *but affirmed by Wilder v. State,* 623 S.W.2d 650 (Tex.Crim.App.1981) (holding that because the governor had commuted the death penalty

sentence to life, the error was moot). "In 1983 the former offenses of rape and aggravated rape became sexual assault and aggravated sexual assault respectively." *Ex parte Austin,* 746 S.W.2d 226, 229 (Tex.Crim.App.1988) (citing Acts 1983, 68th Leg., R.S., chap. 977, p. 5311 (H.B.2008)). Texas Penal Code § 22.021 superceded Texas Penal Code § 21.03. *See Stephens v. State,* 806 S.W.2d 812, 813 n. 1 (Tex.Crim.App.1990).

See
Muniz v. State, 851 S.W.2d 238, 245 (Tex.Crim.App.1993) (finding no legislative intent to preclude the State from relying on a single act to prove both the murder and the aggravating element of the rape).

The indictment charged appellant with capital murder as follows:
Defendant, on or about the 24th day of November, A.D. 1975, and before the presentment of this indictment, in the County and State aforesaid, did then and there intentionally cause the death of an individual, namely Sheryl Ann Norris, by strangling the said Sheryl Ann Norris, and the Defendant was then and there in the course of committing or attempting to commit the offense of aggravated rape of Sheryl Ann Norris;

...Defendant, on or about the 24th day of November, A.D. 1975, and before the presentment of this indictment, in the County and State aforesaid, did then and there intentionally cause the death of an individual, namely Sheryl Ann Norris, by drowning the said Sheryl Ann Norris, and the Defendant was then and there in the course of committing or attempting to commit the offense of aggravated rape of Sheryl Ann Norris[.]

Considering all of the evidence in the light most favorable to the verdict, we conclude the jury could reasonably infer that appellant intentionally murdered Norris in the course of committing aggravated rape by the manner and means alleged in the indictment.
See Sanchez v. State, 376 S.W.3d 767, 773–74 (Tex.Crim.App.2012) (stating that when an indictment permitted a conviction for murder under alternative manners and means, the State could obtain a conviction if it proved any one of the alternatives).

The evidence showed that, consistent with her usual routine, Norris left her office and went home for lunch at noon. Contrary to her usual routine, she did not answer the phone when Andrus called her during the lunch hour. A little after 5:00 p.m., when Andrus found Norris' partially-clothed body in the bathroom, two ligatures were tightly knotted around her neck, her head and shoulders were under water, and her submerged watch was stopped at 12:31. Her vaginal and anal areas were soiled with blood and feces. Appellant's DNA profile was identified in semen inside Norris' body and in a hand print on the blouse she was wearing.
A crumpled rug and money scattered on the floor of the otherwise-tidy apartment indicated that a struggle began near the front door and continued into the bedroom. Damaged sheet rock on the wall, and fecal material leading from the bed to the bathroom, indicated that the struggle continued into the bathroom, where Norris' body was found. Investigators observed feces on the floor under Norris' body. Norris' body had been under water for at least four and one-half hours before the crime scene was photographed around 8:00 p.m. The condition and position of Norris' body were consistent with someone intentionally strangling her and drowning her in the course of committing an aggravated rape. Viewing the totality of the evidence, the jury could reasonably infer that appellant intentionally murdered Norris in the course of committing aggravated rape.
Appellant points out that the ligatures used to strangle Norris had been lost by the time of trial. However, the ligatures themselves were not necessary to prove that Norris had been strangled or that appellant was the person who strangled her. The totality of the evidence was sufficient to show that appellant strangled and drowned Norris in the course of committing aggravated rape against her.
Appellant appears to suggests that, even if the evidence established that he had sexual intercourse with Norris, the State's evidence did not rule out the possibility that someone else murdered her. Appellant presented this theory at trial, where the jury rejected it. On the record of this case, appellant's proffered scenario, in which appellant had sexual intercourse with Norris and then

someone else entered the apartment and murdered her, strains credulity. There was no evidence that Norris and appellant knew each other. Further, we will not usurp the role of the fact finder by factoring into our sufficiency analysis an alternative "hypothesis inconsistent with the guilt of the accused." Point of error one is overruled.

See Geesa v. State, 820 S.W.2d 154, 159 (Tex.Crim.App.1991), *overruled on other grounds by Paulson v. State,* 28 S.W.3d 570, 570 (Tex.Crim.App.2000) ; *see also Ramsey v. State,* 473 S.W.3d 805, 808 (Tex.Crim.App.2015) (noting that "[b]eyond a reasonable doubt" does not require the State to "disprove every conceivable alternative to a defendant's guilt").

ADMISSIBILITY OF DNA EVIDENCE

In point of error two, appellant asserts that the trial court erred in "failing to suppress any and all DNA evidence and testimony due to the failure of the testing to meet quality assurance standards," and therefore his conviction should be reversed. This argument appears to conflate Rule 702, which concerns the admissibility of scientific evidence, with Article 38.23, which concerns the admissibility of illegally obtained evidence. To the extent that appellant's point of error implicates Article 38.23, it is, arguably, multifarious and inadequately briefed. However, in the interest of justice, we will discuss both Rule 702 and Article 38.23 as they apply to appellant's allegations.

Tex.R.App. P. 38.1(i) ; *Ladd v. State,* 3 S.W.3d at 575.

Appellant contends that the DNA profile which was uploaded to CODIS did not comply with the Quality Assurance Standards of the Federal DNA Identification Act or Texas' standards. He asserts that both the federal and state standards specify the inclusion of a "reagent blank" as a control when generating a DNA profile, but in this case, those standards were not followed. He points out that DPS analysts submitted a "Deviation Request" seeking approval to run the "MiniFiler" and obtain a DNA profile even though they did not have a "reagent blank" to run with the liquid extract. Appellant reasons that, because the DNA profile which generated the CODIS hit was obtained without the use of the required "reagent blank," the DNA profile should never have been uploaded to the CODIS database.

A trial court's responsibility under Rule 702 is to determine whether proffered scientific evidence is sufficiently reliable and relevant to assist the jury. The proponent of the scientific evidence bears the burden of demonstrating, by clear and convincing evidence, that the evidence is reliable. This is accomplished by showing that: (1) the underlying scientific theory is valid; (2) the technique applying the theory is valid; and (3) the technique was properly applied on the occasion in question. Before scientific evidence may be admitted, the trial court must conduct a hearing outside the presence of the jury to determine whether the proponent has established all three criteria.

Russeau v. State, 171 S.W.3d 871, 881 (Tex.Crim.App.2005).

Kelly v. State,
824 S.W.2d 568, 573 (Tex.Crim.App.1992).

Somers v. State,
368 S.W.3d 528, 536 (Tex.Crim.App.2012).

Jackson v. State,
17 S.W.3d 664, 670 (Tex.Crim.App.2000).

The record shows that appellant filed a pretrial motion to suppress DNA evidence. In it, he cited the NDIS Operation Procedures Manual and asserted that the quality assurance standards of the Federal DNA Identification Act specified the "inclusion of a reagent blank." He also quoted Texas Administrative Code § 28.26(b), which stated that standards for DNA analysis "shall meet or exceed the current standards for quality assurance ... for forensic DNA analysis issued by the FBI." Appellant stated that, absent DPS's violation of its own DNA testing procedures and FBI quality assurance standards, he would never have been targeted as a suspect. Citing Article 38.23, appellant asserted that "any further results" that "followed from the original violations must also be suppressed as fruits

of the poisonous tree." The trial court did not rule on this motion before trial.

At the hearing on the motion to suppress, defense counsel explained that "NDIS" is the abbreviation for "National DNA Identification System."

In his motion to suppress DNA evidence, appellant used the terms "FBI standards" and "requirements of the Federal DNA Identification Act" interchangeably. However, these terms are not identical. The federal DNA Identification Act provides, in relevant part, for the Director of the FBI to issue quality assurance standards for DNA analysis performed by forensic laboratories. 42 U.S.C. § 14131(a) ; *see Rivera v. Mueller,* 596 F.Supp.2d 1163, 1165–66 (N.D.Ill.2009).

Article 38.23 provides that no evidence obtained by an officer or other person in violation of any provisions of the Constitutions or laws of Texas or the United States shall be admitted against the accused on the trial of any criminal case. Only those acts which violate a person's privacy rights or property interests are subject to this exclusionary rule. *See Miles v. State,* 241 S.W.3d 28, 36 n.33 (Tex.Crim.App.2007) ; *see also Gonzales v. State,* 67 S.W.3d 910, 912 (Tex.Crim.App.2002) (holding that in order to exclude a juvenile's statement there must be a causal link between the illegal conduct, the Family Code violation, and the making of the statement); *Chavez v. State,* 9 S.W.3d 817, 819–20 (Tex.Crim.App.2000) (holding that evidence obtained outside the geographic boundaries of an Interlocal Assistance Agreement should not be excluded).

In a status hearing prior to Flores' testimony, defense counsel clarified that this motion only encompassed the CODIS hit and did not cover anything that happened before 2010. The trial judge made a "preliminary ruling" that he would allow testimony about the history and progress of DNA testing, including any progress past 2010.

At trial, Flores testified before the jury regarding the "checks and balances throughout the screening, extraction, amplification and interpretation processes," the DPS lab's use of proficiency testing and certification for lab personnel, and the fact that the lab is accredited by the American Society of Crime Laboratory Directors. He noted that one quality control measure that the DPS lab uses in conducting a DNA analysis is a reagent blank. In 1997, when Flores made the liquid extract from the vaginal sample, standard practice was to use a reagent blank, and Flores created one at that time. Flores explained that a reagent blank was a sample that contained the reagent that was used in the extraction but not the biological material. It would be analyzed, or run, along with the forensic sample. If the analysis of the reagent blank led to any kind of profile, this would signify that the reagent was contaminated. Flores testified that such contamination would not alter the DNA profile obtained from the forensic sample; it would just provide additional information. Depending on the strength of the contaminant, this additional information might show up as a "second allele from the same individual" or as a reading that an additional person was present.

Flores further testified that, if a reagent blank is consumed in the first analysis because it comes out negative, then there is no need for a reagent blank in subsequent analyses of the same extract. In this case, Flores prepared a reagent blank when he made the liquid extract. It was consumed by the analysis because it came out negative, which signified that the reagent was not contaminated. Therefore, there was no need to run additional reagent blanks when conducting additional analyses of the same liquid extract. Flores' analysis consumed part of the extract, but he saved a "good bit" for further analysis. Carradine and Kuhlmann used this same liquid extract in later DNA analyses.

After Flores testified, the trial court held a hearing outside the jury's presence on the defense's motion to suppress the DNA evidence. Appellant presented a "Deviation Request" that was dated June 24, 2010, and contained the DPS lab's reference number for this case. In it, a DPS lab analyst requested a deviation from standard procedure, stating:

There are samples that were extracted prior to July 1, 2009 that need to be amplified with additional kits (Identifiler, Yfiler, and/or Minifiler) that do not have remaining reagent blanks. Based upon the more sensitive nature of these kits it would be beneficial to conduct further analysis on samples that were extracted prior to July 1, 2009 to obtain more information for comparisons and potential CODIS upload.

The form also contained signatures of approval and a handwritten note, dated June 25, 2010, reflecting that the request was approved, with conditions that: (1) the case record clearly indicate which samples were amplified with this deviation; and (2) a copy of the deviation be included with the case record.

The State presented an excerpt from the "FBI Quality Assurance Standards Audit for Forensic DNA Testing Laboratories, In Accordance with the Quality Assurance Standards for Forensic DNA Testing Laboratories Effective July 1, 2009." This publication contained a checklist with language providing, in relevant part, that reagent blank controls "shall" be amplified and typed under the same conditions as the forensic sample. The text underneath the checklist included the following explanation: "A reagent blank control is an analytical control sample that contains no template DNA and is used to monitor contamination from extraction to final fragment or sequence analysis. The control is treated the same as, and parallel to, the forensic and/or casework reference samples being analyzed." This text also states that the amplification and typing requirements for reagent blank controls are applicable to samples extracted on or after July 1, 2009.

The State also presented a "Deviation Request Supplement" that was dated June 3, 2011, and contained the DPS lab's reference number for this case. This "Supplement" stated, "Due to a revision in the [Standard Operating Procedure], this deviation is no longer needed."

Defense counsel argued that the 2010 DNA profile should never have been uploaded into the CODIS database because the forensic sample used to obtain the DNA profile was not accompanied by a reagent blank when it was run. Counsel reasoned that, without this "hit" in CODIS, none of the other evidence tying appellant to this offense would have existed. Therefore, counsel asserted, evidence of this hit and all of the inculpatory evidence obtained thereafter should be excluded as the "fruit of the poisonous tree."

The State responded that the reagent blank requirement cited by the defense applied to samples extracted on or after July 1, 2009. Because the sample at issue was extracted in 1997, this requirement did not apply. The State argued that the "Deviation Request" did not establish that the procedures failed to comply with FBI and statutory quality control standards. Further, the State argued, appellant had no constitutional right to particular DNA testing protocols, and therefore any deviation went to the weight of the evidence rather than its admissibility. The trial court denied the motion to suppress, noting that the defense could present the jury with evidence and testimony challenging the DNA evidence.

On appeal, appellant challenges only the third criterion of the test for scientific reliability—whether the technique was properly applied on the occasion in question. *See Somers,* 368 S.W.3d at 536. Appellant relies solely on the DPS lab's failure to run a reagent blank when it analyzed the extract in 2010, which he asserts violated FBI and DPS lab protocols. He submits that the "Deviation Request" establishes that the lab did not follow its own procedures. However, the language of the "Deviation Request" specified that the analyst sought a variance from a procedure that applied to samples extracted on or after July 1, 2009, even though the sample to be analyzed was extracted in 1997. Thus, the request appears to have been filed out of an abundance of caution, and as a means of documenting the procedure that was actually followed.

The only evidence concerning the protocol applicable to the 1997 extract at issue was Flores' testimony. Flores stated that he followed the protocol that was in effect in 1997 by running a reagent blank when he first analyzed the liquid extract. According to the protocol then in effect, other analysts who later tested the same extract did not need to run additional reagent blanks.

Moreover, when the trial court ruled on appellant's motion to suppress, the only evidence concerning the purpose of running a reagent blank was Flores' testimony and the "FBI Quality Assurance" publication, both of which indicated that running a reagent blank could reveal whether the reagent used in the forensic sample was contaminated. Flores further testified that, even if the reagent was contaminated, this contamination would not alter the DNA profile obtained from the forensic sample.

The trial court reasonably determined that the proffered scientific evidence was sufficiently reliable to assist the jury. Therefore, the trial court did not abuse its discretion by determining that the 2010 DNA evidence was sufficiently reliable and relevant under Rule 702. *See, e.g., Jackson,* 17 S.W.3d at 672 (holding that there was no harm because the State's DNA evidence was in fact reliable, notwithstanding evidence that the State failed to use reagent blanks "to eliminate the possibility of cross-contamination" and that the protocol was later upgraded to include reagent blanks).

Although appellant referred to Article 38.23 in his

pretrial motion to suppress, he does not expressly refer to Article 38.23 on appeal. However, his assertion that all inculpatory evidence obtained as a result of the 2010 DNA profile should have been excluded, and his argument that his conviction should be reversed, appear to implicate Article 38.23.

Even if appellant had proven the alleged procedural irregularity, it would not merit the exclusion of evidence under Article 38.23. Creating a DNA profile from a biological sample obtained from Norris' body, and uploading the profile into CODIS, did not implicate appellant's privacy or property rights. Therefore, the DNA profile and the CODIS hit are not subject to exclusion under Article 38.23. For the same reasons, Article 38.23 does not require the exclusion of other inculpatory evidence that, arguably, was obtained as a result of the DNA profile and the CODIS hit.

See Maryland v. King, —— U.S. ——, 133 S.Ct. 1958, 1979, 186 L.Ed.2d 1 (2013) ("[T]he processing of respondent's DNA sample's 13 CODIS loci did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional."); *see also Segundo v. State,* 270 S.W.3d 79, 99–100 (Tex.Crim.App.2008) (quoting *Johnson v. Quander,* 440 F.3d 489, 498 (D.C.Cir.2006)) (" '[A]ccessing the records stored in the CODIS database is not a 'search' for Fourth Amendment purposes,' because 'the process of matching one piece of personal information against government records does not implicate the Fourth Amendment.' ").

> *See*
> *Miles,* 241 S.W.3d at 36 n. 33 ("Only those acts which violate a person's privacy rights or property interests are subject to the state or federal exclusionary rule."); *cf. Segundo,* 270 S.W.3d at 99 ("Regarding his argument concerning the potential for abuse, appellant has made no showing that any such abuse has occurred in the Texas CODIS system, much less that such abuse occurred in his case.").

We conclude that the trial court did not abuse its discretion by denying appellant's motion to suppress the 2010 DNA profile, the CODIS hit, and inculpatory evidence that was obtained after appellant was identified as a suspect. Point of error two is overruled.

ADMISSIBILITY OF PLEA OFFER

In point of error three, appellant asserts that the trial court erred in not allowing evidence of his willingness to enter a plea "to the jury" to the offense of aggravated sexual assault, because this evidence was relevant to the mitigation special issue.As an initial matter, the record does not support appellant's assertion that he offered to "enter a plea of guilty to the jury" to the offense of aggravated sexual assault. Rather, in his "Defendant's Offer to Enter Pleas of Guilty," filed on April 3, 2013, appellant offered to:

(1) enter a plea of "guilty" to the offense of capital murder in exchange for a sentence of life imprisonment; and to

Appellant speaks of his willingness "to enter a plea of guilty to the jury." While guilty pleas may be entered to a jury, it does not appear from appellant's arguments that he was trying to "enter a plea of guilty to the jury" but rather he was trying to present evidence to the jury of his willingness to plead guilty to a lesser offense. In other words, appellant wanted to present evidence of his plea negotiations—which included an offer to "enter a plea of guilty to the jury"—as mitigation evidence during the punishment phase of his trial. Appellant's point of error will be interpreted as an allegation of error by the trial court in not admitting evidence of his plea negotiations, rather than an allegation of error by the trial court in not allowing appellant to enter a plea of guilty to aggravated sexual assault.

He also argues that, without this mitigating evidence, the jury was not provided with an effective vehicle for expressing its reasoned moral response to the evidence before it. We note that the "vehicle" for a jury to express its "reasoned moral response" is the trial court's instruction on the mitigation special issue. *See, e.g., Ex parte Moreno,* 245 S.W.3d 419, 423–26 (Tex.Crim.App.2008). To the extent that appellant intends by this point of error to challenge anything other than the trial court's evidentiary ruling, his claim is inadequately briefed as well as multifarious. Tex.R.App. P. 38.1 ; *see also Linney v. State,* 413 S.W.3d 766, 767–68 (Tex.Crim.App.2013) (Cochran, J., concurring). Nevertheless, we will address appellant's claim concerning the evidentiary ruling.

(2) waive indictment and "any issue of the statute of limitations" and plead "guilty" to a felony information to the first degree felony offense of burglary of a habitation with intent to commit sexual assault.

Appellant also offered to waive his right to parole, "so far as that waiver is possible[,]" and to "make no objection to the State of Texas objecting to him being paroled, ... should the Texas Board of Pardons and Parole ever consider paroling him out of prison." Finally, he offered to enter the pleas on separate dates, "so that the Texas Department of Criminal Justice will not consider them as a single plea, making the pleas a de facto stacking of two life sentences."

Appellant does not state that he attempted to introduce his "Offer" as evidence and that the trial court ruled that it was inadmissible. Nor does he cite to any place in the record where he sought a ruling on the admissibility of this pleading. Therefore, this allegation is inadequately briefed. Nevertheless, our independent review reveals that, in a hearing outside the jury's presence at the end of the defense's punishment case-in-chief, appellant attempted to introduce into evidence his written offer to plead guilty. In response to the State's motion in limine concerning the admissibility of plea negotiation evidence under Texas Rule of Evidence 410, appellant argued that Rule 410 only barred the use of plea negotiations against a defendant; it did not bar the introduction of plea negotiations on a defendant's behalf. He further argued that the prosecutor had opened the door to this evidence by telling witnesses, "We're sorry you have to be here," which (according to defense counsel) gave the jury a false impression that the trial was "all [the defendant's] fault," when in fact the trial could have been avoided if the State had accepted his plea offer.

Tex.R.App. P. 38.1(i) ; *Ladd v. State,* 3 S.W.3d at 575.

The prosecutor responded that the purpose of Rule 410 was "to keep plea negotiations or a lack thereof out from [sic] the jury because it's absolutely not relevant to any of the jury's determinations." The prosecutor asserted that the State had "brought in nothing as it relates to plea negotiations," and that simply telling a crying witness, "I'm sorry you're here," did not open the door to evidence that was otherwise inadmissible. The prosecutor further asserted that, if the defense introduced evidence of the plea offer, this evidence would open the door to the State's "sharing with the jury why we can't do that," including a discussion of the applicable parole law, which was "a huge part of why ... this hasn't happened." The trial court ruled that the plea offer was inadmissible "pursuant to the Texas Rules of Evidence." Defense counsel then rested its punishment case-in-chief.

The State objected to the admission of appellant's plea negotiations under Rule 410, but essentially argued at trial that defendant's plea negotiations were not relevant to the jury's decision. We have held that, so long as a party makes the grounds of the objection clear, we will not bar the objection merely on procedural default. *Lankston v. State,* 827 S.W.2d 907, 909 (Tex.Crim.App.1992) ("Straightforward communication in plain English will always suffice. The standards of procedural default, therefore, are not to be implemented by splitting hairs in the appellate courts. As regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.") (internal citations omitted).

Rule 410 provides, in relevant part:

(b) Prohibited Uses in Criminal Cases.—In a criminal case, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

* * *

(3) a statement made during a proceeding on either of those pleas under **Federal Rule of Criminal Procedure 11** or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty or nolo contendere plea or they resulted in a later-withdrawn guilty or nolo contendere plea.

(c) Exception.—In ... a criminal case, the court may admit a statement described in paragraph (b)(3) or (4), when another statement made during the same plea or

plea discussions has been introduced and in fairness the statements ought to be considered together.

Tex.R. Evid. 410.

We note that Rule 410 is silent on the admissibility of plea negotiations when that evidence is presented for, rather than against, a defendant. However, if the trial court's decision was correct on any applicable theory of law, we will sustain it. This is true even if the judge failed to give any reason or gave the wrong reason for the ruling. On appeal, we review the trial judge's evidentiary rulings under an abuse-of-discretion standard.

See Smith v. State, 898 S.W.2d 838, 842 n. 4 (Tex.Crim.App.1995), *overruled in part by Tennard v. Dretke,* 542 U.S. 274, 283–89, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

Prystash v. State, 3 S.W.3d 522, 527 (Tex.Crim.App.1999).

Bowley v. State, 310 S.W.3d 431, 434 (Tex.Crim.App.2010).

Id.

We have held that a State's plea offer, presented by a capital defendant at the punishment phase, might be "*minimally* relevant" as tending to show the District Attorney's office's belief that the defendant is not a future danger. Nevertheless, such evidence is not admissible under Rule 403 because it is "substantially outweighed by the danger of both unfair prejudice and of misleading the jury." Admitting evidence of plea negotiation also runs the risk of confusing the issues by leading the jury down a path of inquiry into the motivations behind each party's plea offer. Further, allowing a defendant to introduce evidence at trial of a sentence offered by the State during plea negotiations clearly militates against public policy favoring the conclusion of litigation by compromise and settlement because it discourages the State from making such offers in the future.

Prystash, 3 S.W.3d at 527–28 ; *Smith,* 898 S.W.2d at 843 (emphasis in originals).

Prystash, 3 S.W.3d at 528 ; *see also Martinez v. State,* 327 S.W.3d 727, 737 (Tex.Crim.App.2010) (stating that the danger of unfair prejudice exists when evidence has the potential to impress the jury in an irrational way).

Cf. *Prystash,* 3 S.W.3d at 528 .

Id.

In this case, like the defendants in *Smith* and *Prystash,* appellant attempted to introduce his own plea offer as evidence in mitigation of punishment. However, appellant offers little argument as to how the jury is to infer mitigation from his plea offer other than it was not his fault that the trial went forward instead of resulting in a plea bargain. In a capital case, the defendant's offer to plead guilty in exchange for a sentence other than death inures to his benefit if the State accepts it, and, if the State rejects it, the defendant is no worse off than he was before. Arguably, therefore, evidence of such a self-serving plea offer is not even "*minimally* relevant" to the mitigation special issue.

Circumstantial evidence poses relevance problems because a judge must decide whether a jury may permissibly make the jump from the proved fact to the inferred fact. David Schlueter, Texas Rules of Evidence Manual 180 (9th ed., 2012)

See Tex.R. Evid. 401 ; *Tennard,* 542 U.S. at 284–85, 124 S.Ct. 2562 (describing relevant mitigating evidence as evidence which tends logically to prove or disprove some fact or

circumstance which a fact-finder could reasonably deem to have mitigating value).

Even assuming that appellant's plea offer evidence was minimally relevant, any probative value of this evidence was substantially outweighed by the dangers of unfair prejudice and misleading the jury. A Rule 403 analysis includes, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. Any probative value of appellant's plea offer was diluted by the various motivations that may have driven appellant's and his attorneys' decision to make the offer. Indeed, evidence of a capital defendant's own plea offer is even less probative and poses an even greater danger of misleading the jury than does evidence of a State's plea offer because the defendant potentially benefits, by offering to plead guilty in exchange for a sentence other than death. Without additional evidence of appellant's and his attorneys' motivations, the jury could only speculate as to the mitigating value, if any, of appellant's plea offer evidence. As such, the potential for this evidence to affect the jury in an irrational way was high. Thus, any arguably probative value of appellant's plea offer evidence would have been substantially outweighed by the danger of unfair prejudice and misleading the jury.We also recognize that allowing a defendant to present evidence of his own plea offer militates against public policy favoring the conclusion of litigation by compromise and settlement. Just as allowing a defendant to introduce a plea offer from the State would discourage the State from making such offers in the future, allowing a defendant to introduce his own plea offer would encourage defendants to make plea offers in order to develop evidence for later proceedings, rather than to conclude the litigation through good-faith negotiation.

See *Smith,* 898 S.W.2d at 844.

Hernandez v. State, 390 S.W.3d 310, 324 (Tex.Crim.App.2012).

Cf. *Anderson v. State,* 416 S.W.3d 884, 888 (Tex.Crim.App.2013) (stating that juries are permitted to draw reasonable inferences from the evidence but they are not permitted to draw conclusions based on speculation); *Hernandez,* 390 S.W.3d at 324 (stating that juries should not consider evidence that depends on mere sympathy or emotional response in determining a defendant's death worthiness); *Ex parte Moreno,* 245 S.W.3d at 426 n. 20 (noting that juries must be able to weigh evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value).

To the extent that appellant intends to argue that the exclusion of his plea offer was unconstitutional, we have held that the federal constitution does not require the admission of mitigating evidence that is otherwise objectionable under state law. *See* *Renteria v. State,* 206 S.W.3d 689, 697 (Tex.Crim.App.2006) ; *Lewis v. State,* 815 S.W.2d 560, 568 (Tex.Crim.App.1991) (concluding that the federal constitution does not require admission of a defendant's self-serving, out-of-court declarations of remorse that are inadmissible under state law, even though remorse "may well be" a mitigating circumstance).

See *Smith,* 898 S.W.2d at 844 n.6.

Cf., e.g., *Ex parte Heilman,* 456 S.W.3d 159, 166–69 (Tex.Crim.App.2015) (emphasizing the "sanctity and finality" of good-faith, arm's length plea agreements); *State v. Munoz,* 991 S.W.2d 818, 822–24 (Tex.Crim.App.1999) (finding that, in evaluating a claimed violation of the speedy trial guarantee, "good faith plea negotiations" were a valid reason for delay that did not weigh against the prosecution).

The decision to admit or exclude appellant's plea offer evidence was soundly within the discretion of the trial judge. This evidence was, at best, minimally relevant,

and its probative value, if any, was substantially outweighed by the danger of unfair prejudice and misleading the jury. We conclude that the trial court did not abuse its discretion by excluding it. Point of error three is overruled.
See Prystash, 3 S.W.3d at 528.

JUROR MISCONDUCT

In point of error four, appellant asserts that the trial court erroneously denied the defense's motion for mistrial after juror misconduct was brought to the trial court's attention. Appellant asserts that, as a result of a juror's improper conversation with an outside party, he did not receive a fair and impartial trial.

The record shows that, on Thursday, June 6, 2013, during the punishment phase, the trial court adjourned the proceedings until the following Monday, June 10, 2013. On Monday morning, before the presentation of evidence resumed, Judith Kama Davis, an attorney unrelated to this case, informed the trial court that one of the jurors, Tim Altenhoff, had communicated with a third party about the case over the weekend. Specifically, he had "texted" Jan Ellis, a friend who lived in New York, asking her to call him so that he could tell her about a murder case on which he was serving as a juror. Concerned that Altenhoff's conduct might be illegal, Ellis contacted Davis, whom Ellis knew socially. Ellis sent Davis copies of the texts that Altenhoff had sent to her, as well as his "electronic contact card" which included his name and telephone numbers. Davis read the following text exchanges into the record:

[Altenhoff to Ellis]: What's up? If you have a few minutes, give me a call at home and I'll tell you what I can about the murder trial I'm on.

[Ellis to Davis]: Somebody from San Marcos sent me this text. Isn't that illegal for a juror?

[Davis to Ellis]: Yes, that's "expletive" illegal. Who sent it? The sentencing phase is going down this week and the guy might get the death penalty.

[Ellis to Davis]: If I tell you .... he will know it was me. It is probably illegal for me not to report it even from New York?

[Davis to Ellis]: Jan, if he's telling you stuff and you're in New York, I can guarantee he's talking to other people,

too. He likely won't know it's you. Has he given you any specific info like the name of the case? And, yes, you have to report him.

* * *

[Ellis to Davis]: I just texted him back and asked him what was the name of the case. I'm sure he is asleep....

* * *

[Davis to Ellis]: Jan, you remember the 1974 event. Did you know Mr. A at the time? Did he know about the event? Did y'all discuss the event around the time it happened?

[Ellis to Davis]: 1975, the year. I do not remember any discussions. We were in high school and everybody knew about it.

* * *

[Altenhoff to Ellis]: State versus Willie Jenkins.

[Ellis to Altenhoff]: That can't be the one from when we were in high school?

[Altenhoff to Ellis]: Yep.

The prosecutor asked Davis if she knew why Altenhoff contacted Ellis about the case. Davis stated that Ellis and Altenhoff had been friends for many years, and Ellis told her that Altenhoff "probably ha[d] a boring life" and was "excited probably to be on a jury in a case of this magnitude." Ellis also suggested that Altenhoff might have believed that he was not breaking any rules by contacting Ellis since she lived in New York.

In addition, Davis noted that Ellis told her that Altenhoff's father had been a probation officer in San Marcos around the time of the instant offense. Ellis

indicated to Davis that Altenhoff's father might have had information about the case in 1975 and that he might have discussed it with Altenhoff.

Defense counsel then moved for a mistrial, expressing his concern that Altenhoff might have lied during jury voir dire when he denied having prior knowledge of the case. The judge pointed out that they did not yet know whether Altenhoff had lied during voir dire. The parties and the judge discussed questioning Altenhoff about what he had shared with Ellis and whether he had committed perjury during voir dire. They agreed that Altenhoff needed the assistance of counsel before they questioned him. The bailiff separated Altenhoff from the rest of the jurors, and the judge appointed counsel to represent him.

The parties and the judge also agreed that the judge would question the rest of the jurors as to whether Altenhoff had shared any outside information about the case, and whether they were aware of him violating any of the court's other instructions. The judge questioned each juror individually. Each juror denied that Altenhoff had shared outside information about the case, and each juror denied knowing whether Altenhoff had violated the court's other instructions. The judge concluded that Altenhoff had not shared any outside information about the case with the rest of the jury.

Defense counsel again expressed concern that Altenhoff might have lied during voir dire. Counsel also worried that Altenhoff's vote at the guilt-or-innocence phase might have been tainted by his prior knowledge of the case. Counsel requested an opportunity to question Altenhoff about these matters, and the State agreed that such questioning would be appropriate. The State offered to grant Altenhoff use immunity in the event that his answers subjected him to a prosecution for perjury.

However, when Altenhoff entered the courtroom, he expressly waived both use immunity and his Fifth Amendment right to remain silent. He agreed to answer all of the judge's and parties' questions. Defense counsel first asked Altenhoff whether he had been in high school in San Marcos in 1975, and Altenhoff confirmed that he had been. Counsel then asked him whether the murder "was a big deal in San Marcos back then." Altenhoff responded, "I'm assuming it was. But ... I honestly do not remember anything about this until I was called for jury duty." He denied that he knew anything about the case when he completed the written juror questionnaire. He stated that he still did not recall the case. Altenhoff testified that the first time he knew that the instant offense had happened was when he reported for jury duty. Altenhoff specifically denied that anything he heard in the courtroom "jog[ged] [his] memory" about the case, and he reiterated that he still did not recall knowing about the case while he was in high school. The questioning continued:

[Counsel]: And the—during the individual voir dire when—back on, I think it was, May the 14th when we had you in here where everybody was questioning you—

[Altenhoff]: Yes.

[Counsel]:—you were asked several times in several ways whether you knew anything about the case.

[Altenhoff]: That's correct. And I did not.

[Counsel]: And yet today we get information that you knew that this happened back in—when you were in high school. So you assume—

[Altenhoff]: The only way I knew that was when the lady asked me in a text: Oh, is that the case [from] when we were in high school? And only because of what I know now, my answer was—I believe, specifically: Yep. That was it. Because of what I know now, not what I remembered from 1975. I did not remember that.

[Counsel]: And so you're saying that nothing that you heard at the first general voir—the—the first day when you filled out the—the questionnaire during general voir dire or during individual voir dire, none of that jogged your memory to—

[Altenhoff]: It did not, sir. No, sir.

[Counsel]: And you only decided that you knew about this case when somebody else said: Oh, is that that case that happened back in high school?

[Altenhoff]: Right. And that's—I could confirm that, yes, that must be because they told us it was 1975 and I was a senior in high school. But it—it didn't jog my memory as to knowing about it or remembering about it from high school. It was only because I learned here that, yes, that is when it was.

[Counsel]: And when did you realize that this was that case from high school, not until she said something?

[Altenhoff]: Well, when I knew from being here in the courtroom that when it happened was 1975. I knew where I was at that time. But still, until this case began or the trial began, I still did not recall knowing about it in high school. I know about it now because of being called for jury duty. That is the only reason I know about it.

[Counsel]: And you didn't think it might be a good idea to let the Judge know that this was something that you might know something about?

[Altenhoff]: I didn't know anything about it. I only know what I've learned in the last few weeks.

The judge then excused Altenhoff and advised him that the court would send him an order to show cause why he should not be held in contempt "because of these text messages." He admonished Altenhoff not to communicate in any way with the remaining jurors. The judge also appointed an alternate juror to replace Altenhoff.

Defense counsel then re-urged his motion for a mistrial. He argued that Altenhoff remembered the case because he was in high school in San Marcos when it happened. He stated that, if the defense had known during voir dire that Altenhoff remembered the case, they would have challenged him for cause and then, if the court denied the challenge, they would have exercised a peremptory strike against him. Counsel argued, "Just even the bare fact that he—that—that he knew about this case or had heard about this case basically kept us from intelligently exercising our peremptory challenges in this case and we would move the Court for a mistrial." The judge noted that Ellis, not Altenhoff, was the person who remembered the case from high school. He found Altenhoff's testimony denying prior knowledge of the case to be credible, and he denied the motion for mistrial.

Article 36.22 provides that no person shall be permitted to converse with a juror about the case except in the presence and by the permission of the court. Once proven, a violation of Article 36.22 triggers a rebuttable presumption of injury to the accused, and a mistrial may be warranted. When determining whether the State sufficiently rebutted the presumption of harm, the evidence is viewed in the light most favorable to the trial court's ruling and deference is given to the trial court's resolution of historical facts and its determinations concerning credibility and demeanor. We consider only those arguments that were before the court at the time of the ruling. We review a trial court's denial of a mistrial for an abuse of discretion.

See Hughes v. State, 24 S.W.3d 833, 842 (Tex.Crim.App.2000).

See *Ocon v. State,* 284 S.W.3d 880, 884 (Tex.Crim.App.2009).

Quinn v. State, 958 S.W.2d 395, 401–02 (Tex.Crim.App.1997).

Ocon, 284 S.W.3d at 884.

Id.

Whether an error requires a mistrial must be determined by the particular facts of the case. A mistrial is an extreme remedy that should be granted only if residual prejudice remains after less drastic alternatives have been explored. Less drastic alternatives include instructing the jury to consider as evidence only the testimony and exhibits admitted through witnesses on the stand, and, if an instruction alone does not sufficiently cure the problem, questioning the jury about the extent of any prejudice. The primary goal of Article 36.22 is to insulate jurors from outside influence. Thus, the effectiveness of possible remedies for an Article 36.22 violation will be determined in part by whether the conversation influenced the juror.

Id.

Id.
at 884–85.

Id.
at 885.

Id.
at 884.

Id.

We note as an initial matter that appellant's complaint on appeal does not comport with his arguments to the trial court. Before the trial court, appellant expressed concern over the possibility that Altenhoff had lied during voir dire about having prior knowledge of the case, and that he might have communicated his outside knowledge to the rest of the jury. Now, appellant argues that the question of whether the trial court erred must focus on whether Altenhoff was biased as a result of the improper conversation, and Altenhoff's motivation for engaging in it. We need not consider these arguments because they were not before the trial court at the time of the ruling.
Id.

Considering the arguments that were before the trial court, we defer to the trial court's findings that Altenhoff's testimony denying prior knowledge of the case was credible and that Altenhoff did not communicate any outside knowledge to other jurors. We conclude that the trial court properly employed less drastic measures that effectively insulated the jury from outside influence and sufficiently cured the problem created by Altenhoff's misconduct. The trial court did not abuse its discretion in denying appellant's motion for mistrial. Point of error four is overruled.

CUMULATIVE EFFECT

In point of error five, appellant asserts, "the cumulative impact of the above errors was so great that reversal is required." Appellant "urges the Court to consider the cumulative impact of the errors present at the pretrial, trial and sentencing proceedings on the outcome of his case." Appellant argues that "the cumulative impact of the many errors in this case is so great that reversal is required because the Court cannot be confident that the constitutional errors can be determined beyond a reasonable doubt not to have contributed" to his conviction and sentence. He also asserts that the "many non-constitutional errors" cumulatively affected his substantial right to a fair trial and sentencing.

In his four preceding points of error, appellant failed to show that the trial court erred. Therefore, there is no error to cumulate. Likewise, to the extent that appellant means to allege cumulative harm from every point of error enumerated in his appellate brief, we have not concluded that the trial court erred with respect to any point of error. Point of error five is overruled.
See Gamboa v. State, 296 S.W.3d 574, 585 (Tex.Crim.App.2009) (quoting *Chamberlain v. State,* 998 S.W.2d 230, 238 (Tex.Crim.App.1999)) ("Though it is possible for a number of errors to cumulatively rise to the point where they become harmful, we have never found that 'non-errors may in their cumulative effect cause error.' ").

JURY INSTRUCTIONS

In point of error six, appellant asserts, "The trial court violated the Sixth, Eighth and Fourteenth Amendment[s] of the United States Constitution by failing to instruct the jury that a vote by one of them would result in a life sentence despite the statutory requirement of ten votes for a 'No' answer to the question of future dangerousness, or for a 'Yes' vote to a finding of a mitigating circumstance." Appellant asserts that the jurors who decided his sentence "were actively struggling with the sentence they wished to impose." Appellant reasons that the "10–12 Rule" may have resulted in the imposition of the death penalty, despite jurors' inclinations, because the rule obstructs jurors' ability to reach a "true verdict." He acknowledges that we have previously denied similar challenges, but he urges us to reconsider.

The trial court's instructions complied with Article 37.0711, § 3(d)(1) and (2). Appellant does not refer us to any part of the record in support of his assertion that jurors "were actively struggling" with the special issues. Nor have we, in our independent review, identified any part of the record that supports this assertion. In any event, we are not persuaded to

reconsider our previous decisions rejecting similar challenges. Point of error six is overruled.
See Soliz v. State, 432 S.W.3d 895, 904 (Tex.Crim.App.2014).

In point of error seven, appellant alleges that the trial court violated the Eighth and Fourteenth Amendments of the United States Constitution by failing to provide four specific jury instructions concerning the jury's consideration of victim impact evidence at the punishment phase. He complains that the trial court failed to instruct the jury that: (a) "its consideration of victim impact evidence should not be conducted in connection with the future dangerousness special issue"; (b) "its consideration of victim impact evidence did not relieve the State of its burden to prove the 'future dangerousness' issue beyond a reasonable doubt"; (c) it should "disregard victim impact evidence that was not shown to be within the knowledge or reasonable expectation of the defendant"; and (d) it should not "make a comparative worth analysis of the value of the victims [sic] to their [sic] families and the community compared to the defendant or other members of society."
Appellant asserts that "considerable victim character and impact evidence was introduced," notably from Norris' sisters, who testified that Norris' parents died without knowing who killed their daughter. Appellant complains that the jury's consideration of this evidence should have been limited by the above-described jury charges. Absent these charges, he argues, this evidence improperly encouraged the jury to make a decision based on an arbitrary and random factor that bore no relation to appellant's future dangerousness. Appellant asserts that he could not have known about the victim's relationship with her sisters or the effect of her death on her parents. He also asserts that, although the prosecutor did not explicitly compare the relative worth of the victim, appellant, and other members of society, "a full instruction on those concerns should have been given in order to insure that the jury's discretion was focused according to the law."
Appellant's factual assertion is at odds with the record, which included Norris' sisters' testimony that their mother was alive at the time of trial and that their father learned, before he died, that police investigators had identified a suspect through DNA evidence.

Appellant also suggests that the victim-impact evidence in this case was unduly prejudicial. To the extent that appellant intends to complain about the admissibility of this evidence, we note that he did not object to its admission at trial. *See* Tex.R.App. P. 33.1. In any event, this additional legal theory would render his point of error multifarious, and we decline to address it. *See Mays v. State,* 318 S.W.3d 368, 390 n. 82 (Tex.Crim.App.2010).

Appellant never requested these instructions in the trial court. Therefore, he is entitled to relief only if the record shows that the jury charge contained error, and the error resulted in egregious harm. Appellant has not cited any authority that mandates these four instructions. In *Mays v. State,* we disposed of nearly identical claims by recognizing that the trial judge submitted a jury charge consistent with applicable state statutes that met federal constitutional requirements. As in *Mays,* the jury charge in this case was consistent with applicable state statutes that met federal constitutional requirements. Point of error seven is overruled.

See Price v. State, 457 S.W.3d 437, 440 (Tex.Crim.App.2015).

318 S.W.3d at 391.

Id.
(citing *Saldano v. State,* 232 S.W.3d 77, 106 (Tex.Crim.App.2007)).

In points of error eight through eleven, appellant asserts that the trial court violated the Eighth and Fourteenth Amendments when it failed to define the terms "probability," "criminal acts of violence," "militates," and "continuing threat to society" in the jury instructions at the punishment phase. Appellant argues that failing to define these terms creates a "substantial risk of arbitrariness and caprice." As appellant acknowledges, we have previously rejected these claims. We are not persuaded to reconsider our prior decisions.

See, e.g., Leza v. State, 351 S.W.3d 344, 362 (Tex.Crim.App.2011) (finding no constitutional violation in failing to define "militates," "criminal acts of violence," and "probability"); *Gardner,* 306 S.W.3d at 302–03 (finding no constitutional violation in failing to define "probability," "criminal acts of violence," "militates," and "continuing threat to society").

Appellant also states that "legislative policy concerns regarding discrimination on the basis of race and ethnicity expressed in the statute would be well served by an instruction" precluding consideration of a defendant's age, race, sex, national origin, religion, political views or sexual orientation as factors supporting a death sentence. Appellant cites no authority for his position that the trial court erred by failing to provide such an instruction. Points of error eight through eleven are overruled.
See Tex.R.App. P. 38.1(i) ; *Ladd v. State,* 3 S.W.3d at 575.

In point of error twelve, appellant asserts that the trial court violated the Eighth and Fourteenth Amendments "by failing to instruct the jury so as to limit the scope of militating evidence to that which a juror might regard as increasing the defendant's moral blameworthiness." Appellant argues that, without such an instruction, the sentencing determination was not "directly related to the personal culpability of the offender," and "the jury instruction as given failed to preclude the jurors from giving weight to factors beyond [appellant's] own control." This point of error essentially repeats point of error ten, in which appellant argued that the court erred by failing to define "militates." Point of error twelve is without merit for the same reason that point of error ten is without merit. *See Gardner,* 306 S.W.3d at 302–03.

In argument, appellant also alleges that the statutorily-mandated language that "the jury shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness" was "inexplicably" omitted from the jury charge. Contrary to appellant's allegation, the record establishes that the written jury charge included the statutorily-mandated language. The charge stated, in relevant part, "In answering Special Issue Number Three you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's blameworthiness." In addition, the trial judge read this language out loud when he read the charge to the jury. Point of error twelve is overruled.
In point of error thirteen, appellant asserts that the trial court violated the Eighth and Fourteenth Amendments by failing to instruct the jury that its finding of guilt in the first phase of the trial did not foreclose consideration of evidence which they believed tended to reduce appellant's moral blameworthiness. Appellant urges that, given the heightened need for accuracy in a capital case, the trial court should have given such an instruction to ensure that the jury understood that its consideration of culpability at sentencing was not foreclosed by the guilty verdict.
We rejected a similar allegation in *Russeau v. State.* In that case, we found that the trial court's instructions, which followed the instructions set forth in Article 37.071, § 2(d)(1) and (f), did not track the language of the instruction that appellant argued was constitutionally required, but they had much the same meaning. As such, the trial court's instructions were sufficient to convey to the jury that a finding of guilt did not foreclose consideration of mitigating evidence. *See* 291 S.W.3d 426, 436 (Tex.Crim.App.2009). In *Russeau,* the appellant argued that the trial court was constitutionally required "to instruct the jury that [the] finding of guilt in the first phase of the trial did not foreclose consideration of evidence which they believed tended to reduce the moral blameworthiness of the defendant." *Id.*

See Id.

Article 37.071, § 2(d)(1) provides that the court shall charge the jury that, in deliberating on the future dangerousness and "anti-parties" special issues submitted under Subsection (b), the jury "shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty." Article 37.071, § 2(f) provides that the court shall

charge the jury that in answering the mitigation special issue submitted under Subsection (e), the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree of what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

In this case, the trial court's instructions followed the instructions set forth in Article 37.0711, § 3(e) and (f), which are substantially the same as the instructions set forth in Article 37.071, § 2(d)(1) and (f). We presume that the jurors understood and followed the instructions, absent evidence to the contrary. Appellant points to no evidence to the contrary. Point of error thirteen is overruled.

Article 37.0711, § 3(e) provides that the court shall instruct the jury that if the jury returns an affirmative finding on each issue submitted under Subsection (b) (deliberateness, future dangerousness, and, if applicable, provocation), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Article 37.0711, § 3(f) provides that the court shall charge the jury that, in answering the issue submitted under Subsection (e), the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree; and

(3) shall consider mitigating evidence that a juror might regard as reducing the defendant's moral blameworthiness.

Crenshaw v. State,
378 S.W.3d 460, 467 (Tex.Crim.App.2012).

See
Colburn v. State, 966 S.W.2d 511, 520
(Tex.Crim.App.1998).

In point of error fourteen, appellant asserts that the trial court violated the Eighth Amendment by failing to instruct the jury that: (a) there is no presumption in favor of death, even if the jury found appellant to be a "future danger;" and (b) the mitigation special issue should be taken up and considered independently, without regard to the finding on the future dangerousness special issue. Appellant appears to assert that the instructions for the future dangerousness and mitigation special issues, found in Article 37.0711, §§ 3(b)(2) and (e), do not protect his rights under the Eighth Amendment. He argues that the Legislature intended "that a life sentence have preference over a death sentence," and since death is "clearly not the 'presumed' or 'default' punishment," the trial court erred by not spelling this out to the jury and by not explaining that the mitigation special issue was independent from the future dangerousness issue.
We rejected a similar claim in *Russeau.* In that case, we found that the trial court's instructions, which followed the instructions set forth in Article 37.071, § 2(e)(1), conveyed to the jury that, if the jury answered

the future dangerousness and anti-parties special issues in the affirmative, then the jury would proceed to answer the mitigation special issue either "yes" or "no." We concluded that nothing in our law required a further instruction that there was "no presumption in favor of death." In this case, the trial court's instructions followed the instructions set forth in Article 37.0711, § 3(e), which are substantially the same as the instructions set forth in Article 37.071, § 2(e)(1). Point of error fourteen is overruled.

See 291 S.W.3d at 436.

See
id. at 431 n. 1, 436.

See
id. at 436.

In point of error fifteen, appellant asserts that the trial court violated the Eighth Amendment when it "failed to instruct the jury so as to provide a vehicle for a juror to return a life verdict where the juror concludes that the aggravating factors, although established by the evidence, still are not so severe as to call for death as a punishment." Appellant argues that Article 37.0711, § 3(b)(2), which requires the jury in a capital case to decide whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, provides no means for the jury to assess a life sentence if it believes that the aggravating factor of future danger exists but is not so severe as to warrant a death sentence. He suggests that a juror might find that appellant was a future danger, but that the future dangerousness risk was so low that a death sentence was inappropriate. However, if the juror did not find sufficient mitigating evidence, his findings would still result in a death sentence. Appellant argues that the charge is unconstitutional because it would not empower the jury to give effect to the evidence under those circumstances.

We rejected a similar claim in *Russeau.* In that case, we found that the trial court's instructions met the requirements of Article 37.071, and Article 37.071, in turn, met the requirements of the Eighth Amendment. Appellant does not distinguish the relevant provisions of Article 37.071, which we upheld in *Russeau,* from the substantially similar provisions of Article 37.0711 that applied to this case. Point of error fifteen is overruled.

See 291 S.W.3d at 436.

See id.; see also
Mays, 318 S.W.3d at 396–97.

In point of error sixteen, appellant asserts that the trial court erred "when it refused to quash the indictment because a grand jury had not considered and alleged in an indictment the facts legally essential to [appellant's] conviction and death sentence." He further asserts that this error violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He argues that he "was entitled to grand jury consideration of all specific facts essential to his conviction and death sentence as a matter of federal constitutional law." Appellant recognizes that we have previously rejected this allegation. We are not persuaded to reconsider our previous decisions. Point of error sixteen is overruled.

He also asserts that this alleged error violated Article I, Sections 2, 10, and 19 of the Texas Constitution. Because appellant does not provide separate authority or argument for his state constitutional claim, we do not address it. *See Berry v. State,* 233 S.W.3d 847, 855 n. 3 (Tex.Crim.App.2007).

See
Roberts v. State, 220 S.W.3d 521, 534–35 (Tex.Crim.App.2007).

In point of error seventeen, appellant asserts that the trial court erred in denying his motion to preclude the death penalty as a sentencing option due to violations of his rights under the Equal Protection Clause. He contends that Article 37.0711 is unconstitutional because there are no uniform, statewide standards to guide prosecutors in deciding when to seek the death penalty. In support of this claim, appellant cites to the United States Attorneys' Manual as an example of written standards already used by federal prosecutors for guiding death penalty prosecutions. The U.S.

Attorney's protocol, which establishes a central authority for assessing and authorizing death penalty prosecutions, is set up to ensure that bias based on race or ethnic origin plays no role in the decision to seek the death penalty and that all defendants are treated in a consistent and fair manner. Considering the decline in the number of prosecutions in which the death penalty is sought, the federal system's protocol might be a workable alternative to the current system. However, taking the decision to pursue the death penalty away from district attorneys' offices in individual counties and vesting that authority in the Texas Attorney General's Office or some other central authority would require legislative action.
USAM § 9–10.10 et seq. (1995). Federal death penalty procedure is based on the Federal Death Penalty Act of 1994, codified at 18 U.S.C. §§ 3591 to 3599.

According to the Texas Department of Criminal Justice only 13 executions took place in 2015, which is down from a high of 40 executions in 2000. Tex. Dept.Crim. Just.: Executions Dec. 7, 1982 through Feb. 18, 2016 *available at* https://www.tdcj.state.tx.us/death_row/dr_executions_by_year.html.

There is nothing inherently unconstitutional about having individual district attorneys' offices make the decision to pursue the death penalty without the benefit of uniform, statewide standards. Moreover, appellant's case would not likely persuade the Legislature to adopt a uniform, statewide system for pursuing death penalty prosecutions. Appellant was convicted of a particularly brutal rape and murder. During the punishment phase of appellant's trial, the State presented evidence that appellant sexually molested his stepdaughters, was convicted of four rapes in California, and was convicted of one rape in Texas. Appellant pled guilty to one of the California rapes only four days before he drove to Texas and murdered the victim in this case, Sheryl Norris. In 2001 Appellant was civilly committed as a sexually violent predator in California. Even being institutionalized did not slow down appellant's propensity for violence. During the punishment phase, the State was allowed to present evidence of appellant's assaults in California on four different inmates as well as institution staff. Appellant also committed violent assaults against several Texas institution inmates. Of particular note was evidence that other inmates convicted of violent crimes—one being a Mexican Mafia member convicted of murder—asked to be moved out of a cell they shared with appellant because of his violence. Appellant's tendency toward violence is so extreme that even other violent inmates feel unsafe around him.
Cantu v. State, 939 S.W.2d 627, 649 (Tex.Crim.App.1997) ; *McClesk e y v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

Appellant cites to death penalty statistics on the race of death penalty defendants as evidence of racial bias in Harris County and Texas in general, but appellant has the burden of showing "the existence of purposeful discrimination." Appellant has not carried that burden and makes no showing of any racial bias against himself specifically. Furthermore, the Legislature, not this Court, is tasked with crafting the procedure by which sentences of death are pursued. We have repeatedly rejected similar claims of Equal Protection violation. We are not persuaded to reconsider our previous decisions. Point of error seventeen is overruled.

> *McClesk e y,* 481 U.S. at 292, 107 S.Ct. 1756 (quoting *Whitus v. Georgia,* 385 U.S. 545, 550, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967)).

> *Id.* at 292–93, 107 S.Ct. 1756 ("[T]o prevail under the Equal Protection Clause, [appellant] must prove that the decisionmakers in *his* case acted with discriminatory purpose").

> *Cf.* *Ex parte Davis,* 947 S.W.2d 216, 224 (Tex.Crim.App.1996) (holding that Article 11.071 did not interfere with "core judicial functions" but merely regulated when substantive claims could be raised).

> *See, e.g.,* *Roberts,* 220 S.W.3d at 535.

In point of error eighteen, appellant asserts that the trial court violated his Eighth Amendment rights, "in that the sentencing phase instructions failed to provide the jury the opportunity to have its decision reflect a 'reasoned moral response' to the offender and his offense." Appellant contends that the jury instructions failed to provide a rational process to determine life or death. He states that, by failing to specify that jurors could consider mitigation evidence apart from its relationship to the future dangerousness special issue, the jury instructions failed to meet the Eighth Amendment's guarantee of individualized sentencing.

This Court has rejected similar claims, finding that the applicable state statutory provisions instruct the jury to take into consideration "all the evidence"—not just evidence a juror might consider mitigating—when determining whether there are sufficient mitigating circumstances to warrant the imposition of a sentence of life imprisonment. In this case, the jury instructions were consistent with the applicable state statutes. It is presumed that the jurors understood and followed the instructions, absent evidence to the contrary. Appellant has not provided such evidence. Point of error eighteen is overruled.

Luna v. State, 268 S.W.3d 594, 609–10 (Tex.Crim.App.2008).

Crenshaw, 378 S.W.3d at 467.

See *Colburn,* 966 S.W.2d at 520.

In point of error nineteen, appellant asserts that the trial court violated the Eighth and Fourteenth Amendments "when it failed to instruct the jury so as to provide a reasoned and rational moral process for the consideration and implementation of mitigating circumstances." Appellant argues that the jury instructions on the special issues, "both in their lack of definition and because of their structure, failed to provide a constitutionally satisfactory process for considering and giving effect to mitigating circumstances." He asserts that the Eighth Amendment requires a greater degree of accuracy and fact-finding in a capital case than in a non-capital case, and the "vague and inherently flawed" jury instructions did not assure this heightened degree of reliability.

Because appellant does not specify which part of the jury instructions on the special issues are "vague and inherently flawed," it is surmised that this point of error is an allegation of cumulative error or harm based on the separate allegations of error specified in points of error six through eighteen. However, in points of error six through eighteen, appellant did not establish that the trial court erred. Therefore, there is no error to cumulate. In the alternative, this point of error is inadequately briefed. Point of error nineteen is overruled.

See Gamboa, 296 S.W.3d at 585.

Tex.R.App. P. 38.1 38.1(i) ; *Ladd v. State,* 3 S.W.3d at 575.

The judgment of the trial court is affirmed.

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)

Justice Scalia delivered the opinion of the Court.

The Massachusetts courts in this case admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

I

In 2001, Boston police officers received a tip that a Kmart employee, Thomas Wright, was engaging in suspicious activity. The informant reported that Wright repeatedly received phone calls at work, after each of which he would be picked up in front of the store by a

blue sedan, and would return to the store a short time later. The police set up surveillance in the Kmart parking lot and witnessed this precise sequence of events. When Wright got out of the car upon his return, one of the officers detained and searched him, finding four clear white plastic bags containing a substance resembling cocaine. The officer then signaled other officers on the scene to arrest the two men in the car—one of whom was petitioner Luis Melendez-Diaz. The officers placed all three men in a police cruiser.

During the short drive to the police station, the officers observed their passengers fidgeting and making furtive movements in the back of the car. After depositing the men at the station, they searched the police cruiser and found a plastic bag containing 19 smaller plastic bags hidden in the partition between the front and back seats. They submitted the seized evidence to a state laboratory required by law to conduct chemical analysis upon police request. Mass. Gen. Laws, ch. 111, §12 (West 2006).

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. Ch. 94C, §§32A, 32E(b)(1). At trial, the prosecution placed into evidence the bags seized from Wright and from the police cruiser. It also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags "[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine." App. to Pet. for Cert. 24a, 26a, 28a. The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law. Mass. Gen. Laws, ch. 111, §13.

Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause decision in *Crawford* v. *Washington*, 541 U. S. 36 (2004), required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as "prima facie evidence of the composition, quality, and the net weight of the narcotic … analyzed." Mass. Gen. Laws, ch. 111, §13.

The jury found Melendez-Diaz guilty. He appealed, contending, among other things, that admission of the certificates violated his Sixth Amendment right to be confronted with the witnesses against him. The Appeals Court of Massachusetts rejected the claim, affirmance order, 69 Mass. App. 1114, 870 N. E. 2d 676, 2007 WL 2189152, *4, n. 3 (July 31, 2007), relying on the Massachusetts Supreme Judicial Court's decision in *Commonwealth* v. *Verde*, 444 Mass. 279, 283–285, 827 N. E. 2d 701, 705–706 (2005), which held that the authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment. The Supreme Judicial Court denied review. 449 Mass. 1113, 874 N. E. 2d 407 (2007). We granted certiorari. 552 U. S. ___ (2008).

Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U. S. 400, 403 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." In *Crawford*, after reviewing the Clause's historical underpinnings, we held that it guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U. S., at 51. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.,* at 54.

opinion described the class of testimonial statements covered by the Confrontation Clause as follows:

"Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*, at 51–52 (internal quotation marks and citations omitted).

There is little doubt that the documents at issue in this case fall within the "core class of testimonial statements" thus described. Our description of that category mentions affidavits twice. See also *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment) ("[T]he

Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary 62 (8th ed. 2004). They are incontrovertibly a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Crawford, supra,* at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." *Davis* v. *Washington*, 547 U. S. 813, 830 (2006) (emphasis deleted).

Here, moreover, not only were the affidavits " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' " *Crawford, supra,* at 52, but under Massachusetts law the *sole purpose* of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance, Mass. Gen. Laws, ch. 111, §13. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves. See App. to Pet. for Cert. 25a, 27a, 29a.

In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to " 'be confronted with' " the analysts at trial. *Crawford, supra,* at 54.[Footnote 1]

III

Respondent and the dissent advance a potpourri of analytic arguments in an effort to avoid this rather straightforward application of our holding in *Crawford*. Before addressing them, however, we must assure the reader of the falsity of the dissent's opening alarum that we are "sweep[ing] away an accepted rule governing the admission of scientific evidence" that has been "established for at least 90 years" and "extends across at least 35 States and six Federal Courts of Appeals." *Post*, at 1 (opinion of Kennedy, J.).

The vast majority of the state-court cases the dissent cites in support of this claim come not from the last 90 years, but from the last 30, and not surprisingly nearly all of them rely on our decision in *Ohio* v. *Roberts*, 448 U. S. 56 (1980), or its since-rejected theory that unconfronted testimony was admissible as long as it bore indicia of reliability, *id.,* at 66. See *post*, at 30.[Footnote 2] As for the six Federal Courts of Appeals cases cited by the dissent, five of them postdated and expressly relied on *Roberts*. See *post,* at 21–22. The sixth predated *Roberts* but relied entirely on the same erroneous theory. See *Kay* v. *United States*, 255 F. 2d 476, 480–481 (CA4 1958) (rejecting confrontation clause challenge "where there is reasonable necessity for [the evidence] and where . . . the evidence has those qualities of reliability and trustworthiness").

A review of cases that predate the *Roberts* era yields a mixed picture. As the dissent notes, three state supreme court decisions from the early 20th century denied confrontation with respect to certificates of analysis regarding a substance's alcohol content. See *post,* at 21 (citing cases from Massachusetts, Connecticut, and Virginia). But other state courts in the same era reached the opposite conclusion. See *Torres* v. *State*, 18 S. W. 2d 179, 180 (Tex. Crim. App. 1929); *Volrich* v. *State*, No. 278, 1925 WL 2473 (Ohio App., Nov. 2, 1925). At least this much is entirely clear: In faithfully applying *Crawford* to the facts of this case, we are not overruling 90 years of settled jurisprudence. It is the dissent that seeks to overturn precedent by resurrecting *Roberts* a mere five years after it was rejected in *Crawford*.

We turn now to the various legal arguments raised by respondent and the dissent.

ARespondent first argues that the analysts are not subject to confrontation because they are not "accusatory" witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband. See

Brief for Respondent 10. This finds no support in the text of the Sixth Amendment or in our case law.

The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses *against him*." (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses "against him," the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor." U. S. Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former;[Footnote 3] the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

It is often, indeed perhaps usually, the case that an adverse witness's testimony, taken alone, will not suffice to convict. Yet respondent fails to cite a single case in which such testimony was admitted absent a defendant's opportunity to cross-examine.[Footnote 4] Unsurprisingly, since such a holding would be contrary to longstanding case law. In *Kirby* v. *United States*, 174 U. S. 47 (1899), the Court considered Kirby's conviction for receiving stolen property, the evidence for which consisted, in part, of the records of conviction of three individuals who were found guilty of stealing the relevant property. *Id.,* at 53. Though this evidence proved only that the property was stolen, and not that Kirby received it, the Court nevertheless ruled that admission of the records violated Kirby's rights under the Confrontation Clause. *Id.,* at 55. See also *King* v. *Turner*, 1 Mood. 347, 168 Eng. Rep. 1298 (1832) (confession by one defendant to having stolen certain goods could not be used as evidence against another defendant accused of receiving the stolen property).

B

Respondent and the dissent argue that the analysts should not be subject to confrontation because they are not "conventional" (or "typical" or "ordinary") witnesses of the sort whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh. *Post*, at 15–16; Brief for Respondent 28. It is true, as the Court recognized in *Crawford*, that *ex parte* examinations of the sort used at Raleigh's trial have "long been thought a paradigmatic confrontation violation." 541 U. S., at 52. But the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the *ex parte* examinations in *Raleigh's Case*, 2 How. St. Tr. 1 (1603). That use provoked such an outcry precisely because it flouted the deeply rooted common-law tradition "of live testimony in court subject to adversarial testing." *Crawford*, *supra*, at 43 (citing 3 W. Blackstone, Commentaries on the Laws of England 373–374 (1768)). See also *Crawford*, *supra*, at 43–47.

In any case, the purported distinctions respondent and the dissent identify between this case and Sir Walter Raleigh's "conventional" accusers do not survive scrutiny. The dissent first contends that a "conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test." *Post*, at 16–17. It is doubtful that the analyst's reports in this case could be characterized as reporting "near-contemporaneous observations"; the affidavits were completed almost a week after the tests were performed. See App. to Pet. for Cert. 24a–29a (the tests were performed on November 28, 2001, and the affidavits sworn on December 4, 2001). But regardless, the dissent misunderstands the role that "near-contemporaneity" has played in our case law. The dissent notes that that factor was given "substantial weight" in *Davis, post,* at 17, but in fact that decision *disproves* the dissent's position. There the Court considered the admissibility of statements made to police officers responding to a report of a domestic disturbance. By the time officers arrived the assault had ended, but the victim's statements—written and oral—were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a "present sense impression." *Davis*, 547 U. S.*,* at 820 (internal quotation marks omitted). Though the witness's statements in *Davis* were "near-contemporaneous" to the events she reported, we nevertheless held that they could *not* be admitted absent an opportunity to confront the witness. *Id.,* at 830.

A second reason the dissent contends that the analysts are not "conventional witnesses" (and thus not subject to confrontation) is that they "observe[d] neither the crime nor any human action related to it." *Post,* at 17. The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause. For example, is a police officer's investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses—a hardly "unconventional" class of witnesses.

A third respect in which the dissent asserts that the analysts are not "conventional" witnesses and thus not subject to confrontation is that their statements were not provided in response to interrogation. *Ibid*. See also Brief for Respondent 29. As we have explained, "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Davis*, *supra*, at 822–823, n. 1. Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a " 'witness against' the defendant," Brief for Respondent 26, than one who is responding to interrogation. In any event, the analysts' affidavits in this case *were* presented in response to a police request. See Mass. Gen. Laws, ch. 111, §§12–13. If an affidavit submitted in response to a police officer's request to "write down what happened" suffices to trigger the Sixth Amendment's protection (as it apparently does, see *Davis*, 547 U. S., at 819–820; *id.*, at 840, n. 5 (Thomas, J., concurring in judgment in part and dissenting in part)), then the analysts' testimony should be subject to confrontation as well.

C

Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is "prone to distortion or manipulation," and the testimony at issue here, which is the "resul[t] of neutral, scientific testing." Brief for Respondent 29. Relatedly, respondent and the dissent argue that confrontation of forensic analysts would be of little value because "one would not reasonably expect a laboratory professional … to feel quite differently about the results of his scientific test by having to look at the defendant." *Id.,* at 31 (internal quotation marks omitted); see *post*, at 10–11.

This argument is little more than an invitation to return to our overruled decision in *Roberts*, 448 U. S. 56, which held that evidence with "particularized guarantees of trustworthiness" was admissible notwithstanding the Confrontation Clause. *Id.,* at 66. What we said in *Crawford* in response to that argument remains true:

"To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. … Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U. S., at 61–62.

Respondent and the dissent may be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test.[Footnote 5] But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6–1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of

expediency." *Id.*, at S–17. A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, *post,* at 10, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as *Amicus Curiae* 15–17 (discussing cases of documented "drylabbing" where forensic analysts report results of tests that were never performed); National Academy Report 1–8 to 1–10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See *Coy* v. *Iowa*, 487 U. S. 1012, 1019 (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009). And the National Academy Report concluded:

"The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report P–1 (emphasis in original).[Footnote 6]

Like expert witnesses generally, an analyst's lacl Dof proper training or deficiency in judgment may be disclosed in cross-examination. This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that "[t]he substance was found to contain: Cocaine." App. to Pet. for Cert. 24a, 26a, 28a. At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use "methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs," App. to Brief for Petitioner 1a–2a. At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination. See 2 P. Giannelli & E. Imwinkelried, Scientific Evidence §23.03[c], pp. 532–533, ch. 23A, p. 607 (4th ed. 2007) (identifying four "critical errors" that analysts may commit in interpreting the results of the commonly used gas chromatography/mass spectrometry analysis); Shellow, The Application of *Daubert* to the Identification of Drugs, 2 Shepard's Expert & Scientific Evidence Quarterly 593, 600 (1995) (noting that while spectrometers may be equipped with computerized matching systems, "forensic analysts in crime laboratories typically do not utilize this feature of the instrument, but rely exclusively on their subjective judgment").

The same is true of many of the other types of forensic evidence commonly used in criminal prosecutions. "[T]here is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material." National Academy Report S–5. See also *id.,* at 5–9, 5–12, 5–17, 5–21 (discussing problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis). Contrary to respondent's and the dissent's suggestion, there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts.

Respondent argues that the analysts' affidavits are admissible without confrontation because they are "akin to the types of official and business records admissible at common law." Brief for Respondent 35. But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer* v. *Hoffman*, 318 U. S. 109 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business." *Id.*, at 114.[Footnote 7] The analysts' certificates—like police reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel").

Respondent seeks to rebut this limitation by noting that at common law the results of a coroner's inquest were admissible without an opportunity for confrontation. But as we have previously noted, whatever the status of coroner's reports at common law in England, they were not accorded any special status in American practice. See *Crawford*, 541 U. S., at 47, n. 2; *Giles* v. *California*, 554 U. S. ___, ___ (2008) (slip op., at 20) (Breyer, J., dissenting); Evidence—Official Records—Coroner's Inquest, 65 U. Pa. L. Rev. 290 (1917).

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence. See *post,* at 19. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State* v. *Wilson*, 141 La. 404, 409, 75 So. 95, 97 (1917). See also *State* v. *Champion*, 116 N. C. 987, 21 S. E. 700, 700–701 (1895); 5 J. Wigmore, Evidence §1678 (3d ed. 1940). The dissent suggests that the fact that this exception was " 'narrowly circumscribed' " makes no difference. See *post,* at 20. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.[Footnote 8]

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition—it was prepared by a public officer in the regular course of his official duties—and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See *People* v. *Bromwich*, 200 N. Y. 385, 388–389, 93 N. E. 933, 934 (1911); *People* v. *Goodrode*, 132 Mich. 542, 547, 94 N. W. 14, 16 (1903); Wigmore, *supra*, §1678.[Footnote 9]

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford:* "Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." 541 U. S., at 56. Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

E

Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power—whether pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. See, *e.g.*, *Davis*, 547 U. S., at 820 ("[The witness] was subpoenaed, but she did not appear at … trial"). Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

F

Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the " 'necessities of trial and the adversary process.' " Brief for Respondent 59. It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.

We also doubt the accuracy of respondent's and the dissent's dire predictions. The dissent, respondent, and its *amici* highlight the substantial total number of controlled-substance analyses performed by state and federal laboratories in recent years. But only some of those tests are implicated in prosecutions, and only a small fraction of those cases actually proceed to trial. See Brief for Law Professors as *Amici Curiae* 7–8 (nearly 95% of convictions in state and federal courts are obtained via guilty plea).[Footnote 10]

Perhaps the best indication that the sky will not fall after today's decision is that it has not done so already. Many States have already adopted the constitutional rule we announce today,[Footnote 11] while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report, *id.*, at 13–15 (cataloging such state laws). Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial. Indeed, in Massachusetts itself, a defendant may subpoena the analyst to appear at trial, see Brief for Respondent 57, and yet there is no indication that obstructionist defendants are abusing the privilege.

The dissent finds this evidence "far less reassuring than promised." *Post*, at 28. But its doubts rest on two flawed premises. First, the dissent believes that those state statutes "requiring the defendant to give early notice of his intent to confront the analyst," are "burden-shifting statutes [that] may be invalidated by the Court's reasoning." *Post,* at 22, 28–29. That is not so. In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. See, *e.g,* Ga. Code Ann. §35–3–154.1 (2006); Tex. Code Crim. Proc. Ann., Art. 38.41, §4 (Vernon 2005); Ohio Rev. Code Ann. §2925.51(C) (West 2006). Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. See *Wainwright* v. *Sykes*, 433 U. S. 72, 86–87 (1977). It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. See Fed. Rules Crim. Proc. 12.1(a), (e), 16(b)(1)(C); Comment: Alibi Notice Rules: The Preclusion Sanction as Procedural Default, 51 U. Chi. L. Rev. 254, 254–255, 281–285 (1984) (discussing and cataloguing State notice-of-alibi rules); *Taylor* v. *Illinois*, 484 U. S. 400, 411 (1988); *Williams* v. *Florida*, 399 U. S. 78, 81–82 (1970). There is no conceivable reason why he cannot similarly be

compelled to exercise his Confrontation Clause rights before trial. See *Hinojos-Mendoza* v. *People*, 169 P. 3d 662, 670 (Colo. 2007) (discussing and approving Colorado's notice-and-demand provision). Today's decision will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause.[Footnote 12]

Second, the dissent notes that several of the state-court cases that have already adopted this rule did so pursuant to our decision in *Crawford*, and not "independently … as a matter of state law." *Post,* at 28. That may be so. But in assessing the likely practical effects of today's ruling, it is irrelevant *why* those courts adopted this rule; it matters only *that* they did so. It is true that many of these decisions are recent, but if the dissent's dire predictions were accurate, and given the large number of drug prosecutions at the state level, one would have expected immediate and dramatic results. The absence of such evidence is telling.

But it is not surprising. Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.[Footnote 13] The *amicus* brief filed by District Attorneys in Support of the Commonwealth in the Massachusetts Supreme Court case upon which the Appeals Court here relied said that "it is almost always the case that [analysts' certificates] are admitted without objection. Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to a defendant from such testimony." Brief for District Attorneys in Support of the Commonwealth in No. SJC–09320 (Mass.), p. 7 (footnote omitted). Given these strategic considerations, and in light of the experience in those States that already provide the same or similar protections to defendants, there is little reason to believe that our decision today will commence the parade of horribles respondent and the dissent predict.

* * *

This case involves little more than the application of our holding in *Crawford* v. *Washington*, 541 U. S. 36. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.[Footnote 14] We therefore reverse the judgment of the Appeals Court of Massachusetts and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Null (Alan William Null) v. State, No. PD-0192-22, op. June 12, 2024

As I understand it, I agree with the result reached by the Court's opinion today. But the Court's opinion seems to focus more than I would prefer on the requirements of the Federal Rules of Evidence and commentaries to those rules. Those rules do not control in Texas state courts. Only our state rules apply, and I am concerned that the Court creates confusion by seeming to suggest that the Federal Rules have some controlling effect on the admissibility of evidence in Texas.0F [1]

Moreover, a focus on the text of our state rules makes clear that there is a difference between expert testimony by a testifying expert and the facts or data underlying that expert's opinion. The Court's opinion seems to acknowledge the difference to which I refer, but I remain somewhat tentative about the clarity of its explanation. And while I do not know if I will do any better a job of explaining that difference, I will do my best.

I.Texas Rules of Evidence at Issue in This Case

First, Texas Rule of Evidence 702 provides that a qualified expert may testify to an opinion so long as that opinion will help the trier of fact to understand other evidence or determine a fact is issue. Tex. R. Evid. 702 (emphasis added). The Court has also said that, in order to be helpful to the trier of fact, and thus admissible pursuant to Rule 702, an expert's opinion must be reliable. Somers v. State, 368 S.W.3d 528, 535 (Tex. Crim. App. 2012) ("The threshold determination in an inquiry into the admissibility of scientific evidence is whether the evidence is helpful to the trier of fact, and for such evidence to be helpful, it must be reliable."). Moreover, to be reliable, and thus helpful to a jury as required by Rule 702, this Court has said that an expert

opinion must meet three specific criteria: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question. See Kelly v. State, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992).

Second, Rule 703 authorizes an expert, in forming his or her opinion, to rely on facts or data, even if such facts or data are not themselves shown to be admissible, so long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Tex. R. Evid. 703. And while, as a condition for the admissibility of an expert's opinion, the underlying facts and data relied upon need not be admissible, Rule 705 provides for how those facts and data may become admissible. Tex. R. Evid. 705.

Rule 705 provides that an expert may be required to disclose underlying facts and data relied upon (1) if the Court requires it as a condition to the admissibility of the expert's opinion (specifically, as explained in the Rule itself: "unless the Court orders otherwise"), or (2) if the expert is called upon to disclose the underlying facts or data while under cross-examination. Tex. R. Evid. 705(a). Also, before admission of an expert's opinion, an adverse party "must . be permitted to examine the expert about the underlying facts or data" outside the presence of the jury. Tex. R. App. 705(b). And Rule 705 provides that, if the underlying facts or data do not provide a sufficient basis for the opinion, the expert's opinion is inadmissible. Tex. R. Evid. 705(c).

II.Application in this Case

The Court is right to point out that, while Appellant explicitly invoked Rule 702, his complaint at trial and in this appeal—the one over which we granted discretionary review—is more complex. The Court, for example, makes clear that Appellant "argues that Symonds' testimony was unreliable because she did not know about the quality of the Bode Technologies data." Majority Opinion at 7. Appellant argues that "Symonds' testimony would be unreliable under Rule 702 because she knew nothing about Bode Technologies or the technicians and analyst who worked the case." Id. at 4.

Appellant's complaint, both in the trial court and on appeal, seems to pertain not only to the admissibility of the opinion of Mary Symonds, the testifying expert in the punishment phase of his trial—that Appellant was the person who committed the extraneous sexual assault against Catherine Bunch—but more specifically to whether, in light of the expert's reliance on underlying facts and data from Bode Technologies that had not itself been shown to meet all three of the Kelly reliability elements, Symonds' opinion itself was still reliable as a function of Rule 702.

According to Appellant, the State was required, as a condition of the admissibility of Symonds' expert opinion testimony, to demonstrate both the reliability of her own expert opinion, and also the reliability of the underlying facts and data upon which she relied. But that seems, at least arguably, to go beyond what is required by Rule 703. All Rule 703 requires before underlying facts and data may be relied upon by an expert in forming her own opinion is that "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Tex. R. Evid. 703. Rule 703 does not suggest that, to offer a reliable opinion, an expert must have personal knowledge of every minute detail about how a source relied upon developed their own facts or data. It only suggests that the expert would act reasonably to rely on the facts or data developed by others in forming his or her own opinion. And Rule 705(c) adds to that a requirement that the "facts or data" relied upon must at least "provide a sufficient basis for the opinion." Tex. R. Evid. 705(c).

Deciding whether, pursuant to rule 703, an expert in a field would "reasonably rely on those kinds of facts or data" may require an assessment of reliability of a sort, even perhaps in the sense outlined in our opinion in Kelly. But the assessment required by Rule 703 is different than the inquiry that we have required with regard to testifying experts themselves, under Rule 702. If for example, a testifying expert relied upon facts or data that were definitively unreliable, then it would strain credibility that "experts in the field would reasonably rely upon them." But if an expert is familiar generally with the work and reputation of the source relied upon, and she has no knowledge of any reason to doubt its work, it might not be unreasonable for that expert to rely on that source in developing an opinion.

Furthermore, when underlying facts or data are relied upon by a testifying expert, the court must ensure that the facts or data relied upon "provide a sufficient basis for the [expert's] opinion" as required by Rule 705(c). But that is not the same inquiry as is required for determining the reliability (to satisfy the requirement of helpfulness) of the testifying expert's opinion itself under rule 702. The Court suggests that whether underlying facts or data provide a "sufficient" basis boils down to a function of quantity of evidence over quality. Majority Opinion at 11 ("Whether there is a sufficient basis is a quantitative rather than a qualitative analysis."). But I am not so sure. It seems to me that

"sufficient basis" as used in Rule 705(c) may suggest both a quantitative and a qualitative assessment.

Under our Texas Rules of Evidence, when a testifying expert relies upon underlying facts and data to support her opinion, those underlying facts and data need not themselves be admissible before the expert may rely upon them. But they must be the kind of facts and data that experts in the field would "reasonably rely upon" in developing their opinion offered at trial. Tex. R. Evid. 703. In addition, the underlying facts and data must provide a "sufficient basis for the [expert's] opinion." Tex. R. Evid. 705(c).

But I would not conclude, at least not as readily as the Court does in its opinion today, that any analysis conducted pursuant to a Rule 705(c) objection will always be "the same" as that required when an objection is raised pursuant to Rule 702. Majority Opinion at 20 ("[T]he analysis will be the same."). It seems to me that the inquiry required by a Rule 705(c) analysis would not be exactly the same as that required by an appropriate Rule 702 objection. One analysis is about whether a testifying expert's opinion testimony is sufficiently "reliable" that it will "help" the trier of fact. Tex. Rule Evid. 702; Kelly, 824 S.W.2d at 572. The other is about whether facts and data relied upon by the testifying expert are "sufficient" to support the opinion. Tex. R. Evid. 705(c).

III. Conclusion

All that being said, it seems clear enough to me in the present case that, as outlined in the Court's opinion, Symonds' explanations of her reasons for accepting and relying upon the facts and data she received from Bode Technologies sufficiently demonstrated that "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Tex. R. Evid. 703. And, as further explained in the Court's opinion, Symonds' testimony similarly demonstrated that the underlying facts and data provided a "sufficient basis for [her] opinion." Consequently, I agree with the Court's decision to reverse the court of appeals and affirm the judgment of the trial court.

I respectfully concur.

Paredes v. State (Tex. Ct. App./post-2011 treatments)

J. BRETT BUSBY, Justice.

A jury found appellant, Jovany Jampher Paredes, guilty of capital murder and the trial court imposed the mandatory sentence of life in prison without the possibility of parole. *See* Tex. Penal Code Ann. § § 12.31(a)(2), 19.03(a)(2) (West 2011). Appellant appealed his conviction and argued, among other things, that the trial court violated the Confrontation Clause by permitting a forensic scientist to testify regarding her DNA analysis, which relied on raw data generated by non-testifying analysts. This Court affirmed the conviction. *See Paredes v. State,* No. 14–10–00266–CR, 2011 WL 3667839 (Tex.App.-Houston [14th Dist.] Aug. 23, 2011, pet. granted) (mem. op., not designated for publication). The Court of Criminal Appeals granted appellant's petition for discretionary review, vacated this Court's judgment, and remanded the case to us to reconsider the Confrontation Clause issue in light of its decision in *Burch v. State,* 401 S.W.3d 634 (Tex.Crim.App.2013). *See Paredes v. State,* No. PD–1420–11, 2013 WL 4507075, at *1 (Tex.Crim.App. Aug. 21, 2013) (per curiam, not designated for publication). On remand, this Court allowed the parties to file supplemental briefs. Having considered appellant's sole issue as framed by the Court of Criminal Appeals, we conclude that *Burch* does not support a holding that the scientist's testimony in this case violated the Confrontation Clause. Therefore, we affirm the trial court's judgment.

Analysis

Appellant argues his right to confront the witnesses against him under the Sixth Amendment of the United States Constitution was violated because Freeman based her opinion on raw DNA data produced by three non-testifying analysts working under her supervision. We rejected this argument on original submission of the case, stating "Freeman offered her expert opinion after she personally compiled the DNA data supplied by the non-testifying analysts, interpreted it, and performed the comparative analysis. An expert witness who offers her opinion based in part on lab work performed by another does not violate the Confrontation Clause." *Paredes,* 2011 WL 3667839, at *10. The Court of Criminal Appeals remanded the case to us to reconsider this

decision "in light of *Burch.*" *Paredes,* 2013 WL 4507075, at *1.

I. Because the facts of *Burch* and the present case differ materially, *Burch* does not show that the Confrontation Clause was violated here.

In *Burch,* the State offered into evidence a one-page lab report stating that four Ziploc bags contained cocaine. *Burch,* 401 S.W.3d at 635. The lab report was signed by the testing analyst as well as the reviewing supervisor. The State called only the reviewing supervisor to testify. The supervisor testified that the testing analyst had performed all of the tests on the cocaine. *Id.* The supervisor also testified that the testing analyst no longer worked for the lab, but she did not offer any explanation for the testing analyst's departure. *Id.* The Court of Criminal Appeals held the surrogate expert testimony of the supervisor violated the Confrontation Clause because the supervisor lacked personal knowledge of the specific tests used and their execution. *Id.* at 640.

In reaching this conclusion, the Court of Criminal Appeals relied primarily on the United States Supreme Court's decision in *Bullcoming v. New Mexico,* ——U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). In *Bullcoming,* the prosecution did not call the analyst who tested the defendant's blood sample for alcohol because the analyst was on unpaid leave. *Id.* at 2709. Instead, the prosecution called another analyst to testify who was familiar with the laboratory's procedures. *Id.* The Supreme Court held that the lab report, which certified that the defendant's blood alcohol level was above the legal limit, was a testimonial statement of the analyst who performed the tests and therefore could not be offered into evidence through the testimony of a different or surrogate witness. *Id.* at 2710.

Because of notable differences between the facts of the present case and the facts of both *Burch* and *Bullcoming,* we conclude those cases do not support a result different from our original opinion. First, in the present case, Freeman testified that if there was a problem conducting the analysis of the DNA, there would be no result, not an erroneous one. This testimony directly addresses one of the primary concerns underlying both *Burch* and *Bullcoming:* incompetent or biased analysts. *See Adkins v. State,* 418 S.W.3d 856, 862 (Tex.App.-Houston [14th Dist.] 2013, no pet.) (holding no Confrontation Clause violation occurred because the testifying analyst was able to discern the quality of the blood draw sample as part of conducting his analysis). In addition, there was no evidence in the present case that any of the three non-testifying analysts were no longer employed by Identigene, evidence considered significant in both *Burch* and *Bullcoming. See Bullcoming,* 131 S.Ct. at 2715–16 (pointing out credibility issues created by the placement of the testing analyst on unpaid leave); *Burch,* 401 S.W.3d at 635 (noting the testing analyst was no longer employed by the testing lab).

Second, unlike the prosecution in both *Burch* and *Bullcoming,* the State in this case did not introduce into evidence any hearsay documents containing data generated by the three non-testifying analysts. More specifically, the State did not introduce either (1) the amplified DNA molecules that the analysts prepared and inserted into the instrument, or (2) the raw data about those molecules that was generated by the instrument and provided to Freeman. This presents a question explicitly left unanswered in *Bullcoming,* as Justice Sotomayor noted. *See Bullcoming,* 131 S.Ct. at 2722 (Sotomayor, J., concurring) ("We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted into evidence."). *Burch* indicates that a testifying expert may rely on unadmitted data generated by a non-testifying analyst—the situation we are presented with here—without violating the Confrontation Clause. *See Burch,* 401 S.W.3d at 639; *Lee v. State,* 418 S.W.3d 892, 898–99 (Tex.App.-Houston [14th Dist.] 2013, pet. ref'd).

Finally and most significantly, unlike in *Burch* and *Bullcoming,* Freeman was not a surrogate witness serving as a mere conduit for another analyst's opinions. Instead, Freeman was the analyst who actually developed the opinions she testified to during appellant's trial. Freeman also had personal knowledge of the procedures and equipment used by Identigene. *See McWilliams v. State,* 367 S.W.3d 817, 820 (Tex.App.-Houston [14th Dist.] 2012, no pet.) (holding defendant's confrontation rights were not violated because testifying expert had direct connection to scientific test at issue). In addition, Freeman testified at length and was cross-examined regarding how she developed her independent opinions regarding the DNA found in the t-shirt stain and collar scrapings. Therefore, we conclude *Burch* does not support a holding that admitting Freeman's testimony violated the Confrontation Clause.

II. Appellant's rights under the Confrontation Clause were not violated because the raw DNA data generated by the non-testifying analysts is non-testimonial.

Burch's discussion of when statements are testimonial also lends support to our original conclusion that no Confrontation Clause violation occurred here. "The Sixth Amendment's Confrontation Clause provides a simple yet unforgiving rule: the State may not introduce a testimonial hearsay statement unless (1) the declarant is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the declarant." *Lee,* 418 S.W.3d at 895. In the present case, there is no contention that the three non-testifying analysts were unavailable or that appellant had an opportunity to cross-examine them. Appellant argues that a Confrontation Clause violation occurred because Freeman based her opinion on testimonial hearsay in the form of raw DNA data produced by the non-testifying analysts. To demonstrate such a violation, appellant must show—among other things—that the raw data was testimonial.

In *Burch,* the Court of Criminal Appeals stated "that the exact contours of what is testimonial continue to be defined by the courts." *Burch,* 401 S.W.3d at 636. It then quoted *Crawford v. Washington,* 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), for the proposition that testimonial statements are those " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " *Id.* (quoting *Crawford,* 541 U.S. at 52, 124 S.Ct. 1354). This principle has been applied to forensic reports that are both formal and have been created for the sole purpose of establishing or proving a fact highly relevant to a criminal prosecution. *Burch,* 401 S.W.3d at 636–37 (citing *Melendez–Diaz,* 557 U.S. 305, 311, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)).

Burch and *Bullcoming* stand for two related propositions. *Adkins,* 418 S.W.3d at 862. First, a forensic report is testimonial if it asserts a fact such as blood alcohol content or that a substance is a certain amount of cocaine. *Id.* Second, the analyst who determines that fact must be subject to cross-examination. *Id.; see Melendez–Diaz,* 557 U.S. at 310, 129 S.Ct. 2527 (holding admission of analysts' affidavits certifying that substance possessed by the defendant was cocaine without accompanying testimony by the testing analyst violated the Confrontation Clause).

Because the raw DNA data generated by the non-testifying analysts does not meet the requirements of a testimonial statement discussed above, we hold it is non-testimonial. We reach this conclusion for two reasons. First, unlike in *Burch* and *Bullcoming,* the raw DNA data generated by the non-testifying analysts here is not found in a formal report and was not admitted into evidence during appellant's trial. It cannot be said that the "primary purpose" of this data, which in itself does not establish any relevant fact, was "creating an out-of-court substitute for trial testimony." *Michigan v. Bryant,* —— U.S. ——, ——, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011). Nor does the raw data meet either of the testimonial requirements used by the plurality and Justice Thomas's concurrence in *Williams v. Illinois,* ——U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012): it was not prepared "for the primary purpose of accusing" appellant (indeed, even Freeman's testimony did not accuse appellant); and it bore no "indicia of solemnity." *Id.* at 2243 (plurality op.), at 2259 (Thomas, J., concurring in judgment); *see also id.* at 2244 (plurality op.) ("The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.").

Second, the raw DNA data was used by Freeman, one of the State's testifying expert witnesses, to develop her own opinions that the t-shirt contained the complainant's DNA as well as the DNA of a major contributor. It is Freeman's opinions—not the raw DNA data generated by the non-testifying analysts—that asserted facts relevant to appellant's prosecution, and appellant was able to cross-examine her regarding those opinions. As noted in Part I above, both *Burch* and our decision in *Lee* indicate that a testifying expert may rely on unadmitted data to form an independent opinion without violating the Confrontation Clause.

Because it is not required that everyone whose testimony may be relevant to establishing the chain of custody, authenticity of the sample, or the accuracy of the testing device must appear in person as part of the prosecution's case, we conclude Freeman's testimony did not violate appellant's Sixth Amendment right to confront the witnesses against him. *Melendez–Diaz,* 557 U.S. at 311 n. 1, 129 S.Ct. 2527; *see Adkins,* 418 S.W.3d at 862 (holding Confrontation Clause not violated even though nurse who drew defendant's blood did not testify because analyst who determined defendant's blood alcohol level did testify); *Infante v. State,* 404 S.W.3d 656, 667 (Tex.App.-Houston [1st Dist.] 2012, no pet.) (holding admission of radio serial number obtained by non-testifying technician did not violate Confrontation Clause even though technician could have misread the serial number or machine technician used could have malfunctioned because these factors go to the evidence's weight rather than its admissibility); *see also Jamerson v. State,* Nos. 05–11–00362–CR, 05–11–00363–CR, 2014 WL 1009990, at *2 (Tex.App.-Dallas Feb. 14, 2014, no pet.) (mem. op., not designated for publication) (holding analyst who testified regarding her own independent

interpretation of raw DNA data satisfied requirements of Confrontation Clause even though another, non-testifying analyst had actually conducted the testing that produced the raw data). Therefore, we overrule appellant's single issue on remand.

Conclusion

Having overruled appellant's sole issue on remand, we affirm the judgment of the trial court.

Smith v. Arizona, 602 U.S. ___ (2024)

Justice Kagan delivered the opinion of the Court.

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. The Clause bars the admission at trial of "testimonial statements" of an absent witness unless she is "unavailable to testify, and the defendant ha[s] had a prior opportunity" to cross-examine her. *Crawford* v. *Washington*, 541 U.S. 36, 53–54 (2004). And that prohibition applies in full to forensic evidence. So a prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing. See *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 307, 329 (2009).

The question presented here concerns the application of those principles to a case in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony. This Court has held that the Confrontation Clause's requirements apply only when the prosecution uses out-of-court statements for "the truth of the matter asserted." *Crawford*, 541 U. S., at 60, n. 9. Some state courts, including the court below, have held that this condition is not met when an expert recites another analyst's statements as the basis for his opinion. Today, we reject that view. When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth. As this dispute illustrates, that will generally be the case when an expert relays an absent lab analyst's statements as part of offering his opinion. And if those statements are testimonial too—an issue we briefly address but do not resolve as to this case—the Confrontation Clause will bar their admission.

I

A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In operation, the Clause protects a defendant's right of cross-examination by limiting the prosecution's ability to introduce statements made by people not in the courtroom. For a time, this Court held that the Clause's "preference for face-to-face" confrontation could give way if a court found that an out-of-court statement bore "adequate indicia of reliability." *Ohio* v. *Roberts*, 448 U.S. 56, 65–66 (1980). But two decades ago, the Court changed course, to better reflect original understandings. In *Crawford* v. *Washington*, the Court deemed it "fundamentally at odds with the right of confrontation" to admit statements based on judicial determinations of reliability. 541 U. S., at 61. The Clause, *Crawford* explained, "commands[ ] not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Ibid.* And so the Clause bars the admission at trial of an absent witness's statements—however trustworthy a judge might think them—unless the witness is unavailable and the defendant had a prior chance to subject her to cross-examination.

But not always. The Clause's prohibition "applies only to testimonial hearsay"—and in that two-word phrase are two limits. *Davis* v. *Washington*, 547 U.S. 813, 823 (2006). First, in speaking about "witnesses"—or "those who bear testimony"—the Clause confines itself to "testimonial statements," a category whose contours we have variously described. *Id.*, at 823, 826; see *id.*, at 822 (statements "made in the course of police interrogation" were testimonial when "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution"); *Michigan* v. *Bryant*, 562 U.S. 344, 358, 359 (2011) (statements made to police "to meet an ongoing emergency" were "not procured with a primary purpose of creating an out-of-court substitute for trial testimony"); *Melendez-Diaz*, 557 U. S., at 311 (testimonial certificates of the results of forensic analysis were created "under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial"); *infra*, at 19. Second and more relevant here, the Clause bars only the introduction of hearsay—meaning,

out-of-court statements offered "to prove the truth of the matter asserted." *Anderson* v. *United States*, 417 U.S. 211, 219 (1974). When a statement is admitted for a reason unrelated to its truth, we have held, the Clause's "role in protecting the right of cross-examination" is not implicated. *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985); see *Anderson*, 417 U. S., at 220. That is because the need to test an absent witness ebbs when her truthfulness is not at issue. See *ibid.*; *Street*, 471 U. S., at 414; *infra*, at 13–14, 17.

Not long after *Crawford*, the Court made clear that the Confrontation Clause applies to forensic reports. In *Melendez-Diaz* v. *Massachusetts*, state prosecutors introduced "certificates of analysis" (essentially, affidavits) stating that lab tests had identified a substance seized from the defendant as cocaine. 557 U. S., at 308. But the State did not call as witnesses the analysts who had conducted the tests and signed the certificates. We held that a "straightforward application" of *Crawford* showed a constitutional violation. 557 U. S., at 312. The certificates were testimonial: They had an "evidentiary purpose," identical to the one served had the analysts given "live, in-court testimony." *Id.*, at 311. And the certificates were offered to prove the truth of what they asserted: that the seized powder was in fact cocaine. See *id.*, at 310–311. So the defendant had a right to cross-examine the lab-analyst certifiers. In reaching that conclusion, we rejected the State's claim that the results of so-called "neutral, scientific testing" should be subject to a different rule. *Id.*, at 317. We again underscored that the Confrontation Clause commanded not reliability but one way of testing it—through cross-examination. See *ibid.* And we thought that method might have plenty to do in cases involving forensic analysis. After all, lab tests are "not uniquely immune from the risk of manipulation" or mistake. *Id.*, at 318. The defendant might have used cross-examination to probe "what tests the analysts performed," whether those tests "present[ed] a risk of error," and whether the analysts had the right skill set to "interpret[ ] their results." *Id.*, at 320.

Two years later, the Court relied on *Melendez-Diaz* to hold that a State could not introduce one lab analyst's written findings through the testimony of another. In *Bullcoming* v. *New Mexico*, 564 U.S. 647, 651–652 (2011), an analyst tested the blood-alcohol level of someone charged with drunk driving, and prepared a "testimonial certification" reporting that the level was higher than legal. But by the time the driver's trial began, that analyst had been placed on unpaid leave. So the State instead called a different analyst from the same lab to testify as to what the certification said. The substitute analyst had similar qualifications, and knew about the type of test performed. But the Court held that insufficient to satisfy the Confrontation Clause. The "surrogate testimony," the Court explained, "could not convey what [the certifying analyst] knew or observed" about "the particular test and testing process he employed." *Id.*, at 661. Nor could that "testimony expose any lapses or lies on the certifying analyst's part," or offer any insight into whether his leave-without-pay was the result of misconduct. *Id.*, at 662. Concluded the Court: "[W]hen the State elected to introduce [the] certification," its author—and not any substitute—"became [the] witness [that the defendant] had the right to confront." *Id.*, at 663.

The very next Term brought another case in which one lab analyst related what another had found—though this time on the way to stating her own conclusion. In *Williams* v. *Illinois*, 567 U.S. 50 (2012), state police sent vaginal swabs from a rape victim known as L. J. to a private lab for DNA testing. When the lab sent back a DNA profile, a state analyst checked it against the police department's database and found that it matched the profile of prior arrestee Sandy Williams. The State charged Williams with the rape, and he went to trial. The prosecution chose not to bring the private lab analyst to the stand. Instead, it called Sandra Lambatos, the state analyst who had searched the police database and found the DNA match. Lambatos had no first-hand knowledge of how the private lab had produced its results; she did not even know whether those results actually came from L. J.'s vaginal swabs (as opposed to some other sample). But she spoke repeatedly about comparing Williams's DNA to the DNA "found in [L. J.'s] vaginal swabs." *Id.*, at 61, 71 (plurality opinion); see *id.*, at 124 (Kagan, J., dissenting). So in addition to describing how she discovered a match, Lambatos became the conduit for what a different analyst had reported—that a particular DNA profile came from L. J.'s vaginal swabs. Williams objected, at trial and later: He thought that, just as in *Bullcoming*, crucial evidence had been admitted through a surrogate expert, thus violating his right of confrontation.

But the Illinois Supreme Court rejected Williams's claim, holding that Lambatos's testimony about the private lab analyst's finding did not raise a Confrontation Clause issue. See *People* v. *Williams*, 238

Ill. 2d 125, 143–144, 939 N.E.2d 268, 278–279 (2010). The court explained that under state evidence law, an expert can disclose "underlying facts and data" for "the purpose of explaining the basis for [her] opinion." *Id*., at 137, 143, 939 N. E. 2d, at 274–275, 278. And when she does so, the court held, the testimony is not subject to the Confrontation Clause because it is not admitted "for the truth of the matter asserted." *Id*., at 143, 939 N. E. 2d, at 278. Thus, Lambatos could relay the private lab's finding that L. J.'s vaginal swabs produced a certain DNA profile in order to "explain[ ] the basis for her opinion" that "there was a DNA match between [Williams's] blood sample and the semen sample recovered from L. J." *Id.*, at 150, 939 N. E. 2d, at 282. The admission of the private lab report's contents for that "limited purpose," the court reasoned, would "aid the [factfinder] in assessing the value of [Lambatos's] opinion." *Id.*, at 144, 939 N. E. 2d, at 278; see *id.*, at 150, 939 N. E. 2d, at 282.

This Court granted Williams's petition for certiorari, but failed to produce a majority opinion. Four Members of the Court approved the Illinois Supreme Court's approach to "basis evidence," and agreed that Lambatos's recitation of the private lab's findings served "the legitimate nonhearsay purpose of illuminating the expert's thought process." *Williams*, 567 U. S., at 78 (plurality opinion). But the remaining five Members rejected that view. Those five stated, in two opinions, that basis evidence is generally introduced for its truth, and was so introduced at Williams's trial. Justice Thomas explained that "the purportedly limited reason for [the basis] testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entail[ed] an evaluation of whether [that] testimony [was] true": "[T]he validity of Lambatos'[s] opinion ultimately turned on the truth of [the private lab analyst's] statements." *Id.*, at 106, n. 1, 108 (concurring in judgment). A dissent for another four Justices agreed: "[T]he utility of the [private analyst's] statement that Lambatos repeated logically depended on its truth." *Id*., at 132 (opinion of Kagan, J.). And the State could not avoid that conclusion by "rely[ing] on [Lambatos's] status as an expert." *Id.*, at 126. Those shared views might have made for a happy majority, except that a different Confrontation Clause issue intruded. Justice Thomas thought that the private lab report was not testimonial because it lacked sufficient formality, so affirmed the Illinois Supreme Court on that alternative ground. The bottom line was that Williams lost, even though five Members of this Court rejected the state court's "not for the truth" reasoning.[1]

Our opinions in *Williams* "have sown confusion in courts across the country" about the Confrontation Clause's application to expert opinion testimony. *Stuart* v. *Alabama*, 586 U. S. ___, ___ (2018) (Gorsuch, J., dissenting from denial of certiorari) (slip op., at 2). Some courts have applied the *Williams* plurality's "not for the truth" reasoning to basis testimony, while others have adopted the opposed five-Justice view.[2] This case emerged out of that muddle.

B

Like *Melendez-Diaz*, this case involves drugs. In December 2019, Arizona law enforcement officers executed a search warrant on a property in the foothills of Yuma County. Inside a shed on the property, they found petitioner Jason Smith. They also found a large quantity of what appeared to be drugs and drug-related items. As a result, Smith was charged with possessing dangerous drugs (methamphetamine) for sale; possessing marijuana for sale; possessing narcotic drugs (cannabis) for sale; and possessing drug paraphernalia. He pleaded not guilty, and the case was set for trial.

In preparation, the State sent items seized from the shed to a crime lab run by the Arizona Department of Public Safety (DPS) for a "full scientific analysis." App. to Pet. for Cert. 127a. The State's request identified Smith as the individual "associated" with the substances, listed the charges against him, and noted that "[t]rial ha[d] been set." *Ibid.* Analyst Elizabeth Rast communicated with prosecutors about exactly which items needed to be examined, and then ran the requested tests. See *id.*, at 99a.

Rast prepared a set of typed notes and a signed report, both on DPS letterhead, about the testing. The notes documented her lab work and results. They disclosed, for each of eight items: a "[d]escription" of the item; the weight of the item and how the weight was measured; the test(s) she performed on the item, including whether she first ran a "[b]lank" on the testing equipment; the results of those tests; and a "[c]onclusion" about the item's identity. See *id*., at 88a–98a. The signed report then distilled the notes into two pages of ultimate findings, denoted "results/interpretations." See *id*., at 85a–87a. After listing the eight items, the report stated that four "[c]ontained a usable quantity of

methamphetamine," three "[c]ontained a usable quantity of marijuana," and one "[c]ontained a usable quantity of cannabis." *Id*., at 86a–87a. The State originally planned for Rast to testify about those matters at Smith's trial.

But with three weeks to go, the State called an audible, replacing Rast with a different DPS analyst as its expert witness. In the time between testing and trial, Rast had stopped working at the lab, for unexplained reasons. And the State chose not to rely on the now-former employee as a witness. So the prosecutors filed an amendment to their "final pre-trial conference statement" striking out the name Elizabeth Rast and adding "Greggory Longoni, forensic scientist (substitute expert)." *Id*., at 26a. Longoni had no prior connection to the Smith case, and the State did not claim otherwise. Its amendment simply stated that "Mr. Longoni will provide an independent opinion on the drug testing performed by Elizabeth Rast." *Ibid.* And it continued: "Ms. Rast will not be called. [Mr. Longoni] is expected to have the same conclusion." *Ibid.*

And he did come to the same conclusion, in reliance on Rast's records. Because he had not participated in the Smith case, Longoni prepared for trial by reviewing Rast's report and notes. And when Longoni took the stand, he referred to those materials and related what was in them, item by item by item. As to each, he described the specific "scientific method[s]" Rast had used to analyze the substance (*e.g.*, a microscopic examination, a chemical color test, a gas chromatograph/mass spectrometer test). *Id.*, at 41a; see *id*., at 42a, 46a–48a. And as to each, he stated that the testing had adhered to "general principles of chemistry," as well as to the lab's "policies and practices," *id*., at 47a–48a; see *id*., at 40a; so he noted, for example, that Rast had run a "blank" to confirm that testing equipment was not contaminated, *id.*, at 42a, 47a. After thus telling the jury what Rast's records conveyed about her testing of the items, Longoni offered an "independent opinion" of their identity. *Id.*, at 46a–47a, 49a. More specifically, the opinions he offered were: that Item 26 was "a usable quantity of marijuana," that Items 20A and 20B were "usable quantit[ies] of methamphetamine," and that Item 28 was "[a] usable quantity of cannabis." *Ibid.*

After Smith was convicted, he brought an appeal focusing on Longoni's testimony. In Smith's view, the State's use of a "substitute expert"—who had not participated in any of the relevant testing—violated his Confrontation Clause rights. *Id.*, at 26a; see Brief for Appellant Smith in No. 1 CA–CR 21–0451 (Ariz. Ct. App.), pp. 20–23. The real witness against him, Smith urged, was Rast, through her written statements; but he had not had the opportunity to cross-examine her. See *ibid.* The State disagreed. In its view, Longoni testified about "his own independent opinions," even though making use of Rast's records. Brief for Appellee Arizona in No. 1 CA–CR 21–0451 (Ariz. Ct. App.), p. 22. So Longoni was the only witness Smith had a right to confront. See *ibid.*

The Arizona Court of Appeals affirmed Smith's convictions, rejecting his Confrontation Clause challenge. It relied on Arizona precedent (similar to the Illinois Supreme Court's decision in *Williams*) stating that an expert may testify to "the substance of a non-testifying expert's analysis, if such evidence forms the basis of the [testifying] expert's opinion." App. to Pet. for Cert. 11a–12a (quoting *State ex rel. Montgomery* v. *Karp*, 236 Ariz. 120, 124, 336 P.3d 753, 757 (App. 2014)). That is because, the Arizona courts have said, the "underlying facts" are then "used only to show the basis of [the in-court witness's] opinion and not to prove their truth." *Ibid.*, 336 P. 3d, at 757. On that view, the Court of Appeals held, Longoni could constitutionally "present[ ] his independent expert opinions" as "based on his review of Rast's work." App. to Pet. for Cert. 11a.

We granted certiorari to consider that reasoning, 600 U. S. ___ (2023), and we now reject it.[3]

II

Smith's confrontation claim can succeed only if Rast's statements came into evidence for their truth. As earlier explained, the Clause applies solely to "testimonial *hearsay*." *Davis*, 547 U. S., at 823 (emphasis added); see *supra*, at 3. And that means the Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U. S., at 60, n. 9. So a court analyzing a confrontation claim must identify the role that a given out-of-court statement—here, Rast's statements about her lab work—served at trial. On that much, indeed, the entire *Williams* Court agreed. Amid all the fracturing that case produced, every Justice defined its primary question in the same way: whether the absent analyst's statements were introduced for their truth. See 567 U. S., at 57–58 (plurality opinion); *id.*, at 104 (Thomas, J., concurring in judgment); *id.*, at 125–126 (Kagan, J.,

dissenting). The parties here likewise concur in that framing. See Brief for Smith 28–29; Brief for Arizona 17–18. If Rast's statements came in to establish the truth of what she said, then the Clause's alarms begin to ring; but if her statements came in for another purpose, then those alarms fall quiet.

Where the parties disagree, of course, is in answering that purpose question. Smith argues that the "for the truth" condition is satisfied here, just as much as in *Melendez-Diaz* or *Bullcoming*. See Brief for Smith 23–28; *supra*, at 3–5. In his view, Rast's statements were conveyed, via Longoni's testimony, to establish that what she said happened in the lab did in fact happen. Or put more specifically, those statements were conveyed to show that she used certain standard procedures to run certain tests, which enabled identification of the seized items. The State sees the matter differently. See Brief for Arizona 19–26. Echoing the Arizona Court of Appeals (and the Illinois Supreme Court in *Williams*), the State argues that Rast's statements came into evidence not for their truth, but instead to "show the basis" of the in-court expert's independent opinion. Brief for Arizona 21; see *supra*, at 6. And to defend that characterization, Arizona emphasizes that its Rule of Evidence 703 (again, like Illinois's) authorizes the admission of such statements only for that purpose—*i.e.*, to "help[ ] the jury [to] evaluate" the opinion testimony. Brief for Arizona 20–21; see *post*, at 8 (Alito, J., concurring in judgment) (arguing the same as to Federal Rule of Evidence 703).

Evidentiary rules, though, do not control the inquiry into whether a statement is admitted for its truth. That inquiry, as just described, marks the scope of a federal constitutional right. See *supra*, at 11. And federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules.[4] The confrontation right is no different, as *Crawford* made clear. "Where testimonial statements are involved," that Court explained, "the Framers [did not mean] to leave the Sixth Amendment's protection to the vagaries of the rules of evidence." 541 U. S., at 61. Justice Thomas reiterated the point in *Williams*: "[C]oncepts central to the application of the Confrontation Clause are ultimately matters of federal constitutional law that are not dictated by state or federal evidentiary rules." 567 U. S., at 105 (opinion concurring in judgment). We therefore do not "accept [a State's] nonhearsay label at face value." *Id.*, at 106; see *id.*, at 132 (Kagan, J., dissenting). Instead, we conduct an independent analysis of whether an out-of-court statement was admitted for its truth, and therefore may have compromised a defendant's right of confrontation.

We did just that in *Tennessee* v. *Street*—and in so doing showcased how an out-of-court statement can come into evidence for a non-truth-related reason. See 471 U. S., at 410–417. Street was charged with murder, based mostly on a stationhouse confession. At trial, he claimed that the confession was coerced, and in a peculiar way: The sheriff, he said, had read aloud an accomplice's confession and forced him to repeat it. On rebuttal, the State introduced the other confession (through the sheriff 's testimony) to demonstrate to the jury all the ways its content deviated from Street's. We upheld that use as "nonhearsay." *Id.*, at 413. The other confession came in, we explained, not to prove "the truth of [the accomplice's] assertions" about how the murder happened, but only to disprove Street's claim about how the sheriff elicited his own confession. *Ibid.* Or otherwise said, the point was to show, by highlighting the two confessions' differences, that Street's was not a "coerced imitation." *Id.*, at 414. For that purpose, the truth of the accomplice's confession (and the credibility of the accomplice himself) was irrelevant.

But truth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise? "The whole point" of the prosecutor's eliciting such a statement is "to establish—*because of the [statement's] truth*—a basis for the jury to credit the testifying expert's" opinion. *Stuart*, 586 U. S., at ___ (Gorsuch, J., dissenting from denial of certiorari) (slip op., at 3) (emphasis in original). Or said a bit differently, the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert's opinion. So "[t]here is no meaningful distinction between disclosing an out-of-court statement" to "explain the basis of an expert's opinion" and "disclosing that statement for its truth." *Williams*, 567 U. S., at 106 (Thomas, J., concurring in judgment). A State may use only the former label, but in all respects the two purposes merge.

Or to see the point another way, consider it from the factfinder's perspective. In the view of the Arizona courts, an expert's conveyance of another analyst's report enables the factfinder to "determine whether [the expert's] opinion should be found credible." *Karp*, 236 Ariz., at 124, 336 P. 3d, at 757; see *Williams*, 238 Ill. 2d, at 144, 939 N. E. 2d, at 278 (also stating that such a report "aid[s] the jury in assessing the value of [the expert's] opinion"); *supra*, at 6, 10. That is no doubt right. The jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based. See D. Kaye, D. Bernstein, A. Ferguson, M. Wittlin, & J. Mnookin, The New Wigmore: Expert Evidence §5.4.1, p. 271 (3d ed. 2021). If believed true, that basis evidence will lead the jury to credit the opinion; if believed false, it will do the opposite. See *Williams*, 567 U. S., at 106, and n. 1 (Thomas, J., concurring in judgment); *id.*, at 126–127 (Kagan, J., dissenting). But that very fact is what raises the Confrontation Clause problem. For the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work.

And if that explanation seems a bit abstract, then take this case as its almost-too-perfect illustration. Recall that Rast tested eight seized items before she disappeared from the scene. At trial, the prosecutor asked the State's "substitute expert" Longoni to testify about four of them (with the rest dropping out of the case). App. to Pet. for Cert. 26a. A recap of their exchange about one item will be enough; the rest followed the same pattern. Remember as you read that Longoni, though familiar with the lab's general practices, had no personal knowledge about Rast's testing of the seized items. Rather, as his testimony makes clear, what he knew on that score came only from reviewing Rast's records. With that as background:

Q Turn your attention to Item 26. I'm going to hand you what's been marked as State's Exhibit 98 [Rast's notes]. . . . Did you review how [Item] 26 was tested in this case?

A Yes.

Q When you reviewed it, did you notice whether the [standard lab] policies and practices that you have just described were followed?

A Yes.

Q Were they followed?

A Yes.

. . . . .

Q From your review of the lab notes in this case, can you tell me what scientific method was used to analyze Item 26?

A Yes.

Q And what was used?

A The microscopic examination and the chemical color test. . . .

Q That was done in this case?

A Yes, it was.

Q Was there a blank done to prevent contamination, make sure everything was clean?

A According to the notes, yes.

. . . . .

Q In reviewing what was done, your knowledge and training as a forensic scientist, your knowledge and experience with DPS's policies, practices, procedures, your knowledge of chemistry, the lab notes, the intake records, the chemicals used, the tests done, can you form an independent opinion on the identity of Item 26?

A Yes.

Q What is that opinion?

A That is a usable quantity of marijuana.

Id., at 39a–42a, 46a. And then the prosecutor went on to Items 20A, 20B, and 28, asking similar questions, receiving similar answers based on Rast's records, and finally eliciting similar "independent opinions"—which were no more than what Rast herself had concluded. See *supra*, at 8–9. "Yes," Longoni confirmed, just as Item 26 was a "usable quantity of marijuana," Items 20A and 20B were "usable quantit[ies] of methamphetamine" and Item 28 was a

"usable quantity of cannabis." App. to Pet. for Cert. 46a, 47a, 49a.

Rast's statements thus came in for their truth, and no less because they were admitted to show the basis of Longoni's expert opinions. All those opinions were predicated on the truth of Rast's factual statements. Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results. And likewise, the jury could credit Longoni's opinions identifying the substances only because it too accepted the truth of what Rast reported about her lab work (as conveyed by Longoni). If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions.

Approving that practice would make our decisions in *Melendez-Diaz* and *Bullcoming* a dead letter, and allow for easy evasion of the Confrontation Clause. As earlier described, those two decisions applied *Crawford* in "straightforward" fashion to forensic evidence. *Melendez-Diaz*, 557 U. S., at 312; see *Bullcoming*, 564 U. S., at 659–661; *supra*, at 3–5. The first prevented the introduction of a lab analyst's testimonial report sans lab analyst. The second refused to accede to the idea that any old analyst—*i.e.*, a substitute who had not taken part in the lab work—would do. Arizona offers only a slight variation. On its view, a surrogate analyst can testify to all the same substance—that is, someone else's substance—as long as he bases an "independent opinion" on that material. And that is true even if, as here, the proffered opinion merely replicates, rather than somehow builds on, the testing analyst's conclusions. So every testimonial lab report could come into evidence through any trained surrogate, however remote from the case. And no defendant would have a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted. In short, Arizona wants to end run all we have held the Confrontation Clause to require. It cannot.

Properly understood, the Clause still allows forensic experts like Longoni to play a useful role in criminal trials. Because Longoni worked in the same lab as Rast, he could testify from personal knowledge about how that lab typically functioned—the standards, practices, and procedures it used to test seized substances, as well as the way it maintained chains of custody. (Indeed, Longoni did just that in a different part of his testimony. See App. to Pet. for Cert. 32a–39a.) Or had he not been familiar with Rast's lab, he could have testified in general terms about forensic guidelines and techniques—perhaps explaining what it means for a lab to be accredited and what requirements accreditation imposes. Or as the *Williams* plurality and dissent both observed, he might have been asked—and could have answered—any number of hypothetical questions, taking the form of: "*If* or *assuming* some out-of-court statement were true, what would follow from it?" See 567 U. S., at 67–68; *id.*, at 129, n. 2. (The State of course would then have to separately prove the thing assumed.) The United States, appearing as *amicus curiae* in support of neither party, usefully addressed these matters at oral argument, distinguishing Longoni's testimony as block-quoted above from the various kinds of testimony just described. See Tr. of Oral Arg. 36–41. The latter forms of testimony allow forensic expertise to inform a criminal case without violating the defendant's right of confrontation. And we offer these merely as examples; there may be others.

But as the United States acknowledged, the bulk of Longoni's testimony took no such permissible form. *Ibid.* Here, the State used Longoni to relay what Rast wrote down about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece. He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth. So if the out-of-court statements were also testimonial, their admission violated the Confrontation Clause. Smith would then have had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records.

III

What remains is whether the out-of-court statements Longoni conveyed were testimonial. As earlier explained, that question is independent of everything

said above: To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other. See *supra*, at 3. The latter, this Court has stated, focuses on the "primary purpose" of the statement, and in particular on how it relates to a future criminal proceeding. See *ibid.* (noting varied formulations of the standard).[5] A court must therefore identify the out-of-court statement introduced, and must determine, given all the "relevant circumstances," the principal reason it was made. *Bryant*, 562 U. S., at 369.

But that issue is not now fit for our resolution. The question presented in Smith's petition for certiorari did not ask whether Rast's out-of-court statements were testimonial. See *supra*, at 11, n. 3 (quoting Pet. for Cert. i). Instead, it took as a given that they were. See *id*., at i. That presentation reflected the Arizona Court of Appeals' opinion. As described earlier, that court relied on the "not for the truth" rationale we have just rejected. See *supra*, at 10. It did not decide whether Rast's statements were testimonial. Nor, to our knowledge, did the trial court ever take a stance on that issue. Because "we are a court of review, not of first view," we will not be the pioneer court to decide the matter. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n. 7 (2005). And indeed, we are not sure if there remains a matter to decide. Smith argues that the State has forfeited the argument: Arizona, he says, "gave no hint in the proceedings below that it believed Rast's statements were anything but testimonial." Reply Brief 3. The State denies that assertion, pointing to a passage about *Williams* in its lower court briefing. See Brief for Arizona 39, n. 14. The dispute is best addressed by a state court. So we return the testimonial issue, including the threshold forfeiture matter, to the Arizona Court of Appeals.

But we offer a few thoughts, based on the arguments made here, about the questions the state court might usefully address if the testimonial issue remains live. First, the court will need to consider exactly which of Rast's statements are at issue. In this Court, the parties disputed whether Longoni was reciting from Rast's notes alone, or from both her notes and final report. See *supra*, at 8–9 (describing those documents). In Arizona's view, everything Longoni testified to came from Rast's notes; although he at times used the word "report," a close comparison of the documents and his testimony reveals (the State says) that he meant only the notes. See Brief for Arizona 39–40; Tr. of Oral Arg. 69–72; see also App. to Pet. for Cert. 39a–40a, 48a. Smith disagrees, taking Longoni's references to the "report," as well as the notes, at face value. According to Smith, Longoni "relied on both" documents and in fact "treated them as a unit," with the notes "attached" to the report as "essentially an appendix." Reply Brief 4; Tr. of Oral Arg. 25, 98. Resolving that dispute might, or then again might not, affect the court's ultimate disposition of Smith's Confrontation Clause claim. We note only that before the court can decide the primary purpose of the out-of-court statements introduced at Smith's trial, it needs to determine exactly what those statements were.

In then addressing the statements' primary purpose—why Rast created the report or notes—the court should consider the range of recordkeeping activities that lab analysts engage in. See generally *supra*, at 3 (describing formulations of the testimonial inquiry). After all, some records of lab analysts will not have an evidentiary purpose. The United States as *amicus curiae* notes, for example, that lab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control. See Tr. of Oral Arg. 51. Or some analysts' notes may be written simply as reminders to self. See *id.*, at 20, 52. In those cases, the record would not count as testimonial. To do so, the document's primary purpose must have "a focus on court." *Id*., at 52. And again, the state court on remand should make that assessment as to each record whose substance Longoni conveyed.

IV

Our holding today follows from all this Court has held about the Confrontation Clause's application to forensic evidence. A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See *Crawford*, 541 U. S., at 68; *Melendez-Diaz*, 557 U. S., at 311. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. See *Bullcoming*, 564 U. S., at 663. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.

That means Arizona does not escape the Confrontation Clause just because Rast's records came in to explain

the basis of Longoni's opinion. The Arizona Court of Appeals thought otherwise, and so we vacate its judgment. To address the additional issue of whether Rast's records were testimonial (including whether that issue was forfeited), we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Williams v. Illinois, 567 U.S. 50 (2012)

Justice Alito announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Kennedy, and Justice Breyer join.

In this case, we decide whether Crawford v. Washington, 541 U.S. 36, 50 (2004) , precludes an expert witness from testifying in a manner that has long been allowed under the law of evidence. Specifically, does Crawford bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify? We also decide whether Crawford substantially impedes the ability of prosecutors to introduce DNA evidence and thus may effectively relegate the prosecution in some cases to reliance on older, less reliable forms of proof.

In petitioner's bench trial for rape, the prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner's blood. On direct examination, the expert testified that Cellmark was an accredited laboratory and that Cellmark provided the police with a DNA profile. The expert also explained the notations on documents admitted as business records, stating that, according to the records, vaginal swabs taken from the victim were sent to and received back from Cellmark. The expert made no other statement that was offered for the purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how Cellmark handled or tested the sample. Nor did the expert vouch for the accuracy of the profile that Cellmark produced. Nevertheless, petitioner contends that the expert's testimony violated the Confrontation Clause as interpreted in Crawford.

Petitioner's main argument is that the expert went astray when she referred to the DNA profile provided by Cellmark as having been produced from semen found on the victim's vaginal swabs. But both the Illinois Appellate Court and the Illinois Supreme Court found that this statement was not admitted for the truth of the matter asserted, and it is settled that the Confrontation Clause does not bar the admission of such statements. See id., at 59–60, n. 9 (citing Tennessee v. Street, 471 U.S. 409 (1985)). For more than 200 years, the law of evidence has permitted the sort of testimony that was given by the ex- pert in this case. Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert. While it was once the practice for an expert who based an opinion on assumed facts to testify in the form of an an- swer to a hypothetical question, modern practice does not demand this formality and, in appropriate cases, permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts. See Fed. Rule Evid. 703. That is precisely what occurred in this case, and we should not lightly "swee[p] away an accepted rule governing the admission of scientific evidence." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

We now conclude that this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment.

As a second, independent basis for our decision, we also conclude that even if the report produced by Cellmark had been admitted into evidence, there would have been

no Confrontation Clause violation. The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. See Perry v. New Hampshire, 565 U. S. ___ (2012). The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.

I

A

On February 10, 2000, in Chicago, Illinois, a young woman, L. J., was abducted while she was walking home from work. The perpetrator forced her into his car and raped her, then robbed her of her money and other personal items and pushed her out into the street. L. J. ran home and reported the attack to her mother, who called the police. An ambulance took L. J. to the hospital, where doctors treated her wounds and took a blood sample and vaginal swabs for a sexual-assault kit. A Chicago Police detective collected the kit, labeled it with an inventory number, and sent it under seal to the Illinois State Police (ISP) lab.

At the ISP lab, a forensic scientist received the sealed kit. He conducted a chemical test that confirmed the presence of semen on the vaginal swabs, and he then resealed the kit and placed it in a secure evidence freezer.

During the period in question, the ISP lab often sent biological samples to Cellmark Diagnostics Laboratory in Germantown, Maryland, for DNA testing. There was evidence that the ISP lab sent L. J.'s vaginal swabs to Cellmark for testing and that Cellmark sent back a report containing a male DNA profile produced from semen taken from those swabs. At this time, petitioner was not under suspicion for L. J.'s rape.

Sandra Lambatos, a forensic specialist at the ISP lab, conducted a computer search to see if the Cellmark profile matched any of the entries in the state DNA database. The computer showed a match to a profile produced by the lab from a sample of petitioner's blood that had been taken after he was arrested on unrelated charges on August 3, 2000.

On April 17, 2001, the police conducted a lineup at which L. J. identified petitioner as her assailant. Petitioner was then indicted for aggravated criminal sexual assault, aggravated kidnaping, and aggravated robbery. In lieu of a jury trial, petitioner chose to be tried before a state judge.

B

Petitioner's bench trial began in April 2006. In open court, L. J. again identified petitioner as her attacker. The State also offered three expert forensic witnesses to link petitioner to the crime through his DNA. First, Brian Hapack, an ISP forensic scientist, testified that he had confirmed the presence of semen on the vaginal swabs taken from L. J. by performing an acid phosphatase test. After performing this test, he testified, he resealed the evidence and left it in a secure freezer at the ISP lab.

Second, Karen Abbinanti, a state forensic analyst, testified that she had used Polymerase Chain Reaction (PCR) and Short Tandem Repeat (STR) techniques to develop a DNA profile from a blood sample that had been drawn from petitioner after he was arrested in August 2000. She also stated that she had entered petitioner's DNA profile into the state forensic database.

Third, the State offered Sandra Lambatos as an expert witness in forensic biology and forensic DNA analysis. On direct examination, Lambatos testified about the

general process of using the PCR and STR techniques to generate DNA profiles from forensic samples such as blood and semen. She then described how these DNA profiles could be matched to an individual based on the individual's unique genetic code. In making a comparison between two DNA profiles, Lambatos stated, it is a "commonly accepted" practice within the scientific community for "one DNA expert to rely on the records of another DNA expert." App. 51. Lambatos also testified that Cellmark was an "accredited crime lab" and that, in her experience, the ISP lab routinely sent evidence samples via Federal Express to Cellmark for DNA testing in order to expedite the testing process and to "reduce [the lab's] backlog." Id., at 49–50. To keep track of evidence samples and preserve the chain of custody, Lambatos stated, she and other analysts relied on sealed shipping containers and labeled shipping manifests, and she added that experts in her field regularly relied on such protocols. Id., at 50–51.

Lambatos was shown shipping manifests that were admitted into evidence as business records, and she explained what they indicated, namely, that the ISP lab had sent L. J.'s vaginal swabs to Cellmark, and that Cellmark had sent them back, along with a deduced male DNA profile. Id., at 52–55. The prosecutor asked Lambatos whether there was "a computer match" between "the male DNA profile found in semen from the vaginal swabs of [L. J.]" and "[the] male DNA profile that had been identified" from petitioner's blood sample. Id., at 55.

The defense attorney objected to this question for "lack of foundation," arguing that the prosecution had offered "no evidence with regard to any testing that's been done to generate a DNA profile by another lab to be testified to by this witness." Ibid.

The prosecutor responded: "I'm not getting at what another lab did." Id., at 56. Rather, she said, she was simply asking Lambatos about "her own testing based on [DNA] information" that she had received from Cellmark. Ibid. The trial judge agreed, noting, "If she says she didn't do her own testing and she relied on a test of another lab and she's testifying to that, we will see what she's going to say." Ibid.

The prosecutor then proceeded, asking Lambatos, "Did you compare the semen that had been identified by Brian Hapack from the vaginal swabs of [L. J.] to the male DNA profile that had been identified by Karen [Abbinanti] from the blood of [petitioner]?" Ibid.

Lambatos answered "Yes." Ibid. Defense counsel lodged an objection "to the form of the question," but the trial judge overruled it. Ibid. Lambatos then testified that, based on her own comparison of the two DNA profiles, she "concluded that [petitioner] cannot be excluded as a possible source of the semen identified in the vaginal swabs," and that the probability of the profile's appearing in the general population was "1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." Id., at 57. Asked whether she would "call this a match to [petitioner]," Lambatos answered yes, again over defense counsel's objection. Id., at 58.

The Cellmark report itself was neither admitted into evidence nor shown to the factfinder. Lambatos did not quote or read from the report; nor did she identify it as the source of any of the opinions she expressed.

On cross-examination, Lambatos confirmed that she did not conduct or observe any of the testing on the vaginal swabs, and that her testimony relied on the DNA profile produced by Cellmark. Id., at 59. She stated that she trusted Cellmark to do reliable work because it was an accredited lab, but she admitted she had not seen any of the calibrations or work that Cellmark had done in deducing a male DNA profile from the vaginal swabs. Id., at 59–62.

Asked whether the DNA sample might have been degraded before Cellmark analyzed it, Lambatos answered that, while degradation was technically possible, she strongly doubted it had occurred in this case. She gave two reasons. First, the ISP lab likely would have noticed the degradation before sending the evidence off to Cell- mark. Second, and more important, Lambatos also noted that the data making up the DNA profile would ex- hibit certain telltale signs if it had been deduced from a degraded sample: The visual representation of the DNA sequence would exhibit "specific patterns" of degradation, and she "didn't see any evidence" of that from looking at the profile that Cellmark produced. Id., at 81–82.

When Lambatos finished testifying, the defense moved to exclude her testimony "with regards to testing done by [Cellmark]" based on the Confrontation Clause. Id., at 90. Defense counsel argued that there was "no

evidence with regards to . . . any work done by [Cellmark] to justify testimony coming into this case with regard to their analysis." Ibid. Thus, while defense counsel objected to and sought the exclusion of Lambatos' testimony insofar as it implicated events at the Cellmark lab, defense counsel did not object to or move for the exclusion of any other portion of Lambatos' testimony, including statements regarding the contents of the shipment sent to or received back from Cellmark. See id., at 55, 56, 90. See also 385 Ill. App. 3d 359, 367–368, 895 N.E.2d 961, 968 (2008) (chain-of-custody argument based on shipping manifests waived).

The prosecution responded that petitioner's Confrontation Clause rights were satisfied because he had the opportunity to cross-examine the expert who had testified that there was a match between the DNA profiles produced by Cellmark and Abbinanti. App. 91. Invoking Illinois Rule of Evidence 703, [1] the prosecutor argued that an expert is allowed to disclose the facts on which the expert's opinion is based even if the expert is not competent to testify to those underlying facts. She further argued that any deficiency in the foundation for the expert's opinion "[d]oesn't go to the admissibility of [that] testi- mony," but instead "goes to the weight of the testimony." App. 91.

The trial judge agreed with the prosecution and stated that "the issue is . . . what weight do you give the test, not do you exclude it." Id., at 94. Accordingly, the judge stated that he would not exclude Lambatos' testimony, which was "based on her own independent testing of the data received from [Cellmark]." Id., at 94–95 (alteration in original).

The trial court found petitioner guilty of the charges against him. The state court of appeals affirmed in relevant part, concluding that Lambatos' testimony did not violate petitioner's confrontation rights because the Cell- mark report was not offered into evidence to prove the truth of the matter it asserted. See 385 Ill. App. 3d, at 369, 895 N. E. 2d, at 969–970 ("Cellmark's report was not offered for the truth of the matter asserted; rather, it was offered to provide a basis for Lambatos' opinion") The Supreme Court of Illinois also affirmed. 238 Ill. 2d 125, 939 N.E.2d 268 (2010). Under state law, the court noted, the Cellmark report could not be used as substantive evidence. When Lambatos referenced the report during her direct examination, she did so "for the limited purpose of explaining the basis for [her expert opinion]," not for the purpose of showing "the truth of the matter asserted" by the report. Id., at 150, 939 N. E. 2d, at 282. Thus, the report was not used to establish its truth, but only "to show the underlying facts and data Lambatos used before rendering an expert opinion." Id., at 145, 939 N. E. 2d, at 279.

We granted certiorari. 564 U. S. ___ (2011).

II

A

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the wit- nesses against him." Before Crawford, this Court took the view that the Confrontation Clause did not bar the admission of an out-of-court statement that fell within a firmly rooted exception to the hearsay rule, see Ohio v. Roberts, 448 U.S. 56, 66 (1980) , but in Crawford, the Court adopted a fundamentally new interpretation of the confronta- tion right, holding that "[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U. S., at 59. Crawford has resulted in a steady stream of new cases in this Court. See Bullcoming v. New Mexico, 564 U. S. ___ (2011); Michigan v. Bryant, 562 U. S. ___ (2011); Melendez-Diaz, 557 U.S. 305 ; Giles v. California, 554 U.S. 353 (2008) ; Indiana v. Edwards, 554 U.S. 164 (2008) ; Davis v. Washington, 547 U.S. 813 (2006) .

Two of these decisions involved scientific reports. In Melendez-Diaz, the defendant was arrested and charged with distributing and trafficking in cocaine. At trial, the prosecution introduced bags of a white powdery substance that had been found in the defendant's possession. The trial court also admitted into evidence three "certificates of analysis" from the state forensic laboratory stating that the bags had been "examined with the following results: The substance was found to contain: Cocaine." 557 U. S., at 308 (internal quotation marks omitted).

The Court held that the admission of these certificates, which were executed under oath before a notary, violated the Sixth Amendment. They were created for "the sole purpose of providing evidence against a

defendant," id., at 323, and were " 'quite plainly affidavits,' " id., at 330 (Thomas, J., concurring). The Court emphasized that the introduction of the report to prove the nature of the substance found in the defendant's possession was tantamount to "live, in-court testimony" on that critical fact and that the certificates did "precisely what a witness does on direct examination." Id., at 311 (internal quotation marks omitted). There was no doubt that the certificates were used to prove the truth of the matter they asserted. Under state law, "the sole purpose of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance." Ibid. (internal quotation marks omitted and emphasis deleted). On these facts, the Court said, it was clear that the certif- icates were "testimonial statements" that could not be introduced unless their authors were subjected to the " 'cru- cible of cross-examination.' " Id., at 311, 317 (quoting Crawford, supra, at 61).

In Bullcoming, we held that another scientific report could not be used as substantive evidence against the defendant unless the analyst who prepared and certified the report was subject to confrontation. The defendant in that case had been convicted of driving while intoxicated. At trial, the court admitted into evidence a forensic report certifying that a sample of the defendant's blood had an alcohol concentration of 0.21 grams per hundred milli- liters, well above the legal limit. Instead of calling the analyst who signed and certified the forensic report, the prosecution called another analyst who had not performed or observed the actual analysis, but was only familiar with the general testing procedures of the laboratory. The Court declined to accept this surrogate testimony, despite the fact that the testifying analyst was a "knowledgeable representative of the laboratory" who could "explain the lab's processes and the details of the report." 564 U. S., at ___ (Kennedy, J., dissenting) (slip op., at 1). The Court stated simply: "The accused's right is to be confronted with the analyst who made the certification." Id., at ___ (slip op., at 2).

Just as in Melendez-Diaz, the forensic report that was "introduce[d]" in Bullcoming "contain[ed] a testimonial certification, made in order to prove a fact at a criminal trial." 564 U. S., at ___–___ (slip op., at 7–8). The report was signed by the nontestifying analyst who had authored it, stating, "I certify that I followed the procedures set out on the reverse of this report, and the statements in this block are correct. The concentration of alcohol in this sample is based on the grams of alcohol in one hundred milliliters of blood." App. in Bullcoming, O. T. 2010, No. 09–10876, p. 62. Critically, the report was introduced at trial for the substantive purpose of proving the truth of the matter asserted by its out-of-court author—namely, that the defendant had a blood-alcohol level of 0.21. This was the central fact in question at the defendant's trial, and it was dispositive of his guilt.

In concurrence, Justice Sotomayor highlighted the importance of the fact that the forensic report had been admitted into evidence for the purpose of proving the truth of the matter it asserted. She emphasized that "this [was] not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." 564 U. S., at ___ (slip op., at 6) (opinion concurring in part) (citing Fed. Rule Evid. 703). "We would face a different question," she observed, "if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." Id., at ___ (slip op., at 6).

We now confront that question.

B

It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts.

At common law, courts developed two ways to deal with this situation. An expert could rely on facts that had already been established in the record. But because it was not always possible to proceed in this manner, and because record evidence was often disputed, courts developed the alternative practice of allowing an expert to testify in the form of a "hypothetical question." Under this approach, the expert would be asked to assume the truth of certain factual predicates, and was then asked to offer an opinion based on those assumptions. See 1 K. Broun, McCormick on Evidence §14, p. 87 (6th ed. 2006); 1 J. Wigmore, Evidence §677, p. 1084 (2d ed. 1923) ("If the witness is skilled enough, his opinion may be adequately obtained upon hypothetical data alone; and it is immate- rial whether he has ever seen the person, place or thing in question" (citation omitted)). The truth of the premises could then be established

through independent evidence, and the factfinder would regard the expert's testimony to be only as credible as the premises on which it was based.

An early example of this approach comes from the English case of Beckwith v. Sydebotham, 1 Camp. 116, 170 Eng. Rep. 897 (K. B. 1807), where a party sought to prove the seaworthiness of a ship, the Earl of Wycombe, by calling as witnesses "several eminent surveyors of ships who had never seen the 'Earl of Wycombe.' " Ibid. The opposing party objected to the testimony because it relied on facts that were not known to be true, but the judge disagreed. Because the experts were "peculiarly ac- quainted" with "a matter of skill or science," the judge said, the "jury might be assisted" by their hypothetical opinion based on certain assumed facts. Id., at 117, 170 Eng. Rep., at 897. The judge acknowledged the danger of the jury's being unduly prejudiced by wrongly assuming the truth of the hypothetical facts, but the judge noted that the experts could be asked on cross-examination what their opinion of the ship's seaworthiness would be if different hypothetical facts were assumed. If the party that had called the experts could not independently prove the truth of the premises they posited, then the experts' "opinion might not go for much; but still it was admissible evidence." Ibid.

There is a long tradition of the use of hypothetical questions in American courts. In 1887, for example, this Court indicated its approval of the following jury instruction:

"As to the questions, you must understand that they are not evidence; they are mere statements to these witnesses . . . and, upon the hypothesis or assumption of these questions the witnesses are asked to give their [opinion]. You must readily see that the value of the answers to these questions depends largely, if not wholly, upon the fact whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts." Forsyth v. Doolittle, 120 U.S. 73 (internal quotation marks omitted).

Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge, but these rules dispense with the need for hypothetical questions. Under both the Illinois and the Federal Rules of Evidence, an expert may base an opinion on facts that are "made known to the expert at or before the hearing," but such reliance does not constitute admissible evidence of this underlying information. Ill. Rule Evid. 703; Fed. Rule Evid. 703. Accordingly, in jury trials, both Illinois and federal law generally bar an expert from disclosing such inadmissible evidence. [2] In bench trials, however, both the Illinois and the Federal Rules place no restriction on the revelation of such information to the factfinder. When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose. As we have noted, "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." Harris v. Rivera, 454 U.S. 339, 346 (1981) (per curiam). There is a "well-established presumption" that "the judge [has] adhered to basic rules of procedure," when the judge is acting as a factfinder. Id., at 346–347 (emphasis added). See also Gentile v. State Bar of Nev., 501 U.S. 1030, 1078 (1991) (Rehnquist, C. J., dissenting).

This feature of Illinois and federal law is important because Crawford, while departing from prior Confrontation Clause precedent in other respects, took pains to reaffirm the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U. S., at 59–60, n. 9 (citing Tennessee v. Street, 471 U.S. 409). In Street, the defendant claimed that the police had coerced him into adopting the confession of his alleged accomplice. The prosecution sought to rebut this claim by showing that the defendant's confession differed significantly from the accomplice's. Although the accomplice's confession was clearly a testimonial statement, the Court held that the jurors could hear it as long as they were instructed to consider that confession not for its truth, but only for the "distinctive and limited purpose" of comparing it to the defendant's confession, to see whether the two were identical. Id., at 417.

III

A

In order to assess petitioner's Confrontation Clause argument, it is helpful to inventory exactly what Lambatos said on the stand about Cellmark. She

testified to the truth of the following matters: Cellmark was an accredited lab, App. 49; the ISP occasionally sent forensic samples to Cellmark for DNA testing, ibid.; according to shipping manifests admitted into evidence, the ISP lab sent vaginal swabs taken from the victim to Cellmark and later received those swabs back from Cellmark, id., at 52–55; and, finally, the Cellmark DNA profile matched a profile produced by the ISP lab from a sample of petitioner's blood, id., at 55–56. Lambatos had personal knowledge of all of these matters, and therefore none of this testimony in- fringed petitioner's confrontation right.

Lambatos did not testify to the truth of any other matter concerning Cellmark. She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact. Nor did she testify to anything that was done at the Cellmark lab, and she did not vouch for the quality of Cellmark's work.

B

The principal argument advanced to show a Confrontation Clause violation concerns the phrase that Lambatos used when she referred to the DNA profile that the ISP lab received from Cellmark. This argument is developed most fully in the dissenting opinion, and therefore we refer to the dissent's discussion of this issue.

In the view of the dissent, the following is the critical portion of Lambatos' testimony, with the particular words that the dissent finds objectionable italicized:

"Q Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?

"A Yes, there was." Post, at 7 (opinion of Kagan, J.) (quoting App. 56; emphasis added).

According to the dissent, the italicized phrase violated petitioner's confrontation right because Lambatos lacked personal knowledge that the profile produced by Cellmark was based on the vaginal swabs taken from the victim, L. J. As the dissent acknowledges, there would have been "nothing wrong with Lambatos's testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of Lambatos's expertise." Post, at 12. Thus, if Lambatos' testimony had been slightly modified as follows, the dissent would see no problem:

"Q Was there a computer match generated of the male DNA profile produced by Cellmark found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?

"A Yes, there was." [3]

The defect in this argument is that under Illinois law (like federal law) it is clear that the putatively offending phrase in Lambatos' testimony was not admissible for the purpose of proving the truth of the matter asserted—i.e., that the matching DNA profile was "found in semen from the vaginal swabs." Rather, that fact was a mere premise of the prosecutor's question, and Lambatos simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles. There is no reason to think that the trier of fact took Lambatos' answer as substantive evidence to establish where the DNA profiles came from.

The dissent's argument would have force if petitioner had elected to have a jury trial. In that event, there would have been a danger of the jury's taking Lambatos' testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs. Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury.

This case, however, involves a bench trial and we must assume that the trial judge understood that the portion of Lambatos' testimony to which the dissent objects was not admissible to prove the truth of the matter asserted. [4] The dissent, on the other hand, reaches the truly remarkable conclusion that the wording of Lambatos' testimony confused the trial judge. Were it not for that wording, the argument goes, the judge might have found that the prosecution failed to introduce sufficient admissible evidence to show that the Cellmark profile was derived from the sample taken from the victim, and the judge might have disregarded the DNA evidence. This argument reflects a profound lack of respect for the acumen of the trial judge. [5]

To begin, the dissent's argument finds no support in the trial record. After defense counsel objected to Lambatos' testimony, the prosecutor made clear that she was asking Lambatos only about "her own testing based on [DNA] information" that she had received from Cellmark. App. 56. Recognizing that Lambatos' testimony would carry weight only if the underlying premises could be established, the judge noted that "the issue is . . . what weight do you give the test [performed by Lambatos], not do you exclude it." Id., at 94. This echoes the old statement in Beckwith that an expert's opinion based on disputed premises "might not go for much; but still it [is] admissible evidence." 1 Camp., at 117, 170 Eng. Rep., at 897. Both the Illinois Appellate Court and the Illinois Supreme Court viewed the record in this way, and we see no ground for disagreement. [6]

Second, it is extraordinarily unlikely that any trial judge would be confused in the way that the dissent posits. That Lambatos was not competent to testify to the chain of custody of the sample taken from the victim was a point that any trial judge or attorney would immediately understand. Lambatos, after all, had absolutely nothing to do with the collection of the sample from the victim, its subsequent handling or preservation by the police in Illinois, or its shipment to and receipt by Cellmark. No trial judge would take Lambatos' testimony as furnishing "the missing link" in the State's evidence regarding the identity of the sample that Cellmark tested. See post, at 6 (opinion of Kagan, J.).

Third, the admissible evidence left little room for argument that the sample tested by Cellmark came from any source other than the victim's vaginal swabs. [7] This is so because there is simply no plausible explanation for how Cellmark could have produced a DNA profile that matched Williams' if Cellmark had tested any sample other than the one taken from the victim. If any other items that might have contained Williams' DNA had been sent to Cellmark or were otherwise in Cellmark's possession, there would have been a chance of a mix-up or of cross-contamination. See District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 80 (2009) (Alito, J., concurring). But there is absolutely nothing to suggest that Cellmark had any such items. Thus, the fact that the Cellmark profile matched Williams—the very man whom the victim identified in a lineup and at trial as her attacker—was itself striking confirmation that the sample that Cellmark tested was the sample taken from the victim's vaginal swabs. For these reasons, it is fanciful to suggest that the trial judge took Lambatos' testimony as providing critical chain-of-custody evidence.

C

Other than the phrase that Lambatos used in referring to the Cellmark profile, no specific passage in the trial record has been identified as violating the Confrontation Clause, but it is nevertheless suggested that the State somehow introduced "the substance of Cellmark's report into evidence." Post, at 8 (Kagan, J., dissenting). The main impetus for this argument appears to be the (erroneous) view that unless the substance of the report was sneaked in, there would be insufficient evidence in the record on two critical points: first, that the Cellmark profile was based on the semen in the victim's vaginal swabs and, second, that Cellmark's procedures were reli- able. This argument is both legally irrelevant for present purposes and factually incorrect.

As to legal relevance, the question before us is whether petitioner's Sixth Amendment confrontation right was violated, not whether the State offered sufficient foundational evidence to support the admission of Lambatos' opinion about the DNA match. In order to prove these underlying facts, the prosecution relied on circumstantial evidence, and the Illinois courts found that this evidence was sufficient to satisfy state-law requirements regarding proof of foundational facts. See 385 Ill. App. 3d, at 366–368, 895 N. E. 2d, at 967–968; 238 Ill. 2d, at 138, 939 N. E. 2d, at 275. We cannot review that interpretation and application of Illinois law. Thus, even if the record did not contain any evidence that could rationally support a finding that Cellmark produced a scientifically reliable DNA profile based on L. J.'s vaginal swab, that would not establish a Confrontation Clause violation. If there were no proof that Cellmark produced an accurate profile based on that sample, Lambatos' testimony regarding the match would be irrelevant, but the Confrontation Clause, as interpreted in Crawford, does not bar the admission of irrelevant evidence, only testimonial statements by declarants who are not subject to cross-examination. [8]

It is not correct, however, that the trial record lacks admissible evidence with respect to the source of the sam- ple that Cellmark tested or the reliability of the Cell- mark profile. As to the source of the sample, the State offered conventional chain-of-custody evidence,

namely, the testimony of the physician who obtained the vaginal swabs, the testimony of the police employees who handled and kept custody of that evidence until it was sent to Cellmark, and the shipping manifests, which provided evidence that the swabs were sent to Cellmark and then returned to the ISP lab. In addition, as already discussed, the match between the Cellmark profile and petitioner's profile was itself telling confirmation that the Cellmark profile was deduced from the semen on the vaginal swabs.

This match also provided strong circumstantial evidence regarding the reliability of Cellmark's work. Assuming (for the reasons discussed above) that the Cellmark profile was based on the semen on the vaginal swabs, how could shoddy or dishonest work in the Cellmark lab [9] have resulted in the production of a DNA profile that just so happened to match petitioner's? If the semen found on the vaginal swabs was not petitioner's and thus had an en- tirely different DNA profile, how could sloppy work in the Cellmark lab have transformed that entirely different profile into one that matched petitioner's? And without access to any other sample of petitioner's DNA (and recall that petitioner was not even under suspicion at this time), how could a dishonest lab technician have substituted pe- titioner's DNA profile? Under the circumstances of this case, it was surely permissible for the trier of fact to infer that the odds of any of this were exceedingly low.

This analysis reveals that much of the dissent's argument rests on a very clear error. The dissent argues that Lambatos' testimony could be "true" only if the predicate facts asserted in the Cellmark report were true, and therefore Lambatos' reference to the report must have been used for the purpose of proving the truth of those facts. See post, at 10–11. But the truth of Lambatos' testimony, properly understood, was not dependent on the truth of any predicate facts. Lambatos testified that two DNA profiles matched. The correctness of this expert opinion, which the defense was able to test on cross-examination, was not in any way dependent on the origin of the samples from which the profiles were derived. Of course, Lambatos' opinion would have lacked probative value if the prosecution had not introduced other evidence to establish the provenance of the profiles, but that has nothing to do with the truth of her testimony.

The dissent is similarly mistaken in its contention that the Cellmark report "was offered for its truth because that is all such 'basis evidence' can be offered for." Post, at 13; see also post, at 3 (Thomas, J., concurring in judgment) ("[S]tatements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose"). This view is directly contrary to the current version of Rule 703 of the Federal Rules of Evidence, which this Court approved and sent to Congress in 2000. Under that Rule, "basis evidence" that is not admissible for its truth may be disclosed even in a jury trial under appropriate circumstances. The purpose for allowing this disclosure is that it may "assis[t] the jury to evaluate the expert's opinion." Advisory Committee's 2000 Notes on Fed. Rule Evid. 703, 28 U. S. C. App., p. 361. The Rule 703 approach, which was controversial when adopted, [10] is based on the idea that the disclosure of basis evidence can help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion. For example, if the factfinder were to suspect that the expert relied on factual premises with no support in the record, or that the expert drew an unwarranted inference from the premises on which the expert relied, then the probativeness or credibility of the expert's opinion would be seriously undermined. The purpose of disclosing the facts on which the expert relied is to allay these fears—to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.

Perhaps because it cannot seriously dispute the legit- imate nonhearsay purpose of illuminating the expert's thought process, the dissent resorts to the last-ditch argument that, after all, it really does not matter whether Lambatos' statement regarding the source of the Cellmark report was admitted for its truth. The dissent concedes that "the trial judge might have ignored Lambatos's statement about the Cellmark report," but nonetheless maintains that "the admission of that statement violated the Confrontation Clause even if the judge ultimately put it aside." Post, at 15, n. 2. But in a bench trial, it is not necessary for the judge to stop and make a formal statement on the record regarding the limited reason for which the testimony is admitted. If the judge does not consider the testimony for its truth, the effect is precisely the same. Thus, if the trial judge in this case did not rely on the statement in question for its truth, there is simply no way around the proviso in Crawford that the Confrontation Clause applies only to out-of-court statements that are "use[d]" to "establis[h]

the truth of the matter asserted." 541 U. S., at 59–60, n. 9 (citing Street, 471 U.S. 409).

For all these reasons, we conclude that petitioner's Sixth Amendment confrontation right was not violated.

D

This conclusion is entirely consistent with Bullcoming and Melendez-Diaz. In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in Bullcoming that the defendant's blood alcohol level exceeded the legal limit and in Melendez- Diaz that the substance in question contained cocaine. Nothing comparable happened here. In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. Thus, just as in Street, the report was not to be considered for its truth but only for the "distinctive and limited purpose" of seeing whether it matched something else. 471 U. S., at 417. The relevance of the match was then established by independent circumstantial evidence showing that the Cellmark report was based on a forensic sample taken from the scene of the crime.

Our conclusion will not open the door for the kind of abuses suggested by some of petitioner's amici and the dissent. See post, at 10–11; Brief for Richard D. Friedman as Amicus Curiae 20–21. In the hypothetical situations posited, an expert expresses an opinion based on factual premises not supported by any admissible evidence, and may also reveal the out-of-court statements on which the expert relied. [11] There are at least four safeguards to prevent such abuses. First, trial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirement that experts display some genuine "scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. Rule Evid. 702(a). Second, experts are generally precluded from disclosing inadmissible evidence to a jury. See Fed. Rule Evid. 703; People v. Pasch, 152 Ill. 2d 133, 175–176, 604 N.E.2d 294, 310–311 (1992). Third, if such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises. See Fed. Rules Evid. 105, 703; People v. Scott, 148 Ill. 2d 479, 527–528, 594 N.E.2d 217, 236–237 (1992). And fourth, if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact. [12]

IV

A

Even if the Cellmark report had been introduced for its truth, we would nevertheless conclude that there was no Confrontation Clause violation. The Confrontation Clause refers to testimony by "witnesses against" an accused. Both the noted evidence scholar James Henry Wigmore and Justice Harlan interpreted the Clause in a strictly literal sense as referring solely to persons who testify in court, but we have not adopted this narrow view. It has been said that "[t]he difficulty with the Wigmore-Harlan view in its purest form is its tension with much of the apparent history surrounding the evolution of the right of confrontation at common law." White v. Illinois, 502 U.S. 346, 360 (1992) (Thomas, J., concurring). "[T]he principal evil at which the Confrontation Clause was directed," the Court concluded in Crawford, "was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." 541 U. S., at 50. "[I]n England, pretrial examinations of suspects and witnesses by government officials 'were sometimes read in court in lieu of live testimony.' " Bryant, 562 U. S., at ___ (slip op., at 6) (quoting Crawford, supra, at 43). The Court has thus interpreted the Confrontation Clause as prohibiting modern-day practices that are tantamount to the abuses that gave rise to the recognition of the confrontation right. But any further expansion would strain the constitutional text.

The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.

In all but one of the post-Crawford cases [13] in which a Confrontation Clause violation has been found, both of these characteristics were present. See Bullcoming, 564 U. S., at 308 (slip op., at 3–4) (certified lab report having purpose of showing that defendant's blood-alcohol level exceeded legal limit); Melendez-Diaz, 557 U. S., at 308 (certified lab report having purpose of showing that substance connected to defendant contained cocaine); Crawford, supra, at 38 (custodial statement made after Miranda warnings that shifted blame from declarant to accused). [14] The one exception occurred in Hammon v. Indiana, 547 U.S. 813 –832 (2006), which was decided together with Davis v. Washington, but in Hammon and every other post-Crawford case in which the Court has found a violation of the confrontation right, the statement at issue had the primary purpose of accusing a targeted individual.

B

In Hammon, the one case in which an informal statement was held to violate the Confrontation Clause, we considered statements elicited in the course of police in- terrogation. We held that a statement does not fall within the ambit of the Clause when it is made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." 547 U. S., at 822. In Bryant, another police-interrogation case, we explained that a person who makes a statement to resolve an ongoing emergency is not acting like a trial witness because the declarant's purpose is not to provide a solemn declaration for use at trial, but to bring an end to an ongoing threat. See 562 U. S., at ___, ___ (slip op., at 11, 14). We noted that "the prospect of fabrication . . . is presumably significantly diminished" when a statement is made under such circumstances, id., at ___ (slip op., at 14) and that reliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause, id., at ___–___ (slip op., at 14–15). We emphasized that if a statement is not made for "the primary purpose of creating an out-of-court substitute for trial testimony," its admissibility "is the concern of state and federal rules of evidence, not the Confrontation Clause." Id., at ___–___ (slip op., at 11–12).

In Melendez-Diaz and Bullcoming, the Court held that the particular forensic reports at issue qualified as testimonial statements, but the Court did not hold that all forensic reports fall into the same category. Introduction of the reports in those cases ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial. There was nothing resembling an ongoing emergency, as the suspects in both cases had already been captured, and the tests in question were relatively simple and can generally be performed by a single analyst. In addition, the technicians who prepared the reports must have realized that their contents (which reported an elevated blood-alcohol level and the presence of an illegal drug) would be incriminating.

C

The Cellmark report is very different. It plainly was not prepared for the primary purpose of accusing a targeted individual. In identifying the primary purpose of an out-of-court statement, we apply an objective test. Bryant, 562 U. S., at ___ (slip op., at 13). We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. Ibid.

Here, the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate petitioner—or for that matter, anyone else whose DNA profile was in a law enforcement database. Under these circumstances, there was no "prospect of fabrication" and no incentive to produce anything other than a scientifi- cally sound and reliable profile. Id., at ___ (slip op., at 14).

The situation in which the Cellmark technicians found themselves was by no means unique. When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have

no way of knowing whether it will turn out to be incriminating or exonerating—or both.

It is also significant that in many labs, numerous technicians work on each DNA profile. See Brief for New York County District Attorney's Office et al. as Amici Curiae 6 (New York lab uses at least 12 technicians for each case); People v. Johnson, 389 Ill. App. 3d 618, 627, 906 N.E.2d 70, 79 (2009) ("[A]pproximately 10 Cellmark analysts were involved in the laboratory work in this case"). When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.

Finally, the knowledge that defects in a DNA profile may often be detected from the profile itself provides a further safeguard. In this case, for example, Lambatos testified that she would have been able to tell from the profile if the sample used by Cellmark had been degraded prior to testing. As noted above, moreover, there is no real chance that "sample contamination, sample switching, mislabeling, [or] fraud" could have led Cellmark to produce a DNA profile that falsely matched petitioner. Post, at 21 (Kagan, J., dissenting). At the time of the testing, petitioner had not yet been identified as a suspect, and there is no suggestion that anyone at Cellmark had a sample of his DNA to swap in by malice or mistake. And given the complexity of the DNA molecule, it is inconceivable that shoddy lab work would somehow produce a DNA profile that just so happened to have the precise genetic makeup of petitioner, who just so happened to be picked out of a lineup by the victim. The prospect is beyond fanciful.

In short, the use at trial of a DNA report prepared by a modern, accredited laboratory "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate." Bryant, supra, at ___ (slip op., at 2) (Thomas, J., concurring).

* * *

For the two independent reasons explained above, we conclude that there was no Confrontation Clause violation in this case. Accordingly, the judgment of the Supreme Court of Illinois is

Affirmed.

Texas Code of Criminal Procedure Art. 36.22

No person shall be permitted to be with a jury while it is deliberating. No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court.

Chambliss v. State, 647 S.W.2d 257 (Tex. Crim. App. 1983)

MILLER, Judge.

After a jury trial, appellant was found guilty of murder and sentenced to ninety-nine years in prison. His appeal was originally to this court, but after the 1980 amendments to Article Five of the Texas Constitution altered the state's appellate framework, we transferred the cause to the Eighth Supreme Judicial District Court of Appeals. Rejecting all of appellant's eleven grounds of error, that court affirmed his conviction. Chambliss v. State, 633 S.W.2d 678 (Tex.App.El Paso, 1982). We granted appellant's petition for discretionary review, primarily to consider his bold contention that under Section Five of Article 38.22, V.A.C.C.P., as amended in 1977, oral statements that do not "stem from custodial interrogation" are admissible only for the purpose of impeachment.

We begin by setting out the facts pertinent to this contention. Appellant was arrested for murder on July 19, 1979, and placed in the Midland County jail. On that date, one Gary Dwayne King was incarcerated *258 in tank 3 of the jail, charged with burglary, attempted burglary, and misdemeanor theft. King testified at trial that he met appellant on July 25th, 26th, or 27th, when he approached appellant because "Midland County jail don't allow you to smoke and he came in with a package of cigarettes...." Until that time, appellant had apparently been kept in a single cell, and King had not seen him before.

For no reason "other than curiosity," King testified, he brought up the subject of the murder charge against appellant.[1] In the conversation that followed,

appellant gave a detailed account of his activities on the night of the murder, concluding that the confession that he had personally shot the victim, Sergeant J.B. England. According to King, however, appellant had told him he was thinking about giving a false statement blaming his co-defendant, Raymond Mathis, for the murder, in retaliation for a statement Mathis had made. Finally, King related that appellant had said that the murder "wasn't on his conscience, that maybe it should be, but it wasn't."

According to King, another "jailmate," Roger Browning, witnessed his conversation with appellant. Browning himself did not testify, however; King said Browning had been "transported" to Shreveport, Louisiana. King denied that at the time he talked to appellant, he had any intention of alerting "the authorities" of anything he might learn. It was not until a few days later that it occurred to him that he might mention the conversation to Captain Tony Roye, a jailer with whom King "always got along good." On cross-examination, King admitted that he later went to the district attorney "partly" because the information might gain him something, but disclaimed any knowledge of a plea bargain and said he had been promised nothing. It was brought out, though, that after telling of his conversation with appellant, King was released on bail, ending over a month's stay in jail. At the time of trial, moreover, King was staying at the Sheraton, with the district attorney's office "picking up the bill."

Appellant concedes that since King was not a police officer and no "interrogation" occurred, his statement to King did not "stem from custodial interrogation" within the meaning of Article 38.22, § 5, V.A.C. C.P.[2] Arguing that the legislative history of Article 38.22 is not a history of "people who have great faith in the honesty of mankind," however, appellant urges that Section 5 be construed so that "jailhouse conversations and other overhead remarks" would be admissible only to impeach a defendant who testifies, and not as substantive evidence of guilt offered in the State's case-in-chief. According to appellant, it is "preposterous" to believe that such statements were meant to be admissible on the question of guilt or innocence, so that "anyone can now testify about anything the defendant says in custody, so long as he is not being interrogated, even though the person so testifying is jailed for a crime and has a strong motive for pleasing the prosecution by what he says on the stand."[3]

*259 The key to appellant's argument is an imaginative reading of Section 5 of Article 38.22. At the time appellant allegedly unburdened himself to Gary King, Article 38.22 provided, in pertinent part:

"Sec. 3. (a) An oral statement of an accused made as a result of custodial interrogation is admissible against the accused in a criminal proceeding for the purpose of impeachment only and when: (1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement; (2) prior to the statement but during the recording the accused is told that a recording is being made; (3) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning; (4) the recording device was capable of making an accurate recording, that the operator was competent, and that the recording is accurate and has not been altered; (5) the statement is witnessed by at least two persons; and (6) all voices on the recording are identified. (b) Every electronic recording of any statement made by an accused during custodial interrogation must be preserved until its destruction is permitted by order of a district court of this state. (c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed. Sec. 4. When any statement, the admissibility of which is covered by this article, is sought to be used in connection with an official proceeding, any person who swears falsely to facts and circumstances which, if true, would render the statement admissible under this article is presumed to have acted with intent to deceive and with knowledge of the statement's meaning for the purpose of prosecution for aggravated perjury under Section 37.03 of the Penal Code. No person prosecuted under this subsection shall be eligible for probation. Sec. 5. Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with Articles 16.03 and 16.04 of this code, or of a statement that is the res gestae of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law." Tex.Code Crim.Pro.Ann., Art. 38.22 (Vernon 1979) (Appellant's emphasis)

Emphasizing the restrictive clause, "that has a bearing upon the credibility of the accused as a witness," appellant contends that this clause should be read to modify not just the words, "or of a voluntary statement, whether or not the result of custodial interrogation," but also the words, "or of a statement that does not stem from custodial interrogation." Under appellant's construction, then, Section 5 would read, in pertinent part: "Nothing in this article precludes the admission of ... a statement that does not stem from custodial interrogation... that has a bearing upon the credibility of the accused as a witness ...." Thus rearranged, Section 5 would restrict the use of statements not stemming from custodial interrogation (be they to cellmates or not) to impeachment purposes only.

Grammatically speaking, it might seem that the clause, "that has a bearing upon the credibility of the accused as a witness," qualifies or restricts only the immediately preceding words, "or of a voluntary statement, whether or not the result of custodial interrogation." Appellant seems to concede that this interpretation is natural, but implicitly *260 argues that his reading is also grammatically possible (a conclusion we will accept, without resort to the byegone practice of "diagramming," whereby sentences were broken into their component parts to see what words "went with" what). In this connection, appellant maintains that we should not apply a venerable doctrine of statutory construction: the "Doctrine of Last Antecedent," whereby "a qualifying phrase must be confined to the words and phrases immediately preceding it to which it may be applied without impairing the meaning of the sentence...." City of Corsicana v. Willman, 147 Tex. 377, 216 S.W.2d 175, 176 (1949). If that doctrine were applied here, of course, the pertinent part of Section 5 would be read this way: "Nothing in this article precludes the admission of... a statement that does not stem from custodial interrogation ..."period.

There is more here than it might seem. As appellant says, the real issue is legislative intent. Citing Easley v. State, 493 S.W.2d 199 (Tex.Cr.App.1973), appellant rightly points out that before Article 38.22 was amended in 1977, "cellmate testimony" like King's would have been inadmissible for any purpose. This was so because under the pre-1977 statute, an oral statement made in jail or in custody was admissible only if it fell within one of three exceptions to the general rule of inadmissibility:

(1) where it was a voluntary statement taken in an examining court; (2) where it was a statement of facts and circumstances found to be true which conduced to establish the defendant's guilt; or (3) it was a statement that was "res gestae" of the arrest or of the offense. Butler v. State, 493 S.W.2d 190, 193 (Tex.Cr. App.1973).

Since statements made to one's cellmate did not fall within one of these three categories, they were not admissible for any purpose, and so Easley held. Id. at 493 S.W.2d 200.

Appellant points out that although Article 38.22 was amended in 1977, the amendments did not expressly overrule Easley, but simply added three new exceptions to the general rule of inadmissibility: "[1] a statement which does not stem from custodial interrogation, or [2] of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or [3] of any other statement that may be admissible under law." And while many commentators assumed that statements that did not stem from custodial interrogation would be admissible as substantive evidence, See, e.g., Bubany, The Texas Confession Statute: Some New Wine in the Same Old Bottle, 10 Tex.Tech.L.Rev. 67 (1978), commentators have failed before in their attempts to plumb the intricacies of Article 38.22. Cf. Bubany, supra, at p. 81, declaring that the "apparent effect" of the new Section Five was to overrule Butler v. State, and adopt Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), and Alfaro v. State, 638 S.W.2d 891 (Tex.Cr. App.1982) (under the 1977 version of Article 38.22, voluntary oral statements that are the result of custodial interrogation are not even admissible for impeachment unless they are electronically recorded).

Not without some justification, appellant reminds us of what we said in Butler about the legislature's perennial distrust of oral statements made in custody, Id. at 493 S.W.2d 198, and of our more recent statement in Alfaro that "the historic concern for the reliability of oral confessions was still alive and well during the 65th Session of the Legislature." Alfaro, supra, at 638 S.W.2d 899. Given this legislative history, appellant submits, it does not make sense that the same legislature which confined the use of statements made as a result of custodial interrogation to impeachment (and then only if they were recorded), should at the same time intend to reject Easley and for the first time in Texas history allow "jailhouse conversations" to be admitted not just to impeach, but as evidence of guilt.[4]

*261 Finally, appellant warns that if the "rather cryptic and abstruse language" of Article 38.22 is not read to limit the use of oral custodial statements to

impeachment, the "sport of jailhouse snitching" will become a state pastime. According to appellant, while the "ties between prosecutor and prisoner will probably remain quite unofficial" lest convictions be reversed under Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), an informal "back-scratching" system will develop, nourishing the inchoate interest in law enforcement of prisoners like Gary Dwayne King. As a result, the "permissible limits of such relationships between informer and the prosecution will have to be defined by this court," a problem that did not trouble us in the days of Easley.

Although appellant's argument is a brave one, we must reject it. In our view, the key language in Article 38.22 is not the clause, "that has a bearing upon the credibility of the accused as a witness." Instead, the real indicator of legislative intent is the term, "custodial interrogation." Until 1977, Article 38.22 applied to confessions made while "the defendant was in jail or other place of confinement or in the custody of an officer...." Art. 38.22, V.A.C.C.P. (Vernon 1966). As can be seen, this language omits any requirement that the statement stem from "interrogation." By contrast, after Article 38.22 was amended in 1977, the old language was changed so that "custody" itself would not invoke the protections of the statute: Section 3(a) spoke of an "oral statement of an accused made as a result of custodial interrogation," and Section 5 created new exceptions for a statement that did not "stem from custodial interrogation" or a "voluntary statement, whether the result of custodial interrogation or not," that had a "bearing upon the credibility of the accused as a witness."[5] (Emphasis supplied)

In short, we are convinced that the repeated use of this new language in 1977 did indeed signal a departure from prior legislative intent. Professor Bubany has summarized the matter well:

"Under the prior law the trigger for statutory limitations on `custodial' statements was the two-dimensional concept of actual custodywhether the accused was `in jail or other place of confinement or in the custody of an officer.' Whether made in response to an official interrogation or not, a statement of the accused while in custody was ipso facto inadmissible unless it was preceded by the appropriate warnings and waiver. In the case of an oral statement, it was ipso facto inadmissible unless it fell within one of the statutory exceptions. * * * * * * "The statutory change from a focus on the fact of custody to an inquiry of whether the statement is the product of a custodial interrogation will have little impact on the law of written confessions. Its real effect will be on the admissibility of oral statements. One effect of the new statute is to overrule Easley v. State and its progeny. Easley held that statements made to a fellow jail inmate concerning a crime for which the accused was in custody must meet the requirements of Article 38.22 to be admissible. *262 Statements of this type are `custodial,' in the sense that they are post-arrest and made while in custody, but under the new law they would not be `a result of' or `stem from' a custodial interrogation." Bubany, supra, at pp. 73-74. (Footnotes omitted)

Thus, we conclude that while the 1977 legislature was still concerned with the reliability of oral statements, its concern was with oral statements resulting from custodial interrogation, not simply statements made in custody. Appellant's interpretation not only ignores the prominence of the new language, but, as he concedes, might "well have adverse effects upon the other clauses in the section [five], the in-court statements and the res gestae statements." For if the words, "that has a bearing upon the credibility of the accused as a witness," are to apply to or modify the words, "a statement that does not stem from custodial interrogation," what words in Section 5 do they not apply to? Under what might be called appellant's "floating modifier" theory, Section Five could be read, for example, to say that "Nothing in this article precludes the admission of a statement made by an accused in open court at his trial ... that has a bearing upon the credibility of the accused as a witness." Whatever else the legislature intended, we are confident that they did not mean for a judicial confession to be limited to impeachment (if that can be conceived of). And yet if this reading is obviously untenable, it only demonstrates the weakness of trying to read in the clause, "that has a bearing ...," whenever one supposes the legislature meant to do so. Let the legislative intent be demonstrated, and we would agree with appellant that "sloppy draftsmanship"[6] might be overlooked; we are unwilling, however, to ignore the importance of the new concept of "custodial interrogation," and cannot divine that appellant's reading was meant. Thus, even though testimony like that here may be unreliable, and even though Massiah may not afford enough protection,[7] those are matters for the legislature, the legislature itself having changed the law. Accordingly, we reject appellant's first ground for review, and hold that statements which are not "the result of" or do not "stem from" custodial interrogation are admissible under Article 38.22 on the question of guilt, and not merely to impeach a defendant who testifies.

Appellant's second ground for review also concerns a conversationa conversation between *263 one of the jurors, Robert Richards, and one of the victim's sisters, Brenda Leak. During a break in the trial, Richards approached Mrs. Leak, who had earlier testified as a witness for the State. Mrs. Leak described the encounter as follows:

"Q Would you tell us the substance, or not so much the substance, would you tell us the exact words used in the conversation? "A He extended his hand to shake hands and said, `My name is Bob Richards, and when this is over would you give me your name and address?' "Q And how did you respond? "A I said, `Okay', or something like that, and then he left. "Q Was there any other conversation before or since? "A No. "Q Have you had any other conversations with any of the other Jurors? "A No. "Q Did your sister say anything? "A Not at all. "Q Or to your knowledge has your sister had any other conversation with any of the other Jurors? "A No, we have been very particular not to. "Q You didn't have any other conversation at lunch, or anything like that? "A No. "Q You didn't tell him something about, or words to the effect of `We will give it to you at lunch, or later'? "A No, he said, `At lunch', or `later', or something like that, and then when I found out he was a Juror, my sister said he was a Juror, and I told Mr. Seltzer that and he said, `By all means, no contact', so I was away from here at lunch time and there has been no contact. "Q So he indicated to you he wanted to talk to you at lunch time, or later? "A Well, he just said, `Would you give me your name and your address and your telephone number either at lunch time or later, or when it is over'. I believe that was his words. "Q And you told Mr. Seltzer about this when? "A Well, immediately. Well, he came down the hall and my sister said he was a Juror. "Q And that was this morning? "A Yes."

Wanda Laney, another of the victim's sisters, remembered the conversation somewhat differently:

"Q I was sitting right there. Now, did you have a conversation with one of the Jurors this morning, or did your sister have a conversation that you were a witness to? "A Yes. "Q Would you tell us what exactly was involved in that conversation? "A He introduced himself, told us his name. I forgot what it was, Richardson, I believe, and I believe he asked her if she was from Asheville and she said yes, and I believe he told her he might know someone in Asheville, or something. I don't remember exactly what he said, and then right at the end of it he said, `I am a Juror and I can't talk to you now', or something like that, `but after this trial is over I would like to get in touch with you,' or something like that. "Q Did he shake your hand? "A Not mine. I believe he did hers, but I'm not sure. "Q And he said he was from the same town you were from? "A I believe he said he knew someone from Asheville. "Q Now, it has come to our attention that one of the replies was, `I will give it to you during lunch time, or immediately after lunch time', do you remember that? "A No, sir. "Q What did he want, do you know? "A He wanted her address, that's all. "Q Did he ask for your address? "A No. "Q And that was outside the Courtroom here, is that correct? "A Yes. "Q On the benches outside? *264 "A Yes. "Q Y'all didn't have any conversation in the elevator? "A No. "Q Any other conversations at all? "A No, sir. "Q One last question, did you call it to the attention of the D.A.? "A Yes. "Q Which District Attorney? "A Mr. Seltzer. "Q And that was immediately? "A Yes, he came in just shortly after the Juror had come in. "Q And what was his reply? "A I don't know, my sister talked to him, I didn't."

Sue Harris, appellant's older sister, gave the following account:

"Q Are you aware of the identity of the persons who have been identified as the sisters of the deceased, J.B. England? "A Yes, sir. "Q Have you had occasion to view either or both of the two sisters talking with one or more Jurors? "A Yes, sir, I have. "Q Was it both of them? "A They were both sitting there. The one that got up on the stand yesterday and testified is the one that spoke to the man. "Q And when did you see the one that testified speak to a Juror? "A This morning between 8:30 and 9:00. "Q And where was the conversation? "A The man walked up and asked "Q Where was the conversation? "A It was out in front of the Courtroom here. "Q Did you overhear any of the conversation? "A Yes, sir. "Q Would you tell us what you saw and overheard? "A The man walked up to the two ladies. He introduced himself and he said,`I am a member of the Jury. Is there any way I can get an address from y'all where I can get in touch with you after the trial is over?' "Q Was there a reply? "A Yes, sir, they said yes, that they would give it to him, and he said he would talk to them at lunch. "Q Anything else? "A No. "Q Did he shake hands with one or more of them? "A I don't recall."

Finally, Juror Richards testified at a hearing on appellant's motion for a new trial that he had seen Mrs. Leak "coming back from lunch break" and had introduced himself. He could not remember precisely what was said, but claimed that a newspaper article he had read after the trial contained an exact quote. (The

article is not in the record.) Richards then testified as follows:

"Q What I am asking you is to tell me and to tell the Judge what you remember about what you said. I am not asking for the quote in the paper. I am asking you for your memory. "A Okay, on that point I introduced myself as Robert Richards and said that I was on the Jury. I said I wanted to make her acquaintance and I hoped that I might have the opportunity of obtaining her address, if possible. "Q And what did she say? "A She looked up at me and, gosh, she looked up at me and her comments were very short in the fact that sheI guess the way I just said it, `I hope I would not be imposing upon you if I could ask for your address', and I introduced myself as being a person on the Jury, and she came back and said, `No, that wouldn't be imposing', and that was the extent of the conversation. "Q Did you have any more conversation with either her or the other sister that was here at the trial? "A Never had a conversation with her other sister. "Q Did you tell them you would get the address or would talk to them about it during or after lunch? *265 "A No, all I said was that if I could be able to obtain the address at a later time, like at lunch time, or what-have-you, because she was not writing the address or giving me a card at that point, so I just came back and said, `If it is appropriate I would like to obtain the address at a later time'. My concern was that she was going to leave right then, that she wouldn't stay until the end of the trial and I wouldn't be able to obtain the address. "Q In any event, it is your testimony that prior to the State resting its case, and before the Defendant had made or had put forth any testimony whatsoever, you had already decided in your own mind that there had been a murder in Midland County? "A Okay, I would say yes."

According to Richards, he had "debated" talking to Mrs. Leak for about a day, but concluded that he would not be violating the court's instructions[8] "just to make my introduction to her and not to talk to her about the case, but make my introduction to her." Richards explained his motivation thusly:

"Q What was your purpose in contacting the witness Brenda Leak? "A The purpose was straightforward in that as I had witnessed the witness bearing testimony, or positive identification, I just had a great deal of respect for her, for apparently the family structure from which she came from, and I thought thatwell, I guess to be very frank that I, anyone else on the Jury, yourself, Kelly Joe, the family, whoever lived here in Midland would take the opportunity and personally, if they were involved in any way, to give their apology for a situation that occurred in Midland. It had no bearing as far as whether we ever found the person that was involved in that or not. The fact that a situation occurred here in Midland that hopefully should not occur on the earth, I felt very strongly about it as an individual and as a human being that I should extend an apology to her. "Q So before the trial was over you already had an opinion about the situation? "A No, my opinion of the situation was that a man had been murdered, at that point in the trial. "Q You had already decided that? "A At that point in the trial we know that a man had been murdered. We know that he had been shot, not by himself, and we knew at that point that he had been shot by somebody. We didn't know who. So at that point in time we knew it had happened in Midland and it was, I think, a very sad situation."

In addition, Richards denied being affected by his conversation:

"Q Mr. Richards, in that relationship in the talk with Mrs. Leak did your conversation with Mrs. Leak in any way affect your thought processes as to Kelly Joe Chambliss' guilt or innocence of the alleged crime? "A Absolutely not. I will be very frank. At that time if I had any hope it was the hope that Kelly Joe Chambliss had no involvement in it. If I have any desire, it would almost be to the point that we would not know who it was. I was not thinking that we have got to find the person to pay the price, no. My mind was not made up at that time. All I know is that the facts were available that some person had passed away that I felt was of quality, and that his sister was indeed very remorseful."

Article 36.22, V.A.C.C.P., provides that "[n]o person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court." (Emphasis supplied). Although it is "generally presumed that a defendant is injured whenever an empaneled juror converses with an unauthorized *266 person about a case," the defendant has the burden "to establish that if a conversation did occur between a nonsequestered juror and someone else ... the discussion involved matters concerning the specific case at trial." Romo v. State, 631 S.W.2d 504, 506 (Tex.Cr.App.1982) (Citations omitted; emphasis supplied).

In the instant case, while Juror Richards had no business talking to Mrs. Leak, the record does not show that he in any way discussed appellant's case, or that Mrs. Leak did. Nevertheless, appellant makes much of Richards'

motivation in approaching Mrs. Leak, arguing that his contact with her was "a re-enforcement [sic] of his sympathetic feelings" and, in effect, "a second exposure to evidence without cross-examination." We note first, however, that Richards did not verbally communicate his feelings of sympathy to Mrs. Leak, or suggest anything as to the outcome of the case. Moreover, appellant's argument proves too much, for a juror's feelings may be reinforced simply by eye contact, without any conversation at all. As we read Article 36.22, though, its main purpose is to prevent an outsider from saying anything that might influence a juror. See Pearson v. State, 145 Tex.Cr.R. 87, 165 S.W.2d 725, 730 (1942) (Ex parte statements made by jurors do not constitute a "conversation" so as to invoke Art. 36.22). Here Mrs. Leak said nothing about the trial, and we do not believe that her agreement to provide her address influenced Richards in his verdict. Consequently, we also reject appellant's second ground for review.[9]

Finally, we have examined appellant's remaining grounds of error[10] and conclude that the Court of Appeals properly disposed of them. Chambliss v. State, supra. The judgment of the Court of Appeals is affirmed.

Green v. State, 840 S.W.2d 394 (Tex. Crim. App. 1992)

CLINTON, Judge.

Appeal is taken from a conviction for capital murder. See V.T.C.A., Penal Code, § 19.03(a)(2). After finding appellant guilty, the jury answered the special issues in the affirmative and punishment was assessed at death. Article 37.071, V.A.C.C.P. Direct review by this Court is automatic. Id., § (h). Appellant raises thirteen points of error and challenges the sufficiency of the evidence at both stages of trial. We will affirm appellant's conviction.

Viewed in the light most favorable to the verdict, the evidence at trial established the following facts. On February 13, 1985, Wilson Lucas, a retired educator, was visiting a friend who lived at a set of apartments located directly behind a Dyer Electronics in San Antonio. The apartment complex and Dyer Electronics were separated by a single fence in need of repair. Lucas testified that, at about midday of February 13, he came into contact with appellant and his co-defendant in the parking lot of the apartment complex. His suspicions aroused by their behavior, Lucas stated that he carefully looked both men over, as well as the vehicle they were near, during the several minutes he was in contact with them. Lucas said that the two men were still at the apartment complex when Lucas and his friend left. He also testified that about twenty minutes after he left the complex, he heard over the radio that the adjacent Dyer Electronics store had been robbed and the attendant had been shot. Lucas and his friend then went to Dyer's and subsequently gave a statement to police.

Shortly before Lucas had his encounter with appellant, Gerry Rickhoff, the store manager at Dyer Electronics, and his eighteen-year-old employee, Timothy Adams, the victim in this case, were commencing what appeared to be another ordinary work day. Rickhoff recalled in testimony that business had been slow that morning, but that two black men had come into the store in the early afternoon. Rickhoff told the jury that he noticed that the vehicle in which the men had arrived was old and in poor condition.[1] He stated that the victim engaged the men in conversation, then one separated from the discussion and looked over the store. The men then left without asking about any particular equipment and without purchasing anything. Rickhoff identified appellant as one of those two men. The other was later identified as one Harold Bowens.

As Rickhoff prepared to leave for lunch, he noticed the same vehicle returning to the store and later identified the same two men as he had seen in the store previously to be the car's occupants. Rickhoff exited his car, returned to the store, and told Adams not to let the two "steal anything." Rickhoff then left for lunch. Upon arriving at his apartment shortly after leaving the store, Rickhoff received a phone call that there had been a shooting at the store.

Next door to Dyer Electronics was a Midas Muffler Shop with Steve Robinson on duty as manager. Jeff Cochran and Randy Reece were also working there on February 13, 1985. Reece testified that at approximately 1:30 p.m. on that day, he heard sounds that his co-worker Cochran identified as gunshots coming from the direction of the electronics store. Reece stated that he then went to the front door of Midas and saw two black males, later identified as appellant and Bowens, exit Dyer's and get into the same old, beat-up vehicle identified by Lucas and Rickhoff. Reece, Cochran, and

Robinson then all ran over to the Dyer building. They found the victim, Adams, alive, but "covered in blood". Reece testified that as he approached the victim, Adams stated several times that he had been shot and needed an ambulance. Reece stated that he found the *399 victim slumped over the cash register and then he helped him to the floor. Reece also told the jury that he overheard the victim tell Cochran, "They tried to rob me, but they didn't get anything."

Cochran and Robinson testified to essentially the same facts as did Reece. Cochran stated that he, also, saw the two black men leaving Dyer Electronics in appellant's car. He further recalled that appellant was driving. Cochran told the jury that one of the suspects appeared to conceal something as he fled the store.

The Dyer stores' city manager, Leslie Daniels, testified that he called the store that afternoon only to have his call answered by Adams proclaiming to be dying and asking for help. Daniels had an employee contact the owner, Jerry Dyer. When Daniels arrived at the store, the police and ambulance were both at the scene. Daniels spoke to the victim who told him that two black men who had been in the store earlier that day had done this to him and that Rickhoff knew who they were. Daniels later told the police that nothing appeared to be missing from the store.

Dyer testified that when he arrived at the store, the victim told him that "they" had shot him and he was dying. Dyer explained to the jury that the cash register would open only if a secret button was pushed. He also told the police that no money or inventory appeared to be missing.

The Emergency Medical Services supervisor, Bobbie Bozek, testified that the victim told her that he had been shot by a black man for no reason. She found the victim in critical condition resulting from his sustaining three gunshot wounds. Officer Donald Weilbacher testified that Adams told him that two black men had shot him during their attempt to commit robbery.

Detectives Allen Rabe and Robert Duross of the San Antonio Police Department testified that they were called to the scene to gather and preserve evidence. Rabe took fingerprints, found a bullet fragment on the floor, and found a bullet hole in the wall from which he retrieved a slug. Duross gave the bullet fragment and the slug to the Medical Examiner's Office. Duross testified that he went over the entire area "with a fine tooth comb," but found no indication that a shot was fired into the floor (as appellant later claimed happened).

After the police arrived at the scene of the shooting and questioned the witnesses, one officer broadcast a description of the suspects and the car involved. Officer James Holguin, of the San Antonio Police Department, testified that he located a car matching the description at an apartment complex.[2] He testified that when he pulled his vehicle close to the suspect vehicle,[3] the two occupants exited the car and began walking in different directions. As the officer recognized the passenger as co-defendant Bowens, he decided to follow the driver, later identified as appellant. Appellant ran when Holguin identified himself as a police officer. Although Holguin gave chase, he momentarily lost sight of the suspect. When the officer saw appellant again, he had removed and discarded the jacket he had been wearing. Appellant managed to elude capture at that time.

Other officers were on the scene by this time and Officer Harold Schott, also of the San Antonio Police Department, testified that he found a gun in the vicinity of where Holguin had chased the suspect. This location was very near the suspect's vehicle. The weapon was identified as a blue steel.38 caliber revolver with a four inch barrel. The six-shot revolver contained four spent shell casings and two live rounds of .38 caliber special Winchester Plus P ammunition. The bullets had been manually altered, with an "X" cut in the nose of each bullet. Schott testified that this type of alteration facilitates a more rapid expansion of the bullet upon impact, resulting in *400 faster killing power. Schott explained that the fresh scratches on the gun indicated that it had been dropped on the ground fairly recently. Schott told the jury that he then fingerprinted the gun and was able to obtain prints.

Fingerprint expert Officer Ricardo Contreras testified that he positively identified the prints taken from the gun as those of appellant. None of the prints lifted from the weapon belonged to Harold Bowens. While other ridge prints were found, they were insufficient to make an identification. Contreras testified, however, that the presence of the ridges indicated that the gun had not been wiped clean.

Firearms examiner Richard Stengel testified that the .38 caliber gun found by Schott was the weapon used to murder the victim. He testified that the altered Plus P bullets found in the weapon were designed to do more damage and be more lethal than ordinary bullets.

Appellant was subsequently arrested pursuant to a warrant and immediately advised of his constitutional rights. Detective Anton Michalec testified that appellant was then taken to the police station where he was readvised of his rights and questioned. Appellant gave a four-page statement to the detective wherein he

basically accused Bowens of planning the entire event and of firing the fatal shot. Appellant explained that when he and Bowens were on their way to pick up some 200 videocassette recorders, Bowens received a.38 caliber gun from a friend which he appeared to place on the floor of the vehicle. Appellant also claimed that Bowens had taken the gun into Dyer's and, when the victim would not cooperate, Bowens fired a shot into the floor of the store.

Dr. Robert Bux performed the autopsy on Adams who had received gunshot wounds to the right elbow, the left anterior chest, and the abdomen below the rib cage. Bux testified that the wound in the victim's arm was consistent with a defensive posture. He also testified that the chest wound traversed downward through the ribs to the lung. The doctor explained that there was no way the six foot one inch tall victim could have received such a chest wound if he were standing straight up and the shooter was six feet tall. The victim had to have been bent over steeply or squatting down in order for the bullet to have taken the trajectory that it did (or the shooter could have been elevated above the victim).

Billy Hazel also testified for the State. He explained that in 1985, he was placed in a cell with appellant while Hazel was under arrest for burglary. Hazel related a conversation he had with appellant in which appellant stated that he had shot a salesperson at Dyer Electronics. Appellant told Hazel that Bowens had been with him and that he (appellant) had made up his mind to rob the place. Hazel also stated unequivocally that he received no deal on his sentence from the State in return for his testimony except to be placed in protective custody. Hazel's attorney also testified in support of Hazel's statement that no deal was made with prosecutors.

Appellant testified on his own behalf at trial. He admitted that he had been convicted twice previously and served time in prison. He admitted going to Dyer's with Bowen; however he maintained that he and Bowens were to "move" two hundred videocassette recorders and that it was an "inside deal." Appellant claimed that Bowens took the gun into the store without his knowledge and that Bowens shot the victim. Appellant also claimed that Bowens shot into the floor. Appellant told the jury that he was at the apartments behind Dyer Electronics, where he and Bowens had been seen by Lucas, earlier that day to visit his brother, but changed his mind. Appellant also made other statements to the jury which were inconsistent with what he had told the police in his earlier statement.

In his tenth point of error, appellant challenges the sufficiency of the evidence to support his conviction. Specifically, he alleges that there is insufficient evidence to prove that the offense of murder occurred while appellant was in the course of committing or attempting to commit robbery. This Court must review all of the evidence in the light most favorable to the *401 verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Dunn v. State, 721 S.W.2d 325, 327 (Tex. Cr.App.1986). This standard is the same for both direct and circumstantial evidence cases. Ransom v. State, 789 S.W.2d 572, 577 (Tex.Cr.App.1989), cert, denied, 497 U.S. 1010, 110 S. Ct. 3255, 111 L. Ed. 2d 765 (1990).

Appellant contends that the above standard of review must be applied differently in a circumstantial evidence case. He argues that every other reasonable hypothesis except that of the guilt of the defendant must be excluded as dictated by Wilson v. State, 654 S.W.2d 465, 467 (Tex.Cr.App. 1983).[4] Specifically, appellant contends that a "robbery" did not occur because the victim never really told anyone that he was robbed and nothing was actually taken. Also, and as he said in his statement to the police, appellant maintains that his intention in going to Dyer's was to "move" some equipment as part of an "inside deal," and that his co-defendant was the one who actually brought the gun and shot the victim. In other words, appellant contends, he was not there to rob anyone, but rather, just to commit theft. Thus he could not be guilty of robbery. Appellant alleges that the facts as established by the State's evidence are consistent with this hypothesis. This argument is not persuasive.

The indictment in the instant case states in pertinent part that:

on or about the 13TH day of FEBRARY, A.D., 1985, [appellant], hereinafter called defendant, did then and there intentionally cause the death of an individual, namely: [complainant], by SHOOING THE SAID COMPLAINANT WITH A GUN, and the said defendant did then and there intentionally cause the death of the said complainant while in the course of committing and attempting to commit the offense of ROBBERY upon [complainant];[5]

This Court has construed the phrase "in the course of committing or attempting to commit" as used in V.T.C.A., Penal Code, § 19.03(a)(2) to mean:

conduct occurring in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of the offense, i.e., in this case, of robbery."

Bower v. State, 769 S.W.2d 887, 895 (Tex. Cr.App.1989), cert, denied, 492 U.S. 927, 109 S. Ct. 3266, 106 L. Ed. 2d 611 (1989); Riles v. State, 595 S.W.2d 858 (Tex.Cr.App. 1980) (emphasis added). Appellant puts great emphasis on the fact that nothing was actually taken from the Dyer store while at the same time admitting that he went to the store to commit theft. This Court stated in Crank v. State, 761 S.W.2d 328, at 350 (Tex.Cr.App.1988), cert, denied, 493 U.S. 874,110 S. Ct. 209,107 L. Ed. 2d 162 (1989), that the "actual commission of theft is not a prerequisite to the commission of robbery; the gravamen of robbery is the assaultive conduct and not the theft."

In applying the "reasonable alternative hypothesis" construct, "[t]he correct procedure involves accepting the inculpatory circumstances ... and then asking if there is a reasonable hypothesis other than guilt which also would account for such circumstances." Girard v. State, 631 S.W.2d 162, at 164 (Tex.Cr.App.1982). Thus, if exculpatory aspects of appellant's statements are fully consistent and in harmony with all of what would otherwise appear to be purely inculpatory circumstantial evidence presented by the State, then under the reasonable alternative hypothesis approach we would be constrained to hold the evidence insufficient. If, on the other hand, exculpatory aspects of appellant's version of events necessarily contradict or *402 conflict with inculpatory inferences drawn from other circumstantial evidence presented by the State, and all of the evidence viewed in the light most favorable to the prosecution would rationally support a jury verdict of guilt to a degree of confidence beyond a reasonable doubt, we must hold the evidence sufficient. In our view this case falls into the latter category.

The evidence established that appellant's fingerprints were on the weapon used in the offense, and that Bowen's were not. Moreover, appellant's former cellmate testified appellant had told him that he, not Bowens, shot the salesperson at Dyer's. These facts are inconsistent with the hypothesis that appellant had no involvement in the assaultive component of the offense. We conclude that there was no other outstanding reasonable hypothesis except for the guilt of appellant. We hold that any rational trier of fact could have found that appellant committed the offense of capital murder beyond a reasonable doubt. Point of error number ten is overruled.

Appellant complains in points of error one through three that the trial court erred in denying his challenge for cause to venire-person Edwin Kruciak. He complains that Kruciak: 1. "could not accord appellant his constitutional right against self-incrimination," 2. demonstrated a bias "toward the appellant", and 3. "demonstrated bias on punishment phase issue No. 2." When the denial of a challenge for cause is at issue, error is preserved for review if appellant 1) used all of his peremptory strikes, 2) asked for and was refused additional peremptory strikes, and 3) was then forced to take an identified objectionable juror whom appellant would not otherwise have accepted had the trial court granted his challenge for cause (or granted him additional peremptory strikes so that he might strike the juror). Demouchette v. State, 731 S.W.2d 75, 83 (Tex.Cr.App.1986), cert, denied, 482 U.S. 920, 107 S. Ct. 3197, 96 L. Ed. 2d 685 (1987). See and compare Long v. State, 823 S.W.2d 259, 264 (Tex.Cr. App.1991) and Harris v. State, 790 S.W.2d 568, 581 (Tex.Cr.App.1989). The record reflects that appellant used all of his peremptory strikes and asked for and was denied additional strikes. Moreover, Kruciak was the twelfth juror selected. We will assume from the fact appellant challenged Kruciak for cause that he found him objectionable, although he does not expressly state that in the record or in his brief. We find that appellant has preserved these issues for our review.

Article 35.16, V.A.C.C.P., sets forth the reasons for which the defense may make a challenge for cause. Our concern lies with (a)(9): "[t]hat [the venireperson] has a bias or prejudice in favor of or against the defendant"; and (c)(2):

[t]hat [the venireperson] has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

The determination on appeal is whether the trial court abused its discretion in denying the challenge for cause. See Mooney v. State, 817 S.W.2d 693 (Tex.Cr.App.1991). The propriety of the trial court's rulings will be reviewed in light of the venireperson's voir dire as a whole. When faced with a vacillating or equivocal venireperson, this Court will accord great deference to the trial judge who had the better opportunity to see and hear the person. Mooney, 817 S.W.2d at 701.

The record reveals that appellant challenged the venireperson for cause at three separate instances in the voir dire process, resulting in the following:

DEFENSE: I would challenge, Your Honor, at this time. The fact the juror has testified that he would not be able to follow the court's order and not consider any outside information, not seeking outside information, more specifically, newspaper, possible television. And that he would always answer issue number two yes. * * * * * *

Your Honor, at this time, the defense would challenge the juror, Mr. Kruciak, on the fact that there is a possibility, due *403 to his history, that he would become biased... for the State against the defense. And also for the answers he made during the general voir dire as to informationoutside information that he would seek out and the fact that he would always answer issue number one yes, even though he was talked toI'm sorry, issue number two. Even though he was talked to by the State and given an extreme hypothetical. Has nothing to do with the hypothetical in this case, wherein he would answer it no.
For those reasons, we would ask that he be excused.

* * * * * * THE COURT: [In regards to appellant's challenge for cause of the venireperson,] [t]ell me why. DEFENSE: Under bias, Your Honor. Bias on the answers that he gave in our second session, and I renew our challenge under the same issues that he have in the first session, talking to him.

In point of error number one, appellant complains that his challenge for cause should have been granted because the venireperson could not accord appellant his constitutional right against self-incrimination. However, it appears from the above recitation that this complaint did not constitute any part of the basis of appellant's challenge for cause at trial. Because the basis for the challenge raised during voir dire differs from the complaint raised on appeal, appellant has waived error as to this point.[6]Harris v. State, 784 S.W.2d 5, 27 (Tex.Cr.App.1989), cert, denied, 494 U.S. 1090, 110 S. Ct. 1837, 108 L. Ed. 2d 966 (1990). See Long, supra. Point of error number one is overruled.
In point of error number two, appellant contends that Kruciak had a bias (or, as he inconclusively stated in his objection, "there [was] a possibility, ..., that he would become biased") against him and for the State.[7] Appellant makes this contention based on the fact that the venireperson had previously been the victim of a robbery and appellant was indicted for murder in the course of committing or attempting to commit a robbery. § 19.03(a)(2), supra.
The record reflects that the trial court directed a few general questions and comments to Kruciak and then allowed the State to proceed. The State made a few general comments at the end of which it asked Kruciak the following questions:

[THE STATE]: [Y]ou mentioned [in your questionnaire] that you were the victim of a robbery. Do you understand that has nothing to do with this case? [KRUCIAK]: I understand. Q. All right. You are not going to hold that against this Defendant are you? A. No, not this Defendant.

The State then continued and subsequently finished its questioning without further mention of this subject.
Appellant then proceeded to question Kruciak, but did not make mention of the fact that he had previously been a victim, not even to question him on any potential bias. In fact, it was not until after appellant finished questioning Kruciak, the State questioned him further, and appellant was questioning him a second time that the issue again arose, at which time the following took place:

[DEFENSE COUNSEL]: Okay. Do you know of any reason why you cannot be fair and impartial in thison this jury that we are here for today? [KRUCIAK]: None other than my feelings about murder, armed robbery, or things like that. Q. Okay. What do you mean by that? A. Well, I mean, you know, as in the questionnaire, I have been a victim. * * * * * *

So maybe or maybe not. I think it probably has maybe biased me in a certain direction.

*404 Q....I believe you were a victim of a robbery? * * * * * * A. Yes. Somewhere around early '80s. Q. The fact that you were a victim of a robbery, would that make you tend to favor the State in this case? A. Possibly. Yes. Q. Would it make you tend to disfavor the defense in this case? A. Oh, yes. I mean, if it's making me favor one. * * * * * * Again, human nature, as I'm sitting there trying to be unbiased, I think because of the past incident I might be putting myself in a certain position. * * * * * * Q. Okay. Do you have a preconceived notion for or against the State or the defense in this case as you sit there right now? A. No. * * * * * * Q. Do you feel that in your mind you have

drawn from, what you have told me, okay, that you have drawn such a conclusion as to the guilt or innocence of the Defendant that would influence you in your action in finding a verdict in this case? A. No. I haven't drawn any. Q. Okay. As to this particular Defendant; is that right? A. In this particular case. Q. So all that you are telling me, then, is that there is a possibility or probability that because of your experience in the past you may have a bias for the State, and possibly a bias against the ... Defendant; is that right? A. Right. * * * * * * But not necessarily in this situation.

The State then quickly followed up with these questions:

[THE STATE]: You don't like robbers, right? [KRUCIAK]: Right. Q. You are not saying that you don't like [appellant] because he's charged with robbery? A. Right. Q. Okay. You are not going to say that this at this [sic] point you think he's guilty or anything, or you think the State has a better case just because you were the victim of a robbery? A. I can't say that. I have no evidence one way or the other. * * * * * * Q. [Y]ou don't like robbers. If the jury finds that he's guilty of committing capital murder while in the course of committing a robbery, you are going to have a bias against the person who is guilty of doing something like that, right? A. Yes. Q. Human nature? A. Right. Q. But you are not going to be unfair to him when you are deciding whether or not he's guilty? A. Right.

Appellant then made his challenge for cause against Kruciak based on several reasons, but the trial judge requested further questioning regarding his prior status as a victim and illustrated the specific questions he wanted asked. That further questioning established that the veniremember was robbed in the early 1980's when he was delivering pizzas as an extra job. Kruciak unequivocally stated that he would still hold the State to its burden of proof at the guilt/innocence phase, and, if necessary, the punishment phase of trial. Ultimately, he stated that his past experience "could [make me biased], but it wouldn't."

As this Court stated in Anderson v. State, 633 S.W.2d 851, at 854 (Tex.Cr. App.1982):

Bias exists as a matter of law when a prospective juror admits that he is biased for or against a defendant, [citations omitted]; admits prejudice against persons who use intoxicating beverages, when the defendant is charged with an offense involving liquor, [citations omitted]; or when he admits or demonstrates *405 prejudice toward a racial or ethnic class of which the defendant is a member.

When a veniremember is shown to be biased as a matter of law, he must be excused when challenged, even if he states that he can set his bias aside and provide a fair trial. Id. However, it is left to the discretion of the trial court to initially determine whether such a bias exists and the court's decision will be reviewed in light of all of the answers given. Id.

We cannot say here, in light of all of Kruciak's voir dire testimony, that the trial court erred in concluding he harbored no particular bias against appellant. The trial court did not abuse its discretion in denying appellant's challenge for cause on this ground. Point of error number two is overruled.

In point of error number three, appellant alleges that Kruciak had a bias against the law on which appellant was entitled to rely. Specifically, appellant contends that Kruciak expressed a tendency to always answer the second special issue under Article 37.-071, § (b)(2), supra, regarding the probability of future dangerousness, in the affirmative.

The record reveals that the State began the voir dire with regard to this issue with a general explanation of the second special issue. The State then asked Kruciak whether he could be fair, keep an open mind, and wait to hear all of the evidence before determining the answer to the second special issue. To this, the Kruciak responded, "I think I could do that."

Appellant, however, was a little more detailed in his questioning. Appellant was discussing the terms of "possibility" versus "probability" when the following occurred:

[DEFENSE COUNSEL]: Okay. Now, my question to you is this: You have found this person guilty in the first phase of this imaginary capital murder of intentionally taking a life. Because you have found him guilty of intentionally taking a life, would you always answer that yes, that there is probability [sic] he will commit criminal acts of violence that would constitute a continuing threat to society in the future? [KRUCIAK: I would lean that way, yes. * * * * * * Q. Would you always answer that [second special issue] yes just because you have found a person guilty in the first phase of intentionally taking a life on capital murder? A. Yes. I would.

Appellant then proceeded to delve into other aspects of the capital sentencing scheme and did not come back to this issue during this phase of questioning.
The State then attempted to rehabilitate Kruciak by giving him an extreme example of a "mercy" killing for insurance proceeds. At this time, the following transpired:

[THE STATE]: There is not a probability this 80-year old man is going to go out and commit another criminal act of violence. Okay? [KRUCIAK]: In that circumstance, you are probably right. Q. Exactly. So you wouldn't always answer that question, no. You can wait until you see all the facts before you decide? A. Okay. * * * * * * Q. Okay. Can you keep an open mind and wait, in this case or any other case, if you are a juror in a capital murder in the punishment phase, and decide that issue based upon the evidence? A. Yes.

When appellant was again given the opportunity to question him, Kruciak answered unequivocally that he would not always answer the second punishment question "yes" on the basis of a guilty verdict alone, and that it was up to the State to prove up the second the issue to him.
When confronted with a venireman who vacillates on the question of his ability to answer special issues under Article 37.071, § (b)(2), supra, without conscious bias or distortion, this Court defers to the findings of the trial court. Perillo v. State, 758 S.W.2d 567, at 576-77 (Tex.Cr. App.1988). Kruciak was just such a vacillating *406 venireman. First he maintained a guilty verdict at the guilt phase of trial would dictate a `yes' answer to the second special issue. Later he acknowledged, during the State's attempt to rehabilitate, that he would have to consider the second special issue in light of all the evidence, including that adduced at the punishment phase, and that not every guilty verdict would dictate an affirmative answer to the second special issue. Such a record "presents an adequate basis to support the trial court's ruling either that the venireman was challengeable for cause ... or that [he] was not." Id. at 577 (emphasis in the original). Thus, we cannot say the trial court abused its discretion in failing to grant appellant's challenge for cause. Consequently, we overrule point of error number three.
In point of error number four, appellant complains that the trial court erred in overruling appellant's Motion for New Trial "in view of direct evidence of outside interference with the jury." The record reveals that sometime during the evening before jury deliberations were to begin on punishment, the jury foreperson, Estella Hamilton, was visited at her home by an unidentified woman who asked her not to show up in court the following day. The unidentified woman offered the foreperson one thousand dollars in cash for her compliance.
Article 36.22, V.A.C.C.P., states that:

No person shall be permitted to be with a jury while it is deliberating. No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court.

When a juror does converse with an unauthorized person, injury to the accused is presumed. Mayo v. State, 708 S.W.2d 854, 856 (Tex.Cr.App.1986). However, this presumption is rebuttable. Id. If it is shown that the case was not discussed or that nothing prejudicial to the accused was said, then appellant has not been injured. If this is the case, then the verdict will be upheld and a new trial is not required. Thomas v. State, 699 S.W.2d 845, 853 (Tex.Cr.App. 1985).
In the present case, the unauthorized contact and bribe was immediately reported to the court and an evidentiary hearing was held on the matter. Testimony at the hearing revealed that no bribe was accepted, that the juror did not comply with the woman's request to not show up, and that the juror discussed the incident with no one other than the court and the parties to the case. Furthermore, all twelve jurors, including the juror contacted, signed affidavits stating that they arrived at their individual verdicts solely from the evidence presented during the trial of the case and the law given to them by the court. The affidavits also stated that the jury did not discuss the subject of an attempt to bribe a juror or prevent a juror from performing his or her duty in accordance with the law; nor was such a subject discussed in their presence. On these facts, the trial court was justified in concluding appellant suffered no prejudice. Because the trial court committed no error, we overrule appellant's fourth point of error.
Appellant alleges in point of error number five that the trial court erred by denying his Motion for a Life Sentence after the jury notified the trial court that it could not reach a verdict. The record reveals that the jury began deliberations at 10:45 a.m. on January 30th and sent a note to the judge at approximately 5:30 p.m. informing him that they could not unanimously agree on any of the issues. The judge told the jury to continue their deliberations. This action drew an objection from appellant coupled with the Motion for a Life Sentence

which is the subject of appellant's complaint on appeal. The objection and motion were overruled by the trial judge. At 6:10 p.m., the jury was recessed for a dinner break and subsequently reconvened for deliberations, the latter of which lasted until 12:15 a.m. when the jury was sequestered for the evening. The jury again reconvened at 8:30 in the morning and informed the judge approximately one hour later that they had a verdict.

Although the jury seems to have deliberated for approximately thirteen *407 and one-half hours total, appellant complains of the events that occurred after less than one-half of that time. There is no set time limit on the amount of time a jury may deliberate. Article 36.31, V.A.C.C.P., states that:

After the cause is submitted to the jury, it may be discharged when it cannot agree and both parties consent to its discharge; or the court may in its discretion discharge it where it has been kept together for such time as to render it altogether improbable that it can agree.

Under this provision we have held that the length of time the jury may be held for deliberation rests in the sound discretion of the trial judge, who will not be reversed on appeal absent a showing by appellant that that discretion was abused. Montoya v. State, 810 S.W.2d 160, 166 (Tex.Cr.App. 1989), cert, denied, ___ U.S.___, 112 S. Ct. 426, 116 L. Ed. 2d 446 (1991). This Court has considered very similar situations in the past and found no abuse of discretion on the part of the trial judge. See Montoya, supra, and cases cited therein.

As pertains to the length of time a jury may be held in deliberations, we observe that in Burnett v. State, 754 S.W.2d 437, 447-8 (Tex.App.San Antonio 1988, pet. ref'd), the jury sent a note to the court indicating it was deadlocked approximately eleven hours after it had begun deliberating and the trial court instructed the jury to continue its deliberations. The jury sent a second note to the trial court over eight hours later still maintaining its deadlocked position and asking for instructions. The jury was recessed for the evening. When they resumed deliberations in the morning, indicating that the deadlocked position was not likely to change, the appellant again moved for a mistrial as he had done when the first note was handed in to the court. The judge again overruled his motion and approximately 11:30 that morning, the jury returned a verdict.

Turning to this case, we must first consider that it involves a prosecution for capital murder. We must also consider that, on punishment, the jury had approximately five days full of evidence to review and reflect upon involving the testimony of about twenty-six witnesses.[8] In light of these circumstances, we find no abuse of discretion in the court's order for the jury to continue deliberations after only six and one-half hours. In fact, given the nature of the potential sentence involved in this case, it is unlikely that there would have been such an abuse even after thirteen hours. Point of error number five is overruled.

In point of error number six, appellant argues that the trial court erred when it accepted the co-defendant's assertion of a Fifth Amendment claim.[9] The record reveals that the defense called the co-defendant, Harold Bowens, to the stand and the following transpired:

THE COURT: Mr. Bowens, let me explain. First of all, the defense has called you as a witness. I simply want to ask you, do you want to testify, or do you not want to testify? * * * * * * THE WITNESS: No.

Whereupon, appellant's attorney asked to approach the bench and the record reveals only that "there was an off-the-record discussion at the bench." No further action or inquiry was taken by either party pertaining to proffered testimony from Bowens.[10] Absent an offer of proof, nothing is preserved for our review. Tex.R.Cr.Evid., Rule 103(a)(2). Point of error number six is overruled.

In his seventh point of error, appellant complains that the trial court abused its discretion in refusing trial counsel's motion to withdraw. In the instant case, the record reveals that appellant was incarcerated *408 in Bexar County where his trial was subsequently set for and held in early January, 1990. He was initially represented by appointed counsel. In the latter part of May or early part of June, 1989, appellant retained new counsel, John Causey. Causey sought and engaged co-counsel, Demetrio Duarte. In early October of the same year, Causey accepted a position in Montgomery County, approximately 250 miles from Bexar County. He then filed a motion to withdraw from the case in the latter part of October, 1989, because, he contended, his retention "would seriously hinder [appellant's] right to effective consultation and right to effective counsel." Duarte also sought to withdraw because appellant did not wish "to retain [him] as his counsel to proceed further."

After testimony by Causey and Duarte in the hearing on counsel's motion to withdraw, the trial court pointed out that, prior to or concurrent with appellant's hiring of Causey and Duarte, the court had appointed two other

attorneys to represent appellant and had a trial date set for September, 1989. However, when Causey notified the court of his employment, the trial court released appointed counsel and reset the trial date to January, 1990, to accommodate Causey and Duarte. By the time of the hearing on the motion in late October, 1989, the trial court had already set trial procedures in motion including having the clerk's office prepare to call one hundred venirepeople.[11] The State suggested appellant be given one week to retain new counsel. However, the trial court refused this suggestion and denied counsel's request to withdraw. The trial court based its action on the above-stated concerns as well as on the fact that retained counsel had already been paid a partial fee.

It is generally within the discretion of the trial court to determine whether or not trial counsel should be allowed to withdraw from a case. Brewer v. State, 649 S.W.2d 628, 631 (Tex.Cr.App.1983). However, the right to counsel may not be manipulated so as to obstruct the judicial process or interfere with the administration of justice.[12]Wallace v. State, 618 S.W.2d 67, 70 (Tex.Cr.App.1981). In the instant case, the Motion to Withdraw was brought forth in late October. Jury selection was set to begin in early to mid-December, just over one month away. Furthermore, the trial had already been reset once to accommodate Causey.

Causey told the trial court in the hearing on his motion that contact with appellant was very difficult except on a personal basis and there could be "no real appointments made where he could come in or telephone calls made." The hearing was held, however, before Causey moved 250 miles away, and seemingly before he ever tried an alternative approach to contacting appellant. Causey's opinion as to how difficult it would be to contact appellant to prepare for trial was therefore speculative at best. Furthermore, there was no testimony as to whether trial counsel had to move away immediately in order to keep his new job or whether there was some flexibility in finishing prior commitments like the one before him here. There was no testimony Causey would be distracted or unable to do an adequate job at trial, nor any indication from the trial record that he did not give representation of appellant his undivided attention. Counsel on appeal now argues that appellant was denied effective assistance of counsel, but shows us no place in the record where this is documented.

Given the circumstances and the testimony adduced at the hearing on the Motion to Withdraw, we cannot say that the trial court abused its discretion in denying the *409 motion. Point of error number seven is overruled.

Appellant's points of error numbers eight and eleven challenge the sufficiency of the evidence to sustain the jury's affirmative answers to the first and second special issues. Article 37.071, §§ (b)(1) and (2), supra.[13] The well-established standard in reviewing these two points of error is, looking at the evidence in the light most favorable to the jury's verdict, whether any rational trier of fact could have found the elements of Article 37.071(b), V.A.C.C.P., beyond a reasonable doubt. Earhart v. State, 823 S.W.2d 607, 619 (Tex.Cr.App. 1991); Keeton v. State, 724 S.W.2d 58, 61 (Tex.Cr.App.1987) (respectively).

In point of error number eight, appellant contends that the evidence is insufficient to support the affirmative finding of "deliberateness" in the punishment phase of the trial. See Article 37.071, § (b)(1). Again, to determine the sufficiency of this evidence, we must view the evidence presented in the light most favorable to the jury's verdict to determine whether any rational trier of fact could have found, beyond a reasonable doubt, that the appellant acted "deliberately" or with reasonable expectation or contemplation that death would result. Meanes v. State, 668 S.W.2d 366, 370 (Tex.Cr.App.1983), cert, denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 476 (1984).

Appellant argues that the jury could not find affirmatively on the issue of deliberateness because the appellant did not fire the fatal shot. In fact, appellant contends, as he testified at trial, his codefendant took the weapon into the store without his knowledge and killed the victim. While the law of parties has long been held to apply to capital cases, it does not so apply in the punishment phase. Green v. State, 682 S.W.2d 271 (Tex.Cr. App.1984), cert, denied, 470 U.S. 1034, 105 S. Ct. 1407, 84 L. Ed. 2d 794 (1985). Therefore, the jury is required to make their determination based solely on the behavior and perceived intent of appellant and not the actions or intent of his co-defendant.[14] In this case, the jury was properly instructed to consider the special issues in light of the appellant's mental state and conduct rather than the mental state or conduct of any other person or persons.

The short answer to appellant's contention is that, as pointed out in our treatment of his tenth point of error, challenging sufficiency of the evidence to establish his guilt, there is evidence from which the jury could rationally conclude appellant was the triggerman in this cause. Whether the jury could have found his conduct as a party to have been "deliberate" is a question we

therefore need not address. Appellant's point of error number eight is overruled.

Appellant maintains in his point of error number eleven that the evidence was insufficient to sustain the jury's affirmative answer to the second special issue on future dangerousness. Article 37.071, § (b)(2), supra. This Court has set out a number of factors that may be considered in making this determination. E.g., Keeton v. State, supra, at 61.

The evidence of the crime itself indicated that the underlying robbery was planned, complete with casing the store before the incident and waiting until only one clerk remained. Furthermore, the evidence was such that the jury could have inferred that appellant, and not his co-defendant, anticipated *410 the need for and procured the weapon used in the offense. Additionally, the jury could have inferred an intent to use that gun in a deadly manner since it was loaded with ammunition that had been physically and purposely altered to give it more killing power. The evidence also revealed that appellant did have prior experience with firearms. His own testimony plus supporting State's exhibits revealed that appellant had two prior convictions for unauthorized use of a vehicle and one prior conviction for burglary of a habitation. Appellant also recounted one incident in which he was found to be carrying a concealed weapon.

The record also reveals that several persons testified at the punishment stage that appellant's reputation in the community for being a peaceable and law abiding person was bad. An assistant warden testified that appellant had been segregated six times while in prison because of various difficulties. Additional witnesses testified to various unadjudicated offenses involving appellant, including some that were committed when appellant was a juvenile.

Given this evidence, we believe it would be rational for a trier of fact to believe that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society. Point of error number eleven is overruled.

In point of error number twelve, appellant complains that the trial court erred in admitting a photograph of the deceased into evidence over appellant's objection. Specifically, he complains of a photograph depicting the victim as he appeared after death.[15] Appellant alleges that the photograph was introduced purely for inflammatory purposes and, as such, constituted error. However, the State counters that, notwithstanding an attempted stipulation by appellant, the photograph was introduced to prove identity of the victim.[16]

Admissibility of such evidence is governed by Tex.R.Cr.Evid., Rule 403, which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

See Long v. State, 823 S.W.2d 259, 271-272, fn. 18 (Tex.Cr.App.1991). Rule 403 favors the admission of relevant evidence[17] and carries a presumption that relevant evidence will be more probative than prejudicial. Montgomery v. State, 810 S.W.2d 372, 389 (Tex.Cr.App.1990). See Long, 823 S.W.2d at 271.

A court may consider several factors in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. These factors include, but are not limited to: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up, and whether the body depicted is naked or clothed. Long, supra. The availability of other means of proof and the circumstances unique to each individual case must also be considered. Id.

The single photograph of which appellant complains in this point of error is a color photograph approximately three and one-half by four inches in size. It shows a close-up shot of the victim's head and the top part of his shoulders with various tubes and other medical equipment still in place from the doctors' attempts at saving the victim. While some blood is visible in the photograph, it is only seen with fairly close inspection. Finally, while we know from *411 the record that the victim was bloated as a result of the gunshot wounds, we also note that, at first glance, the subject of the photograph looks no different than a sleeping or unconscious overweight man under intensive medical care. These circumstances support the trial court's finding that the prejudicial effect of this photo, if any, did not substantially outweigh the probative value. Hence, we hold that no error was made by the trial court in admitting this exhibit. Point of error number twelve is overruled.

Appellant alleges in points of error nine and thirteen that the trial court erred in overruling appellant's objection to hearsay testimony. Specifically, appellant complains in point of error number nine of the statements of the victim which were admitted through various witnesses and he complains in point of error number thirteen of

some statements he had made to an excellmate which were admitted through that witness.

In point of error number nine, appellant correctly acknowledges that "dying declarations" under Tex.R.Cr.Evid., Rule 804(b)(2) are exceptions to the general prohibition against hearsay evidence and, therefore, are admissible at trial.[18] Under the express language of the above rule, the declarant's statements must be made at a time when the declarant believes that his death is imminent. See Rushing v. State, 813 S.W.2d 646, 650 (Tex.App.Houston [14th Dist.] 1991, pet. ref'd); Johnson v. State, 770 S.W.2d 72, 76 (Tex.App.Texarkana 1989), affd, 815 S.W.2d 707 (Tex.Cr. App.1991); Hayes v. State, 740 S.W.2d 887, 888-9 (Tex.App.Dallas 1987). Here the victim expressly stated to witnesses, "I'm dying." The trial court could readily have accepted that the victim, the declarant of the statements, did, in fact, believe that death was imminent. Tex.R.Cr.Evid., Rule 104(a).

Appellant contends that the emergency medical technician on the scene made statements to the victim that were designed to alleviate his fear of dying and, therefore, the victim's statements should not be considered an exception. This argument fails for two reasons. First, the medical technician was not even on the scene when the first several statements of which appellant complains were made. Thus, she could not have alleviated his fear (or changed his belief). Secondly, Rule 804(b)(2) speaks of the declarant's belief, not someone else's, and there is no indication in the record that the medical technician's statements actually did relieve the victim's fear and belief that he was dying. The trial court was justified in finding that the victim's statements fell within the "dying declaration" exception to the hearsay rule and did not err in admitting them into evidence. Point of error number nine is overruled.

In point of error number thirteen, appellant complains of the admission of statements he made to his ex-cellmate, Hazel. He relies on Tex.R.Cr.Evid., Rule 803(24), the "statement against interest" exception to the hearsay rule, to support his argument.[19] He contends that the key to the admissibility of the statements is their "trustworthiness," since the rule specifically requires corroborating circumstances indicating trustworthiness in order for such a statements to be admissible as against interest. See Flix v. State, 782 S.W.2d 1, 3 (Tex.App.Houston [14th *412 Dist.] 1989, pet. refd). Appellant also makes a blanket assertion that such corroborating circumstances do not exist. We do not agree.

As previously set out in the facts recited for the sufficiency of evidence points of error, corroborating circumstances did exist including (among other details) the fact that appellant was identified by a number of people as being at the scene at the time of the murder and that only appellant's fingerprints were on the murder weapon. It was within the trial court's discretion to find the statements were sufficiently corroborated to be trustworthy, and we hold it was not error to have admitted them into evidence. Point of error number thirteen is overruled.

Finding no reversible error, we affirm the judgment of the trial court.

Irvin v. Dowd, 366 U.S. 717 (1961)

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a habeas corpus proceeding, brought to test the validity of petitioner's conviction of murder and sentence of death in the Circuit Court of Gibson County, Indiana. The Indiana Supreme Court affirmed the conviction in *Irvin v. State,* 236 Ind. 384, 139 N.E.2d 898, and we denied direct review by certiorari "without prejudice to filing for federal habeas corpus after exhausting state remedies." 353 U.S. 948. Petitioner immediately

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sought a writ of habeas corpus, under 28 U.S.C. § 2241, [Footnote 1] in the District Court for the Northern District of Indiana claiming that his conviction had been obtained in violation of the Fourteenth Amendment in that he did not receive a fair trial. That court dismissed the proceeding on the ground that petitioner had failed to exhaust his state remedies. 153 F. Supp. 531. On appeal, the Court of Appeals for the Seventh Circuit affirmed the dismissal. 251 F.2d 548. We granted certiorari, 356 U.S. 948, and remanded to the Court of

Appeals for decision on the merits or remand to the District Court for reconsideration. 359 U. S. 394. The Court of Appeals retained jurisdiction, and decided the claim adversely to petitioner. 271 F.2d 552. We granted certiorari, 361 U.S. 959.

As stated in the former opinion, 359 U.S. at 359 U. S. 396-397:

"The constitutional claim arises in this way. Six murders were committed in the vicinity of Evansville, Indiana, two in December, 1954, and four in March, 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases

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which were intensively publicized, stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner, counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue."

During the course of the *voir dire* examination, which lasted some four weeks, petitioner filed two more motions for a change of venue and eight motions for continuances. All were denied.

At the outset, we are met with the Indiana statute providing that only one change of venue shall be granted "from the county" wherein the offense was committed. [Footnote 2] Since petitioner had already been afforded one change of venue, and had been denied further changes solely on the basis of the statute, he attacked its constitutionality. The

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Court of Appeals upheld its validity. However, in the light of *Gannon v. Porter Circuit Court,* 239 Ind. 637, 159 N.E.2d 713, we do not believe that argument poses a serious problem. There, the Indiana Supreme Court held that, if it was

"made to appear after attempt has actually been made to secure an impartial jury that such jury could not be obtained in the county of present venue . . . , it becomes the duty of the judiciary to provide to every accused a public trial by an impartial jury, even though, to do so, the court must grant a second change of venue, and thus contravene [the statute]. . . ."

239 Ind. at 642, 159 N.E.2d at 715. The prosecution attempts to distinguish that case on the ground that the District Attorney there conceded that a fair trial could not be had in La Porte County, and that the court, therefore, properly ordered a second change of venue despite the language of the statute. Inasmuch as the statute says nothing of concessions, we do not believe that the Indiana Supreme Court conditions the duty of the judiciary to transfer a case to another county solely upon the representation by the prosecutor -- regardless of the trial court's own estimate of local conditions -- that an impartial jury may not be impaneled. As we read *Gannon,* it stands for the proposition that the necessity for transfer will depend upon the totality of the surrounding facts. Under this construction, the statute is not, on its face, subject to attack on due process grounds.

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, *Fay v. New York,* 332 U. S. 261; *Palko v. Connecticut,* 302 U. S. 319, every State has constitutionally provided trial by

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jury. *See* Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions, 578-579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver,* 333 U. S. 257; *Tumey v. Ohio,* 273 U. S. 510. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U. S. 133, 349 U. S. 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial. *Cf. Thompson v. City of Louisville,* 362 U. S. 199. This is true regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). [Footnote 3] "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States,* 98 U. S. 145, 98 U. S. 155.

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.

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This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois,* 123 U. S. 131; *Holt v. United States,* 218 U. S. 245; *Reynolds v. United States, supra.*

The adoption of such a rule, however,

"cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law."

Lisenba v. California, 314 U. S. 219, 314 U. S. 236. As stated in *Reynolds,* the test is

"whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact. . . ."

At p. 98 U. S. 156.

"The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed."

At p. 98 U. S. 157. As was stated in *Brown v. Allen,* 344 U. S. 443, 344 U. S. 507, the

"so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge."

It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors.

The rule was established in *Reynolds* that

"[t]he finding of the trial court upon that issue [the force of a prospective juror's opinion] ought not be set aside by a reviewing court unless the error is manifest."

98 U.S. at

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98 U. S. 156. In later cases this Court revisited *Reynolds,* citing it in each instance for the proposition that findings of impartiality should be set aside only where prejudice is "manifest." *Holt v. United States, supra; Spies v. Illinois, supra; Hopt v. Utah,* 120 U. S. 430. Indiana agrees that a trial by jurors having a fixed, preconceived opinion of the accused's guilt would be a denial of due process, but points out that the *voir dire* examination discloses that each juror qualified under the applicable Indiana statute. [Footnote 4] It is true that the presiding judge personally examined those members of the jury panel whom petitioner, having no more peremptory

challenges, insisted should be excused for cause, and that each indicated that, notwithstanding his opinion, he could render an impartial verdict. But, as Chief Justice Hughes observed in *United States v. Wood,* 299 U. S. 123, 299 U. S. 145-146:

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and

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procedure is not chained to any ancient and artificial formula."

Here, the build-up of prejudice is clear and convincing. An examination of the then-current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the *cause celebre* of this small community -- so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County, and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary, and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime, and that the six murders were solved, but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a

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99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another characterized petitioner as remorseless and without conscience, but also as having been found sane by a court-appointed panel of doctors. In many of the stories, petitioner was described as the "confessed slayer of six," a parole violator and fraudulent check artist. Petitioner's court-appointed counsel was quoted as having received "much criticism over being Irvin's counsel," and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin. On the day before the trial, the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case), as well as

"the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky."

It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that "strong feelings, often bitter and angry, rumbled to the surface," and that

"the extent to which the multiple murders -- three in one family -- have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions. . . ."

A few days later, the feeling was

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described as "a pattern of deep and bitter prejudice against the former pipefitter." Spectator comments, as

printed by the newspapers, were "my mind is made up"; "I think he is guilty", and "he should be hanged."

Finally, and with remarkable understatement, the headlines reported that "impartial jurors are hard to find." The panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were peremptorily challenged by petitioner, and 10 by the State; 12 persons and two alternates were selected as jurors, and the rest were excused on personal grounds, *e.g.,* deafness, doctor's orders, etc. An examination of the 2,783-page *voir dire* record shows that 370 prospective jurors, or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opinion) entertained some opinion as to guilt -- ranging in intensity from mere suspicion to absolute certainty. A number admitted that, if they were in the accused's place in the dock and he in theirs on the jury with their opinions, they would not want him on a jury.

Here, the "pattern of deep and bitter prejudice" shown to be present throughout the community, *cf. Stroble v. California,* 343 U. S. 181, was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. *See Delaney v. United States,* 199 F.2d 107. Where one's life is at stake -- and accounting for the frailties

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of human nature -- we can only say that, in the light of the circumstances here, the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty, and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he "could not . . . give the defendant the benefit of the doubt that he is innocent." Another stated that he had a "somewhat" certain fixed opinion as to petitioner's guilt. No doubt, each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt. *Stroble v. California,* 343 U. S. 181; *Shepherd v. Florida,* 341 U. S. 50 (concurring opinion); *Moore v. Dempsey,* 261 U. S. 86.

Petitioner's detention and sentence of death pursuant to the void judgment is in violation of the Constitution of the United States, and he is therefore entitled to be freed therefrom. The judgments of the Court of Appeals and the District Court are vacated, and the case remanded to the latter. However, petitioner is still subject to custody under the indictment filed by the State of Indiana in the Circuit Court of Gibson County charging him with murder in the first degree, and may be tried on this or another indictment. The District Court has power, in a habeas corpus proceeding, to "dispose of the

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matter as law and justice require." 28 U.S.C. § 2243. Under the predecessors of this section,

"this Court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected."

Mahler v. Eby, 264 U. S. 32, 264 U. S. 46. Therefore, on remand, the District Court should enter such orders as are appropriate and consistent with this opinion, *cf. Grandsinger v. Bovey,* 153 F. Supp. 201, 240, which allow the State a reasonable time in which to retry petitioner. *Cf. Chessman v. Teets,* 354 U. S. 156; *Dowd v. Cook,* 340 U. S. 206; *Tod v. Waldman,* 266 U. S. 113.

Vacated and remanded.

Mayo v. State, 708 S.W.2d 854 (Tex. Crim. App. 1986)

WHITE, Judge.

This is an appeal from a conviction for the capital murder of Kimberly Sue Reeves. Appellant pled not guilty. The jury found appellant guilty of capital murder while in the course of committing aggravated sexual assault. See V.T.C.A., Penal Code Sec. 19.03(a)(2). After the jury returned an affirmative answer to the first two special issues in Art. 37.071, V.A.C.C.P., the trial court imposed the sentence of death by lethal injection. This case is before us on direct appeal.

Article 37.071, V.A.C.C.P., reads in pertinent part: ". . .

"(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result:

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

The third special issue in Art. 37.071, supra, was not submitted, and it is not contended on appeal that it should have been, because it was not raised by the evidence.

On April 13, 1984, between the hours of 1:30 and 2:30 p.m., the body of the deceased was found next to the concrete supports of a bridge crossing over part of Lake Nasworthy in Tom Green County. Police found Ms. Reeves' automobile and personal belongings approximately 600 yards from the bridge supports. She appeared to have been sunbathing. She was last seen alive at approximately 10:30 a.m. on April 13 by students at Angelo State University in San Angelo. The body of the deceased, identified by her father, was transported to San Antonio for an autopsy. The autopsy revealed that Kimberly Sue Reeves died as a result of a blow to the skull and brain with a blunt instrument. It was further concluded by the medical examiner that neither of two stab wounds, one to the neck and one to the abdomen, would have caused death under ordinary circumstances. Examination of the vaginal cavity of the deceased indicated the presence of spermotazoa.

Appellant was seen driving later that same evening in San Angelo. He pulled his car into the Sonic Drive In and was arrested at approximately 8:45 p.m., pursuant to a warrant from Lubbock County for another crime.

Appellant made two confessions to police, the validity of which are not before us for review. He also led police to an area where he had thrown the jack stand he used to crush the skull of the deceased. Appellant does not question the sufficiency of the evidence to support his conviction.

In his first ground of error, appellant alleges the trial court erred by overruling his motion for new trial. Appellant's motion for new trial alleged a violation of Art. 40.03(7), V.A.C.C.P. Specifically, after presentation of the evidence in the punishment phase, but before final arguments and deliberations, Dennis Potter, the foreman of the jury, made a telephone call to Raymond Allison, a witness who testified on behalf of the defense in the punishment phase. Appellant claims *McMahon v. State,* 582 S.W.2d 786 (Tex.Cr.App. 1978), *cert. den. sub. nom., McCormick v. Texas,* 444 U.S. 919, 100 S.Ct. 238, 62 L.Ed.2d 175 (1979), *reh. den.* 444 U.S. 985, 100 S.Ct. 492, 62 L.Ed.2d 414 (1979), and *Williams v. State,* 463 S.W.2d 436 (Tex.Cr.App. 1971), hold that injury to the accused is presumed when a juror converses with an unauthorized person. However, the State points out, and appellant concedes, this presumption is rebuttable, *McMahon,* supra.

Article 40.03, V.A.C.C.P., reads in pertinent part: "Art. 40.03. Grounds for New Trial in Felony

"New trials, in cases of felony, shall be granted the defendant for the following causes, and for no other:

". . .

"(7) Where the jury, after having retired to deliberate upon a case, has received other evidence; or where a juror has conversed with any person in regard to the case; . . ."

The trial court held a hearing on appellant's motion for new trial. At the hearing, Allison testified that he was contacted by Dennis Potter on January 30, 1985, at about 5:00 p.m., after the jury had been released for the day. Allison stated that Potter told him he appreciated his [Allison's] testimony because he seemed to be the only witness who said anything good about appellant. Allison asked Potter to be lenient toward appellant because he [Allison] felt that if given a chance, possibly to learn a trade while in prison, appellant could be a benefit to society when he got out. Potter, who also testified at the hearing, corroborated this testimony. Both men stated that everything stated in the phone call had been said at trial. Another juror, John Michael Anderson, testified at this hearing that Potter made no mention, to any member of the jury, of the phone call to Allison during any of the jury's deliberations. Additionally, according to Anderson, no one in the jury room brought up how much time appellant might actually have to spend in prison if he received a life sentence.

Appellant's attorney conceded that Allison's testimony at trial was along the same lines as the testimony brought out at the motion for new trial hearing, but claims that the State has not rebutted the presumption of harm.

We disagree. The testimony at the motion for new trial hearing indicates that the conversation on the telephone was substantially the same in content as Allison's testimony at the punishment phase of appellant's trial. The only statement made in the telephone call that was not said at trial was that Allison expressed his wish to Potter that appellant be given a more lenient sentence than the death penalty. Judging from the sentence received, death by lethal injection, it appears Allison's plea for a life sentence was totally disregarded. We find the State has rebutted the presumption of harm under *McMahon,* supra.

Ground of error one is overruled. Appellant's second ground of error is a failure to grant a mistrial because evidence of an extraneous offense was admitted during the guilt/innocence phase of appellant's trial. Jimmy Don Daniel, a witness for the State, testified before the jury that appellant called him on the telephone and told him he had been arrested on a capital murder charge. Appellant contends that Daniel was undoubtedly making reference to an unrelated, extraneous capital murder, because at the time of the phone call appellant had not yet been charged with the capital murder in the present case. The transcription of the relevant testimony reads as follows:

By Mr. McCoppin [prosecuting attorney]:

"Q. Directing your attention to the evening hours of April the 13th, 1984, did you have occasion to have telephone contact with Randy Dale Mayo?

"A. Yes, sir.

"Q. Approximately what time was that?

"A. I'm not sure. I didn't pay any attention to the clock because I was already asleep.

"Q. Okay. Do you have any idea?

"A. Well, I know I went to bed about — I imagine, around 9:30 or 10:00, somewhere around there, I guess, something like that.

"Q. Okay. What, if anything, did he say when he called you on the phone?

"A. He told me that he'd been arrested on a Capital Murder charge and would I please —

"Q. Uhhh . . . Without —

"MR. HAWKINS [defense attorney]: Your Honor, I'd object to that question and answer. Calls for hearsay, first of all.

"And I'd ask the Jury to disregard the witness' answer.

"THE COURT: All right, what do you say? Do you have any —

"MR. McCOPPIN: No objection, Your Honor.
"THE COURT: I'll sustain the objection. The Jury will not consider the answer.

"MR. LUPTON [defense attorney]: Your Honor, due to the prejudicial nature of the statement, I'd move for a mistrial.

"THE COURT: I can't hear you. You're going to have to speak up, now.

"MR. LUPTON: Due to the prejudicial nature of the statement, I'd move for a mistrial, Your Honor.

"THE COURT: Overruled.
"MR. McCOPPIN: We withdraw that question, Your Honor. Pass the witness.

"MR. LUPTON: No questions, Your Honor."
The record reflects that appellant was actually arrested pursuant to a warrant concerning another, unrelated capital murder. However, the testimony complained of gives no indication that appellant was or was not actually speaking of the case at bar. We cannot find anywhere in the statement of facts where it is stated *before the jury* that appellant was arrested for anything other than the present case. We note that at the time appellant made the aforementioned telephone call, the investigation had begun to focus on appellant concerning the capital murder in the present case. We do not believe, based on these facts, that the jury could have been misled, or that appellant could have been harmed by the aforementioned testimony.
Appellant's second ground of error is overruled.
Appellant, in his third ground of error, claims the evidence was insufficient to warrant an affirmative finding by the jury to the second special issue in Art. 37.071, supra. In support of his contention, appellant points out that the State presented only *one* prior final conviction, that of burglary. The State introduced evidence of an unrelated murder, wherein appellant beat a man to death. The State also introduced numerous instances wherein appellant threatened death or serious bodily injury to various individuals. Appellant *appears* to claim these extraneous offenses, which are unajudicated, are not probative of the second special issue in capital murder cases. See Art. 37.071(b)(2), supra.
We find appellant's ground of error to be without merit. In the punishment phase of a capital murder case, *any* evidence that the trial court deems relevant to sentencing may be presented. Art. 37.071(a), supra. Unadjudicated extraneous offenses have been held to be admissible at the punishment phase of the trial. *Rumbaugh v. State,* 629 S.W.2d 747 (Tex.Cr.App. 1982); *Williams v. State,* 622 S.W.2d 116 (Tex.Cr.App. 1981), *cert. den.* 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982). Further, the circumstances surrounding the capital offense itself, if severe enough, can be sufficient to sustain an affirmative finding under the special issues in death penalty punishment determinations. *O'Bryan v. State,* 591 S.W.2d 464 (Tex.Cr.App. 1979).
In the present case, appellant forced Kimberly Sue Reeves, who was sunbathing, to submit to his sexual desires at knifepoint. After raping her, he stabbed her twice, neither of the two wounds resulting in injury severe enough to cause her death. Then, as he was leaving the scene, he went to his car and removed the jack stand, came back to where Ms. Reeves was laying face down, and proceeded to literally beat her brains out with the steel jack stand.
We find this type of conduct, and the other evidence brought out at the punishment phase, sufficient to sustain the affirmative finding of the jury to the second special issue.
The judgment of the trial court is affirmed.

McIntire v. State, 698 S.W.2d 652 (Tex. Crim. App. 1985)

CLINTON, Judge.
Appellant was convicted of the offenses of aggravated sexual abuse of a child and of indecency with a child and assessed punishment by the jury of 25 years and 5 years, respectively, which terms of imprisonment were ordered to run concurrently by the trial court. Both convictions stemmed from a single indictment.
On appeal the Thirteenth Court of Appeals in Corpus Christi affirmed the conviction for aggravated sexual abuse, but reversed the conviction for indecency with a child. *McIntire v. State,* 662 S.W.2d 65 (Tex.App.-

Corpus Christi 1983). The court ruled that the trial court, having found appellant guilty upon the jury's verdict as to the first count in the indictment, was without legal authority to enter a judgment and pronounce sentence on the subsequent count. Accordingly the judgment was reformed to reflect conviction of aggravated sexual abuse only. We granted the State's petition for discretionary review to examine this action by the court of appeals.

We also granted appellant's petition in order to review the judgment of the court of appeals insofar as it pertained to purported error in the trial court's disposition of appellant's motion for new trial.

I.

The first count of the indictment alleged that on January 25, 1982 the appellant engaged in deviate sexual intercourse by placing his genitals in contact with the anus of the complaining witness, a child younger than fourteen years of age and not appellant's spouse. The third count alleged that on the same day appellant engaged in sexual contact by touching the genitals of the same complaining witness. Both acts are alleged to have been committed with intent to arouse and gratify the sexual desire of appellant.

The charge to the jury authorized it to convict appellant, should the proof warrant it, of both aggravated sexual abuse of a child and indecency with a child. This the jury did. Guilt was adjudicated and punishment imposed in a single judgment.

Count two alleged appellant engaged in deviate sexual intercourse by placing his mouth in contact with the genitals of the complaining witness. The court's charge authorized conviction for aggravated sexual abuse upon proof of *either* the theory contained in count one *or* that contained in count two. In addition, in a separate "application" paragraph, the charge also authorized a conviction upon proof of facts going to establish the indecency allegation contained in the third count.

Though no defect was called to the attention of the trial court or expressly argued to the court of appeals, the court of appeals nevertheless reformed the judgment to delete the conviction for indecency, relying on this Court's holding in *Ex parte Easley,* 490 S.W.2d 570 (Tex.Cr.App. 1972) and *Garcia v. State,* 574 S.W.2d 133 (Tex.Cr.App. 1978).

This Court has recently reaffirmed that when separate and distinct offenses alleged in one indictment arise from a single criminal transaction, "the more reasoned view is that a trial court is 'without legal authority' to enter judgment and impose sentence for more than one offense. *Ex parte Easley,* [supra]." *Drake v. State,* 686 S.W.2d 935, 944 (Tex.Cr.App. 1985). Accordingly, in *Ex parte Siller,* 686 S.W.2d 617 (Tex.Cr.App. 1985) we granted habeas corpus relief by vacating the second of two convictions which had been obtained at one trial on a single indictment. Because both convictions arose from a single criminal transaction, we did not look to see whether an objection had been lodged at trial or whether the error had been raised on appeal.

Objection *will* be required to preserve the error for appeal when separate and distinct offenses are alleged in, and convictions obtained from a single indictment where the offenses arose out of *different* transactions. *Drake,* supra, at 944.

Thus the court of appeals in the instant cause was correct in relying on *Easley,* supra, if it can be said that both offenses for which appellant was convicted grew out of the same criminal transaction. The evidence adduced at trial indicates they did.

Ms. Maria Gonzales testified that on January 25, 1982 she lived in an apartment right next door to appellant, that two windows of her apartment faced two of the windows in appellant's apartment, and that these facing windows were about six feet apart. Ms. Gonzales and two other witnesses, Efrain Estrada and Demetrio Medrano, testified that sometime in the early afternoon of January 25, they together observed appellant through the facing windows performing anal intercourse upon the complaining witness. Testimony of the eleven year old complaining witness confirmed this observation. Estrada also testified that at or about this same time he observed appellant's hand on the complaining witness' penis. The complaining witness confirmed at least that appellant "tried to grab" his penis.

The witnesses' testimony varied as to the exact time, with estimates ranging between 11:00 a.m. and 2:00 p.m.

The witnesses' testimony also varied as to the exact location and respective postures of appellant and the complaining witness during this act.

Although the exact time frame within which the anal intercourse and the touching of the complaining witness' genitals occurred is not well developed in the record, it is clear from the accumulation of testimony that these acts took place either contemporaneously or within minutes of one another. Further, it is clear that a single guilty intent ran through and connected both acts, *viz:* the intent to arouse and gratify the appellant's sexual desire through some form of sexual contact with the complaining witness. See *Drake,* supra, citing *Banks v. State,* 93 Tex.Crim. 117, 246 S.W. 377 (1922) and *Crawford v. State,* 31 Tex.Crim. R., 19 S.W. 766 (Ct.App. 1892).

V.T.C.A. Penal Code, § 21.01(2) defines sexual contact to mean " *any* touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." (All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

We conclude that the allegations of aggravated sexual abuse of a child and of indecency with a child arose in the same criminal transaction. The trial court was therefore without legal authority to authorize a conviction on both count one and count three of the instant indictment, and the court of appeals was correct to reform the judgment as it did. *Drake,* supra. *Siller,* supra.

II. A.

Appellant was sentenced on May 13, 1982. On May 24 appellant filed a *pro se* motion through which he "NOTIF[IED] [the district] COURT OF HIS INTENTION AND DESIRE TO APPEAL FOR NEW TRIAL." It is not clear whether this handwritten motion was meant to be a notice of appeal or a motion for new trial. What is certain from the motion is that appellant's attorneys were out of town and appellant, operating upon the erroneous assumption that some document had to be filed within "THE 10 DAY PERIOD OF TIME ALLOWING APPEAL," was attempting to protect his right to pursue a new trial in any fashion open to him. A formal motion for new trial with supporting affidavits was filed on June 11, along with a motion to set a hearing on the motion for new trial. In its order dated June 14, denying the latter motion, the trial court found the motion for new trial to have been "untimely filed, Notice of Appeal having been given May 24, 1982. Such motion additionally presents nothing for hearing." A formal notice of appeal was filed on June 24.

Motion for new trial must be filed within 30 days of imposition of sentence, Article 40.05(a), V.A.C.C.P. Where no motion for new trial is filed, notice of appeal must be filed within 15 days of sentencing, Article 44.08(b), supra.

On appeal it was contended that the trial court erred in finding appellant's motion for new trial to have been untimely filed, in finding that said motion presented "nothing forhearing," and in overruling same without granting a hearing. The court of appeals concurred in the trial court's determination that the motion and supporting affidavits presented no matter calling for a new trial, and for this reason found the trial court's determination that the motion was untimely presented to have been harmless; "that is, none of his grounds of error were waived, and he is not prejudiced on this appeal." *McIntire,* supra, at 68. Further, finding that the record and supporting affidavits were a sufficient basis upon which the trial court could evaluate the contentions in appellant's motion for new trial, the court of appeals found no abuse of discretion by the trial court in overruling the motion without a hearing.

B.

Initially we observe that the trial court did err in ruling appellant's motion for new trial to have been untimely presented. The trial court apparently construed appellant's *pro se* motion of May 24 to be a notice of appeal, the filing of which divested the court of jurisdiction to entertain the subsequent motion for new trial. However, this Court has recently held that notice of appeal filed prior to an otherwise timely filed motion for new trial will *not* deprive the trial court of jurisdiction to rule on that motion. *Ex parte Drewery,* 677 S.W.2d 533 (Tex.Cr.App. 1984). Assuming then as the trial court did, that appellant's *pro se* motion was a notice of appeal, this would not prevent the trial court from ruling on the motion for new trial. Inasmuch as its denial of the motion for new trial and failure to set a hearing thereon were premised on the untimeliness of the motion, the trial court erred.

Whether this error was harmless, as the court of appeals ruled, depends upon our resolution of appellant's remaining contentions. To these we now turn.

C.

In his brief to the court of appeals appellant identified three points upon which he contended his motion and affidavits presented matters which should have been taken up in a hearing. He argued that the affidavit of one of the jurors at his trial showed "an implied agreement by the jurors to abide by [a] quotient verdict;" that one of his own character witnesses conversed prejudicially with the affiant juror during a break in the jury's deliberations; and that jury misconduct in the form of a discussion of parole "resulted in an unfair verdict against [appellant] and was fundamental error in violation of due process of law." In conclusion appellant asserted that "[b]ecause of these matters, and other matters set out in the Motion for New Trial, the trial judge should have heard the motion."

See Article 40.03(3), V.A.C.C.P.

See Article 40.03(7), V.A.C.C.P.

Although improper discussion of parole by the jury may be cognizable under either §§ 7 or 8 of Article 40.03, V.A.C.C.P., see *Diaz v. State,* 660 S.W.2d 93 (Tex.Cr.App. 1983), the language used in appellant's motion for new trial seems to invoke § 8 in its implication that appellant was denied a "fair and impartial trial." Either way the Court will now apply the "five prong test" enunciated in *Sneed v. State,* 670 S.W.2d 262, 266 (Tex.Cr.App. 1984), see n. 15, *post.*

The court of appeals examined each of these grounds for new trial in turn, and, based upon "the record itself and . . . the juror's affidavit," agreed with the trial court that the motion for new trial "presented nothing for hearing." Having found the affidavit insufficient to establish any complete grounds for new trial, the court of appeals then ruled, paradoxically, that the juror's affidavit was all the trial court needed to dispose of appellant's claims, and overruled his contention that he had an absolute right to have his motion heard.

In essence the court of appeals thus ruled that an affidavit attached to a motion for new trial must establish a *prima facie* case for at least one cognizable ground for new trial before a hearing on the motion is required. In this the court of appeals erred. This Court has never articulated such a requirement.

In *Hicks v. State,* 75 Tex.Crim. R., 171 S.W. 755, 763 (Tex.Cr.App. 1914) it was said that "in order for appellant to have had considered his ground of motion attacking the verdict of the jury *on any matter extrinsic the record itself,* as a matter of *pleading,* he must support it by his own affidavit or the affidavit of someone else specifically showing the truth of the grounds of attack." Elsewhere we have stated that a motion for new trial which alleges, *inter alia,* jury misconduct "must be supported by the affidavit of a juror or some other person who was in a position to know the facts, or must state some reason or excuse for failing to produce the affidavits." *Dugard v. State,* 688 S.W.2d 524, 528 (Tex.Cr.App. 1985) and cases cited therein. The policy underlying this pleading requirement is to prevent "fishing expeditions." *Hicks,* supra, *Dugard,* supra. See also *Bearden v. State,* 648 S.W.2d 688 (Tex.Cr.App. 1983). Never has the Court held, however, that before a hearing is necessitated the affidavits must reflect every component legally required to establish a claim of jury misconduct.

Appellant's motion for new trial was not verified. However, because it was supported by affidavits, such verification of the motion itself was unnecessary. *Bearden v. State,* supra, overruling *Cartwright v. State,* 612 S.W.2d 609 (Tex.Cr.App. 1981).

We have not held, for instance, that the affidavit itself, standing alone, must establish each of the five prongs of the test enunciated in *Sneed v. State,* 670 S.W.2d 262 (Tex.Cr.App. 1984), see n. 15, *post,* before a hearing must be held on the issue of parole discussion in the jury room. Nor did we hold, prior to *Sneed,* that an affidavit must show, *prima facie,* that some discussion of parole laws occurred which *unquestionably* denied the accused a fair and impartial trial, under the now abandoned standard in *Munroe v. State,* 637 S.W.2d 475 (Tex.Cr.App. 1982).

This is not to say that affidavits may not serve as proof on a motion for new trial. Indeed, Articles 40.03(8) and 40.06, V.A.C.C.P. mandate otherwise. Should he feel, then, that his affidavit *does* suffice to establish every facet of a claim of jury misconduct, or of any other cognizable ground for new trial with which the State

may take issue, an accused may have said affidavit introduced into evidence, and the matter may be resolved exclusively on that basis. In order to so introduce his affidavits, however, a *hearing* is required. *Stephenson v. State,* 494 S.W.2d 900 (Tex.Cr.App. 1973); *Brown v. State,* 505 S.W.2d 277 (Tex.Cr.App. 1974); *Rios v. State,* 510 S.W.2d 326 (Tex.Cr.App. 1974); *Pinson v. State,* 530 S.W.2d 946, 947 (Tex.Cr.App. 1975); *Lamb v. State,* 680 S.W.2d 11 (Tex.Cr.App. 1984).

As a matter of pleading and as a prerequisite to obtaining a hearing, keeping in mind that the purpose of the affidavit requirement is to limit the parameters of the hearing that is sought, we hold that an affidavit is sufficient if it demonstrates that reasonable grounds exist for believing that jury misconduct occurred, a quotient verdict was agreed upon, or a juror conversed with an unauthorized person regarding the case.

In *Dugard,* supra, at 531, it is suggested in dictum that, at least where an affidavit purports to raise an issue as to the discussion of parole law in the jury room, the affidavit must establish "probable cause" to believe this violation occurred. This is an anomalous standard when one considers the holding of this Court that when juror affidavits are shown to be unavailable to the accused, he may nevertheless otherwise show "reasonable grounds for believing that misconduct actually occurred." *Stephenson v. State,* supra, at 909; *Prince v. State,* 158 Tex.Crim. R., 254 S.W.2d 1006, 1011 (1953). Upon this showing the accused is entitled to be heard.

Next we turn to an examination of the juror's affidavit in this case to determine, applying the above standard, whether it was sufficient to entitle appellant to a hearing.

D.

Relative to appellant's allegation that the jury's verdict was decided by quotient, the juror's affidavit stated:

"On the morning that we began deliberating on the punishment to be given [appellant], there was some disagreement between us as to how many years he should get. I though he ought to get at least ten years because if he got less than ten years we would all have to decide whether to give the defendant probation. And I remember that we couldn't agree right away how much punishment he should get. . . .

"After lunch I remember one of the jurors suggested we ought to figure out what each one of us thought [appellant] should get and then we should just take the average. He thought that that would be a good way to do it. One of the other jurors, a slim Mexican-American man, said that if we were going to do that, then he thought [appellant] should get fifty years. I figure he wanted to make his number high so the average would be higher. . . . Anyway, we made out little slips of paper with the number of years we thought he should get on it and one of the women jury members came around and picked it up. Then we averaged them all up and the average was twenty-seven years.

The two jurors who were holding out for less than ten years agreed to change to twenty-five years and that's how we all finally agreed to twenty-five years. You know it's hard to agree about how many years a guy like that ought to get."

While it is true that, as the court of appeals concluded, there is no express showing of an advance agreement to abide by the quotient, see *Martinez v. State,* 496 S.W.2d 612 (Tex.Cr.App. 1973), such an agreement is at least implied. That is all that is required to obtain a hearing, wherein the existence *vel non* of such an advance agreement can be thoroughly investigated.

The affidavit also contains the following account of an encounter between the affiant juror and one of appellant's own character witnesses:

"During the evening adjournment the [sic] guilt/innocence phase, after I had picked up my newspaper from the jury room I got in the elevator to leave. While I was on the elevator one of the witnesses came over to me and saw my jury button and asked which court I was in. I told him I was in Judge Hester's court. He asked me if it was [appellant's] case and I nodded my head — I didn't say anything to him. He said, 'What do you do with a guy like that?' The witness was the older one of the two Mormons who testified. I didn't say anything, I just left."

The court of appeals found this exchange not to concern the *specifics* of appellant's case, and implied that it did not rise to the level of "conversation" prejudicial to appellant. However, it is clear that the witness' remark pertained to appellant's case. Such an exchange need not constitute a full blown discussion of the specifics of a given case before harm may result. The affidavit was a sufficient pleading to invoke the presumption that an

accused has been injured when an impaneled juror communicates with an unauthorized person about a case. *Romo v. State,* 631 S.W.2d 504 (Tex.Cr.App. 1982). If introduced as evidence *at the hearing,* the affidavit would thus put the State to its proof, to rebut the presumption, either by testimony or by counter affidavit. See 25 Tex.Jur.3rd, Criminal law § 3518.

The court of appeals relied on *Romo v. State,* 631 S.W.2d 504 (Tex.Cr.App. 1982) for its holding that because the "specifics" of appellant's particular case were not discussed, no harm is shown. However, in *Romo* the police officer had no knowledge whatsoever of the accused's particular case and therefore could not have discussed the "specifics" with the juror. He could inject only the "rank generality directed toward all defendants," *id.,* at 506, that they should all be convicted. The distinction between this and the instant situation is obvious.

The *initial* burden is on the defendant to show the communication pertained to his case, of which the unauthorized party had knowledge. From there, harm is presumed, and the burden shifts to the State to defeat the presumption. See *Romo v. State,* supra, and cases cited therein at 506.

As to parole discussion in the jury room the affiant stated:

"If we had agreed on ninety-nine years, it wouldn't have mattered to me because you figure he'll get out on parole sooner or later. Of course we all discussed parole several times before we finally agreed on the twenty-five years. I remember someone saying during one of the discussions about parole, 'How do you rehabilitate a man like that?' "

Clearly, standing alone, this statement would not suffice to establish jury misconduct under the test in *Sneed v. State,* 670 S.W.2d 262 (Tex.Cr.App. 1984). It was sufficient, however, to put the trial court on notice that reasonable grounds exist to believe misconduct occurred.

That test would require the defendant to show: (1) that a misstatement of the law (2) asserted as a fact was made (3) by someone professing to know the law (4) which was relied upon by other jurors (5) who for that reason changed their vote to a harsher punishment.

We find, in short, that any one of the three bases for new trial discussed by the court of appeals were pled sufficiently to entitle appellant to a hearing thereon.

E.

Because we find appellant's motion for new trial and supporting affidavit to comprise a sufficient pleading, we agree with appellant that he should have been afforded a hearing on the motion. Under art. 755 (1925), the direct predecessor to our current Article 40.05, V.A.C.C.P., it has been held that "[t]he right to file *and have heard* a motion for new trial is deemed absolute, provided the right is asserted within the time specified by law." *Synagogue v. State,* 122 Tex.Crim. R., 55 S.W.2d 1052, 1053 (1932). As we have already determined, appellant's motion and affidavits were timely filed. *Drewery v. State,* supra; Article 40.05(a), supra. The order denying appellant's motion reflects that within ten days of its having been filed said motion was presented to the trial court. Article 40.05(d), supra. In short, the motion for new trial was in all things a timely and sufficient pleading.

That a motion for new trial is susceptible to being overruled by operation of law 75 days after the date of imposition of sentence pursuant to Article 40.05(c), V.A.C.C.P. does *not* mean that an appellant whose motion is timely filed and timely presented to the court, with adequate supporting affidavits, is *not* entitled to a hearing on that motion as an absolute right — contrary to the conclusion of the court of appeals, 662 S.W.2d at 69.

In *Appleman v. State,* 531 S.W.2d 806, 810 (Tex.Cr.App. 1976) and *Powell v. State,* 502 S.W.2d 705, 711 (Tex.Cr.App. 1973) it was iterated that:

"The trial court is the place to decide issues of fact as to what occurred in the jury room. That decision will not be disturbed by this Court in the absence of an abuse of discretion."

Where the evidence adduced at the hearing conflicts, it is not an abuse of discretion for the trial court to deny a motion for new trial. *Appleman v. State,* supra. Furthermore, in *Darrington v. State,* 623 S.W.2d 414 (Tex.Cr.App. 1981), a panel of this Court found no error in overruling a motion for new trial without a hearing when *no* affidavit was filed in support of the defendant's claim of jury misconduct, and all other grounds raised

in the motion were determinable from the trial record. See also *Garza v. State,* 622 S.W.2d 85 (Tex.Cr.App. 1981). In another context, however, we have observed that a motion for new trial hearing "is the only opportunity to present to the trial court certain matters that may warrant a new trial, and to make a record on those matters for appellate review." *Trevino v. State,* 565 S.W.2d 938, 940 (Tex.Cr.App. 1978). In the face of a timely motion for new trial supported by sufficient affidavit, a trial court which denies an accused this opportunity abdicates its fact finding function and denies the accused a meaningful appellate review. Such was the case here, and we find, therefore, that the trial court in the instant cause abused its discretion in denying appellant a hearing on his motion for new trial.
As in *Trevino v. State,* supra, the cause is remanded to the trial court for a hearing on appellant's motion for new trial.
Appellant argues that his conviction should be reversed and remanded for a new trial on authority of *Jackson v. State,* 157 Tex.Crim. R., 248 S.W.2d 748 (1952) and *Cross v. State,* 627 S.W.2d 257 (Tex.App. — Fort Worth 1982, pet. ref'd).

In *Jackson,* however, the Court observed that "[t]he sole question presented for review is the refusal of the trial court to *grant* appellant's amended motion for new trial based upon misconduct." 157 Tex.Cr.R. at 324, 248 S.W.2d at 748. Thus, it is clear that, while noting that "[t]he affidavit was sufficient to support the allegations of jury misconduct, and the trial court was not warranted in declining to hear testimony thereon[,]" *id.,* the Court found the defendant's affidavits sufficient to entitle him, not only to a hearing, but also to the new trial he sought.

The affidavits in the instant cause do not of themselves entitle appellant to a new trial. They do entitle him "to present to the trial court certain matters that may warrant a new trial, and to make a record on those matters for appellate review." As we did in *Trevino v. State,* supra, we here remand the cause to allow appellant a meaningful albeit somewhat belated, review of the contentions raised in his motion for new trial.

Accordingly, the judgment of the court of appeals in reforming the judgment to delete appellant's conviction for indecency with a child is affirmed. However, in its holding that the trial court did not abuse its discretion in failing to grant a hearing on appellant's motion for new trial, the judgment of the court of appeals is reversed. The cause is remanded to the trial court for a hearing on motion for new trial.

Remmer v. United States, 347 U.S. 227 (1954)

During the trial of petitioner in a Federal District Court on charges of willful evasion of federal income taxes, an unnamed person communicated with a juror who afterwards became the jury foreman, and remarked to him that he could profit by bringing in a verdict favorable to petitioner. The juror reported the incident to the judge, who informed the prosecuting attorneys and advised with them. As a result, the Federal Bureau of Investigation made an investigation and report, which was considered by the judge and prosecutors alone, but nothing further was said or done. Petitioner and his counsel first learned of the matter after a verdict of guilty had been rendered, and petitioner thereupon moved for a new trial, which was denied. Held: The case is remanded to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to petitioner, and if found to have been harmful, to grant a new trial. Pp. 228-230.

(a) In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. P. 229.

(b) The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. P. 229.205 F.2d 277, judgment vacated.

III.

J. Louis Monarch argued the cause for petitioner. With him on the brief were Spurgeon Avakian, John R. Golden and Leslie C. Gillen.

Philip Elman argued the cause for the United States. With him on the brief were Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack and Joseph M. Howard. [347 U.S. 227, 228]

MR. JUSTICE MINTON delivered the opinion of the Court.

The petitioner was convicted by a jury on several counts charging willful evasion of the payment of federal income taxes. A matter admitted by the Government to have been handled by the trial court in a manner that may have been prejudicial to the petitioner, and therefore confessed as error, is presented at the threshold and must be disposed of first.

After the jury had returned its verdict, the petitioner learned for the first time that during the trial a person unnamed had communicated with a certain juror, who afterwards became the jury foreman, and remarked to him that he could profit by bringing in a verdict favorable to the petitioner. The juror reported the incident to the judge, who informed the prosecuting attorneys and advised with them. As a result, the Federal Bureau of Investigation was requested to make an investigation and report, which was accordingly done. The F. B. I. report was considered by the judge and prosecutors alone, and they apparently concluded that the statement to the juror was made in jest, and nothing further was done or said about the matter. Neither the judge nor the prosecutors informed the petitioner of the incident, and he and his counsel first learned of the matter by reading of it in the newspapers after the verdict.

The above-stated facts were alleged in a motion for a new trial, together with an allegation that the petitioner was substantially prejudiced, thereby depriving him of a fair trial, and a request for a hearing to determine the circumstances surrounding the incident and its effect on the jury. * A supporting affidavit of the petitioner's [347 U.S. 227, 229] attorneys recited the alleged occurrences and stated that if they had known of the incident they would have moved for a mistrial and requested that the juror in question be replaced by an alternate juror. Two newspaper articles reporting the incident were attached to the affidavit. The Government did not file answering affidavits. The District Court, without holding the requested hearing, denied the motion for a new trial. The Court of Appeals held that the District Court had not abused its discretion, since the petitioner had shown no prejudice to him. 205 F.2d 277, 291. The case is here on writ of certiorari. 346 U.S. 884 .

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Mattox v. United States, 146 U.S. 140, 148 -150; Wheaton v. United States, 133 F.2d 522, 527.

We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. The sending of an F. B. I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action ex parte on information such [347 U.S. 227, 230] as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.

Judgment vacated.