No. 01-24-00919-CR

In the First Court of Appeals
At Houston, Texas

WILLIAM GLENN HERRON.

V.

THE STATE OF TEXAS

On Appeal from
The 10th District Court of
Galveston County, Texas
No. 21CR1354

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

May 1, 2025

List of Interested Persons

- Appellant William Glenn Herron is incarcerated on a 40 year sentence at the Gib Lewis Unit of the Texas Department of Criminal Justice.
- Nick Poehl, SBN 24056148, an Katie Marie Lyles, SBN 240101127, 3027 Marina Bay Drive, Ste. 230, League City, Texas 77573 (409 740.7200) represented Appellant at trial.
- Appellant is represented on appeal by Mark W. Stevens TBN 19148300 PO Box 16138, Galveston, Texas 77552 (409 765 6306).
- The State of Texas was represented at trial by Ms. Whitney Raspberry, SBN 24100577, formerly of the District Attorney's Office, and Ms. Rebecca Millo, TBN 24042189, formerly of the District Attorney's office and presently judge of the 10th District Court of Galveston County, Texas.
- The State of Texas is represented on Appeal by Ms. Rebecca Klaren, ADA, of the appellate division of the Office of the Galveston County District Attorney.

Authorities

Cases

Statutes

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TO THE HONORABLE FIRST COURT OF APPEALS:

Statement of The Case

Murder case. Appellant William Glenn Herron ("Appellant") was convicted by a jury and sentenced by the court to 40 years TDCJ.

Overview

There were no eyewitnesses to the death of the deceased (Elizabeth Hyman) except defendant's overheard phone call commentsnd audio Statement, SX 258, admitting that he had an argument with her but claimed that she had an accident and fell. Different witnesses painted different pictures of the deceased and Defendant. One set set of witnesses painted the victim as a severe inebreate prone to falling and occasional violence. Another set of witnesses portrayed Defendant as

a peron concerned with the welfare of Victims. Although there was no genuine dispute about Defendant's mere presence, the State pursued an elaborate set of "expert" witnesses who used "blood spatter" and DNA evidence to needlessly place Defendant at the scene, and more importantly to attempt to recreate the sequence of events leading to the death of Ms. Hyman.

This appeal will continue the longstanding challenges of abolition of factual sufficiency review, and suggest a form of modified review which will give full effect both to federal law under *Jackson v. Virginia,* and Texas law under Tex. Const. art. V, sec. 6(a).

Procedural History

- Indictment at CR6—Note that Appellant was charged in the alternati ve with intentionally and knowingly causing the death of an individual, namely, Mary Elizabeth Hyman, by striking Mary Elizabeth Hman with Defendant's hand an/or kicking Mary Elizabeth with the defendant's foot and/or striking Mary Elizabeth Hyman ith an object unknown to the Grand Jury (Para. 1) or …with intent to cause serious bodily injury to an individual, namely, Mary Elizabeth Hyman, commit an act clearly dangerous to human life that caused the death of said Mary Elizabeht Hyman, by striking Mary Elizabeth Human ith the defendant's hand an/or kicking Mary Elizbeth Hyman with Defenda's foot and/or striking Mary Elizabeth hyman with an object unknown to the Grand Jury(Para.2)
- Charge on Guilt/Innocence CR 257 At CR 258 (first two paragraphs) the charge properly followed the language of the indictment.
- Verdict at CR 261
- Judgment at CR 264
- Court's Certification of Right to Appeal CR 269
- Notice of Appeal CR 263
- Notice of Discovery Compliance CR 269

Facts

The testimony is described below in some detail, both (1) as necessary for any sufficiency review, and (2) to demonstrate the complexity of the evidence which was placed before a lay jury.

Jeremiah Sitton 3 RR 26

Sitton is a deputy with the Galveston County Sheriff's office. He has worked in the mental health division. 3 RR 27.

When he arrived at the scene, the defendant was standing on the patio and apparently (to Sitton) waiving at Sitton to gain his attention. 3 RR 28/18.

State's Exibit 2 (Stitton's body cam video) was admitted without objection. 3 R 31. Sitton believed the victim was deceased based on body discoloration etc. Sitton then called other investigators and EMS to ensure there was no sign of life.

Sitton found the defendant extremely calm given the situation. 3 RR 36/4. The Defendant admitted to Sitton that he had been drinking that night. 3 RR /6.

Sitton recalled a 911 call to the effect that "My Girlfriend, I think she's dead. I can't get her to respond." 3 RR 37/20.

The defendant was detained partly due to the fact that he admitted he and the deceased had been "fighting" that night, i.e., taken by Sitton to have meant physically fighting. 3 RR 38/9.

Sitton claimed, per usual, that the defendant was not in custody, but was "only detained." 3 RR 39/14.

Travis Hall 3 RR 43

Deputy Hall has been with the Galveston County Sheriff's Office for 13 years.

Various photos, Exhibits 6 through 18, were admitted without objection.

A person "Butch" was named, and was a next door neighbor to the deceased.

Zachory Brown 3 RR 55

Mr. Brown works for Clear Lake Nisson, but was previously a corrections deputy for Galveston County. As such he had occasion to supervise the Defendant, William Herron. 3 RR 56.

Brown listened to a phone call made by Defendant to his Defendant's son, and during which the Defendant discussed the charges and said that the deceased "…hit her head. She died right there. We were drunk, both drunk, got in a fight, hit her head, and died right there." 3 RR 58/20. [This second hand "confession" falls short of claiming that Herron himself struck Ms. Hyman, and forced the state to later interpolate with the speculative testimony of other witnesses, e.g., Lt. Bell and Medical Examiner Barnhart.]

On cross examination, Mr. Brown was asked if the Defendant said on the phone call "I killed her", and Mr. Brown answered, "No, sir." 3 RR 59/24, describing it as an accident. 3 RR 60/1.

Mario Reyes 3 RR 62

At the time of the incident, Officer Reyes was employed by the Galveston County Sheriff's Office. 3 RR 63/19.

On April 26, 2021, Officer Reyes responded to a possible physical disturbance at 631 24th Street in San Leon 3 RR 64/5. His response took place at 6:30 p.m. 3 RR 65/25. There present were two females and one male.

Officer Reyes did not take further action because he had "nothing to go on" and nobody was claiming physical injury, etc. He was later administratively reprimanded for that, but the reprimand was not connected to his departure from the Sheriff's Office.

Beverly Moncrief 3 RR 77

Ms. Moncrief had been an acquaintance of the deceased for about 5 weeks. 3 RR 77/21.

On the day of or prior to the death of decedent, Ms. Moncrief helped her move to a gated community for safety. 3 RR 78/12.

After several objections were overruled Ms. Moncrief stated that the victim claimed to be scared of Mr. Herron, the defendant. 3 RR79-80,

State's Exhibit 209, a phone recording, was admitted without objection. The voices were Ms. Moncrief, the decedent's, and the defendant's, Mr. Herron. 3 RR 81/21.

At 3 RR 82, Ms. Moncrief testified that on an occasion close in time (the record is not specific) The Defendant approached a car in which Ms. Moncrief and Ms. Hyman were seated; nearly collided; and later punshed the driver side window. The confrontation was frightening to Ms. Moncrief.

On the Monday before the death, Ms. Moncrief observed bruising o the left side of Ms. Hyman's face. 3 RR 85/22.

The deceased "liked to drink" and Ms. Moncrief considered her an alcoholic. 3 RR 86-87. Mocrief described her as a "funny" drunk. She had not observed her to be aggressive. 3 RR 87/20.

At one point the deceased had been in "rehab." 3 RR 89/20.

During the Recording (SX 209) Mr. Herron was talking to Elizabeth about her drinking. 3 RR 90/9.\be

On redirect, Ms. Moncrief recounted an incicent shortly before trial when according to her Mr. Herron (on bond) instructed her "not to turn" on him at trial, and then added "….better yet, not show up" 3 RR 95. These statements were "a few days apart" 3 RR 3 RR 96/24.

Jennifer Bell 3 RR 98

Lieutenant Bell is with the Crime Scene Unit of the Galveston County Sheriff's Office. 3 RR 98.

Lt. Bell described at some length the process of blood stain mapping. 3 RR 104 ff. She categorized bloodstains in three groups: passive, spatter and altered bloodstains. 3 RR 111/18.

Lt. Bell described Exhibit 63 as a photo of hair with a bloodstain on it. 3 RR 135/16.

Exhibit 72 was a photo of rocks (outside of the home and porch) with blood on them and nearby a large clump of hair. 3 RR 138/8.

Exhibit 73 was a photo of a rocks with a large clump of hair with blood nearby. 3 RR 138/14.

At 3 RR 140-41/5, Lt. Bell describes bloodstains on a rock which could have been caused ("yes") by active bleeding.

At 3 RR 142/5, referring to SX 85, Lt. Bell describes it as a photo of a bloody handprint consistent with the victim being pulled or dragged inside the home shelter.

At 3 RR 144/5, Lt. Bell describes the photo as showing lividity on the back but no lividity on the front of the body.

SX 93 indicates, to Lt. Bell, that based upon the materials found on the socks, the victim had walked outside on red dirt. 3 RR 146/15.

According to Lt. Bell, SX 153 show an impact stain, due to the patter of radiating around a central point. 3 RR 168/14.

State's Exhbits 166-167 were admitted without objection 3 RR 172/consisting largely of articles taken from the Defendant at jail.

SX 167, according to Lt. Bell, is an impact blood stain on the shirt of the defendant. 3 RR 173/11

SX 178-179 depicts among other things a broken bracelet found near the body of the victim inside the shelter.

At 3 RR 189/22, Lt. Bell describes generally a shirt taken from the victim's body, noting that "…this shirt made contact with the dirt in a pretty forceful way so that it would stick to the shirt."

Item 28 found in SX 196 was "black curly hair" at the foot of the victim inside the residential RV. 3 RR 191/23.

Bag 40 within SX 196 depicts two broken cell phones, one on the landing in front of the bathroom and one from the hallway of the victim's RV residence. 3 RR 192.

Based upon the "totality" of her knowledge of the scene, Lt. Bell at 3 RR 196 opined as follows:

> …..a bloodletting event occurred outside of the RV that created injuries on the victim. She was assisted or dragged from her spot where the bloodletting event happened in front of the porch and was led or dragged from that section and was—she **laid down** or was **placed down** in the position that she was found when the first responding officers got there and when I made location. I don't believe that she on her own went up the stairs but was **assisted** in some way or **dragged** by the evidence that's on her chest, with the bloody handprint with the dirt that's on the front of her shirt, the dirt that was embedded in her bracelet, it is my opinion that she was **assisted** or **dragged** from the spot –a spot in front of the porch and up the stairs and into the RV.

3 RR 196/6-21. [Emphasis added]

The examination of Lt. Bell resumed in Volume 4.

Lt. Bell made a very important qualification on her opinions as follows:

> Q: Why those three terms? [i.e., Assisted, dragged or led.]
> A: It can't be determined with the physical evidence that was present exactly what happened because the—in the rock pathway that looked to be like similar to drag marks. Because I wasn't there, I won't commit to saying that she was **dragged,** because it could have been some sort of **assistance,** along with understanding that the –there's a possibility that someone could help you walk even though you might not be picking up your feet very high in a normal step or gait."

4 RR 18/11-22.

` At 4 RR 30/5, Lt. Bell admitted ("Correct") that blood on the bottom of the shoes could have been from a completely separate event.

Lt. Bell carefully chose her words to identify the defendant as an individual present but not to accuse him of murder as opposed to merely assisting an injured person:

Q: And who do you believe **assisted,** led or **dragged** her?
A: It is my opinion that the Defendant is the one who did that.

4 RR 31/6-9.

Lt. Bell was aware that the DNA of an unidentified male was found at the scene. ("Yes.") 4 RR 34/15-18.

The Defendant Herron's DNA was not found on the flashlight which was found near the body. 4 RR 41/17.

The Defendant Herron was excluded from the DNA found in a forensic vaginal swab of the deceased. 4 RR 42/16.

An important admission was made by Lt. Bell at 4 RR 43/23. Referring to a shirt:

> A: It was not determined that the sample was going to be sent to the lab.
> Q: Do you know with regard to that particular piece of of evidence it wasn't.?
> A: **I don't have a reason that it was not determined to be sent to the lab.**

[Emphasis added]

[The "reason" is obvious: It was not sent to the lab because the State felt it had enough to convict Defendant Herron without giving him the benefit of potentially exculpatory evidence, i.e., that which would have identified another individual.]

Then, at 4 RR 50/22-25:

> Q: Can you identify any stains that you believe William Herron created with his blood based on your knowledge of the DNA testing?
> A: No, I cannot.

Cross Examination concluded with this:

> Q: Can you scientifically rule out, based on your training and experience, Ms. Human in an inebriated state, passing off or falling off that porch ; injuring herself, landing essentially on her face on that gravel, creating some of the cuts that we see; regaining consciousness; pulling herself up on the edge of that patio; stumbling, perhaps falling some more on her way to the steps; trying to clean up herself; making it as far as the bathroom, maybe even making it into the bedroom, dripping onto things before making her way back to the front area collapsing and dying; can you rule that out?
> A: **No, I cannot.**

4 RR 52/19-53/6. [Emphasis added]

Sam Adams 4 RR 57

Mr. Adams is a tow truck driver who recounted that at one point in time close to the death, the victim wanted to move because she was fearful of a boyfriend or ex-boyfriend who was not specifically named in the conversation. 4 RR 62/22.

Darcy Maconkey 4 RR 72

Ms. Maconkey is retired and was for 7 years manager of an RV Park in San Leon, Texas. She recounted a conversation with Ms. Hyman who said she was scared of a boyfriend who, she was afraid, would kill her. Ms. Hyman said she wanted to move to Ms. Maconkey's park because it was security gated. 4 RR 75/17.

Shortly before Ms. Hyman's death, she called Ms. Maconkey in a very drunk state and said she wanted Ms.Maconkey to come and get her. 4 RR 77/15.

A "couple of weeks" before the trial, Ms. Maconkey met the defendant Herron in a local bar called "Radio". She claimed that Herron said that his attorney as "…really good and he's going to rip me apart on the stand—bring up anything in my past since I was 10, 12 years old…" 4 RR 79/12. Subsequently, on cross examination, Ms. Maconkey said that Mr. Herron did not coerce her or try to change her testimonh. . 4 RR 84/24.

Laura Perez 4 RR 85

[It should be noted in advance that the ostensible objective of this "CSI" testimony was to place Defendant at the scene, regardles of the fact that his prsence that evenng was separately and more simply demonstrted and was not in duspute.]

Ms. Perez lives in San Leon and was an ex-neighbor to the defendant, Mr. Herron. 4 RR 86/23. She also knew the deceased, Mary Elizabeth Hyman.

Ms. Perez maintained a video surveillance system at her home, 4 RR 89/24, and much of her testimony concerned images from that system. A video disc SX 214-222 was admitted without objection. Ms. Perez identified a truck in the video stills as belonging to the Defendant Bill Herron. 4 RR 92/7.

SX 218 shows another vehicle which Ms. Perez could not identify as to its owner. 4 RR 93/3. ("I don't recognize it."

At 4 RR 93-24 she identified a set of headlights

which she knew or presumed was Herron's heading in the direction of Ms. Hyman's home.

At 4 RR 101/10, Ms. Perez described one incident of abuse in a bar, when Mr. Herron (per Perez) pushed Ms. Human off of a chair and inflicted bruises.

As with all other witnesses, Ms. Perez did not see Mr. Herron or anybody else kill Ms. Human. 4 RR 105/20.

Further on cross examination, Ms. Perez states that the shirt depicted on SX-10 (Herron) was not the shirt she saw before the death of Ms. Human. She did not know if the police described any neon green shirt. 4 RR 109/15-23, thus suggesting that the individual she thought was Herron was possibly someone else.

Ms. Perez was sufficiently acquainted with Ms. Hyman such that she would not be surprised to learn that the deceased had a blood alcohol content of .38. 4 RR 114/12.

Wendel Reed 4 RR 121

[It is questionable why the State called Mr. Reed, except perhaps to establish redundant evidence of proximity.]

Mr. Reed lived in San Leon and in the same general neighborhood as the victim. He had seen Ms. Hyman and the defendant together on one or more occasions. 4 RR 123/17.

On one occasion, Ms. Hyman pointed what appeared to be a 12 gauge shotgun at Mr. Reed, scaring him (a Vietnam veteran) severely. 4 RR 138/12. Cf. 4 RR 141/22 (Vietnam/Riverboats). On that occasion, Reed described Ms. Hyman as "out of her mind" and stated that she was not "coherent enough to understand what was going on." Id.

Reed "believed" that the defendant resided for a period of time with Ms. Hyman. 4 RR 139/24, i.e., he "assumed" that to be the case.

At bottom, Reed testified that he felt the defendant Herron was concerned about Ms. Hyman's welfare:

"…But yes, he was concerned about her. It seemed like most the time when we talked it was about—her name would come up…." 4 RR 142/15.

Gary Koller 4 RR 146

Mr. Koller is retired and has lived in San Leon since about 2016. He met Ms. Hyman through her mother. 4 RR 147/17. He also knew the Defendant Herron.

Koller was aware that Ms. Hyman's body was found on a Tuesday morning. 4 RR 148/24.

On one occasion, Mr. Koller was contacted by Hyman's mother and as a result picked up Ms. Hyman at a local restaurant, Noah's Ark. 4 RR 19, and took her to his own residence.20.

Koller's own vehicle is a Hundai "Santa Fe", colored black. 4 RR 157/19.

On one occasion, Koller called the Sheriff's Department about 3 times to call on Ms. Hyman. It took about 45 minutes for them to arrive. 4 RR 158/24.

The deputy who arrived did not take action, apparently to Koller's concern. Koller testified that he predicted, "If you do not not separate them or do not take **one of them**, that she will not see the light of day." 4 RR 159/20. [Emphasis added]

Over objection (Overruled) Koller stated that on that occasion Ms. Hyman said she was scared of Mr. Herron. 4 RR 163/3.

Around 6:00 in the evening of Monday, the day before the death, Herron testified that Ms. Hyman called him, said she was scared, and wanted to be picked up. When he arrived, she had changed her mind and did not want to go. 4 RR 166/10.

At around 7:30 the same evening, Koller received another call from Ms. Hyman asking him to come over and part in front of the gate. He did so and walked to Ms. Hyman's residence. When he go there she again changed her mind and said, " I just don't want to cause any problems for you. I know there's going to be problems if I go back to your house." 4 RR 167/11-25.

Later that night Koller received, apparently from Ms. Hyman, three missed phone calls as 8:16, 8:22, and 8:30. 4 RR 170.

Koller described Ms. Hyman's motor skills, while inebriated, as good or as he put it, "amazing." 4 RR 170/24.

Alice Guy 4 RR 183

Alice Guy is the mother of Ms. Hyman, the victim.

Ms. Guy testified that she was once awakened by a noise, and thereafter her daughter, Ms. Hyman, complained that Defendant had assaulted her. Mr. Herron had left the scene and was not present when the statement was made. The Statement over objection which was overruled. 4 RR 190, The incident appears to have taken place on the Saturday before the Victim's death.

At about 11:00 pm on the night before the victim's death, Ms. Guy received a call from her daughter saying that "William" had turned off the electricity to her residence 4 RR 195/16 .

Minh Liu 4 RR 208

Minh Liu is a forensice expert (digital examiner) and provided testimony about cell phone data and extractions.

She described the procedure for dealing with a broken cell phone, e.g., that of the victim. 4 RR 211/15 ff.

The phone number in question was 832 444 1119.

Ms. Liu's reports are peer reviewed. 4 RR 217/21.

Due to a power interruption, Ms. Liu's testimonay was continued to the next day and Reporter Record 5 (RR 5)

Kelsie Miller 5 RR 6

Kelcie Miller is a Lieutenant in the Criminal Investigation Division of the Galveston County Sheriff's Office. As such, she and her division do all of the follow-up investigation on serious crimes such as homicide. Her credentials were established.

She was called to the site—631 24th Street, San Leon, and told it was a "suspected homicide." 6 RR 10/25.

The Defendant, Mr. Herron, gave Ms. Miller consent to search the trailer/home, based on what she was "told on the scene." 6 RR 12/20. When she found out that Herron did not live there, she obtained a search warrant. 6 RR/21/13.

At 6 RR 17, Exhibits 228 through 253 were admitted without objection, being Photos from the video surveillance camera of a Mr. Wendell Reed. 19

Beginning at 6 RR 19, Ms. Miller describes those photos in the following timeline referring to SX 229 and subsequent:

- William Herron's truck head southbound towards Hyman's residence. 7:16 a.m.
- Herron's truck again driving southbound towards Hyman's residence 10:07 a.m.
- Herron's truck backing or pulling forward in the U shaped driveway of Hyman's residence 10:09:27;
- Herron's truck driving southbound towards Hyman's residence at 12:13 p.m.
- Again, Herron's truck heading south towards Hyman's residence at 12:13 p.m.
- At 12:15 p.m. Herron's truck exiting the u shaped driveway;
- At 1:13 p.m. Herron's truck southbound agan;

- At 2:21 pm, Herron's truck driving toward Hyman's residence;
- At 2:27 pm , Herron driving southbound towards Hyman's residence;
- 2:25 pm, Herron's truck exiting the U shaped driveway.
- 6:07 pm Herron's truck driving towards Hyman's residence;
- At approximately 6:30 p.m., Galveston County SO responds to a the Hyman address;
- 6:32 pm, Galveston County patrol unit arrives;

At this point in her testimony, Ms. Miller stated that she contacted Laura Perez and obtained a video from April 26 6:00 p.m. through April 27 at 8:00 a.m., and consulted it to "….make sure [Herron] left again during the night to go back to Mary Hyman's house." 6 RR 25/19.

- April 26, 6:56 p.m., Herron's truck pulling into the driveway of his residence;
- SX 218 shows Gary Koller's SUV southbound on 24th Street.
- SX 219 shows Koller's SUV Northbound from Hyman's trailer on April 26 at 7:17 pm. 6 RR 27/15
- SX 221 depicts Herron's truck leaving the driveway of his residence
- At 9:18 pm, Herron's truck is driving southbound towards Hyman's trailer. 6 RR 28/21;

Having reviewed all of Ms. Perez' videos, Officer Miller did not observe Herron returning to his home on the night of April 26-27. . 6 RR 28-29.

Herron was on the scene when deputies arrived the next morning, i.e.,, April 27. 6 RR 30/6.

From 6 CR 39 to 6 CR 64, Lt. Miller recites into the record the content of numerous emails between Ms. Hyman and the Defendant. Summarized, these email appear to be the raucous and often obscene exchanges between two individuals, but contain no overt threats or intimations of violence.

The flashlight found at the scene is then discussed. Witness Miller opines that the defendant hit Ms. Hyman with his hands, feet—and the flashlight. 6 RR 92/19. However, at 6 RR 93/2 there is this:

> Q: Okay. Were you able to tie that flashlight to Mr. Herron in any way?
> A: In—like forensically?
> Q: Correct.
> A: No, sir.

A bit later, beginning at 6 RR 93/18:

> Q;:…Do you know that that flashlight was used to kill her?
> A: I don't really understand what you're asking. Are you asking me if his DNA is on the flashlight?
> Q: Was it?
> A: No, sir, it was not.
> Q: Fingerprints?
> A: No, sir, it was not.
> Q: Fibers from something matching his clothing?
> A: No, Sir.
> Q: Hair?

A: No, sir.
Q: Saliva?
A: No, sir.
Q: Nothing?
A. No, sir.

Ending at 6 RR 94/7.

At 6 RR 100/1, Lt. Miller states that "…there was unknown DNA found somewhere on the porch or the stairs…" Further, she "believes" that it was a bloodstain sample. 6 RR 100/7. ("Yes, sir, I believe so.") These references were to Item "Q" found on the step. 6 RR 101/20.

At 6 RR 112 this exchange takes place:

> Q: It didn't cause you any concern that you found a mixture of Liz' [Hyman's] and somebody else's DNA in a bloodstain but that you hadn't found Bill's anywhere in that blood or in the exterior whatsoever?
> A: No, sir. Stairs are a high traffic area.

Shortly after that at 6 RR 113/14-22:

> Q: Okay. Was a comparison ever made between the DNA on the stop and the DNA that was found her vagina?
> A: are you asking if –
> Q: If you know.
> A: --the DNA on the steps and the DNA in the vagina were the same DNA?
> Q: Correct.
> A: I do not know the answer to that.

Then, asked why a bloody shirt that was found right next to the victim's body was not sent off for analysis, this followed:

Q: Why was that?
A: I guess we didn't believe it had any evidentiary value that was near her head where it was pooled up of blood. So we believe that the blood came out of her head and seeped into the shirt.

6 RR 114/17.

A bit later referring to the same non-tested shirt:

Q: Do ou believe it could be mixed with anybody else's, perhaps her attacker?
A: No, sir.
Q: Why not?
A: We-I don't' have an answer.

6 RR 116/23.

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> Q: Why not?
> A: We-**I don't' have an answer.**

6 RR 116/23.[Emphasis Added]

Jacaranda Solis 5 RR 124

Ms. Solis is a forensic biologist with the Texas Department of Public Safety laboratory in Houston.

She described the theory behind Forensic use of DNA as a see-saw, with Ms. Hyman on one side and an unknown on the other. 5 RR 137.15

Referring to a flashlight sound at the scene, Ms. Solis found a very high probability that the DNA was from the Victim, but no other person. 5 RR 142/25.

Regarding the shoe taken from the Defendant, and assuming defendant was one contributor, the probability was "335 quadrillion" times greater than the probably of Herron plus one other unrelated unknown individual.

At 5 RR 145, Ms. Solis described the DNA results from a pair of shorts taken from the Defendant, and came up with a probability of 14 Septillion that the sample consisted of DNA from Herron, the victim, and **one unknown individual.** 5 RR 145/22.

Similarly, a cutting from the lower leg of the shorts taken from Defendant yielded a ratio of 26.7 septillion times greater than the probability of obtaining that profile if the DNA came from William Herron and one person other than the victim. Another cutting from the shorts yielded a probability of 27.5 Septillion. See 5 RR 146-147. Another cutting from the shorts yielded a similar result, 5 RR 147/17.

A cutting from Defendant's shirt yielded a result of 41.3 Million, again suggesting the Victim as a possible contributor.

Finally, a cutting from the center of Defendant's shirt yielded a result of 26.5 Septillion, again indicating the Victim as a possible contributor.

Semen was not detected in the vaginal swabs taken from the Victim. 5 RR 151/6.

The flashlight found at the scene did not yield any DNA results, because "only a presumptive test for blood" was performed. 5 RR 153/4.

Item Q yielded an important non-result, i.e., that there was some likelihood that the DNA of a Non-Donor (i.e., other than Defendant) was present. Both the Defendant and Gary Koller were excluded. 5 RR 157-158/10.

This witness explained an important qualification—and limitation—on DNA evidence at 5 RR 160/5-9. Asked whether DNA demonstrated that a ***particular person*** is a contributor, she answered:

> A: We do not attribute the profile to any one individual. We provide the best possible scenario that explains that sample profile we obtained. It is **up to the jury to decide** that type of information with the information that we provided.

Again, at 5 RR 165/25:

> A: …it is not my opinion. In this matter I can only report to what I have found, and it's **up to the jury to decide.**

[emphasis added]

Shauna Joseph 5 RR 170

Ms. Joseph is also a forensic scientist with DPS in Houston. She performed an advanced "Y.S.T.R." test on the vaginal swabs taken from the victim. The result of the tests, in brief, excluded with certainty the Defendant, Mr. Koller, and Wendell Reed. 5 RR 176. However, the YSTR test also indicated the presence of DNA from **another, unknown, individual**. 5 RR 178/7.

Erin Barnhart, M.D. (Medical Examiner) 6 RR

Dr. Barnhart is the Galveston County Medical Examiner, and performed the autopsy on the Deceased, Ms. Hyman. Her credentials are questioned.

Dr. Barnhart described forensic pathology as "determining the cause and manner of death" 6 RR 6/13.

Her testimony placed emphasis on the flashlight as a possible deadly weapon. 6 RR 13/19, referencing specific bruises on the deceased. She described various apparent injuries as resulting from "blunt trauma". 6 RR 17/5.

Dr. Barnart appeared to reject the theory of an accidental or inebriated fall by the victim, citing the fact that bruises, etc. were on "essentially every part of the face." 6 RR 18/13.

The missing hair was described by Dr. Barnhart as "traumatic alopecia", i.e., the hair being pulled out. 6 RR 18/25. In her opinion, the missing hair was not "consistent with somebody falling." 6 RR 19/12. She did not attempt to negate the possibility of the victim being dragged.

Dr. Barnhart stated that the multiple bruises on the "reflected" scalp would be "consistent" with multiple impacts from different directions 6 RR 21/20.

At 6 RR 26/19, Dr. Barnhart stated that the amount of missing hair was in her opinion not consistent with the deceased's falling off of the porch/deck.

Beginning at 6 RR 29, Dr. Barnhart gave testimony which suggested (using the word "consistent") that the accused assailant was the defendant, e.g.:'

- 6 RR/29/8: A 175 pound man striking a 122 pound woman would be "clearly dangerous to human life."
- 6 RR 29/8: 180 pound man striking a woman with a flashlight "clearly dangerous to human life"
- 6 RR 29/22: Same but with an unknown object, clearly dangerous to human life.
- 6 RR 29/25: Same, with fists.
- 6 RR 30; Dr. Barnhart stated that the lacerations on the forehead were "consistent with the curve of the flashlight."
- 6 RR 30; that a flashlight "could be used as a deadly weapon.

On cross examination, Dr. Barnhart conceded that there were "other items that could create the injuries. 6 RR 31/21.

The victim had a blood alcohol content of **.349**, and also had a metabolite of valium in her system. 6 RR 34/17-24.

The use of valium would tend to exacerbate the effects of intoxication. 6 RR 36/23-6RR 37/1 ("That's possible.")

The time of death was never established in this case. 6 RR 37/4. Subsequently, Dr. Barnhart explained that times of death were determined some

years back (20 or 30) but since then the techniques had been determined to be "problematic." 6 RR 37/8-22.

Dr. Barnhart conceded that many people intoxicated to that extent with valium in their system would be asleep or passed out: "A: I think that's safe to say") 6 RR 40/11.

Then this:

> Q: Could she have come out on her own under her own steam and fallen off that porch from either passing out or just losing her balance briefly losing consciousness? Is that possible?
> A: Yes.

6 RR 40/16.

And this:

> Q: Would it be possible for her to fall off this porch, essentially face-planting on that gravel and regain consciousness?
> A: Yes.
> ….
> Q: So, she pulls herself back up, begins walking over the stairs. Maybe she falls a few more times. That would be possible at that—at that intoxication level and now having suffered from some injuries, correct?
> A: It could be, yeah.

6 RR 40-41/3-9.

In stating that, the medical examiner focused on bruises to the eyelids, overlooking the fact that the deceased had recently had plasic surgery in that area which might have accounted for some or all of that bruising.

Dr.Barnhart stated that the multiple injuries could be "contemporaneous in time, but could not narrow that time frame to less than two hours. 6 RR 42/20/25

Derick Sweat (Defense) 6 RR 49

Derick Sweat lives in San Leon and was acquainted with Ms. Hyman, whom he called "Liz." He described the relationship between Ms. Human and Mr. Herron as "very toxic." 6 RR 50/13. Both were "alcoholics to some degree." 6 RR 50/25.

Mr. Sweat owned the property that Ms. Hyman was living on. 6 RR 51/18. He considered Ms. Hyman to be "the more physically aggressive." 6 RR 53/10. Alcohol was the main topic of their arguments. 6 RR 54/2.

Ms. Hyman's favorite drink was apparently some mixture of "Jager" or "Jaegermeister". 6 RR 54/16, drinking mostly during the days.

Ms. Hyman's drinking appeared to Sweat to be escalating in the month or two before her death. 6 RR 55/12.

Mr. Herron lived at Hyman's trailer "on and off". 6 RR 56/16.

Mr. Sweat saw Hyman fall down from being drunk "many" times or as he qualified it, "…more than a few but less than a whole lot." 6 RR 57/9-11.

His impression was that Bill Herron cared for Ms. Hyman, but not obsessed. 6 RR 57/14-19.

Sweat agreed that in the two days before her death, Herron was looking for her all day on both of those days. 6 RR 61/24.

According to Sweat, whenever Ms. Hyman got out of "rehab", she would go missing, or "MIA" for 3 or 4 days before that. 6 RR 68/12.

Brandi Antley (Defense) 6 RR 69

Mr. Antley met Hyman at a San Leon restaurant called Gilloolie's. 6 RR 70/11, where he served drinks. At some point he became the manager there. 6 RR 71/2.

Mr. Sweat only saw Hyman hit Bill Herron once, in the head. 6 RR 73/16.

Mr. Sweat never had problems with Bill Herron as a customer; however, he did have to "cut off" Hyman on some occasitons. 6 RR 75/9,

Sweat's perception was that Herron was a "caretaker" to Ms. Hyman. 6 RR 6 RR 76/13.

Mr. Sweat saw Ms. Hyman "falling down drunk" on a few occasions. 6 RR 76/25.

Issues for Review

Issue I-A

The evidence was legally insufficient to support the verdict under currently governing case law.

Issue I-B

The evidence was legally insufficient to support the verdict under a proposed modification suggested view of current state law which proposalthe standard of review which calls for review of all evidence in a neutral light, in order to give full effect to both federal and Texas State law.

Summary of the Argument

There was no eyewitness to the death of Elizabeth Hyman, other than the second hand and ambiguous statement of defendant through the testimony of former Deputy Zachory Brown The State's forensic evidence early on conceded that there were two potential scenarios: (1) an **accidental** death due to inebriated loss of balance; or (2) homicide.

On that record the jury took about 90 minutes to convict Appellant. It now falls on this Honorable court to determine whether the evidence was legally sufficient, i.e., whether any jury could find each and every element of thee charge true beyond a reasonable doubt—and to do so **rationally.**

Despite the fact that Defendant Herron was clearly present at the premises the state presented an inordinate amount of "expert" testimony including DNA evidence, which was redundant or even irrelevant to the proof necessary in this

case. Appellant maintains that the use of DNA evidence in this manner was an attempt to bolster its case by the use of forensic (DNA) evidence which under the case law has been observed to have a potentially irrational effect on juries.

That task requires appellant to urge that current standards of review of sufficiency under the plurality opinion of *Brooks v. State* and the binding precedent of this Court of Appeals be revisited in light of intervening developments including the untethered use of DNA statistical evidence before lay juries, and the implications of that practice fortendency in some opinions of giving tacit but logically unjustified deference to jury findingsverdicts.

Standard of Review

The standard of review for legal sufficiency is a well trodden path, but with many potholes. As generally stated, the reviewing court must consider:

> "…the combined and cumulative force of all admitted evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inference therefrom, a jury was ***rationally*** justified in finding guilt **beyond a reasonable doubt."**

[Emphasis added] *Tate v. State,* 500 S.W.3d 410, 413 (Tex. Crim. App. 2016), citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Direct and circumstantial evidence are said to be equally probative. See, e.g., *Huff v. State,* 467 S.W.3d 11, 19 (Tex. App.—San Antonio 2015, pet. ref'd.).

The Standard under *Tate, supra,* is the truncated version, lacking the broadeer scope of factual sufficiency which was eventually abolished following the plurality opinion of *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010).

The sole present standard –legal sufficiency as prescribed by *Jackson v. Virginia* and *B*rooks, contains an obvious internal inconsistency, i.e., considering "all" evidence but doing so "in the light most favorable to the verdict." The same concept would be more clearly conveyed by a dubious instruction, e.g., to consider "only that evidence supporting the verdict and disregarding any contrary other

evidence, no matter what its logical force." Review under such a standard in most cases would be **no meaningful review at all**.

Plurality opinions, of course, generally are not binding precedent unless a majority opinion can be derived. However, the Texas Court of Criminal Appeals has repeatedly denied calls from lower courts for reinstatement of factual sufficiency review. See, *Roncocco v. State,* 2023 WL 3376659 * 7 (Tex. App.—Houston [14th Dist.] 2023, no pet.).

In *Brooks v. State,* 323 S.W.3d 893, 901(Tex. Crim. App. 2010) concluded that "a legal sufficiency [appellate] standard of review is indistinguishable from a factual sufficiency [appellate] standard of review. And thus made questions of fact pure questions of law. *Vernon v. State,* 571 S.W.3d 814, 831 (Tex. App. – Houston [1st Dist.] 2019 pet. ref'd)(Jennings, J., concurring).

Before *Brooks*, evidence that was legally sufficient can be found factually insufficient in one of two ways, primarily "if the evidence supporting the conviction is "too weak" to support the factfinder's verdict. *Vernon, supra,* at 829.

Vernon, supra at 830 stated that, a Court of Appeals must (1) consider all the evidence in a neutral light; (2) must find factual insufficiency to prevent "manifest injustice", and (3) explain why the evidence is "too weak" or why conflicting evidence weighs greatly against the verdict.

In this appeal, Herron continues the dispute over the demise of factual sufficiency. " Although we are not free to to disregard biding precedent….we are certainly free to point out any flaws in the reasoning of the [binding] opinions." *Vernon, supra* at 831, quoting Jennings, J., denial of en banc consideration in *Benge v. Williams,* 472 S.W.3d 684, 738 (Tex. App. (Houston [1st Dist.] 2014, aff'd 538 S.W.2d 466 (Tex. 2018).

Further, Although "we are bound by precedent…we are not gagged by it." *Jones v. State,* 962 S.W.2d 96, 99 (Tex. App.—Houston [1st Dist.] 1997)(Taft J., concurring), aff'd 984 S.W.2d 254 (Tex. Crim. App. 1998). *Vernon, supra* at 831.

Argument and Authorities Under Issue 1-A

Issue I-A Restated

The evidence was legally insufficient to support the verdict under currently governing case law.

Juries are free to draw ***rational*** inferences, but they cannot "…translate unrelieved uncertainty into belief from the evidence beyond a reasonable doubt." *Redwine v. State*, 305 S.W.3d 360 , 367(Tex. App.—Houston [14th Dist] 2010, pet. ref'd.).

Further, juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculations. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App.2007). Speculation is the mere theorizing or guessing about the possible meaning of the facts and the evidence presented. Id. at 16. On the other hand, 'an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Id. A conclusion that is reached by speculation may not seem completely unreasonable, but it is not sufficiently based upon facts or evidence to support a conviction beyond a reasonable doubt. Id.

That uncertainty was established by the testimony of the State's lead investigator, Jennifer Bell, whose testimony at 3 RR 196 bears repeating here as follows:

..a bloodletting event occurred outside of the RV that created injuries on the victim. She was **assisted** or **dragged** from her spot where the bloodletting event happened in front of the porch and was **led** or **dragged** from that section and was—she **laid down** or was **placed down** in the position that she was found when the first responding officers got there and when I made location. I don't believe that she on her own went up the stairs but was **assisted** in some way or **dragged** by the evidence that's on her chest, with the bloody handprint with the dirt that's on the front of her shirt, the dirt that was embedded in her bracelet, it is my opinion that she was **assisted** or **dragged** from the spot –a spot in front of the porch and up the stairs and into the RV.

Somewhat later, Lt. Bell doubled down on her own uncertainty as follows:

Q: Can you scientifically rule out, based on your training and experience, Ms. Hyman in an inebriated state, passing off or falling off that porch ; injuring herself, landing essentially on her face on that gravel, creating some of the cuts that we see; regaining consciousness; pulling herself up on the edge of that patio; stumbling, perhaps falling some more on her way to the steps; trying to clean up herself; making it as far as the bathroom, maybe even making it into the bedroom, dripping onto things before making her way back to the front area collapsing and dying; can you rule that out?
A: **No, I cannot.**

4 RR 52/19-53/6 [emphasis added]

Lt. Bell made a very important qualification on her opinions as follows:

Q: Why those three terms? [i.e., Assisted, dragged or led.]
A: **It can't be determined with the physical evidence** that was present exactly what happened because the—in the rock pathway that looked to be like similar to drag marks. Because I wasn't there, I won't commit to saying that she was dragged, because it could have been some sort of assistance, along with understanding that the – there's a possibility that someone could help you walk even though you might not be picking up your feet very high in a normal step or gait."

4 RR 18/11-22. [Emphasis added]

` At 4 RR 30/5, Lt. Bell admitted ("Correct") that blood on the bottom of the shoes could have been from a completely separate event.

Lt. Bell carefully chose her words to identify the defendant as an individual present but not to accuse him of murder as opposed to merely assisting an injured person:

> Q: And who do you believe assisted, led or dragged her?
> A: It is my opinion that the Defendant is the one who did that.

4 RR 31/6-9. Whatever "that" was, i.e., assistance or assault, was never determined or even alleged by this witness.

Lt. Bell was aware that the DNA of an unidentified mail was found at the scene. ("Yes.") 4 RR 34/15-18.

The Defendant Herron's DNA was not found on the flashlight which was found near the body. 4 RR 41/17.

The Defendant Herron was excluded from the DNA found in a forensic vaginal swab of the deceased. 4 RR 42/16.

An important admission was made by Lt. Bell at 4 RR 43/23. Referring to a shirt:

> A: It was not determined that the sample was going to be sent to the lab.
> Q: Do you know with regard to that particular piece of of evidence it wasn't.?

A: I don't have a reason that it was not determined to be sent to the lab.

The reason was obvious: It was not sent to the lab because the State felt it had enough to convict Defendant Herron without giving him the benefit of potentially exculpatory evidence, i.e., that which would have identified another individual.

Then, at 4 RR 50/22-25:

Q: Can you identify any stains that you believe William Herron created with his blood based on your knowledge of the DNA testing?
A: No, I cannot.

Cross Examination concluded with this:

Q: Can you scientifically rule out, based on your training and experience, Ms. Human in an inebriated state, passing off or falling off that porch ; injuring herself, landing essentially on her face on that gravel, creating some of the cuts that we see; regaining consciousness; pulling herself up on the edge of that patio; stumbling, perhaps falling some more on her way to the steps; trying to clean up herself; making it as far as the bathroom, maybe even making it into the bedroom, dripping onto things before making her way back to the front area collapsing and dying; can you rule that out?
A: No, I cannot.

4 RR 52/19-53/6.

The flashlight found at the scene is then discussed. Witness Miller opines that the defendant hit Ms. Hyman with his hands, feet—and the flashlight. 6 RR 92/19. However, at 6 RR 93/2 there is this:

Q: Okay. Were you able to tie that flashlight to Mr. Herron in any way?
A: In—like forensically?
Q: Correct.
A: No, sir.

A bit later, beginning at 6 RR 93/18:

Q;:…Do you know that that flashlight was used to kill her?
A: I don't really understand what you're asking. Are you asking me if his DNA is on the flashlight?
Q: Was it?
A: No, sir, it was not.
Q: Fingerprints?
A: No, sir, it was not.
Q: Fibers from something matching his clothing?
A: No, Sir.
Q: Hair?
A: No, sir.
Q: Saliva?
A: No, sir.
Q: Nothing?
A. No, sir.

Ending at 6 RR 94/7.

At 6 RR 100/1, Lt. Miller states that "…there was unknown DNA found somewhere on the porch or the stairs…" Further, she "believes" that it was a bloodstain sample. 6 RR 100/7. ("Yes, sir, I believe so.") These references were to Item "Q" found on the step. 6 RR 101/20.

At 6 RR 112 this exchange takes place:

> Q: It didn't cause you any concern that you found a mixture of Liz' [Hyman's] and somebody else's DNA in a bloodstain but that you hadn't found Bill's anywhere in that blood or in the exterior whatsoever?
> A: No, sir. Stairs are a high traffic area.

Shortly after that at 6 RR 113/14-22:

> Q: Okay. Was a comparison ever made between the DNA on the stop and the DNA that was found her vagina?

A: are you asking if –
Q: If you know.
A: --the DNA on the steps and the DNA in the vagina were the same DNA?
Q: Correct.
A: I do not know the answer to that.

Then, asked why a bloody shirt that was found right next to the victim's body was not sent off for analysis, this followed:

Q: Why was that?
A: I guess we didn't believe it had any evidentiary value that was near her head where it was pooled up of blood. So we believe that the blood came out of her head and seeped into the shirt.

6 RR 114/17.

A bit later referring to the same non-tested shirt:

Q: Do ou believe it could be mixed with anybody else's, perhaps her attacker?
A: No, sir.
Q: Why not?
A: We-I don't' have an answer.

6 RR 116/23.

Asked whether DNA demonstrated that a ***particular person*** is a contributor, she answered:

A: We do not attribute the profile to any one individual. We provide the best possible scenario that explains that sample profile we obtained. It is **up to the jury to decide** that type of information with the information that we provided.

Again, at 5 RR 165/25:

> A: …it is not my opinion. In this matter I can only report to what I have found, and it's **up to the jury to decide.**

[emphasis added]

Thus, adhereing to the limitations of abstruse probability mathematics, the witness acting for the state dumps the mystery without guidance on a jury of twelve well meaning lay persons who, according to the court's notes, too about 90 minutes in an attempt to "rationally" digest the five volume record summarized above. The task could be manageable, or even easy, if the jury simply too, the bait, relied **irrationally** on the DNA evidence—which in the context of this case proved nothing relevant to the mechanism of injury , and voted to convict for murder. The DNA evidence at best did **nothing more than prove Appellant's presence at some point** in the still unknown sequence of events on the night of April 26-27.

Medical Examiner Barnhart only compounded the uncertaintyas to the mechanism of injury or death. She confirmed that many people who were intoxicated with Valium in their system would be asleep or passed out. 6 RR 40/11.

> Then this:
>
> Q: Could she have come out on her own under her own steam and fallen off that porch from either passing out or just losing her balance briefly losing consciousness? Is that possible?
> A: Yes.

6 RR 40/16.

And this:

> Q: Would it be possible for her to fall off this porch, essentially face-planting on that gravel and regain consciousness?
> A: Yes.
> ….
> Q: So, she pulls herself back up, begins walking over the stairs. Maybe she falls a few more times. That would be possible at that—at that intoxication level and now having suffered from some injuries, correct?
> A: It could be, yeah.

6 RR 40-41/3-9.

As noted in *Redwine, supra,* the courts cannot leave to juries the task of speculating between distinct alternatives. Even under the strict application of the current standard of review for legal sufficiency, this case fails because there is no way a jury could rationally convict.

Argumentns and Authorities Under Issue I-B

Issue 1-B Restated

The evidence was legally insufficient to support the verdict under a proposed modification suggested view of current state law which proposal the standard of review which calls for review of all evidence in a neutral light, in order to give full effect to both federal and Texas State law.

But there was a way in which the jury could have—and must have—reached an **irrational** verdict of guilty on the record described above. Simply put, the jury in this case was stampeded by DNA evidence, on what has been known and criticised as the "CSI" Effect.

Background—DNA and The "CSI" Effect

For years, commentators and some courts (often in dissent or concurrence) have noted that DNA evidence is subject to—and used because of—the so-called "CSI Effect". i.e., lay juries accustomed to a diet of television crime dramas have formed two related views of scientific forensic evidence: (1) that juries expect such evidence in some form regardless of its potential role or irrelevancy in a given case, and (2) that when such evidence is offered, juries accept it without question and in some cases, such as this, give it irrational weight in determining a verdict of guilty or not guilty.

The State's approach to this case was a illustration of the so-called "CSI Effect" to the prejudice of Appellant. The mere presence of Defendant was established and never seriously disputed. However, lay jurors, marinated in a diet of television crime dramas, have come to expect "scientific" evidence, even if it logically demonstrates nothing. *In Re Z.R.,* 2013 WL 4680241 *13, n. 4 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)(Sharp, J., dissenting and noting tendency for juries to be misled by technical testimony).

DNA statistics are **not** just another form of circumstantial evidence. A typical lay jury cannot be expected to grasp the subtlety of the distinction between using statistics—incorrectly and deceptively—to **suggest** the identify of a single individual as the culprit, especially in view of the enormous "numbers" of exclusion probabilities presented. Nor is the jury – unless it is composed of college professors and NASA engineers—likely to be capable of assessing the merits of the "expert's" calculations and techniques. That is so especially where, as here, the jury is fed raw numbers which are the product of arcane calculations which remain hidden in the "expert's mind an lab notes. The problems if further compounded, as noted, by the fact that the presence of Appellant Herron was not seriously in dispute; the DNA was just misleading window dressing for an otherwise speculative case.

Once fed such statistics, juries marinated in television lore are disposed to regard DNA evidence as confirmation beyond proof of holy writ, i.e., blind acceptance of DN. Courts too often do the same. See *Flores v. State,* 491 S.W.3d 6(Tex. App.—Houston [14th Dist.] 2016, pet. ref'd.)(Court of Appeals panel appearing to stress DNA evidence and concluding post conviction testing would not affect outcome). *Cf. Wilson v. State,* 185 S.W.3d 481 (Tex. Crim. App. 2006)(affirming, holding Appellant failed to demonstrate that he would not have been convicted if exculpatory results had been obtained through DNA testing. Justices Price and Womack dissented. Johnson, J., filed concurring opinion as follows:

> "The experts who come to court to present DNA evidence frequently come up with probabilities of such great magnitude that they are patently unsupportable to those who understand numbers and very impressive to those who do not….."Mathematics, a veritable sorcerer in our computerized society, while assisting the trier of fact in the search for truth, must not cast a spell over him."

Wilson, supra, 185 S.W.3d at 486-87, quoting *People v. Collins,* 438 P.2d 33 (Cal. 1968). *See, also, Adams v. State,* 2018 WL 2355280 (Tex. App.—Dallas 2018, pet. ref'd.; cert. denied). Whitehall, J., dissenting):

> "The distinction is critical where, as here, DNA evidence that the State urges puts appellant at the crime scene also puts at least two and possibly more than a dozen people there and there is **no evidence of who actually committed the crime."**

Adams, supra, at *17. [Emphasis added].

As a further example, see *Hernandez v. State,* 2018 WL 4904589 (Tex. App.—Beaumont 2018, pet. ref'd.) conviction of sexual assault of a child. Evidence without DNA was sufficient for conviction, but in some respects circumstantial or subject to jury rejection. DNA was admitted which proved only that (1) perpetrator could have been Defendant or any male relative; and (2) DNA admitted from panties which had been laundered and thus could have been transferred to the garments during washing. The court acknowledged that evidence apart from DNA was sufficient for conviction but nevertheless held that admission of DNA was not so prejudicial as to undermine the verdict. *13

> "Even if we assume that the trial court abused its discretion by admitting the DNA report and McKinney's testimony about it, the remaining evidence in the record supporting the jury's findings causes us to conclude that the effort, if any….did not affect Hernandez' substantial rights." *13.

But DNA did affect the most substantial of rights, i.e., a defendant's entitlement to have a jury unanimously and ***rationally*** *f*ind guilt under the court's charge.

In *Brooks v. State,* 323 S.W.3d 893, 901(Tex. Crim. App. 2010) concluded that "a legal sufficiency [appellate] standard of review is indistinguishable from a

factual sufficiency [appellate] standard of review. And thus made questions of fact pure questions of law. *Vernon, supra* at 831.

Evidence that is legally sufficient can be found factually insufficient in one of two ways, primarily "if the evidence supporting the conviction is "too weak" to support the factfinder's verdict. *Vernon, supra* at 829. At 830: Court of Appeals must (1) consider all the evidence in a neutral light; (2) must find factual insufficiency to prevent "manifest injustice", and (3) explain why the evidence is "too weak" or why conflicting evidence weighs greatly against the verdict. *Vernon, supra* at 831: " Although we are not to disregard biding precedent….we are certainly free to point out any flaws in the reasoning of the [binding] opinions." At 831, quoting Jennings, J., denial of en banc consideration in *Benge v. Williams,* 472 S.W.3d 684, 738 (Tex. App. (Houston [1st Dist.] 2014, aff'd 538 S.W.2d 466 (Tex. 2018)

Although "we are bound by precedent…we are not gagged by it." *Jones v. State,* 962 S.W.2d 96, 99 (Tex. App.—Houston [1st Dist.] 1997)(Taft J., concurring), aff'd 984 S.W.2d 254 (Tex. Crim. App. 1998).

This Honorable Court has been through the same thicket before. See, *Vernon v. State,* 571 S.W.3d 814 (Tex. App. – Houston [1st Dist.] 2019 pet. ref'd)(Jennings, J., concurring). Disputes over the abolition of factual sufficienty, i.e., reviewing all evidence in a neutral light, are grounded in Factual

Exclusivity Clause, Tex. Const. art. V, Sec. 6(a). "The decision of [the Texas Courts of Appeals] shall be conclusive of all questions of fact before them on appeal or error, as well as a parallel commndment in Texas Code of Criminal Procedure art. 44.25.

The Vernon panel felt bound by its own prior ruling in *Vernon, supra* at 828 in view of the binding precedent *Ervin v. State,* 331 S.W.3d 49 (Tex. App. Houston [1st Dist.] 2010, pet. ref'd.) and thus refused to resurrect factual sufficiency review.

Evidence that is legally sufficient could be found factually insufficient in one of two ways, primarily "if the evidence supporting the conviction is "too weak" to support the factfinder's verdict. *Vernon, supra,* at 829. Under *Vernon, supra at* 830, Court of Appeals must (1) consider all the evidence in a neutral light; (2) must find factual insufficiency to prevent "manifest injustice", and (3) explain why the evidence is "too weak" **or why conflicting evidence weighs greatly against the verdict.**

That burden on Appellant and this court is answered by giving appropriate weight to the concessions made by the State's expert witnesses, as cited above. It is not so much a question of conflicting, e.g., defense, evidence, but the interenal weakness of the State's own evidence .

A Modest Proposal

Appellant argues that if the tests for factual and legal sufficiency are logically identical, *Brooks, supra,* then there should be no bar to adopting the broader protections of Tex. Const. art. V, Sec. 6(a) and CCP art. 44.25 by conducting sufficiency review with a neutral assessment of the evidence.

There is no bar to Texas' providing protections which are broader than federal requirements, and certainly no requirement that Texas courts conform federal formulations of due process, e.g., *Jackson v. Virginia, supra,* without considering the practial implications of such rulings, as demonstrated in this case.

For a start, this Honorable Court is urged to conduct a sufficiency review by focusing on that evidence which is directly pertinent to the contested issue, i.e., the particular role of Appellant in the death of Ms. Hyman. In so doing, the court will quickly realize that the jury could only –and improperly—*speculate* as to what happened between Appellant and Ms. Hyman. DNA and "spatter" evidence could not determine those facts, and the jury was left to arbitrarily base its decision what amounted to forensic gossip between two camps of witnesses, none of whom actually saw the events.

Conclusion

The State may counter that in so doing, the courts raise the bar for the State in obtaining convictions, and that it forces the state to face the possibility of acquittal. **But that is the way our system is supposed to work** under the Texas Constitution and art. 44.25 of the Code of Criminal Procedure. Some crimes—if indeed they are crimes—simply cannot be solved or proved.

Prayer

Given the current state of precedent, Appellant prays that this court hold that the evidence herein was legally sufficient under any appliable and appropriate test, and that the case be reversed and an acquittal ordered.

Respectfully submitted,
/s/ Mark W. Stevens
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Certificate of Service

A true and correct copy of the foregoing instrument was served on Ms. Rebecca Klaren, ADA, via email/pdf on May 1, 2025.

Certificate of Compliance

___ The applicable portions of the foregoing instrument contain 11, 342 words.

/s/ Mark W. Stevens

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

mark stevens on behalf of mark stevens
Bar No. 19184300
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Envelope ID: 100333853
Filing Code Description: Brief Requesting Oral Argument
Filing Description: Brief Requesting Oral Argument
Status as of 5/1/2025 2:37 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
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