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 20th day of November, 2020, a copy of the Petitioner's Reply Brief was 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 REPLY BRIEF

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STATEMENT OF FACTS

Some of the State's purported "additions and clarifications" (Brief of Respondent at 1) to the statement of facts presented in Mr. Leidig's brief should be rejected or disregarded.

According to the State, Mr. Leidig "suggests" in his principal brief that Sergeant Haugh did not take preventative measures such as cleaning with bleach or changing his gloves in between taking samples from the crime scene. (Brief of Respondent at 2). Mr. Leidig did not "suggest" any such thing. Sergeant Haugh

testified that he did not take these steps. (E. 64-65). The State may not like that portion of his testimony, but it can't be dismissed as mere suggestion by Mr. Leidig.

To be sure, the State is correct that the record contains "no indication that the 'preventative measures' to which Leidig alludes were required or standard practices." (Brief of Respondent at 2). But Ms. Keener testified that cleaning surfaces with bleach and changing gloves were steps that she routinely took when she handled evidence. (E. 79, 97-99). Furthermore, the State, as the proponent of the DNA results, did not introduce any evidence to show that Ms. Keener was overcautious or that these measures would not have materially reduced the risk of contamination. And given that the issue in this case is whether Mr. Leidig was improperly denied his right to cross-examine the analyst who examined the samples Sergeant Haugh collected to determine what precautions she took, it is unfair to fault Mr. Leidig for any deficiencies in the record.

Along similar lines, the State asks this Court to infer that Mr. Leidig was responsible for the State not calling Ms. Rollo as a witness:

> Leidig's case did not come to trial until 2019. Although not discussed at trial, the reason for the delay was that, in the interim, Leidig was incarcerated on other charges in Pennsylvania. Leidig was brought to Maryland to resolve the charges in this case (and another unrelated one) pursuant to a request filed in 2018 under the Interstate Agreement on Detainers. (E. 6; R1. 15-21). An indictment was then filed in the circuit court in February 2019 (E. 6; R1. 22-27), and Leidig was tried in March 2019. (E. 4-5). By that point, Rollo had left the MSP crime lab and was employed at another lab in Prince George's County. (E. 83, 87).

(Brief of Respondent at 4-5).

As an initial matter, it is unclear what relevance the fact that Mr. Leidig was incarcerated in another state has to do with the legal issues before the Court. *See* Md. Rule 8-504(a)(4) (stating that a brief shall contain "[a] clear concise statement of the facts *material to a determination of the questions presented*, except that the appellee's brief shall contain a statement of *only those additional facts necessary to correct or amplify* the statement in the appellant's brief") (emphasis added). It is not a coincidence that Mr. Leidig's incarceration was not discussed at trial. Absent reason to believe that he engaged in some wrongdoing with the intention of rendering Ms. Rollo unavailable to testify, it is irrelevant why he was not tried until 2019. *See Giles v. California*, 554 U.S. 353, 359-60 (2008) (holding that defendant forfeits right to confront witness only when defendant specifically intends that their wrongdoing would render witness unavailable to testify).

What is relevant, and what the State sheds no light upon, is why *it* failed to call Ms. Rollo as a witness. After all, Ms. Rollo, by the State's own admission, was employed at the time of trial as an analyst in another lab in Maryland. (Brief of Respondent at 5). So far as the record discloses, then, she was not unavailable to testify, and the State could have called her. That Mr. Leidig may or may not have a criminal record that extends beyond this case is irrelevant and should play no role in the Court's decision.

ARGUMENT

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.

The State advances three arguments as to why it believes Mr. Leidig's convictions should be affirmed: (1) the Rollo report does not contain testimonial hearsay; (2) the Rollo report was admitted not for its truth but as non-hearsay "basis" evidence under Maryland Rule 5-703; and (3) Ms. Keener was a proper conduit for the information in the Rollo report because she acted as a peer reviewer for the report. (Brief of Respondent at 5-8). None of the State's arguments is persuasive.

A. The Rollo report is testimonial.

In arguing that the Rollo report is not testimonial because it does not contain sufficient indicia of formality, the State attempts to analogize this case to *Cooper v. State*, 434 Md. 209 (2013), and distinguish it from *State v. Norton*, 443 Md. 517 (2015). While the DNA report in *Cooper* bears some similarity to Ms. Rollo's report, it is missing one key thing: the authoring analyst's signature. This Court described the exhibit in *Cooper* as "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." *Cooper*,

434 Md. at 237. However, according to the Court, the report lacked "an indication that the results are sworn to or certified or that any person attests to the accuracy of the results." *Id.* The exhibit, as appended to the State's brief, confirms this. Nowhere on the two pages does the analyst's signature – or even her name – appear. (Apx. 30-31). The omission is significant since, as Mr. Leidig noted in his principal brief, one of the requirements of the FBI's Quality Assurance Standards is that a forensic 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). Indeed, without a signature, the report in *Cooper* is even less formal than the report in *Williams*, which was signed, albeit by its peer reviewers rather than the putative author. *See Williams v. Illinois*, 567 U.S. 50, 111 (2012) (Thomas, J., concurring).

Norton, in contrast, cannot be distinguished so easily. According to the State, the holding in *Norton* turned on a single factor: the analyst's report "certified its conclusion with the 'talismanic' phrase 'within a reasonable degree of scientific certainty.'" (Brief of Respondent at 27). This is contrary to the Court's opinion, however, in which the Court set forth multiple bases for finding the report to be formal, including, as relevant here, its inclusion of the following language:

> 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.

Norton, 443 Md. at 521. This language, the Court explained, was important when viewed in conjunction with the analyst's signature because it signified that the report was "signed by the analyst who had performed the test, indicating that the analyst's results had been validated according to federal standards, even if unsworn." *Id.* at 549.

The Court was right to focus on the reference to federal standards as a factor in the testimonial analysis. Just two years earlier, the Court held that the bench notes of a serological examiner were not testimonial because they contained "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" and that another report was not testimonial because "[n]o statements … appear anywhere on the results attesting to their accuracy or that the analysts who prepared them followed any prescribed procedures." *Derr v. State*, 434 Md. 88, 118-19 (2013). Furthermore, the briefs filed in *Norton* indicate that this factor was argued to the Court as a basis for finding that the report was testimonial. *See* Respondent's Brief at 14-15, *State v. Norton*, No. 67, September Term 2014 ("In the case at bar, the report was submitted by two non-testifying signatories, Ms. Cline and her supervisor Ms. Bach, who claimed, *inter alia*: … *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.") (emphasis in original); Brief of Amicus Curiae the Innocence Network in Support of Respondent at 22, *State v. Norton*, No. 67, September Term 2014 ("The Cline Report – like the report in *Malaska* – contains the requisite formality and solemnity to be testimonial for purposes of the Confrontation Clause. In this regard, the named authors of the report personally affirmed that the controls and procedures used to test the evidence against suspect Harold Norton had been validated according to scientific standards applicable to such a 'Forensic DNA Case Report.'").

Thus, the State is incorrect when it argues that "this Court in *Norton* did not highlight" the statement in the report that the analyst complied with federal standards. (Brief of Respondent at 38). More importantly, the State is incorrect, and misguided, when it argues that "invocation of the FBI's standards for DNA testing is not equivalent to a certification of the results." (Brief of Respondent at 39). It is incorrect because, as noted, the FBI's Quality Assurance Standards include the requirement that a DNA 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). Inclusion of a statement indicating compliance with the Quality Assurance Standards thus serves the same purpose as an assertion by the analyst to the effect of "you can trust my results because I followed FBI guidelines."

As also discussed in Mr. Leidig's principal brief, the State is incorrect

because compliance with the Quality Assurance Standards is a prerequisite to admissibility of a DNA report under Courts and Judicial Proceedings Article § 10-915. The State correctly observes that the purpose of § 10-915 is to obviate the need to relitigate the general reliability of a particular form of DNA analysis. Brief of Respondent at 40 (citing *Armstead v. State*, 342 Md. 38, 57 (1996)). However, the State's conclusion – that this has no bearing on whether a report is testimonial – does not follow. The fact that a report is drafted in a manner needed to make it admissible is a factor is determining whether it is testimonial. *See Bullcoming v. New Mexico*, 564 U.S. 647, 665 (2011) ("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."); *Norton*, 443 Md. at 548-49 ("The phrase, then, of 'within a reasonable degree of scientific certainty', constitutes such 'talismanic words' that, without them, the testimony cannot cross the threshold of acceptance by the judge as gatekeeper.").

That, as the State notes, a defendant can still challenge the reliability of the evidence at trial after it has been admitted pursuant to § 10-915 is both irrelevant and ironic. Brief of Respondent at 41. Formality does not guarantee reliability; in other words, it does not mean that evidence is unassailable. Norton, too, was not forced to accept the State's evidence, but, like, Mr. Leidig, his ability to present a defense in response to it was hamstrung by his inability to confront the authoring analyst. How, the State does not explain, is a defendant like Mr. Leidig to mount an effective challenge to DNA evidence if the State does not make the author of

the report and primary analyst available for cross-examination?

The State's argument belies the same overly rigid view of what makes a statement formal reflected in the decision of the Court of Special Appeals. The State professes to be advocating a functional test that looks to whether the report "is not merely stating findings but is, in substance, certifying the correctness of those findings." (Brief of Respondent at 44). However, the State offers no way to apply this test apart from performing a word search for terms and phrases like "swear," "certify," or "reasonable degree of scientific certainty." That is not how this Court, the Supreme Court, or even Justice Thomas have applied the test.

In understanding what is meant by "testimonial," it helps to go back to the modern source of the term. In *Crawford*, the Supreme Court surveyed "[v]arious formulations of this core class of 'testimonial' statements," which "all share a common nucleus and then define the [Confrontation] Clause's coverage at various levels of abstraction around it." *Crawford v. Washington,* 541 U.S. 36, 52 (2004). These formulations include "pretrial statements that declarants would reasonably expect to be used prosecutorially" as well as the similar "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. The Court pointedly added that its approach was not formulaic—if a statement is generally of the kind to which the Sixth Amendment applies, the fact that it was not sworn to would not exempt it from the right to confrontation. *See id.* at 52 n. 3.

The Court reiterated this point two years later in *Davis v. Washington,* 547

U.S. 813 (2006), and would come back to it again including in *Bullcoming v. New Mexico.* In *Davis*, the Court wrote:

> Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath—which invites the argument that the scope of the Clause is limited to that very formal category. But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see *Crawford*, *supra*, at 52, and n. 3, 124 S.Ct. 1354. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it.

Id. at 825-26. Likewise, in *Bullcoming*, the Court held that a report of a driver's blood alcohol content was testimonial notwithstanding that it was not sworn to under oath:

> Distinguishing Bullcoming's case from *Melendez–Diaz*, where the analysts' findings were contained in certificates "sworn to before a notary public," *id.*, at 308, 129 S.Ct., at 2531, the State emphasizes that the SLD report of Bullcoming's BAC was "unsworn." Brief for Respondent 13; *post*, at 2724 ("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." 147 N.M., at 494, 226 P.3d, at 8 (quoting *Crawford*, 541 U.S., at 52, 124 S.Ct. 1354). 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, 124 S.Ct. 1354. 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, 126 S.Ct. 2266; *id.*, at 838, 126

> S.Ct. 2266 (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, 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.

Justice Thomas' formality test, properly understood, is not as narrow as the State construes it. In *Williams*, Justice Thomas applied the test as follows:

> I conclude that Cellmark's report is not a statement by a "witnes[s]" within the meaning of the Confrontation Clause. The Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. See Report of Laboratory Examination, Lodging of Petitioner. The report is signed by two "reviewers," but they neither purport to have performed the DNA testing nor certify the accuracy of those who did. See *ibid.* And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

Williams, 567 U.S. at 111. Thus, what mattered to Justice Thomas was that the report was not signed by its author indicating, as this Court stated in *Derr*, 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."

Derr, 434 Md. at 119.

More recently, and, importantly, post-*Williams*, the Supreme Court reiterated that formality is among the factors a court should consider in determining the primary purpose of the inquiry that led to the making of an out-of-court statement:

> One additional factor is "the informality of the situation and the interrogation." *Id.*, at 377, 131 S.Ct. 1143. A "formal station-house interrogation," like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. *Id.*, at 366, 377, 131 S.Ct. 1143. And in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.*, at 358–359, 131 S.Ct. 1143. In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Id.*, at 358, 131 S.Ct. 1143.

Ohio v. Clark, 576 U.S. 237, 245 (2015).

This, then, is the "common nucleus" of the test for whether a statement is testimonial, *Crawford*, 541 U.S. at 52: where evidence is generated with an eye toward using it in a prosecution, the defendant must be afforded the opportunity to challenge it through cross-examination. It does not matter that a judge deems the evidence to be reliable because it has been authenticated or because it satisfies an exception to the hearsay rule. *See Crawford*, 541 U.S. at 61-62 (stating that Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"). And it does not matter that a statement was not prepared using

"magic words." *Norton*, 443 Md. at 549 n. 29. Formality, as Justice Sotomayor wrote in *Bullcoming*, "has long been a hallmark of testimonial statements because formality suggests that the statement is intended for use at trial." *Bullcoming*, 564 U.S. at 671 n. 3 (Sotomayor, J., concurring in part); *see also State v. Sinclair*, 210 A.3d 509, 523 (Conn. 2019) ("Like the Second Circuit, we 'think it sufficient to conclude that we must rely on Supreme Court precedent before *Williams* to the effect that a statement triggers the protections of the [c]onfrontation [c]lause when it is made with the primary purpose of creating a record for use at a later criminal trial.' … The one thread of *Williams* that is consistent with the court's earlier precedent is that there is agreement among all of the justices that the formality attendant to the making of the statement must be considered.").

The State, in embracing a rigid view of formality, loses sight of core principles and asks this Court to apply a standard that is rudderless and arbitrary. According to the State, no matter what else the Rollo report contains, it does not use "any phrase such as 'within a reasonable degree of scientific certainty,'" and so cannot be considered testimonial. (Brief of Respondent at 33). If the State is correct, the right to confrontation will offer no real protection in cases involving forensic evidence. The State can maintain a list of phrases (or "textual indicators," Brief of Respondent at 44) never to be uttered by an out-of-court declarant in order to avoid the reach of the Confrontation Clause. It is no answer that courts will not permit intentional evasion of a defendant's right to confrontation. (Brief of Respondent at 44-45). Proving the existence of prosecutorial malfeasance is

difficult under ordinary circumstances; it is all but impossible when the defendant lacks the ability to cross-examine the declarant to find out why they did not use a particular phrase.

The State's approach also brings with it a risk that the right to confrontation will be reduced to a historical anachronism in a world where scientific evidence is becoming increasingly more common. Since this Court issued its decision in *Norton*, there has been a movement in the scientific community towards abandoning the phrase "reasonable degree of scientific certainty." In 2016, the National Commission on Forensic Sciences issued a statement on this topic in which it concluded that "[t]he phrase 'reasonable degree of scientific certainty,' which combines two words of concern—'scientific' and 'certainty'—has no scientific meaning." National Commission on Forensic Sciences, "Testimony Using the Term 'Reasonable Degree of Scientific Certainty'" (Mar. 22, 2016).[1] The Department of Justice subsequently issued a memorandum directing its forensic examiners and prosecutors to stop using the phrase. *See* Department of Justice, Office of the Attorney General, Memorandum for Heads of Department Components (Sept. 6, 2016).[2] *See also* David H. Kaye, David E. Bernstein, & Jennifer L. Mnookin, The New Wigmore: Expert Evidence § 1.5.2 (arguing that "[e]xpert testimony would benefit from the elimination of the talisman of a

[1] https://www.justice.gov/archives/ncfs/page/file/641331/download (last visited Nov. 11, 2020).

[2] https://www.justice.gov/opa/file/891366/download (last visited Nov. 11, 2020).

reasonable degree of name-your-field certainty"). If a forensic report must contain the phrase "reasonable degree of scientific certainty" in order for a defendant to have the right to confront its author, few defendants will enjoy the right going forward.

Whether the Rollo report is testimonial must be determined by looking at the evidence in its totality and not merely with a magic word finder. The overarching question is not whether a report contains certain words or phrases but, rather, whether it contains sufficient indicia of solemnity to demonstrate that "viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 576 U.S. at 245.

To that end, the Court should consider that the Rollo report: (a) was prepared on State Police letterhead; (b) is addressed to the lead criminal investigator in the case; (c) states that the testing was "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;" (d) is signed by the author/primary analyst; and, last but not least, (e) states that the DNA results were determined using procedures that complied with federal (FBI Quality Assurance) standards. Taking all of these factors into account, the conclusion is unmistakable that the Rollo report is a piece of evidence generated by an agent of the State for the express purpose of building a future case against a criminal defendant. "A contrary conclusion," as the Court explained in *Norton*, "would elevate form over substance, which this Court is loath to do,

especially when constitutional rights are in issue." *Norton*, 443 Md. at 549 n. 29.

B. The Rollo report was admitted for its truth.

The State and Mr. Leidig are in agreement that "both Rule 5-703 and the Confrontation Clause … preclude the admission of testimonial basis evidence *for the truth of the matter asserted*." (Brief of Respondent at 55) (emphasis in original). Yet, the State claims that it did not introduce Ms. Rollo's report for its truth. *Id.* at 55-57. In fact, the prosecutor relied on the report to establish at least three things: (1) the substance on the crime scene swabs was blood; (2) the blood contained the DNA of a single male contributor as opposed to a mixture of DNA profiles; and (3) the DNA profile of that single male contributor was composed of a certain set of alleles. Only the third of these served as the basis for Ms. Keener's testimony that the profile from the swabs matched Mr. Leidig's profile. The first and second were independent conclusions but were still critical to the State's case as the prosecutor relied on them to refute defense counsel's arguments concerning the risk of contamination. (E. 113-15, 137). In other words, much of the report was not introduced as basis evidence at all.

However, even with respect to Ms. Rollo's determination as to the composition of the DNA profile, the State is wrong that the evidence did not come in for its truth. As a majority of the justices concluded in *Williams*, "[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." *Williams*, 567 U.S. at 106 (Thomas, J., concurring). *See also id.* at 126-27

(Kagan, J., dissenting) ("So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies. That is why the principal modern treatise on evidence variously calls the idea that such 'basis evidence' comes in not for its truth, but only to help the factfinder evaluate an expert's opinion 'very weak,' 'factually implausible,' 'nonsense,' and 'sheer fiction.'") (quoting D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: Expert Evidence § 4.10.1, pp. 196–197 (2d ed. 2011)).

What this Court said in *Norton* is also instructive:

> We have concluded that admission of the Report without the analyst's testimony violated Norton's Sixth Amendment right of confrontation, so that the question of whether the supervisor was the proper conduit for testimony about the Report is answered negatively. *See Bullcoming,* 564 U.S. at ——, 131 S.Ct. at 2716, 180 L.Ed.2d at 623 ("[W]hen the State elected to introduce [the analyst's] certification, [the analyst] 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 334, 129 S.Ct. at 2545 (KENNEDY, J., dissenting) (Court's holding means 'the ... analyst who must testify is the person who signed the certificate').").

Norton, 443 Md. at 552 n. 32.

Here, as in *Norton,* the Rollo report was admitted into evidence and was testimonial in nature. The State may not seek refuge in Rule 5-703 when introduction of the report violated Mr. Leidig's constitutional right to confrontation.

C. Cross-examination of Ms. Keener did not suffice.

Recognizing that Ms. Keener described herself as the "administrative reviewer" of Ms. Rollo's report, the State nonetheless urges this Court to make a

factual finding that Ms. Keener actually functioned as something more and akin to a "technical reviewer." Brief of Respondent at 61. But the State also admits that the record on what Ms. Keener did vis-à-vis Ms. Rollo's report is "somewhat sparse." (Brief of Respondent at 57). This is significant. As the proponent of the evidence, it was the State's burden to show that Ms. Keener was an adequate surrogate (assuming such a thing exists) for Ms. Rollo. To the extent the record is insufficient to show that Ms. Keener played a role in addition to administrative reviewer, it is improper for the State to ask this Court to engage in fact-finding to make up for the deficiency. The State failed to fulfil its burden at the time it was called upon to do so, and the sanction should have been exclusion of the evidence unless the State was willing to call Ms. Rollo as a witness.

In any event, the State reads too much into Ms. Keener's testimony. The State looks for support in Ms. Keener's claim that she initialed Ms. Rollo's report "indicating that I agree with her results and conclusions." (E. 83). But this revealed nothing about the basis for her agreement, whether she reviewed both the serology and DNA portions of the report, or even whether she personally confirmed that Ms. Rollo followed lab protocols in conducting her analyses. Indeed, the State separately admits that Ms. Keener was not able to testify to what procedures Ms. Rollo followed based on firsthand knowledge ("Keener testified that Rollo … *would have used* the MSP lab's 'standard operating procedures, which Keener described[.]"). (Brief of Respondent at 9) (emphasis added).

Furthermore, in accordance with Ms. Keener's testimony that reports are

reviewed by two individuals, another person's initials also appear on the report. (E. 154-55). Presumably, the initials belong to the technical reviewer, and, also presumably, Ms. Keener did not duplicate that person's work. Yet, what then did Ms. Keener do if, as the State now claims, she did not act as the administrative reviewer?

Tellingly, the other portion of the transcript the State cites suggests that Ms. Keener was the administrative reviewer and nothing more. The State directs this Court to the following passage:

> Q. The last thing. With respect to the original analysis of the window and curtain, did you look at the peaks that were generated and make your own calls with respect to the locus or are you just relying on her numerical chart, your peer?
>
> A. I reviewed her results as a peer reviewer at the time of the analysis. And then I use her reviewed results to make my conclusions.
>
> Q. My question was did you look at the peaks that were generated?
>
> A. Yes. During my initial review of her case I did, yes.

(E. 116). However, the State neglects to include the following question and answer that followed almost immediately thereafter:

> Q. When you looked at the peaks that she relied on did you see peaks that she characterized as noise or did not make a call for?
>
> A. Those peaks that he's referring to are things that happened during our analysis. And there are thresholds and filters that, that filter them out. It just happens to be a part of our analysis and *with her interpretation she saw that there was a DNA profile from one now [sic] contributor so I used her results in order to make*

my comparisons.

(E. 117) (emphasis added). As she did on other occasions,[3] Ms. Keener thus took credit only for the work she did herself and did not try to take credit for work performed by her colleagues that she was not personally involved in. The State's argument that Ms. Keener was an adequate substitute for Ms. Rollo has no merit.

CONCLUSION

For the foregoing reasons, in addition to those set forth in his principal brief, Petitioner respectfully requests that this Court reverse the judgment of the court below.

Respectfully submitted,

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[3] *See, e.g.,* E. 81 (Ms. Keener agreeing that Ms. Rollo was "the primary forensic scientist that analyzed those swabs" and that Ms. Rollo "was able to" create DNA profile from them); E. 82-83 ("I was the administrative reviewer for Molly Rollo's report."); E. 87 ("I performed the DNA analysis [of Mr. Leidig's known sample] and I compared my results to the results that were previously obtained from Molly Rollo."); E. 93 ("Molly Rollo performed serology testing on the swabs from both of those items. … Her result was that blood was indicated on both the swabs of the window frame and of the living room curtain."); E. 114-15 ("But for the purpose of this case the swabs from the window frame and curtain the conclusions that Molly Rollo made were that the DNA profile was from one male contributor. She didn't see any evidence of an additional contributor being present.").

CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,507 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/

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Brian L. Zavin