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JAMES MATTHEW LEIDIG,	IN THE
Petitioner	COURT OF APPEALS
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2020
Respondent	No. 19
	COA-REG-0019-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2020, copies of the Petitioner's Brief and Record Extract in the captioned case were delivered via the MDEC system by arrangement with the Office of the Attorney General to:

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IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2020

NO. 19

JAMES MATTHEW LEIDIG,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

By charging document filed in Circuit Court for Washington County Case No. C-21-CR-19-000099, the State charged Petitioner James Matthew Leidig with first, third, and fourth degree burglary, theft, and malicious destruction of property. After a trial on March 12, 2019, the Honorable Dana Moylan Wright presiding, a jury acquitted Mr. Leidig of first degree burglary and theft and convicted him of third and fourth degree burglary and malicious destruction of property. On May 9, 2019, the circuit court sentenced Mr. Leidig to eight years of

incarceration and ordered him to pay restitution.[1]

In an opinion filed on May 5, 2020, the Court of Special Appeals vacated the order of restitution but affirmed Mr. Leidig's convictions and held that his right to confrontation was not violated by the admission of DNA and serological evidence. *James Matthew Leidig v. State of Maryland*, Court of Special Appeals, September Term 2019, No. 463.

On July 13, 2020, this Court granted Mr. Leidig's petition for writ of certiorari to consider the following question.

QUESTION PRESENTED

Did the circuit court violate Petitioner's right to confrontation under the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights when it admitted DNA and serological evidence through a witness who did not perform the analysis of the crime scene evidence?

STATEMENT OF FACTS

The charges against Mr. Leidig arose out of the burglary of the Hagerstown residence of Ralph and Rebecca Brown on September 1, 2016. Neither of the Browns witnessed the burglary in progress or identified Mr. Leidig as its perpetrator. To prove the latter fact, the State relied upon DNA and serological evidence purportedly recovered by the police from the crime scene.

[1] During the same proceeding, Mr. Leidig entered a guilty plea to a charge of conspiracy to commit burglary in an unrelated case, Washington County Circuit Court Case No. 21-K-16-053070. The circuit court sentenced him in that case to a concurrent term of eight years. Mr. Leidig did not file an application for leave to appeal in Case No. 21-K-16-053070, and it is not the subject of the present appeal.

Mr. Brown testified that he arrived home at around 1:00 in the afternoon after running some errands. (E. 27). When he left that morning, the house was empty, his wife having gone shopping, and the doors and windows were closed. (E. 27-28). After being back home for about an hour, Mr. Brown discovered that one of the living room windows was broken and that a window had been raised. (E. 28). Mr. Brown also discovered damage to the locking mechanism on the door leading to the basement. (E. 29). Nothing else appeared out of order except that Mr. Brown's handgun was missing from where he remembered leaving it on a piece of furniture located between the living room and kitchen. (E. 28-29). Mr. Brown denied knowing Mr. Leidig or inviting him in the house. (E. 34).

Ms. Brown too testified that she was out of the house at the time of the burglary, but she recalled that she left after her husband and arrived home before him. (E. 37). Nevertheless, she confirmed that a window in the living room had been broken and that the basement door had been damaged. (E. 38). Like Mr. Brown, Ms. Brown also denied knowing Mr. Leidig or inviting him into the house. (E. 39).

As noted, the State sought to connect Mr. Leidig to the burglary through the use of forensic evidence. Dispatched to the Browns' house on the afternoon of the burglary, Sergeant David Haugh concluded, based on his investigation, that there had been an unsuccessful attempt to enter through the basement door and that the living room window had been broken from the outside, causing glass to fall in the house. (E. 42-43). Using special kits for the collection of biological substances,

Sergeant Haugh took swabs of the window frame and curtain on which he saw reddish brown markings consistent with the appearance of blood. (E. 48). However, he did not take certain preventative measures to minimize the risk of contamination, including sanitizing his hands with bleach and changing gloves in between swabbing the window frame and curtain. (E. 64-65). Sergeant Haugh also did not attempt to take samples from the basement door, windows, broken glass, or the piece of furniture from which Mr. Brown said his gun had been stolen. (E. 66).

Sergeant Haugh further testified that, during a canvass of the area for witnesses, he located "some people who said they had seen an individual … several times in the neighborhood[.]" (E. 62). One woman he spoke with had reported an incident two weeks prior to the burglary involving an individual who fled on foot. Although she identified a suspect other than Mr. Leidig as that individual, she told Sergeant Haugh that she did not think the individual was the person she saw on the date of the burglary of the Browns' residence. (E. 67-70).

The crime scene swabs collected by Sergeant Haugh were sent to the Maryland State Police for analysis. There, they were examined by Molly Rollo, a forensic scientist, who produced a report, dated October 14, 2016, in which she opined that the swabs contained blood and that the blood contained the DNA profile of a single male contributor. The State did not call Ms. Rollo to testify but introduced her report into evidence over Mr. Leidig's objection that, among other things, he had a right to cross-examine Ms. Rollo. (E. 83-85).

Ms. Rollo's report, which is reproduced in full in the Record Extract, states

that it is a "Laboratory Report" prepared by the Maryland State Police Forensic Sciences Division and is addressed to Corporal David Haugh of the Washington County Sheriff's Office. (E. 154). The report contains the following prefatory language:

> This examination has been made with the understanding that the evidence is connected with an official investigation of a criminal matter and that the Laboratory Report will be used for official purposes only related to the investigation or a subsequent criminal prosecution. This report contains the conclusions, opinions and interpretations of the examiner whose signature appears on the report.

Id. The next section of the report, entitled "Results and Conclusions of Examination/Analysis," begins with the following declaration:

> The deoxyribonucleic acid (DNA) results reported below were determined by procedures which have been validated according to the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories.

Id. The report then states, without elaboration, that "[b]lood was indicated" on the swabs, which "were forwarded for DNA extraction and quantitation." *Id.*

Ms. Rollo's report does not address the DNA extraction procedure, skipping instead to the "quantitation" stage, at which, the report states, "Human and male DNA was detected[.]" The report then sets forth a table captioned "AUTOSOMAL STR TYPING RESULTS AND CONCLUSIONS," the numerical results listed in the table suggesting that DNA from the swabs of the window frame and curtain were from the same individual. (E. 155). The report then states Ms. Rollo's conclusion that "[a] DNA profile from one male

contributor was obtained." *Id.*

At the end the report is Ms. Rollo's signature followed by her title. *Id.* In addition, the first page of the report contains the initials of three individuals, "TK," "LAM," and "MR," and the second page contains the initials of "TK" and "LAM." (E. 154-55).

As noted, the State introduced Ms. Rollo's report into evidence but did not call Ms. Rollo, who had since obtained employment at a different lab in Prince George's County. (E. 83, 87). Instead, the State called Tiffany Keener, another forensic scientist with the State Police, who was tasked with comparing the DNA profile generated by Ms. Rollo with Mr. Leidig's known DNA profile. Ms. Keener testified to the process for DNA analysis that is generally followed by analysts with the Maryland State Police. (E. 78-79). In addition, she explained the various safeguards her lab generally used to minimize the risk of contamination, including cleaning workspaces with bleach and ethanol and putting on a new pair of gloves for each piece of evidence to be examined. (E. 79, 97-99).

According to Ms. Keener, Ms. Rollo, her former co-worker and "the primary forensic scientist that analyzed th[e] swabs," "was able to" generate DNA profiles from the crime scene evidence. (E. 81). Pursuant to lab policy, each analyst's report must be peer reviewed by two other analysts; Ms. Keener served as "the administrative reviewer" for Ms. Rollo's report. (E. 82-83). Ms. Keener was not asked to elaborate on what her role as administrative reviewer entailed other than that she "reviewed [Ms. Rollo's] results[.]" (E. 116). However, she

made it clear that she relied on Ms. Rollo's findings in conducting the comparison with Mr. Leidig's DNA profile. (E. 117).

In particular, Ms. Keener testified that it was "Molly Rollo" who "performed serology testing on the swabs," found "that blood was indicated," and generated DNA profiles from the purported blood. (E. 87, 93). Ms. Keener later developed a separate DNA profile from a buccal swab of Mr. Leidig and "compared my results to the results that were previously obtained from Molly Rollo." (E. 87). Based upon that comparison, Ms. Keener believed that Mr. Leidig's DNA profile "matched" the profiles generated by Ms. Rollo, and she documented her opinion in a similar-looking report, dated April 17, 2017, which states that it "is supplemental to the original Maryland State Police report" prepared by Ms. Rollo. (E. 88, 157-60). Ms. Keener further opined, and documented in her report, that the odds of randomly selecting an unrelated individual with the same DNA profile were one in 9.7 sextillion in the U.S. Caucasian population, one in three sextillion in the African-American population, and one in five sextillion in the U.S. Hispanic population. (E. 88, 159). As with Ms. Rollo's report, the court admitted Ms. Keener's report into evidence over defense objection. (E. 147-48).

On cross-examination, defense counsel elicited from Ms. Keener that, due to a change in laboratory equipment, she was able to analyze more loci in Mr. Leidig's known DNA sample than Ms. Rollo had been able to analyze in the crime scene evidence. (E. 92, 107-08). Ms. Keener admitted that had Ms. Rollo been

able to analyze those additional loci, and had those results differed from Mr. Leidig's DNA profile, she would not have reached the same result in her comparison. (E. 109-11).

In his cross-examination of Ms. Keener, defense counsel also sought to emphasize the risk of cross-contamination from "touch DNA," or DNA left behind when a person has contact with an object. (E. 97-99). The State, by contrast, sought to downplay the risk of cross-contamination, first by eliciting from Ms. Keener that "the conclusions that Molly Rollo made were that the DNA profile [from the crime scene] was from one male contributor. She didn't see any evidence of an additional contributor being present." (E. 113-15). Second, the State argued, in closing, that "[t]here was no mixture" and that "you also heard from serology that it was blood. This wasn't touch DNA. It was blood." (E. 137).

ARGUMENT

Introduction

If the State's case against Mr. Leidig consisted of only a single strand of evidence, this did not seem to faze the prosecutor, who ended his rebuttal closing argument by declaring that "[t]he State has offered the most scientific evidence possible … [a] DNA match[.]" (E. 145). Strategically, this was a smart move; as this Court has observed, "jurors place a great deal of trust in the accuracy and reliability of DNA evidence." *Whack v. State*, 433 Md. 728, 732 (2013). But the prosecutor's display of confidence belied an uncomfortable truth: people are responsible for the generation of DNA evidence, and people are not perfect. In its

2016 report, the President's Counsel of Advisors on Science and Technology expressed this notion as follows:

> Concerning validity as applied, DNA analysis, like all forensic analyses, is not infallible in practice. Errors can and do occur. Although the probability that two samples from different sources have the same DNA profile is tiny, the chance of human error is much higher. Such errors may stem from sample mix-ups, contamination, incorrect interpretation, and errors in reporting.

President's Counsel of Advisors on Sci. & Tech., Report to the President Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, at 7 (2016).[2]

By allowing the State to call only a witness who, so far as the record discloses, neither observed the analysis of the crime scene evidence nor formed an independent opinion on the presence of blood or the generation of DNA profiles from the evidence, the trial court violated Mr. Leidig's right to confrontation, guaranteed by the state and federal constitutions. Mr. Leidig was unable to explore on cross-examination whether Ms. Rollo – "the primary forensic scientist" with respect to the crime scene evidence – obtained her results through fraud or

[2] *See also State v. Bowman*, 337 S.W.3d 679, 694 n. 3 (Mo. 2011) (Wolff, J., concurring in part and dissenting in part) ("Every prosecutor wishes to have a 'smoking gun' to use against a defendant. In today's world, the 'smoking gun' that jurors wish to see—and, therefore, may place undue weight on—is DNA evidence."); Joel D. Lieberman et al., Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?, 14 Psychol. Pub. Pol'y & L. 27, 31 (2008) (observing that DNA evidence, "although superior in its scientific underpinning to other pieces of forensic identification evidence, … is far from infallible and should not be considered the 'platinum standard'" as "DNA-profiling evidence and the technology underlying it are subject to the fallibility of human behavior in its collection, interpretation, and application").

incompetence. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318-19 (2009) (noting that "[f]orensic evidence is not uniquely immune from the risk of manipulation" and that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well").

It is no response that cross-examination of Ms. Keener was "good enough" or "fair enough." As Justice Ginsburg wrote for the Supreme Court in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011):

> More fundamentally, as this Court stressed in *Crawford*, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." 541 U.S., at 54, 124 S.Ct. 1354. 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, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) (plurality). 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.

Id. at 662.

Because she did not perform or observe the serological examination of the crime scene evidence, Ms. Keener could do nothing other than repeat Ms. Rollo's opinion that the markings on the window frame and curtain came from blood. And because Ms. Keener did not perform or observe the DNA analysis of that evidence, she could do no more than state that her former colleague had generated the profiles that Ms. Keener would later deem a match with Mr. Leidig's DNA profile. For the reasons set forth below, the admission of testimonial hearsay by

Ms. Rollo through Ms. Keener deprived Mr. Leidig of the ability to present a full and effective defense to the charges, and that error necessitates that his convictions be reversed.

THE CIRCUIT COURT VIOLATED PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS WHEN IT ADMITTED DNA AND SEROLOGICAL EVIDENCE THROUGH A WITNESS WHO DID NOT PERFORM THE ANALYSIS OF THE CRIME SCENE EVIDENCE.

Before the Court of Special Appeals, Mr. Leidig argued that the circuit court erred in admitting the reports prepared by both Ms. Rollo and Ms. Keener. Ms. Rollo's report, Mr. Leidig contended, contained testimonial hearsay by a witness against him who, because the State elected not to call her, was not subject to cross-examination. And because Ms. Keener restated and relied upon Ms. Rollo's conclusions in reaching her determination that it was Mr. Leidig's DNA in the crime scene evidence, the court erred in admitting her report as well. Disagreeing with Mr. Leidig, the Court of Special Appeals held that "Ms. Rollo's report in the case at bar is not testimonial because … '[n]owhere does the report *attest* that its statements *accurately* reflect the DNA testing processes used or the results obtained.'" (E. 18-19) (quoting *Williams v. Illinois*, 567 U.S. 50, 111 (2012) (Thomas, J., concurring)).

The Court of Special Appeals erred by mischaracterizing the evidence and misapplying the test for when an out-of-court declaration constitutes testimonial

hearsay. To understand how, it is necessary to review the evolution of the test over the last 16 years.

A. The source of the right to confrontation

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Article 21 of the Maryland Declaration of Rights provides correspondingly that "in all criminal prosecutions, every man hath a right ... to be confronted with the witnesses against him" and "to examine the witnesses for and against him on oath[.]" Md. Decl. Rts., Art. 21.

The Sixth Amendment and Article 21 have often been interpreted as being in *pari materia*. *See, e.g., Derr v. State*, 434 Md. 88, 103 (2013), *cert. denied*, 573 U.S. 903 (2014) (*Derr II*). However, the provisions are not identical textually. Whereas the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him," Article 21 guarantees this right as well as the right "to examine the witnesses for and against him on oath." The legislative history for these provisions is sparse. *See Gregory v. State*, 40 Md. App. 297, 310 (1978) ("We thus have two provisions of organic law one State and one Federal nearly identical in language, expressing what, on more than one occasion, the Supreme Court has considered to be 'one of the fundamental guarantees of life and liberty' with precious little legislative history to point out their meaning.") (footnote omitted). Nevertheless, the textual difference between the state and

federal constitutions is apparent and indicates that the framers of the Declaration of Rights intended to provide a more robust, and active, right of cross-examination.[3]

Moreover, there have been noteworthy dissents to the view that Article 21 provides no greater protection than the Sixth Amendment. In *Derr II*, the late Judge Eldridge pointedly noted that "the Confrontation Clauses of the Maryland Constitution preceded by 15 years the Sixth Amendment's Confrontation Clause which was ratified in 1791, and it preceded by 189 years the Supreme Court's decision that the Sixth Amendment's Confrontation Clause was applicable to state criminal proceedings." 434 Md. at 143 (Eldridge, J. dissenting). As Judge Wilner, writing for the Court of Special Appeals, explained in *Gregory*, *supra*, "the pre-1965 nature, scope, and meaning of the right of confrontation in Maryland developed solely from the opinions of the Court of Appeals in the context of Article 21 of the Declaration of Rights." 40 Md. App. at 311.[4]

As he did below, Mr. Leidig maintains that this case can be resolved in his favor by application of case law construing the Sixth Amendment right to

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[3] During the 1967 Constitutional Convention, concern was expressed that "'[c]onfronted with' may, under the erosions of time and the judicial process, be interpreted to mean something other than confronted with the right to cross-examine," and it was noted that the right to cross-examination is broader than, and necessarily encompasses, a right to confrontation. Proceedings and Debates of the 1967 Constitutional Convention, Volume 104, Volume 1, Debates 2203.

[4] It bears noting that none of the cases cited by the Court of Special Appeals as applying Article 21 involved, as here, the admission against an accused of testimonial hearsay prepared in connection with a criminal investigation. *See id.* at 311-14 (discussing *Johns v. State*, 55 Md. 350 (1881), *Dutton v. State*, 123 Md. 373 (1914), and *Jones v. State*, 205 Md. 528 (1954)).

confrontation. To the extent that the Court concludes otherwise, Mr. Leidig urges the Court to consider whether the Maryland Constitution offers additional protection rather than leave the meaning of Article 21 to the ever-shifting and difficult-to-discern whims of a federal court interpreting the federal constitution.

B. Application of the right to confrontation to forensic evidence

1. The Supreme Court

Among its other insights, *Gregory*, filed in 1978, cautioned against viewing the right to confrontation as a mere subset of the hearsay rule:

> It has been suggested, declared, and assumed that the right of confrontation was an outgrowth of the hearsay rule generally, which may well be the case. To some extent, at least, their purposes are similar. But, however entwined the development of these two concepts may have been in their formative periods, the evidence is quite clear that, at least by the late 1600's, the right of confrontation was considered to be something more than merely a part of the overall rule against the use of hearsay. It was much more particular, being a right peculiar to defendants in certain criminal cases, rather than to litigants, or even defendants, generally; and it had to do not with the quality of the evidence given by witnesses (whether it was upon personal knowledge, for example), but rather with the requirement that the witness be produced that his testimony be Viva voce. The suggestion that the right of confrontation is no more than a particular expression or emanation of the hearsay rule does not find substantial support historically.

Gregory, 40 Md. App. at 307. Arguably, the Supreme Court made this very mistake when, just two years later, it held in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), that, for purposes of the Sixth Amendment right to confrontation, "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.'"

Almost a quarter century later, the Supreme Court took corrective action when, overruling *Roberts*, it held that "[t]estimonial statements of witnesses absent from trial" are admissible under the Confrontation Clause of the Sixth Amendment "only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Echoing *Gregory*, the Court explained that the Sixth Amendment right to confrontation "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." *Id.* at 61-62.

If *Crawford* solved one problem by severing the right to confrontation from the hearsay rule, it created another by introducing the amorphous term "testimonial statement." There was little question that the evidence in *Crawford* – a witness's recorded statement to the police – constituted a testimonial statement, so the Court had no need to resolve which other statements would also qualify. Nevertheless, the Court offered various possible "formulations," including:

> 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; [and] 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).

In later cases, the Supreme Court has struggled to come up with a workable standard for when the report of a forensic test result constitutes a "testimonial statement." In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that "certificates of analysis," which showed the results of analysis of suspected cocaine, "fall within the 'core class of testimonial statements'" to which the Sixth Amendment right to confrontation applies, as the documents "are quite plainly affidavits[.]'" *Id.* at 308, 310. The reports were also testimonial, the Court held, because they were created to prove "that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine." *Id.* at 310. According to the Court, they were thus "'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 311 (quoting *Crawford*, 541 U.S. at 52).

One argument advanced by Massachusetts was 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.'" *Melendez-Diaz*, 557 U.S. at 317. In rejecting the significance of that distinction, the Court noted that "[f]orensic evidence is not uniquely immune from the risk of manipulation" and

emphasized the importance of cross-examination "to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 318-19. The Court explained that, "[l]ike expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 320. As such, "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." *Id.* at 321.

The Court next had cause to address what constitutes a testimonial forensic report in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Bullcoming was charged with driving while intoxicated, and the "principal evidence against him was a forensic laboratory report certifying that [his] blood-alcohol concentration was well above the threshold for aggravated DWI." *Id.* at 651. At trial, the prosecution did not call the analyst who performed the test on Bullcoming's blood sample. *Id.* Instead, it introduced his laboratory report as a business record and called another analyst who was familiar with the laboratory's testing procedures to testify to the results, which formed the basis of his expert opinion testimony. *Id.*

As in *Melendez-Diaz*, the Supreme Court held that admission of the report through an analyst who neither performed nor witnessed the testing violated the Confrontation Clause. *Bullcoming*, 564 U.S. at 659, 661-62. In the view of the Court, the Constitution "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." *Id.* at 662.

To that end, the Court rejected the government's contention that the original analyst was a "'mere scrivener.'" *Id.* at 659-60. To the contrary, the machines used to determine blood alcohol concentration levels required specialized knowledge and training, multiple steps were involved in the process, and "human error can occur at each step." *Id.* at 654. As to whether the report contained testimonial hearsay, the court reasoned:

> 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, 126 S.Ct. 2266 (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.

Id. at 664-65.

One year after *Bullcoming*, the Court addressed the issue again, leading to a fractured decision. In *Williams v. Illinois*, 567 U.S. 50 (2012), the police sent a swab from a rape kit to Cellmark, a private DNA analysis laboratory. A Cellmark analyst produced a report that included a male DNA profile but did not connect the profile to any particular person. *Id.* at 59. An Illinois State Police forensic specialist then entered the DNA profile from Cellmark's report into a database and determined that it matched Williams' DNA. At trial, the Cellmark report was admitted during the testimony of the police forensic specialist; the Cellmark

analyst did not testify. *Id.* at 61.[5]

A majority of the Court concluded that Williams' right to confrontation had not been violated. Writing for a plurality of the Court, Justice Alito offered two rationales. First, he reasoned that the Cellmark report had not been offered for its truth but, rather, only to show the basis for the testifying expert's opinion. *Id.* at 57-58. Second, he argued that the report was not testimonial because it was not produced for "the primary purpose of accusing a targeted individual." *Id.* at 58.

In a concurring opinion, Justice Thomas disagreed that the report was not offered for its truth, reasoning that "statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose" and that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." *Id.* at 106. At the same time, however, Justice Thomas agreed with the plurality that Williams' right to confrontation was not violated, albeit for a different reason. According to Justice Thomas, the Cellmark report was insufficiently formal because it was "neither a sworn nor a certified declaration of fact" and did not "attest that its statements accurately reflect the DNA testing processes used or the results obtained." *Id.* at 111.

In addition to Justice Thomas, Justice Breyer filed a concurring opinion in

[5] The Cellmark Report, included in an appendix to this Court's opinion in *State v. Norton*, 443 Md. 517 (2015), consisted in large measure of a series of scientific charts, contained the signatures of two reviewing analysts but not the analyst who prepared the report, and included no declaration that the analyst followed any particular standards or guidelines in generating the evidence.

which he advocated having the case reargued and expressed doubt about the value of cross-examination "when the out-of-court statement was made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work." *Id.* at 95. On the other hand, four justices, in an opinion authored by Justice Kagan and joined by, among others, Justice Scalia who authored the Court's opinion in *Crawford*, dissented. The dissent took the position – endorsed by a majority of the Court taking into account Justice Thomas' concurrence – that evidence of the Cellmark report was admitted for "its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements." *Id.* at 126. In addition, the dissent argued against adopting either the plurality's or Justice Thomas's tests for when an out-of-court statement is testimonial, instead favoring a return to the *Crawford* standard of whether the statement was 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 132-40.

2. *Maryland's courts*

This Court and the Court of Special Appeals, like courts in many of Maryland's sister jurisdictions, have devoted considerable effort to discerning the precedential value of *Williams*. *Derr II*, *supra*, 434 Md. 88, involved the admission of DNA evidence connecting the defendant to an alleged rape.[6] In 1985,

[6] The Court had considered the same issue prior to *Williams* and held in Derr's favor. *Derr v. State*, 422 Md. 211 (2011). On petition by the State, the

an FBI serological examiner identified sperm and semen on swabs taken from the victim and recorded the findings in laboratory bench notes. *Id.* at 98. In 2002, FBI analysts generated a DNA profile of a suspect from the swabs. *Id.* Two years later, analysts compared that profile to Derr's existing profile in the CODIS database. *Id.* In 2006, analysts then compared the DNA profile from the swabs of the victim to samples obtained from Derr's brothers. *Id.* At trial, the State called a forensic DNA examiner who conducted none of the previous analyses but was allowed, over objection, to offer her opinion that it was Derr's DNA on the swabs. *Id.* at 100-02.

Noting that there was no majority opinion in *Williams*, the Court accepted Justice Thomas' concurring opinion – "requiring that statements be, at a minimum, formalized to be testimonial" – as the holding of the Supreme Court. *Derr II*, 434 Md. at 114. Applying that test, the Court held that there was no error in Derr's case. The 1985 bench notes of the serological examiner were not testimonial, the Court reasoned, because "[t]here are no signed statements or any other indication that the results or the procedures used to reach those results were affirmed by any analyst, examiner, supervisor, or other party participating in its development." *Id.* at 118-19. Similarly, the report documenting the 2002 generation of a DNA profile from the swabs was just "a series of numbers and lines, and on the bottom of the documents are the initials of two parties;" there

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Supreme Court remanded for reconsideration in light of *Williams*, hence the reference in the text to *Derr II*. *Maryland v. Derr*, 567 U.S. 948 (2012).

were "[n]o statements … anywhere on the results attesting to their accuracy or that the analysts who prepared them followed any prescribed procedures." *Id.* at 119. Finally, the results of the 2004 analysis linking Derr's CODIS profile to the profile generated from the swabs were not testimonial because they were "almost identical in form" to the 2002 test results save that the report setting forth the 2004 results did not contain "initials on the bottom[.]" *Id.* 120.

The majority opinion in *Derr II*, written by Judge Greene, was joined by four other judges, three of whom also wrote or joined concurring opinions. Judge Adkins, joined by Judge Harrell, issued a concurring opinion addressing a separate discovery issue. *Id.* at 135-39. In another concurring opinion, Judge McDonald wrote to express his skepticism that "the rationale of the [majority] opinion will ultimately be embraced by the Supreme Court." *Id.* at 139. Finally, as noted earlier, Judge Eldridge wrote a dissenting opinion, joined by Judge Bell, in which he advocated a broader and more protective interpretation of the right to confrontation under Article 21 of the Maryland Declaration of Rights. *Id.* at 140-49.

Four days after it issued its opinion in *Derr II*, the Court issued its opinion in *Cooper v. State*, 434 Md. 209 (2013), *cert. denied*, 573 U.S. 903 (2014). In *Cooper*, the State called a serological examiner to testify that he found sperm and seminal fluid on a napkin recovered from the victim after she was raped. *Id.* at 216-17. In addition, the State called a DNA analyst from Bode Technology, a private lab, who testified that another Bode analyst whom she supervised had

developed a profile for an unknown male from the biological material on the napkin. *Id.* at 217. Finally, the State called an analyst with the Baltimore City Police Department, who compared the profile from the napkin with Cooper's known profile and found them to be consistent. *Id.*

Cooper contended that his right to confrontation was violated when the trial court allowed the Bode analyst to testify about the generation of the DNA profile from the napkin as she did not personally take part in the testing and analysis of the evidence. Applying the test set forth by Justice Thomas in his concurring opinion in *Williams*, a majority of the Court affirmed. According to the Court, the report of the analyst who performed the testing at Bode

> is a two page document indicating, among other things, when the report was created, what items were tested, what procedures were used to develop the results, and the DNA results from the testing. Nowhere on either page of the report, however, is there an indication that the results are sworn to or certified or that any person attests to the accuracy of the results. Although Bode developed the results at the request of the Baltimore City Police Department, the Shields report is not the result of any formalized police interrogation. Therefore, applying Justice Thomas' reasoning we conclude that the Shields report lacks the formality to be testimonial….

Id. at 236. Judge McDonald wrote a concurring opinion to reiterate his concerns about the majority's reasoning, and Judge Bell wrote a dissenting opinion to express his agreement with Judge Eldridge's opinion in *Derr II*. *Id.* at 245.

Following *Derr II* and *Cooper*, Maryland's courts have shied away from a rigid application of Justice Thomas' concurring opinion in *Williams*. The first crack in the ice appeared in *Malaska v. State*, 216 Md. App. 492, *cert. denied*, 439

Md. 696 (2014). In *Malaska*, a medical examiner was called to testify about the results of an autopsy which she supervised but did not perform. The autopsy report was signed by the medical examiner who performed the autopsy, the testifying supervisor, and the Chief Medical Examiner. *Id.* at 502-03.

In reaching the conclusion that the report was testimonial, the Court of Special Appeals looked to whether it "contains formalized indicia such as attestations and/or certifications as to the accuracy of the testing processes used or the results obtained therefrom." *Id.* 510. The court held that it did. Specifically, the presence of the signatures on the final page of the report was significant because "[a]lthough the report does not employ the words 'attest' or 'certify' or any variation thereof, the signatures clearly imply that the signatories agree with and approve the contents of the report." *Id.* In addition, the report was prepared pursuant to statutory authority, which provided for the admissibility of an autopsy report in evidence. *Id.* at 510-11.

On the other hand, the Court of Special Appeals held that Malaska's right to confrontation was satisfied when he was able to cross-examine the testifying supervisor. The court reasoned that the witness attended the autopsy, co-signed the autopsy report, and, as the supervising official, "carried the responsibility and authority to make the ultimate determination as to the cause and manner of death[.]" *Id.* at 516. According to the court, *Bullcoming* was distinguishable, as "[i]t was uncontested in *Bullcoming* that the surrogate witness in that case was not the supervisor in charge of conducting the scientific tests at issue, and, further, that

the witness had no knowledge as to the actual tests completed or the actual chemists' job performance." *Id.* at 515.

Next, in *State v. Norton*, 443 Md. 517 (2015), this Court explicitly called into question the reasoning – though not the result – in *Derr II*. Judge Battaglia authored the majority opinion, which was joined by all members of the Court (including Judge Greene) except for Judge Harrell, who joined only in the judgment. At issue was the admission of a report prepared by a DNA analyst at Bode Technology. Police sent evidence from the crime scene, along with a buccal swab from Norton, to Bode for testing. A Bode analyst found that Norton's DNA matched DNA found on the crime scene evidence. *Id.* at 519-20. At trial, the State admitted the analyst's report through the testimony of a supervisor and did not call the analyst. *Id.* at 522. The report, which is reproduced in the Court's opinion, is entitled "Forensic DNA Case Report," is signed by the analyst and a "Forensic Casework Manager," and contains the following statements:

> - The DNA Profiles reported in this case were determined by procedures that have been validated according to standards established by the Scientific Working Group on DNA Analysis Methods (SWGDAM) and adopted as Federal Standards.
>
> - Therefore, within a reasonable degree of scientific certainty, Harold Norton (2506-062-01) is the major source of the biological material obtained from evidence item 2506-062-02.

Id. at 520-22.

Holding that the report was testimonial in nature, the Court examined opinions from other jurisdictions which "have struggled to interpret *Williams* and

apply its tenets." *Id.* at 542. The court further took note that "no other state supreme court nor federal circuit court of appeals has solely relied upon Justice Thomas's concurrence." *Id.* at 545. Citing *Young v. United States*, 63 A.3d 1033 (D.C. 2013), a case discussed in greater detail below, the Court then adopted "a test that, if satisfied, would result in adherence to the opinions of a majority of the Justices" in *Williams* including Justice Alito's plurality opinion and Justice Thomas's concurring opinion. The Court articulated the new, two-part test as follows:

> [W]e guide our trial courts, when reviewing the admissibility of forensic documents under the Confrontation Clause, to consider first, whether the report in issue is formal, as analyzed by Justice Thomas; or if not, whether it is accusatory, in that it targets an individual as having engaged in criminal conduct, under Justice Alito's rationale.

Id. at 547. As relevant here, the Court also explained that "formality does not require that the document contain specific words of attestation, but that the report, in substance, functions as a certification." *Id.* at 548.

Returning to the case before it, the Court next held that the Bode report was testimonial either because it was formal or because it was accusatory. It was accusatory because it targeted a specific individual when it stated that "within a reasonable degree of scientific certainty, Harold Norton (2506-062-01) is the major source of the biological material obtained from evidence item 2506-062-02." *Id.* at 549. And, it was formal in two respects. First, that same language – "within a reasonable degree of scientific certainty" – was needed to make the analyst's opinion admissible. *Id.* at 548-49. Second, "it was certified and signed by

the analyst who had performed the test, indicating that the analyst's results had been validated according to federal standards." *Id.* at 549. The Court added that this was so notwithstanding that the report did not actually use the word certify." According to the Court, "[a] contrary conclusion requiring such magic words as 'certification' would elevate form over substance, which this Court is loath to do, especially when constitutional rights are in issue." *Id.* at 549 n. 29.

In a lengthy footnote, the Court also held that Norton's ability to cross-examine the Bode analyst's supervisor did not satisfy his right to confront the analyst. The witness in *Norton* testified to his opinion based on his review of "'all the materials, all of the notes, the lab notes, all of the data that was generated, the paperwork and the final report [of the non-testifying analyst].'" *Id.* at 522. According to the Court, *Melendez-Diaz* and *Bullcoming* nonetheless compelled the conclusion that the supervisor was not a "proper conduit" for testimony about the analyst's report. *Id.* at 552 n. 32. The Court distinguished cases cited by the State, which, the Court summarized, involved: non-testimonial hearsay, *People v. Barba*, 215 Cal.App.4th 712 (2013); testimonial hearsay that was not admitted into evidence, *State v. Manion*, 295 P.3d 270 (Wash. Ct. App. 2013); an expert who "was a witness with respect to his or her own analysis, review and certification," *Marshall v. People*, 309 P.3d 943 (Colo. 2013); and an expert who was "'integrally involved in the entire process,'" *State v. Lopez*, 45 A.3d 1 (R.I. 2012).[7]

[7] To similar effect are two cases cited by the State in its Appellee's Brief in the Court of Special Appeals. In *State v. McLeod*, 66 A.3d 1221, 1230-31 (N.H.

More recently, the Court of Special Appeals held in *Rainey v. State*, 246 Md. App. 160 (2020), that the results of psychological tests were improperly, but harmlessly, admitted through the testimony of an expert who did not perform the tests. Rainey admitted to committing the charged offense but contested the issue of criminal responsibility. At trial, the State called a witness who offered her expert opinion that Rainey was responsible. During her testimony, the witness mentioned a report prepared by a non-testifying expert which contained the expert's opinion that psychological tests suggested Rainey was malingering. *Id.* at 169.

Applying, with some reservation[8], an expanded version of the two-pronged test announced in *Norton*, the Court of Special Appeals agreed with Rainey that the testimony about the psychological tests violated his right to confrontation. The "*Norton* test," according to the Court of Special Appeals, asked first whether a forensic report "was prepared for an evidentiary purpose, and, if so, whether it was either 'formal' or 'targeted.'" 246 Md. App. at 181-82. Applying that standard, the

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2013), the court held that the prosecution may present testimony by an expert who formed an opinion on the basis of testimonial hearsay but may not introduce as independent evidence in its case-in-chief that testimonial hearsay. And, in *State v. Watson*, 185 A.3d 845 (N.H. 2018), the court held that there was no error in allowing the prosecution to call a toxicology expert who, in formulating his opinion, reviewed "'all the documentation' in the case, including the chain of custody, and ensured that all of the information had been correctly entered into the NMS computer system," "personally reviewed the 'actual instrument data' and made sure that the data were accurately entered into the NMS computer," and "'actually reviewed all of the testing results.'" *Id.* at 858.

[8] The Court of Special Appeals accepted that it was "bound" by *Norton* but noted that "several lower courts [have] conclude[d] that *Marks* [*v. United States*, 430 U.S. 188 (1977)] does not yield a holding when applied to *Williams* and that therefore *Williams* has no precedential value beyond its facts." *Rainey*, 246 Md. App. at 176-77.

court held that while evidence of the psychological tests was not formal – it was not notarized and did not "certify that the tests were administered according to any specific protocol" – it was accusatory and served an evidentiary purpose. *Id.* at 182-85. Following the lead of this Court as well as that of a majority of the justices in *Williams*, the Court of Special Appeals also held that the State could not evade the Confrontation Clause by introducing the evidence as "basis" evidence under Rule 5-703, as this would put Rule 5-703 into conflict with the Constitution. *Id.* at 177-80.

3. Other jurisdictions

Relied on by this Court in *Norton* in making sense of the multiple opinions in *Williams*, *Young v. United States* also bears some factual similarity to the case at bar. In *Young*, the State called an FBI examiner, Craig, to testify to her opinion based on her comparison of DNA profiles developed by her colleagues from swabs from the victim, defendant, and victim's residence. According to the court, whether Young had a right to confront the analysts who developed the profiles first depended upon whether evidence of the profiles they generated came in for its truth: "'the appropriate question is whether the substance of the testimonial materials is shared with the fact-finder to suggest its truth, without the report's author being available for cross-examination.'" *Young*, 63 A.3d at 1044 (quoting David H. Kaye, David E. Bernstein, & Jennifer L. Mnookin, The New Wigmore: Expert Evidence § 4.10.2 at 200 (2d ed.2011)). The court concluded that it did – that Craig "relayed hearsay" – even though the government did not independently

admit evidence of the DNA profiles:

> She admittedly relied throughout her testimony not just on her general understanding of FBI laboratory procedures, but on the documentation, testing, and analysis written or produced by other employees of the FBI laboratory in connection with this particular case. The prime example is Craig's testimony that she matched a DNA profile derived from appellant's buccal swab with male DNA profiles derived from Villatoro's vaginal swabs and her discarded tissue. Because Craig was not personally involved in the process that generated the profiles, she had no personal knowledge of how or from what sources the profiles were produced. She was relaying, for their truth, the substance of out-of-court assertions by absent lab technicians that, employing certain procedures, they derived the profiles from the evidence furnished by Villatoro or appellant. Those assertions were hearsay. Without them, what would have been left of Craig's testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless.

Id. at 1045 (footnotes omitted).

The court further held that the evidence was testimonial in nature. According to the court, it was testimonial "[u]nder the basic 'evidentiary purpose' test," because "the DNA profiles and RMP about which Craig testified were generated for the primary purpose of establishing or proving a past fact relevant to later criminal prosecution, namely the identity of Villatoro's assailant." *Id.* at 1047-48. In part, the evidence also satisfied Justice Alito's test as, insofar as some of the DNA profiles were generated after Young was identified as a suspect, they were "obtained for 'the primary purpose of accusing a targeted individual.'" *Id.* at 1048 (quoting *Williams*, 567 U.S. at 58). The court added that it would have reached a different conclusion had Craig participated in the generation of the profiles; "[b]ut without evidence that Craig performed or observed the generation

of the DNA profiles (and, perhaps, the computer calculation of the RMP) herself, her supervisory role and independent evaluation of her subordinates' work product are not enough to satisfy the Confrontation Clause because they do not alter the fact that she relayed testimonial hearsay." *Id.* at 1048.

Another case bearing a factual similarity to the present case is *State v. Walker*, 212 A.3d 1244 (Conn. 2019). Following his arrest, the police performed a buccal swab on Walker to obtain a DNA sample. The swab was sent to a lab, where an analyst generated a DNA profile. A second analyst compared that profile to DNA found on evidence at the crime scene. At Walker's trial, the prosecution called only the second analyst, who "neither performed nor observed the analysis of the buccal swab that produced the DNA profile[.]" *Id.* at 1246-48.

Holding that the failure to call the analyst who generated the DNA profile violated Walker's right to confrontation, the Connecticut Supreme Court held that evidence of the profile was both hearsay and testimonial in nature. On the first point – that the evidence was hearsay – the court considered its evidentiary rules which, as in Maryland, permit an expert to rely on otherwise inadmissible information in forming their opinions so long as that information is not admitted for its truth. *Id.* at 1252. Citing cases from a variety of jurisdictions, both state and federal, the court explained that "expert witnesses may base their opinions on the testimonial findings of other experts without violating the confrontation clause if those underlying findings are not themselves put before the jury." *Id.* at 1253. "On the other hand," the court continued, "where the testifying expert explicitly refers

to, relies on, or vouches for the accuracy of the other expert's findings, the testifying expert has introduced out-of-court statements that, if offered for their truth and are testimonial in nature, are subject to the confrontation clause." *Id.* To that end, the evidence of the profile in the case before it was hearsay because the testifying analyst "explicitly referred to, relied on, and vouched for the quality of work that she did not perform and, in so doing, relayed to the jury the known processing group's out-of-court statements about the defendant's numerical DNA profile." *Id.* at 1255.

Turning to whether the evidence was testimonial, the court sided with jurisdictions which have concluded that the "fractured nature of the *Williams* decision … 'made it impossible to identify the narrowest ground because the analyses of the various opinions are irreconcilable.'" *Id.* at 1260 (quoting *State v. Sinclair*, 210 A.3d 509, 523 (Conn. 2019)). Instead, the court held, the test for whether evidence is testimonial, as derived from prior Supreme Court opinions, is whether it was made with the primary purpose of creating a record for use at a later criminal trial. *Id.* Applying that test, the court had no trouble finding that the evidence of the DNA profile was testimonial as it was "generated in aid of an ongoing police investigation" and "the analyst or analysts of the known processing group who processed the defendant's buccal swab reasonably could have expected that the resulting DNA profile would later be used for prosecutorial purposes." *Id.* at 1262-63. The court added that it would reach the same conclusion were it to apply the formality test:

> At any rate, the buccal swab and DNA profile were obtained pursuant to a postarrest court order. The known processing group provided the DNA profile to Degnan along with "paperwork" indicating that the sample was analyzed according to accepted laboratory procedures. These facts are suggestive of a certain level of formality that, together with the circumstances set forth previously in this opinion, are sufficient to render the statement testimonial.

Id. at 1264.

Lastly, the court rejected an argument that the testifying analyst was an adequate substitute for the analyst who prepared the profile. The court reasoned that while the testifying analyst was a supervisor at the lab who was familiar with the lab's standard procedures, there was no evidence that she was personally familiar with how the profile was generated or that she reached an independent opinion based on the same raw data. *Id.* at 1267. According to the court, "there is no evidence Degnan [the testifying analyst] did anything at trial other than simply relay to the jury the profile that had been provided to her;" therefore, she was "not a sufficient substitute witness to satisfy the defendant's right to confrontation." *Id.*

Other courts have reached conclusions like those in *Young* and *Walker*. *See, e.g.*, *Alejandro-Alvarez v. State*, 587 S.W.3d 269, 270, 273 (Ark. Ct. App. 2019) (holding that admission of DNA evidence through analyst who only served as "administrative reviewer" violated defendant's right to confrontation as "[t]he governing case law consistently indicates that the testimony must be by an analyst who performed the analysis at issue, not someone who merely reviewed the data"); *People v. Ogaz*, 53 Cal.App.5th 280, 2020 WL 4581253 at *7 (2020)

(holding that report setting forth results of drug testing was testimonial because it was signed by analyst who conducted testing "thereby attesting to its contents," it contained analyst's "substantive conclusions" rather than just "machine generated data," and it was not prepared "for administrative purposes only" but rather as part of criminal investigation); *Burch v. State*, 401 S.W.3d 634, 639 (Tex. Ct. Crim. App. 2013) ("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.").

C. Standard of review

"An appellate court reviews without deference a trial court's ruling on whether admission of evidence would violate a constitution." *Hailes v. State*, 442 Md. 488, 506 (2015) (reviewing ruling implicating right to confrontation).

D. The error in this case

In holding that Mr. Leidig suffered no violation of his right to confrontation, the Court of Special Appeals stated that "Ms. Rollo's report in the case at bar is not testimonial because … '[n]owhere does the report *attest* that its statements *accurately* reflect the DNA testing processes used or the results obtained.'" (E. 18-19) (quoting *Williams*, 567 U.S. at 111 (Thomas, J., concurring)). The court's reasoning is doubly flawed. The court mischaracterized

Ms. Rollo's report, which on its face indicates that it was prepared with the purpose of being used in a criminal investigation and prosecution and which bears many of the hallmarks of the report this Court deemed testimonial in *Norton*. Moreover, the Court of Special Appeals misapplied the test for admissibility by fixating on the absence of "magic words" in the report rather than examining the report in its totality and assessing the meaning of its carefully and deliberately worded content. *Norton*, 443 Md. at 549 n. 29. Because the report was testimonial, and because Ms. Keener acted as a mere conduit for its admission, Mr. Leidig's right to confrontation was infringed.

1. Ms. Rollo's report was testimonial in nature.

The contrast between Ms. Rollo's report and the reports at issue in *Williams*, *Derr II*, and *Cooper* is stark. Right off the bat, the report signals its purpose. Prepared on State Police letterhead and captioned a "Laboratory Report" of the "Forensic Sciences Division – Pikesville," the report is addressed to the lead police investigator, then-Corporal Haugh of the "Washington County Sheriff's Office. (E. 154). The report states, explicitly, that "[t]his examination has been made with the understanding that the evidence is connected with an official investigation of a criminal matter and that the Laboratory Report will be used for official purposes only related to the investigation or a subsequent criminal prosecution." *Id.*

In addition to serving an evidentiary purpose, the report is replete with

indicia of formality.[9] Ms. Rollo's signature at the end of the report is meaningful in itself. *Compare Bullcoming*, 564 U.S. at 665 ("Like the *Melendez–Diaz* certificates, Caylor's certificate is 'formalized' in a signed document … headed a 'report[.]'"); *and Malaska*, 216 Md. App. at 510 ("Although the report does not employ the words 'attest' or 'certify' or any variation thereof, the signatures clearly imply that the signatories agree with and approve the contents of the report."); *and Burch*, 401 S.W.3d at 639 ("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."); *with Derr II*, 434 Md. at 118-19 (noting absence from bench notes of "signed statements or any other indication that the results or the procedures used to reach those results were affirmed by any analyst, examiner, supervisor, or other party participating in its development"). But Ms. Rollo's signature takes on added significance in light of the report's earlier assertion that "[t]his report contains the conclusions, opinions and interpretations of the examiner whose signature appears on the report." (E. 154).

However, any lingering doubt as to the formal nature of the report is laid to rest by the next section of the report. Entitled "Results and Conclusions of Examination/Analysis," the section opens with the following declaration:

> The deoxyribonucleic acid (DNA) results reported below were determined by procedures which have been validated according to the Federal Bureau of Investigation's Quality Assurance Standards

[9] Mr. Leidig does not argue that Ms. Rollo's report is accusatory.

for Forensic DNA Testing Laboratories.

(E. 154). This declaration is nearly identical to the one which this Court placed weight upon in *Norton* because, in combination with the analyst's signature, it "indicat[ed] that the analyst's results had been validated according to federal standards, even if unsworn." 443 Md. at 549.

In fact, this section of the report is significant for reasons not addressed by the Court in *Norton*. That the analyst certified that she followed the FBI's Quality Assurance Standards was a precondition to the admissibility of her report under Courts and Judicial Proceedings Article § 10-915. *See Phillips v. State*, 451 Md. 180, 204 (2017) ("[W]e hold that the Prince George's County Laboratory's statement of validation, that the DNA analysis in this case was 'determined by procedures which have been validated according to the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories,' satisfies the requirement of CJP § 10–915(b)."). In that respect, the inclusion of this declaration served a purpose similar to the manner in which the autopsy report was prepared in *Malaska* and the employment of language denoting the accuracy of the comparison of DNA profiles in *Norton*. *See also Bullcoming*, 564 U.S. at 665 ("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.").

Moreover, among the FBI's Quality Assurance Standards is a requirement that a report "include … [a] signature and title, or equivalent identification, of the

person accepting responsibility for the content of the report." FBI, Quality Assurance Standards for Forensic DNA Testing Laboratories, Standard 11.2.9 (2011) (available at https://ucr.fbi.gov/lab/biometric-analysis/codis/qas-standards-for-forensic-dna-testing-laboratories-effective-9-1-2011) (last checked 9/7/20).[10] Thus, just as the signatures on the autopsy report in *Malaska* "clearly imply that the signatories agree with and approve the contents of the report," 216 Md. App. at 510, Ms. Rollo's signature (and title below it) indicate that she "accept[ed] responsibility for the content of the report."

Ms. Rollo's report thus contains both a signature acknowledging what the report will be used for and attesting to the accuracy of the results contained therein *and* a statement evincing the validity of the procedures employed to obtain those results. To be sure, the report does not use "magic words [such] as 'certification.'" *Norton*, 443 Md. at 549 n. 29. But, as this Court explained, requiring that it does would elevate form over substance. *Id.*; *see also Malaska*, 216 Md. App. at 510. Furthermore, to conclude otherwise would permit the State to evade the requirements of the state and federal constitutions by simply omitting such language from its forensic reports, the very result Justice Kagan predicted in *Williams* would happen from a rigid application of Justice Thomas' formality test. *See Williams*, 567 U.S. at 140 ("Justice Thomas's approach, if accepted, would turn the Confrontation Clause into a constitutional geegaw—nice for show, but of

[10] This version of the Quality Assurance Standards went into effect on September 1, 2011, and remained in effect on October 14, 2016, the date of Ms. Rollo's report. A new version took effect on July 1, 2020.

little value. The prosecution could avoid its demands by using the right kind of forms with the right kind of language. (It would not take long to devise the magic words and rules—principally, never call anything a 'certificate.'")).

2. Ms. Keener was not an adequate substitute for Ms. Rollo.

Based on the case law, one of two conditions must be met in order for the State to be permitted to call as a witness an individual who was not the original forensic analyst. First, consistent with Rule 5-703, testimonial hearsay by the original analyst may not be admitted as substantive evidence. *See, e.g.*, *Walker*, 212 A.3d at 1253 ("In criminal cases, the admission of expert testimony that is based upon an out-of-court statement may implicate the confrontation clause if the underlying statement itself is testimonial. Acknowledging these concerns, courts have held that expert witnesses may base their opinions on the testimonial findings of other experts without violating the confrontation clause if those underlying findings are not themselves put before the jury."); *McLeod*, 66 A.3d at 1232 ("Our holding—disallowing 'basis evidence' in the form of testimonial statements of an unavailable witness on direct examination of a State's expert, but allowing a defendant to explore those statements on cross-examination—is based upon well-established legal principles."). Alternatively, the testifying witness must have played a substantial role in the generation of the evidence. *See, e.g.*, *Marshall*, 309 P.3d at 947 ("[W]hen Burbach testified at trial, she testified as to her own involvement in the process, not as a 'surrogate' for someone else's."); *Malaska*,

216 Md. App. at 516 (observing that testifying witness was supervising medical examiner who attended autopsy, co-signed report, and "carried the responsibility and authority to make the ultimate determination as to the cause and manner of death").

Neither condition was satisfied here. The State introduced Ms. Rollo's report during its direct examination of Ms. Keener, Ms. Keener testified multiple times to Ms. Rollo's opinions, and Ms. Keener's report repeated Ms. Rollo's conclusions. On the second point, Ms. Keener testified that it was "Molly Rollo" who "performed serology testing on the swabs," found "that blood was indicated," and "was able to" generate the DNA profiles. (E. 81, 93). By contrast, Ms. Keener stated that she only generated the DNA profile for Mr. Leidig and "compared my results to the results that were previously obtained from Molly Rollo." (E. 87).

At the same time, Ms. Keener did not play a substantial role in the serology analysis or the generation of the DNA profiles from the crime scene evidence and did not testify that she reached an independent opinion about that evidence based on a review of the raw data. According to Ms. Keener, she acted as an "administrative reviewer" for Ms. Rollo's report. (E. 82-83). While the State never had her define what this entailed, there is good reason to believe that it did not involve anything approaching the responsibilities of the toxicology expert in *Marshall* or the supervising medical examiner in *Malaska*. Instead, she appears to have done even less than the witness in *Norton*, 443 Md. at 522, who testified to his independent opinion about the DNA evidence based on his review of "'all the

materials, all of the notes, the lab notes, all of the data that was generated, the paperwork and the final report [of the non-testifying analyst].'" *See also Bullcoming*, 564 U.S. at 651, 659-61 (holding that witness who "neither participated in nor observed the test on Bullcoming's blood sample" was not adequate "surrogate" for non-testifying analyst); *Walker*, 212 A.3d at 1267 ("[T]here is no evidence Degnan did anything at trial other than simply relay to the jury the profile that had been provided to her. Degnan was, therefore, not a sufficient substitute witness to satisfy the defendant's right to confrontation."); *Young*, 63 A.3d at 1048 ("[W]ithout evidence that Craig performed or observed the generation of the DNA profiles (and, perhaps, the computer calculation of the RMP) herself, her supervisory role and independent evaluation of her subordinates' work product are not enough to satisfy the Confrontation Clause because they do not alter the fact that she relayed testimonial hearsay.").

In *Cooper*, the Court summarized the testimony of a witness distinguishing between an "administrative review" and a "technical review" of a DNA analysis:

> Ashley Fulmer, "a supervisor and a senior DNA analyst" at Bode, was called as an expert witness during the State's case-in-chief. During Fulmer's voir dire, among other things, she testified about the duties of a DNA analyst at Bode, and more specifically about her role as a supervisor. Fulmer noted that she "basically manage[s] a group of DNA analysts[,]" "oversee[s] the functioning of that group[,]" and reviews case files. Fulmer testified that reviewing case files includes both an "administrative review" that "evaluate[s] sort of, you know, grammar, there's punctuation and that sort of stuff[,]" and a "technical review" where she would "go through everything in the case, make sure procedures were followed, make sure things were tested in the right manner and all of that. Make sure that the results, any conclusions that were made are reported accurately."

Cooper, 434 Md. at 219–20; *see also Alejandro-Alvarez*, 587 S.W.3d at 270, 273 (holding that court erred in permitting "administrative reviewer" to serve as conduit for testimonial hearsay as "[t]he governing case law consistently indicates that the testimony must be by an analyst who performed the analysis at issue, not someone who merely reviewed the data"). Tellingly, the testimony in *Cooper* is consistent with the FBI's Quality Assurance Standards, which contain the following definitions:

> "***Administrative review*** is an evaluation of the report and supporting documentation for consistency with laboratory policies and for editorial correctness."
>
> * * *
>
> "***Technical review*** is an evaluation of reports, notes, data, and other documents to ensure there is an appropriate and sufficient basis for the scientific conclusions."

FBI, Quality Assurance Standards for Forensic DNA Testing Laboratories (2011).

As the proponent of the evidence, it was the State's burden to show that Ms. Keener was an adequate substitute for Ms. Rollo. And, in fact, in response to defense counsel's objection, the prosecutor indicated a familiarity with this Court's Confrontation Clause jurisprudence, including *Cooper* and *Derr II*. (E. 83-85). Yet, when the State had Ms. Keener on the stand, it failed to demonstrate that she played a substantial role in the generation of the evidence. So far as the record shows, Ms. Keener's role as an administrative reviewer was limited to looking over the report after the fact for "editorial correctness." She did not say that she conducted a technical review, let alone that she assisted or observed Ms. Rollo in

performing the serological and DNA analyses of the crime scene evidence. Therefore, calling Ms. Keener did not satisfy Mr. Leidig's right to confront Ms. Rollo.

3. The error was not harmless.

For the reasons stated above, Mr. Leidig was denied his right to confrontation protected by the Sixth Amendment and Article 21 of the Declaration of Rights. He did not have the opportunity to cross-examine Ms. Rollo, the analyst who examined the swabs from the window frame and curtain at the Browns' residence, made a determination that the swabs contained blood, and further concluded that the blood contained the DNA profile from a single male individual. He was thus unable to explore whether Ms. Rollo possessed the requisite training and experience and whether her findings, the accuracy of which underlay Ms. Keener's subsequent source attribution, were obtained through fraud or incompetence. *See Bullcoming*, 564 U.S. at 654, 662; *Melendez-Diaz*, 557 U.S. at 318-21.

The prejudice to Mr. Leidig was real. Ms. Keener's opinion that Mr. Leidig's known DNA profile "matched" the profiles generated by Ms. Rollo had probative value only to the extent that Ms. Rollo's opinions were correct. Moreover, the State relied on Ms. Rollo's findings to rebut the possibility that the DNA profile on the swabs did not come from Mr. Leidig's blood. As noted, defense counsel, hobbled by his inability to question Ms. Rollo, still did his best on cross-examination of Ms. Keener to show the risk of contamination from touch

DNA. (E. 97-99). In response, the State elicited from Ms. Keener that "the conclusions that *Molly Rollo* made were that the DNA profile [from the crime scene] was from one male contributor. *She* didn't see any evidence of an additional contributor being present." (113-15) (emphasis added). The prosecutor then relied on Ms. Rollo's report again when he stated in closing argument:

> The question you have to ask yourself is do you believe Ms. Keener when she says it was a match. She's been stipulated as an expert. *She testified about all the safeguards they go through.* You heard defense counsel raise what are called red herrings. He things [sic] he's going to fill up to distracts you. He's going to say well you didn't bleach your hands before you put gloves on to take the DNA swab. You didn't change your gloves before you took the second swab. That could have led to some cross-contamination. Had there been some cross-contamination there likely would have been a mixture. *There was no mixture.* You heard him say oh will [sic] it could be transferred DNA. You know if I hand you a pen and I touch your hand and then that hand gets shakes [sic] someone else it could transfer to a third party. Maybe that's how it got there. *But you also heard from serology that it was blood. This wasn't touch DNA. It was blood.*

(E. 136-37) (emphasis added).

Since Ms. Rollo did not testify, the jury never actually "heard from serology." The jury just had to assume that she correctly determined that "it was blood," that she followed "all the safeguards" to minimize the risk of cross-contamination, and that "[t]here was no mixture." The jury had to assume, without hearing from Ms. Rollo directly, that the DNA profiles she documented in her report were DNA profiles from the crime scene swabs (and were the only DNA profiles on the swabs).

DNA evidence was the sole evidence of guilt in this case. There was

nothing else—no eyewitness account, no confession, nothing else showing that Mr. Leidig was even in Washington County on the date of the offense. Under these circumstances, depriving him of his right to cross-examine the analyst who generated the DNA profiles from blood allegedly left at the crime scene was a critical and fatal error.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the court below.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 12,183 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/
_____
Brian L. Zavin

PERTINENT AUTHORITY

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.

Md. Decl. Rts., Art. 21

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Md. Code, Cts. & Jud. Proc. Art. § 10-915

> **Definitions**
>
> (a)(1) In this section the following words have the meanings indicated.
>
> (2) "Deoxyribonucleic acid (DNA)" means the molecules in all cellular forms that contain genetic information in a chemical structure of each individual.
>
> (3) "DNA profile" means an analysis of genetic loci that have been validated according to standards established by:
>
> (i) The Technical Working Group on DNA Analysis Methods (TWGDAM);
>
> (ii) The DNA Advisory Board of the Federal Bureau of Investigation;
>
> (iii) The Federal Bureau of Investigation's Quality

Assurance Standards for Forensic DNA Testing Laboratories; or

(iv) The Federal Bureau of Investigation's Quality Assurance Standards for DNA Databasing Laboratories.

DNA profile admissible with statement of how validated

(b) A DNA profile is admissible under this section if it is accompanied by a statement from the testing laboratory setting forth that the analysis of genetic loci has been validated by:

(1) Standards established by TWGDAM;

(2) Standards established by the DNA Advisory Board of the Federal Bureau of Investigation;

(3) The Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories; or

(4) The Federal Bureau of Investigation's Quality Assurance Standards for DNA Databasing Laboratories.

Introduction of DNA profile evidence

(c) In any criminal proceeding, the evidence of a DNA profile is admissible to prove or disprove the identity of any person, if the party seeking to introduce the evidence of a DNA profile:

(1) Notifies in writing the other party or parties by mail at least 45 days before any criminal proceeding; and

(2) Provides, if applicable and requested in writing, the other party or parties at least 30 days before any criminal proceeding with:

(i) First generation film copy or suitable reproductions of autoradiographs, dot blots, slot blots, silver stained gels, test strips, control strips, and any other results generated in the course of the analysis;

(ii) Copies of laboratory notes generated in connection with the analysis, including chain of custody documents, sizing and hybridization information, statistical calculations, and worksheets;

(iii) Laboratory protocols and procedures utilized in the analysis;

(iv) The identification of each genetic locus analyzed; and

(v) A statement setting forth the genotype data and the profile frequencies for the databases utilized.

Continuance for disclosure of information

(d) If a party is unable to provide the information required under

subsection (c) of this section at least 30 days prior to the criminal proceedings, the court may grant a continuance to permit such timely disclosures.

Discovery under Maryland Rules

(e) Except as to the issue of admissibility under this section, subsection (c) of this section does not preclude discovery under the Maryland Rules relating to discovery, upon a showing of scientific relevance to a material issue regarding the DNA profile.

Md. Rule 5-703

(a) Admissibility of Opinion. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If the court finds on the record that experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

(b) If Facts or Data Inadmissible. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury over objection only if the court finds on the record that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

(c) Instruction to Jury. If facts or data not admissible in evidence are disclosed to the jury under this Rule, the court, upon request, shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(d) Right to Challenge Expert. This Rule does not limit the right of an opposing party to cross-examine an expert witness or to test the basis of the expert's opinion or inference.