NO. 14-24-00241-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

JASON B. JACKSON,
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1579438
From the 482nd District Court of Harris County, Texas

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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PRESIDING JUDGE:	
FOR PRE-TRIAL AND VOIR DIRE:	Hon. Denise Bradley Judge Presiding
AT GUILT-INNOCENCE AND PUNISHMENT TRIALS:	Hon. Leslie Brock Yates Judge Presiding 482nd District Court Harris County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested.

STATEMENT OF THE CASE

Mr. Jackson was charged with the offense of aggravated sexual assault of an adult in Cause No. 1579438. Specifically, the indictment in the instant case provided:

> ...on or about December 30, 2009, did then and there unlawfully, intentionally and knowingly cause the penetration of the sexual organ of T.T., hereinafter called the Complainant, by placing his male sexual organ in the sexual organ of the Complainant, without the consent of the Complainant, namely, the Defendant compelled the Complainant to submit and participate by threatening to use force and violence against the Complainant, and the Complainant believed that the Defendant had the present ability to execute the threat, and by acts and words the Defendant placed the Complainant in fear that death and serious bodily injury would be imminently inflicted on T.T.

[C.R. at 15][1].

Mr. Jackson entered a plea of "not guilty" [5RR 58-59], and was found guilty of sexual assault as charged in the indictment. [7RR49]. Mr. Jackson initially elected to have his punishment assessed by the jury [CR710], but after being found guilty, was

[1]References to the Reporter's Record will appears [volume number + RR + page number]. E.g., [1RR 2] et seq. References to the Clerk's Record will appear as [CR + page number] and the Supplemental Clerk's Record will appear as [Supp. CR + page number]. E.g., "[CR 1]" and [Supp. CR 1]. State's Exhibits are abbreviated as "SX1," et seq. and Defense Exhibits as "DX1" et seq.

permitted by agreement to change his punishment election to the court. [7RR46; CR723]. Mr. Jackson pled true to the enhancement paragraph in the indictment alleging he had been convicted of the March 17, 2006 felony offense of possession of a controlled substance [8RR4]. He also stipulated to the evidence supporting this conviction. [8RR5]. The court assessed punishment at sixty (60) years in the Institutional Division of the Texas Department of Criminal Justice. [8RR17; CR722]. Mr. Jackson filed a timely Notice of Appeal on March 27, 2024, the date sentence was imposed. [CR 722]. No Motion for New Trial was filed. Mr. Jackson's brief is due filed on or before September 26, 2024.

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE: THE TRIAL COURT ERRED BY ADMITTING THE STATE'S TESTIFYING DNA EXPERT'S REPORTS AND OPINIONS THAT WERE PREMISED ON NON-OFFERED OR ADMITTED ASSERTIONS OF A NON-TESTIFYING ANALYST OVER DEFENSE COUNSEL'S OBJECTIONS IN VIOLATION OF THE CONFRONTATION CLAUSE AND THE SUPREME COURT'S OPINION IN *SMITH VS. ARIZONA*.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONIAL HEARSAY OF A COMPLAINING WITNESS TO AN EXTRANEOUS SEXUAL ASSAULT AT PUNISHMENT, OVER DEFENDANT'S CONFRONTATION CLAUSE OBJECTION.

STATEMENT OF FACTS

The Complainant's Allegation:

The complainant, T.T. testified she was sexually assaulted on her walk home from work on December 30, 2009. [6RR117, 129-30, 169-71]. She testified in 2009 she was 20 or 21 years old, and had three biological children – an 11 or 12 year old child, a 9 year old child and a 5 or 6 year old child. [6RR120-121, 188]. She lived in an apartment in southwest Houston in the "Mahatma Gandhi District" with her children, their father and two temporary guests. [6RR 122, 126-7]. She testified she did not want to review her medical records or listen to her audio interviews prior to testifying. [6RR 154].

At the time of her assault, T.T. worked at Michaels International as a waitress.

[6RR122]. She worked a nighttime shift from around 7:00 p.m. to 2:00 a.m. [6RR123]. On the night of December 30, 2009 she testified she left work before 2:00 a.m. because it was New Years and she wanted to get home by New Year's to be with her kids. [6RR130].[2] She agreed that she told police she got to work at 9:30 p.m. that night. [6RR 166-67]. She testified she left work at 11:00 p.m., insisting it was slow and her goal to get home to her family by midnight for New Years. [6RR169-170]. When questioned about discrepancies in her reporting the time she left work that night, she did not dispute telling the police she left at 1:00 or 2:00 a.m. [6RR170-71].

She testified that when she worked, she drank alcohol. [6RR147]. On this night, she had a few drinks - more than two. [6RR147]. She claimed not to have drunk enough to lose her memory because she did not want to be drunk in front of her kids. [6RR147]. However, on cross-examination she admitted she told the police she was tipsy when she left work. [6RR172].

To get to and from work, she would take a taxi, get a ride with a co-worker or when she had to, walk. [6RR124]. She testified at trial that she did not get rides home with her customers from work. [6RR130-31]. However, she does not recall telling

[2] Although the complainant's allegations spanned the night of December 30, 2009 into the morning of December 31, 2009, the complainant was confused and seemed to believe this occurred instead on New Years Eve into New Year's Day. [6RR167-69].

officers that she normally would get a ride home by one of her customers. [6RR175].

When she walked home from work, her walking route would be along the feeder for 59 Southwest Freeway to Gulfton and then home to Renwick. [6RR128]. This route would take her an hour to hour and half to walk home from work. [6RR129]. Because she left work early on December 30, 2009, before the time her shift ended, she could not ask a co-worker for a ride, so she walked home. [6RR131]. It was cold so she wore a "big gold bubble jacket." [6RR131].

T.T. testified that as she walked home that night a green van pulled up next to her. [6RR132, 180]. Two men got out and grabbed her and put her in the van. [6RR180]. She was not far from home and claimed to have an open knife inside her jacket pocket, but she froze. [6RR132]. She said she was pulled inside the van by what she thinks was her jacket, but she did not remember. [6RR133]. She could not see any faces. [6RR134]. Her jacket was unzipped, but she said somehow it was over her face and the fabric was wet and hot. [6RR135]. She said her wrists were being held together by what felt like fingers, or a big hand, that was tightly squeezing her. [6RR135-36]. She remembers being told, "Shut up. Shut up." [6RR136]. The people in the van were talking to each other, but she does not remember what they were talking about. [6RR137]. She felt "hitting, biting, licking" and wetness on her chest area and torso. [6RR138]. She felt licking and penetration inside her vagina.

[6RR138]. She does not remember if she felt anything around her anus. [6RR139]. She was trying to get free and trying to scream, but she felt like she could not breathe. [6RR139]. She could not defend herself, and does not know if there was a weapon. [6RR140]. She thought she was going to die and worried about her kids. [6RR140]. She was not given an opportunity to say no to the assailants, and she was not asked if she wanted sexual contact. [6RR141].

When they were finished assaulting her, she was thrown out of the van approximately a block away from her home. [6RR142, 175]. Although she was naked, her clothes were thrown out of the van too. [6RR142]. She got dressed and ran home. [6RR142].

When she got home, her "ex" Axcedric Williams and his cousin were there and wanted to know what had happened. [6RR143, 153]. Axcedric was the father of her kids, and she was with him for ten years. [6RR159]. T.T. said she split up with him more than ten years prior to trial. 6RR146, 159]. Axcedric called 911. [6RR179]. She does not recall the ambulance coming, but she remembers being examined. [6RR143]. She also spoke to police officers at the hospital. [6RR169].

Complainant's Report to Police:

She told police she walked home because she did not have money for a cab that night. [6RR145, 172]. But she also told police she had $300.00 and a pink and black

backpack stolen from her. [6RR172, 174]. She does not remember telling anyone she had $300 stolen, but if she did, she regrets it. [6RR 146]. She also claimed her ex told her to say she had money stolen. [6RR145].

Edgar De Jesus, a retired Houston Police Department officer, investigated T.T.'s allegation of sexual assault at the Memorial Southwest Hospital on December 31, 2009 at 11:00 a.m. [6RR209-211]. He spoke with the complainant and made a report. [6RR 212]. At first the complainant told Officer De Jesus she left work at 11:00 p.m. [6RR213]. However, then she said it was 2:00 a.m. [6RR214]. She also told him she normally gets a ride home from work from one of her clients. [6RR215]. The complainant told him she was tipsy when she left work. [6RR214]. With regard to where she was when the assailants in the van picked her up, she provided inconsistent locations. [6RR215]. DeJesus testified alcohol can affect the memory, as can the passage of time and experienced trauma. [6RR216].

At the time of her sexual assault examination, T.T. stated there were two assailants that sexually assaulted her. [5RR98-99]. Although she testified she did not remember it, in a recorded interview in October 2017, she told police that there were four men. [6RR185-186].

The Forensic Sexual Assault Examination:

T.T. remembers the examination at the hospital being cold and long. [6RR144].

She did not want to be talking about it and only wanted to sleep and shower. [6RR144].

Rachel Thomas, a Forensic Nurse Examiner testified on December 30-31, 2009 she was working as a forensic nurse with Memorial Hermann Hospital and performed the sexual assault examination of T.T. at the ER. [5RR67-68, 75, 89-90]. T.T. arrived at the ER by ambulance at 6:53 a.m. and was examined by Ms. Thompson at 8:38 a.m. [5RR 139, 142, 147].

T.T. told Ms. Thomas that she was sexually assaulted by two men. They did not hit her, but scratched and bit her and held her down. [5RR94]. Ms. Thompson performed a forensic examination of TT in a private room, where only the two of them were present. [5RR95]. The complainant's examination lasted one hour and four minutes. [5RR96]. During her testimony, Ms. Thompson read the complainant's medical history:

> "Patient states 'these two dudes jumped out of a green van and got me. The first one put my jacket over my head and was holding me down. They bit me right here' -- and she pointed to her right breast. 'They scratched me. They raped me. I don't know if it was one or two. Their penis went in my vagina. Somebody was trying to stick their finger in my ass. It went in. They were laughing. I feel all wet right here' -- and she points to her genital area. 'I think he come in me.'"

[5RR98-99]. T.T. informed Ms. Thomas this happened between 2:00 a.m. and 6:00 a.m. on 12-31-2009. [5RR99]. At the time of her examination the complainant said

she had not: douched, bathed or showered, had a bowl movement, vomited, eaten or drank anything, changed clothing or smoked anything. [5RR102]. She had, however, wiped or washed her body, urinated, and brushed her teeth or used mouthwash. [5RR 102]. No spermicide or lubricant was used. [5RR 102-3]. There was penetration of her vagina and anus. [5RR103]. The complainant indicted there was ejaculation in her vagina but she was unsure as to the anus. [5RR 103]. Ms. Thompson testified the complainant had some bruises and abrasions of different colors on her body, but could not say when these occurred. [5RR114, 116-117, 167]. She said T.T.'s injuries were consistent with her report of sexual assault. [5RR135].

The Collection of the Sexual Assault Kit:

Based on complainant's account of what transpired, Ms. Thompson collected evidence from the complainant, including: vaginal swabs, anal swabs, saliva swabs, fingernail swabs, swab from her right breast. [5RR120-123]. She also took head combings and collected the complainant's panties. [5RR121]. She only collected a pair of red panties that the complainant had been wearing. [5RR169]. She testified the panties had no stains or tears on them. [5RR171]. The complainant's last consensual sexual contact was December 29, 2009. [5RR104]. T.T. testified that at the time of her assault, she had a consensual sexual relationship with her ex, Axcedric Williams. [6RR153]. Although Axcedric was an African-American, T.T. does not

remember being asked by the forensic nurse, who took swabs of her body, what her ex's race was. [6RR154]. Ms. Thompson placed this evidence in a box, which was entered into evidence as State's Exhibit 9. [5RR 126-29].

Years Later: The Investigation

In 2015 the complainant was arrested for working at a sexually oriented business, without a license. [6RR149]. She pleaded guilty to the offense and received a 30-day jail sentence. [6RR150, 160]. In 2017, someone from Houston Police Department reached out to her. [6RR 150]. She could not talk openly with them because her kids were there. [6RR150]. She remembers being shown a photo of someone, but she could not identify them. [6RR150-51, 53; 9RRSX19]. Additionally, at trial, T.T. was unable to identify the person who assaulted her. [6RR155].

Outside the presence of the jury, the parties informed the court this was a "CODIS hit case." [5RR26]. Because it would be prejudicial for the jury to know what the CODIS database is, i.e., a DNA database of convicted felons whose DNA is obtained when they go into custody [5RR26-27], the parties agreed to explain this case involved an "investigative lead or some other phrasing where we're not using CODIS." [5RR26].

Officer Daniel, a retired Houston Police Department officer, testified he was working in the sexual assault case backlog division in 2014. [5RR194]. While

working in this division, he was assigned this case on November 6, 2017. [5RR191, 194, 200]. He was the fourth investigator assigned the case. [5RR 201-2]. He testified that the first investigator at the time of the assault was Pete Moreno, and he did not file charges. [5RR202]. At the time, there were no DNA matches, so the case was inactivated March 11, 2010. [5RR203]. The next Detective assigned was Detective Taylor in May 2017. [5RR203]. Taylor was promoted so Detective Garza was assigned the case in September 2017, and then he got it in November 2017. [5RR204]. Officer Daniel testified his predecessors conducted an interview of the complainant, and presented a photo array to her. [5RR206]. When asked if the complainant picked anyone out of the lineup, defense counsel objected to hearsay, which was sustained. [5RR207].

In Prison on Another Case, Mr. Jackson is Interviewed at the TDCJ:

Daniel testified that by the time he got the case, he felt it should be presented to the DA for filing charges. [5RR207-208]. Officer Daniel got a statement from Mr. Jackson on November 20, 2017. [5RR209].[3] Officer Daniel explained his partner

[3] The State asked Officer Daniel to describe the layout of the room where they interview took place. [5RR211]. Defense counsel objected and the court overruled the objection. However, as soon as the witness began responding that the interview was not at his office, the State said it would rephrase the question and the court called a recess. [5RR210]. Outside the presence of the jury, the parties, including the witness, discussed not getting into the fact it occurred in a jail or prison. [5RR213].

Detective Alex Agravante, and a new detective, Doug Escobar were present at the time of the interview. [5RR213]. Daniel testified he read Mr. Jackson the Texas statutory warnings on it "and it is the warnings to be given before questioning an adult in custody." [5RR215]. He recorded the interview with a pocket recorder, and identified the recording of his interview as State's Exhibit 10. [5RR216]. The State offered SX10 in evidence. Defense counsel renewed his previous objections, which were overruled and the recording was admitted. [5RR216-7]. The end of the interview was not recorded because the recorder stopped. [5RR217]. The state published SX10 to the jury. [5RR218]. During the interview, Mr. Jackson denied knowing the complainant, or having sexual relations with her. [5RR 219-220]. When Detective Daniel showed Mr. Jackson a photo of the complainant, SX20, he stated he did not know her. [5RR222]. Daniel described Mr. Jackson's demeanor as calm and cordial, but nervous toward the end. [5RR223].

Over defense counsel's objections to invading the provence of the jury, Det. Daniels testified he felt there was probable cause to charge the case. [5RR223]. In fact, earlier in his testimony he said by the time he received the case, it had already been presented to the District Attorney's Office. [5RR201-2]. At the motion to suppress hearing, Daniel said it was a correct statement that he "interviewed the defendant in this case on orders, so to speak, of an assistant district attorney who

wanted that done before any charges were filed." [5RR38] At the time of the interview, eight years had passed between the alleged sexual assault and when Detective Daniel showed Mr. Jackson the photographs of the complainant. [5RR 237]. Detective Daniel admitted he has no idea what year the black and white photo of the complainant, which he showed to Mr. Jackson, was taken. [5RR 236, 239].

Mr. Jackson's DNA:

Gabe Vasquez testified that from 2000 to 2020 he worked as an investigator for the Harris County District Attorney's Office. [5RR244]. Part or his responsibilities there was to collect buccal swabs for DNA testing. [5RR248-49]. This, he explained, can be obtained through either consent, a warrant or court order. [5RR248-49]. He was asked to collect a swab from Mr. Jackson. [5RR249]. He obtained Mr. Jackson's consent for this and on May 14, 2013, obtained a buccal swab from Mr. Jackson. [5RR253]. The voluntary consent to obtain buccal swab form was admitted in evidence as State's Exhibit 11. [5RR249-50]. The form shows the name of G. Vasquez and it was also witnessed by Mr. Jackson's attorney. [5RR253]. State's exhibit 30, and the contents of State's exhibit 32, which was the buccal swab of Mr. Jackson, were admitted. [5RR258-59]. Mr. Vasquez identified Jason Jackson as the person he collected a buccal swab from. [5RR259].

State's Testifying DNA Expert Ms. Powers' Testified to Her Opinion Based on Results of Another Lab's Testing and Analysis:

Ms. Powers, a DNA analyst with Houston Forensic Science Center testified to her opinion and interpretation of another lab's analyst's testing results and analysis.[4] When the sexual assault kit in this case was originally submitted to the lab, it contained a known sample for T.T. [6RR49]. Initially, there were no other known samples when the kit was submitted to the lab for testing. [6RR49]. The HFSC lab outsourced the processing and DNA testing of the kit in Jackson's case to another lab, Bode Technology. [6RR35]. Ms. Powers reviewed that data and report and found that an unknown profile was generated from this report. [6RR49-50]. If there are no known reference samples to compare the unknown profile to, "it sits and waits for a reference to be compared to it." [6RR 50].[5]

Ms. Powers testified that ultimately a known reference sample of Jason Jackson form a buccal swab, was submitted to the lab to compare to the unknown profile. [6RR50]. Powers explained the known reference from Mr. Jackson was also processed and analyzed by Bode, separately from the other evidence. [6RR105-6]. All of the analysis was done at Bode. [6RR105-6]. Powers testified that each comparison

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[4] See Point of Error Number One for detailed facts regarding this.

[5]This is what occurred in this case, until the CODIS hit, as discussed supra, revealed a potential match to the unknown reference sample.

she made was compared back to the Bode reference. [6RR105-6]. She claimed to have reviewed Bode's records and taken ownership of it before she used it in her comparisons. [6RR105-6]. In reviewing Bode's records, she documented her findings in her reports, State's Exhibits 12-15. [6RR51,76].

State's Exhibit 12 titled "laboratory report number 5" was dated August 13, 2018. [6RR57]. She stated she was the author of this report. [6RR57]. This report pertained to a portion of vaginal swab, item 1.2.1, which she said contained epithelial and sperm cell fractions. [6RR60]. Ms. Powers stated she was able to analyze and reach conclusions "...after reviewing the data and analysis that was done with this." [6RR57]. She testified Jason Jackson was excluded as a possible contributor to the epithelial fraction, but could not be excluded as a possible contributor to the sperm fraction. [6RR60; 9RRSX12]. Another item in SX12, item 1.4.1, a portion of anal swab, involved a straight extraction which does not provide for separating epithelial and sperm fractions. [6RR65; 9RRSX12]. The latter was not requested for this item. [6RR65-66].

State's Exhibit 13, titled "DNA lab report 6" dated February 4, 2020. Ms. Powers testified item 1.9.1, the potion of breast swabs contained a mixture of DNA from at least two contributors; T.T. was one known contributor but "...the foreign DNA is insufficient for comparison." [6RR68; 9RRSX13 at 61]. Item 1.8.2.1 the

sperm fraction portion of stain from the panties also had "insufficient data" for interpretation. [9RRSX13 at 61].

Because there were changes in DNA testing in 2020, Ms. Powers said these items, even with low data, were retested with STRMix, and the results were documented in State's Exhibit 14, titled "Lab Report No. 7" and dated January 24, 2022. [9RRSX14]. With the new STRMix testing, item 1.8.2.1, a portion of stain from the panties came back with a finding of "very strong support" on the applicable likelihood ratio that Mr. Jackson was a contributor to the item's DNA. [6RR71-72; 9RRSX14]. Under the new STRMix testing, the breast swab, item 1.9.1 came back with a finding of "strong support" that Mr. Jackson was a contributor. [6RR73-74; 9RRSX14].

State's Exhibit 15, dated May 22, 2023 pertains to a retesting of item 1.5.1, a portion of T.T.'s fingernail swabs. [6RR ;9RRSX15 at 68]. After being retested this item came back as mixture of two individuals, T.T, and "very strong support" that Mr. Jackson was a contributor to the DNA. [6RR75; 9RRSX15].

Punishment:

In exchange for an agreement to stipulate to his prior criminal history, the State agreed to Mr. Jackson changing his election as to punishment from the jury to the court. [7RR47]. Mr. Jackson pled true to having been convicted of the March 17,

2006 felony offense of possession of a controlled substance. [8RR4]. He also stipulated to the evidence supporting this conviction. [8RR5]. State's Exhibit 40, the written stipulation of evidence was admitted in evidence. [8RR18].

Per the agreement made between Mr. Jackson and the State regarding changing Jackson's election as to punishment, the State offered three exhibits: 1) SX41, a governmental record, and affidavit accompanied by records from Houston Fire and EMS regarding Mr. Jackson's other sexual assault case involving David Coronado [8RR5-6]; SX42, the SANE record from the other case in which David Coronado was a victim [8RR6]; and 3) SX43 a judgment of conviction showing Mr. Jackson was convicted of the offense of sexual assault in the case involving David Coronado. [8RR6; 9RRSX41, SX42, SX43]. Defense counsel had no objection State's Exhibit 42, the judgment of conviction and sentence. [8RR6]. However, defense counsel objected to State's Exhibit 41 and 42 based on relevance and the fact the witness is not present for cross-examination and confrontation, and the Sixth Amendment. [8RR7]. The Court overruled the objection, finding they were business records and they had been on file, with an affidavit, for more than 14 days before trial. [8RR7]. State's Exhibits 41, 42, and 43 were admitted. [8RR7].

The State then read SX42, which, via "language link Catalina 9195" was an alleged report from the complainant in that case. [8RR7]. Specifically, the following

was read:

> After the guy, Jason, abused me I escaped. His back was to me and that's when I ran out and hid behind the house. He forced me to have oral sex, his penis in my mouth. He penetrated my anus with his penis and did not use a condom. I was screaming to let me go, but he was very strong. After he let me go, I felt weak and tired. I think he may have put something in my drink.

[8RR7-8].

Additionally, the following judgments of prior convictions were admitted without objection from the defense: SX44, the judgment in Cause No. 998756, a conviction for possession of a controlled substance, penalty group 2 (methamphetamine), 4 grams to 400 grams [8RR8]; State's Exhibit 45, the judgment in Cause No. 1333636, a conviction for possession of a controlled substance, cocaine, with intent to deliver, more than 1 gram and less than 4 grams [8RR8]; and State's Exhibit 46, the judgment in Cause No. 1150860 (the same one mentioned in the stipulation), a conviction for a State Jail Felony offense of theft from person. [8RR8]. The penitentiary packet from the Texas Department of Criminal Justice, documenting Mr. Jackson served prison sentences for Cause Nos. 1333636, 1365892 and 998756 was admitted, without objection, as State's Exhibit 47. [8RR9-10]. Finally, the mandate from the First Court of Appeals following the appeal in Cause No. 1365892 was admitted, without objection, as State's Exhibit 48; and the mandate from the

Fourteenth Court of Appeals following the on appeal in Cause No. 1333636 was admitted without objection as State's Exhibit 49. [8RR9-10].

The defense presented no evidence at punishment. The court sentenced Mr. Jackson to sixty (60 years) in prison. [8RR17]. The State moved to stack the sentences, which the Court denied. [8RR17].

SUMMARY OF THE ARGUMENT

Mr. Jackson's right of Confrontation was violated when the State's testifying expert's reports and opinions, which were predicated on non-offered or admitted factual assertions of a non-testifying analyst from a different lab were admitted over his objection to the denial of his right of Confrontation. The United State's Supreme Court's opinion in *Smith v. Arizona* held that allowing a testifying expert to testify to another analyst's findings "...as long as he bases an 'independent opinion' on that material" would "allow for easy evasion of the Confrontation Clause." *Smith v. Arizona*, 144 S. Ct. 1785, 1799-800, 219 L. Ed. 2d 420 (2024). The statements in question were testimonial in that they were made for the primary purpose of criminal prosecution. They were necessarily offered for the truth of the matter asserted in that if they were not true, the expert's opinion would have been meaningless. Accordingly, Jackson "...had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records." *Id*. at 1801. In that the DNA

was the only evidence linking Mr. Jackson to T.T.'s sexual assault, there is no doubt he was harmed and the case should be reversed.

Furthermore, the trial court's decision to admit the state's extraneous evidence at punishment violated appellant's confrontation rights, under the federal and state constitutions, to confront his accusers. U.S. Const., Am. VI & XIV; Tex. Const., Art. 1, §10. *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *Langham v. State*, 305 S.W.3d 568, 575 (Tex. Crim. App. 2010). The complainant in the extraneous sexual assault case was not called by the State to testify and Mr. Jackson had no prior opportunity to cross examine them. The state's evidence was testimonial hearsay and the state failed to show the witness's unavailability. *See Crawford*, 541 U.S. at 68. This constitutional violation was preserved and error is reversible unless this Court finds beyond a reasonable doubt that admission of the evidence did not contribute to the verdict. Tex. R. App. Pr. 44.2(a). The details, presented without Confrontation unquestionably influenced the sentencer and contributed to the hefty sentence. Mr. Jackson's case presents reversible error.

ARGUMENT

POINT OF ERROR NUMBER ONE: THE TRIAL COURT ERRED BY ADMITTING THE STATE'S TESTIFYING DNA EXPERT'S REPORTS AND OPINIONS THAT WERE PREMISED ON NON-OFFERED OR ADMITTED ASSERTIONS OF A NON-TESTIFYING ANALYST OVER DEFENSE COUNSEL'S OBJECTIONS IN VIOLATION OF THE CONFRONTATION CLAUSE AND THE SUPREME COURT'S OPINION IN *SMITH VS. ARIZONA*.

A. Standard of Review Applicable to Points of Error One and Two:

Although the Court defers to a trial court's determination of historical facts and credibility, the Court reviews a constitutional legal ruling, i.e. whether a statement violates the Confrontation Clause, de novo. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006). See also *Lilly v. Virginia*, 527 U.S. 116, 136-37, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (explaining when reviewing the admissibility of out-of-court statements over a Confrontation Clause objection, courts should independently review whether the evidence satisfies the demands of the Constitution).

B. The Applicable Facts:

1. The Sexual Assault Examination:

On December 31, 2009 the complainant T.T. went to Memorial Hermann Hospital where Forensic Nurse Examiner Rachel Thomas performed a sexual assault examination of her. [5RR67-8, 95]. The complainant informed Ms. Thomas two males held her down, bit her right breast, scratched her, raped her by putting their

penis in her vagina and ejaculating inside her, and putting their finger in her anus. [5RR98-99, 102]. T.T. also reported that she scratched her assailant a few times. [5RR160]. Ms. Thomas noted T.T. said she did the following prior to coming to the hospital for the examination: wiped, washed, urinated, brushed her teeth and used mouthwash. [5RR 161]. She did not, however, change her clothes or panties prior to the exam. [5RR 162-63]. T.T. reported her last consensual sexual contact was on December 29, 2009. [5RR104]. Based on complainant's account of what transpired, Ms. Thompson collected evidence from the complainant, including: vaginal swabs, anal swabs, saliva swabs, fingernail swabs, and a swab from her right breast. [5RR120-123]. She also took head combings and collected the complainant's panties. [5RR121].

2. The State's Testifying DNA Expert: Ms. Powers of HFSC

Ms. Powers, a DNA analyst with Houston Forensic Science Center (HFSC) testified for the prosecution. At the time of her testimony in March 2024, she had worked for HFSC for twelve years. [6RR6-7]. When she first started working for HFSC, the HFSC lab was part of the Houston Police Department, and was called the Houston Police Department Crime Lab. [6RR83]. In fact, the complainant's sexual assault kit was first screened by analysts within the Houston Police Department's lab. [6RR85]. Ms. Powers said her lab was part of the Houston Police Department until

2014. [6RR84]. However, it was not until 2018 that the lab physically left the Houston Police Department building. [6RR85]. Ms. Powers acknowledged that when HFSC was part of the police department there were some "issues" and the lab separated from the police department. [6RR84]. She explained her job at HFSC is to write reports, and testify when needed. [6RR8].

3. Trial Testimony Regarding DNA Testing Generally:

Ms. Powers explained in general terms that DNA profiling is the process of taking a sample of DNA from one item, analyzing it and comparing it to another DNA sample. [6RR13-14]. The first step involves generating DNA profiles from items of evidence in the case. [6RR14]. Next, they generate DNA profiles from known references and then compare those known references to the evidence and include or exclude individuals as contributors of DNA. [6RR14]. A known profile is a reference or sample collected from a person - usually via taking blood or a buccal swab. [6RR15]. Not every case has known reference to compare DNA on the evidence to. [6RR16].

In general terms, Powers explained there are four main steps in DNA analysis. [6RR23]. The analysis process involves extracting the DNA from the sample so as to isolate it from all the non-DNA material. [6RR23]. The next step is quantification which means taking stock of how much DNA material there is. [6RR23]. The next

step is amplification where they amplify the DNA by making multiple copies of it. [6RR 23]. Finally, the last step is analysis which is "...that's where the product is sent through a capillary electrophoresis instrument that measures the DNA and generates data that we use to interpret and compare known references to." [6RR23].

4. Outsourcing of DNA Analysis:

Ms. Powers explained the HFSC receives about fifty sexual assault kits per week. [6RR20]. To facilitate processing of the sexual assault kits within the required time frame, the HFSC outsources processing of them. [6RR20-21]. According to Powers, HFSC has been outsourcing since 2012. [6RR21].

She explained that they outsource cases in different ways, and sometimes only outsource the extracts. [6RR34]. However, in most cases currently, they outsource the entire kit. [6RR34]. That means that when her lab first receives the box containing the sexual assault kit, it is packed up and sent off to the outsource lab who then opens it, inventories it, and works on it. [6RR20, 34]. The outsource lab then processes the kit and they write a report. [6RR20]. Then, the HFSC evaluates the report to make sure they agree with all their data, their findings, and make sure they followed their standard operating procedures. [6RR20]. Ms. Powers explained her role: "My main role is to write cases. So that once that data is generated in the lab, I'm immediately taking that data, interpreting it, writing up my findings in a report and testifying in

court...” 6RR23-4].

In the outsourcing process, Powers testified to “safeguards” used to make sure the results are accurate. [6RR24, 27]. In explaining the safeguards, she highlighted areas where error, or lack of accuracy can occur. For example, to avoid cross-case contamination, “we want to only open items of evidence from one case at a time” [6RR24]; to avoid cross-contamination between known references and items of evidence, “we don’t want to open items – known references at the same time we’re opening evidence so that we don’t have cross-contamination” [6RR24-25]; we use reagent blanks during the lab process whereby those samples contain reagents but no DNA and should come out clean if done properly [6RR25]; positive and negative controls are used to make sure the instruments and kits are working [6RR25]; after she writes a report, two other analysts review her work to see if they agree with her findings [6RR25]; they do not consume items of evidence so that some still remains if anyone wants to retest it [6RR26].

However, illustrative of the potential for human induced error, she explained if an instrument stops working, “...sometimes you can go past that step and that would be fine” but “...if you see that those safeguards that are put in place are not working the way that they should be, you would stop there and work backwards to make sure -- to see if you could find out where the issue was.” [6RR26].

She explained it can take a long to time to process the evidence, so it is common to test via a "batching system" where as many cases and samples are batched and tested at the same time to maximize the use of their instruments. [6RR22]. Powers also admitted known and unknown samples are run in the same batch so that the case finishes at the same time. [6RR26]. However, as a safeguard against contamination in this process, she cautioned that they would not place the samples next to each other during the testing because "...we wouldn't want the instrument to contaminate an evidence sample with a known reference and then it would look like to us that that reference was on the item of evidence." [6RR26-7].

When the outsourcing lab runs the samples, they use their own standard operating procedures, and their own instruments. [6RR33]. Ms. Powers said they are similar to those of HFSC, but not the same. [6RR33]. Powers testified this was a positive factor because the outsource lab then "...run[s] the samples as they would in their own accredited lab." [6RR34].

5. This Case: Mr. Jackson's Case Was Outsourced to Bode Technology

The outsource lab in Mr. Jackson's case was Bode Technology. [6RR35]. Ms. Powers explained that when HFSC outsources to Bode, Bode returns the original evidence to HFSC along with Bode's generated data, documentation and a report with their findings. [6RR35]. With regard to her role at HFSC with the DNA in the instant

case, Ms. Powers explained:

> I interpreted the data. I never opened this kit. I didn't analyze specifically; but the data that was generated from this kit, I was able to evaluate, interpret, and wrote reports.

[6RR44]. Powers identified State's Exhibits 12-15 as her reports. [6RR52]. The State offered the Powers' reports and on the defense's voir dire of her, she admitted her reports were based on data obtained from others and she did not do all the work that generated the data for the reports. [6RR53]. She admitted her testimony is based on the prior work of others the Bode Lab, the Houston Forensic Science Center and also the lab prior to the Houston Forensic Science Center, which was the Houston Police Department Crime Lab. [6RR53-4]. Defense counsel objected to the reports per the Confrontation Clause of the United States Constitution's Sixth Amendment, case law and hearsay. [6RR54]. Defense counsel's objection was overruled and Powers' reports, State's Exhibits 12-15 were admitted. [6RR54]. Thereafter the State questioned Powers about the "end result with each of the reports."

Powers testified from the chain of custody form in this case. With regard to storage of the sexual assault kit, Ms. Powers did not know what conditions the storage would have been in 2009 when the kit was collected, but it would have been stored a the Houston Police Department Property Room. [6RR85-87]. The chain of

custody showed the kit came into the Houston Police Department Crime Lab[6] in 2011 and was assigned to screening analyst Kirby Watson. [6RR87]. HPD Crime Lab analyst Watson screened the kit, evaluated the items for bodily fluids and took portions of the evidence and placed them in tubes that were outsourced to Bode Technology for processing. [6RR48, 87]. When the kit was originally submitted to the lab, it contained a known sample for T.T. [6RR49]. Initially, there were no other known samples when the kit was submitted to the lab for testing. [6RR49]. The items of evidence were then outsourced to the Bode Lab two years later on March 12, 2013. [6RR87.] Ms. Powers explained there is a difference between screening a sexual assault kit, which is what the analyst Watson at the Houston Police Department lab did in this case, and processing which is what happened when the kit was sent to the outsource lab, Bode Technology, in 2013. [6RR48].

6. Ms. Powers Reviewed Bode's DNA Work:

With regard to Mr. Jackson's case, Ms. Powers was clear she never touched the sexual assault kit in the case, she did not analyze, but from the data generated from the kit, she was able to evaluate, interpret and write reports. [6RR44]. With regard to her role with the DNA in the instant case, Ms. Powers explained:

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[6] This is what the Houston Forensic Science Center lab used to be called, before it separated from the Houston Police Department in 2014. [6RR84].

> I interpreted the data. I never opened this kit. I didn't analyze specifically; but the data that was generated from this kit, I was able to evaluate, interpret, and wrote reports.

[6RR44].

7. Powers' Vouched for the Work and Accuracy of Bode's Analyst

Ms. Powers stated it is customary for them to know the standard operating procedures of the outsource lab. [6RR37]. Powers reviewed Bode's documents, and if they had a question, or saw an error they would reach out to the outsource lab and ask if they meant to report it the way they did. [6RR37]. Ms. Powers said if her lab disagreed with the outsource lab they would work it in-house or interpret it the way they thought it should be. [6RR38]. When asked if she reviewed all the work that came before and considered all the data in making her report, she stated that she looked at it all, but she never put hands on the kit and did not screen it herself. [6RR41]. But she evaluated each of the pages to make sure they followed protocols. [6RR41]. She stated that having reviewed Bode's data, it was accurate. [6RR39]. Although she was merely looking at a report, Powers testified that based on her review of the case file, the procedures, protocols and compliance checks were in place at the time of the analysis. [6RR47].

She said it is not customary for all the individuals involved in the DNA process to court to testify. [6RR41]. Further, it was her opinion that it would not be necessary

to do so, because she claimed she has reviewed everything and she is the one taking ownership as the author of the comparison reports. [6RR41].

She further explained that based on her review of the case, it is clear there was a time when the lab learned some information that was able to be passed back to the agency about a possible suspect. [6RR43].

8. Powers' Opinion Based on Results of Bode's Analysis:

When the kit was originally submitted to the lab, it contained a known sample for T.T. [6RR49]. Initially, there were no other known samples when the kit was submitted to the lab for testing. [6RR49]. After the kit was processed and analyzed and she reviewed the data, an unknown profile generated from this report. [6RR49-50]. If there are no known reference samples to compare the unknown profile to, "it sits and waits for a reference to be compared to it." [6RR 50].[7] Ms. Powers testified that ultimately a known reference sample of Jason Jackson form a buccal swab, was submitted to the lab to compare to the unknown profile. [6RR50]. Powers explained the known reference from Mr. Jackson would have been processed and analyzed by Bode, separately from the other evidence. [6RR105-6]. All of the analysis was done at Bode. [6RR105-6]. Powers testified that each comparison she made was compared

[7]This is what occurred in this case, until the CODIS hit, as discussed supra, revealed a potential match to the unknown reference sample.

back to the Bode reference. [6RR105-6]. She claimed to have reviewed Bode's records and taken ownership of it before she used it in her comparisons. [6RR105-6]. Powers then compared the DNA profile from the known reference sample of Mr. Jackson to the unknown sample in State's Exhibit No. 9, and documented her findings in her reports, State's Exhibits 12-15. [6RR51,76].

State's Exhibit 12 titled "laboratory report number 5" was dated August 13, 2018. [6RR57]. She stated she was the author of this report. [6RR57]. This report pertained to a portion of vaginal swab, item 1.2.1, which she said contained epithelial and sperm cell fractions. [6RR60]. Ms. Powers stated she was able to analyze and reach conclusions "...after reviewing the data and analysis that was done with this." [6RR57]. She testified Jason Jackson was excluded as a possible contributor to the epithelial fraction, but could not be excluded as a possible contributor to the sperm fraction. [6RR60; 9RRSX12]. Another item in SX12, item 1.4.1, a portion of anal swab, involved a straight extraction which does not provide for separating epithelial and sperm fractions. [6RR65; 9RRSX12]. The latter was not requested for this item. [6RR65-66].

State's Exhibit 13, titled "DNA lab report 6" dated February 4, 2020. Ms. Powers testified item 1.9.1, the potion of breast swabs contained a mixture of DNA from at least two contributors; T.T. was one known contributor but "...the foreign

DNA is insufficient for comparison." [6RR68; 9RRSX13 at 61]. Item 1.8.2.1 the sperm fraction portion of stain from the panties also had "insufficient data" for interpretation. [9RRSX13 at 61].

Because there were changes in DNA testing in 2020, Ms. Powers said these items, even with low data, were retested with STRMix, and the results were documented in State's Exhibit 14, titled "Lab Report No. 7" and dated January 24, 2022. [9RRSX14]. With the new STRMix testing, item 1.8.2.1, a portion of stain from the panties came back with a finding of "very strong support" on the applicable likelihood ratio that Mr. Jackson was a contributor to the item's DNA. [6RR71-72; 9RRSX14]. Under the new STRMix testing, the breast swab, item 1.9.1 came back with a finding of "strong support" that Mr. Jackson was a contributor. [6RR73-74; 9RRSX14].

State's Exhibit 15, dated May 22, 2023 pertains to a retesting of item 1.5.1, a portion of T.T.'s fingernail swabs. [6RR ;9RRSX15 at 68]. After being retested this item came back as mixture of two individuals, T.T, and "very strong support" that Mr. Jackson was a contributor to the DNA. [6RR75; 9RRSX15].

C. Argument and Authorities

The Confrontation Clause of the Sixth Amendment guarantees the accused the right to confront the witnesses against him. U.S. CONST. amend. VI; *Crawford v.*

Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Testimonial statements are inadmissible at trial unless either the declarant testifies at trial or the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 54 (2004). As reiterated by the United States Supreme Court recently,

> And that prohibition applies in full to forensic evidence. So a prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307, 329, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)

Smith v. Arizona, 144 S. Ct. 1785, 1791, 219 L. Ed. 2d 420 (2024). Additionally, the Court reminded:

> this prohibition "applies only to testimonial hearsay," *Davis v. Washington*, 547 U.S. 813, 823, 126 S.Ct. 2266, 165 L.Ed.2d 224, and in that two-word phrase are two limits. First, in speaking about "witnesses"—or "those who bear testimony"—the Clause confines itself to "testimonial statements," a category this Court has variously described. Id., at 823, 826, 126 S.Ct. 2266. Second, the Clause bars only the introduction of hearsay—meaning, out-of-court statements offered "to prove the truth of the matter asserted."

Smith, 144 S. Ct. at 1788.

Analysis:

On June 21, 2024 the United State Supreme Court decided *Smith v. Arizona*, its most recent opinion dealing with the application of the Confrontation Clause to forensic-opinion testimony *Smith v. Arizona*, 144 S. Ct. 1785, 1791, 219 L. Ed. 2d

420 (2024).[8] Specifically, Smith's case concerned the application of application of the Confrontation Clause to a case, such as Mr. Jackson's, in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony." *Id.* As such, the Supreme Court's opinion of *Smith v. Arizona* speaks directly to the issue presented in Mr. Jackson's case: whether the admission of the State's testifying DNA expert's reports and opinions, which were premised on non-offered or admitted factual assertions of a non-testifying analyst violated the Confrontation Clause. Per the United States Supreme Court's opinion in *Smith*, the answer appears to be yes.

Smith v. Arizona:

In *Smith v. Arizona*, Mr. Smith was found in possession of a large quantity of what appeared to be drugs and drug paraphernalia. *Smith v. Arizona*, 144 S. Ct. at 1788. The State sent the seized items to a crime lab for scientific analysis. *Id.* Lab

[8] Prior post-Crawford cases involving forensic testing and the Confrontation Clause include: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)(certificates of analysis by nontestifying analysts as to composition, quantity, and weight of narcotics inadmissible under Confrontation Clause); *Bullcoming v. New Mexico*, 564 U.S. 647, 131 (2011)(report by blood alcohol content analyst conducting defendant's test inadmissible where analyst did not testify and defendant had no prior opportunity to cross-examine him); and *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012), abrogated by *Smith v. Arizona*, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024)(report of lab-created DNA profile admissible even though analysts that created it did not testify when testifying expert compared the profile to one in a database and determined they matched, where expert testified a profile from degraded sample would exhibit "telltale signs" and where report itself was not offered in evidence)(a plurality opinion abrogated by *Smith v. Arizona*).

analyst Elizabeth Rast ran forensic tests on the items, prepared a set of typed notes and a signed report about the testing, and concluded that they contained usable quantities of methamphetamine, marijuana, and cannabis. *Id.* Prior to trial, Rast stopped working at the lab and the State substituted another analyst from the same lab, Greggory Longoni, to "provide an independent opinion on the drug testing performed by Elizabeth Rast." *Id.* Accordingly, Arizona contended Rast's statements came into evidence, not for their truth, but to "show the basis" of Longoni's independent opinion. *Id*. Smith argued the State's use of the substitute expert – who had not participated in any of the relevant testing – to convey the substance of Rast's materials violated his Confrontation Clause rights. *Id.* at 1796. The Arizona State court disagreed, holding that Longoni could constitutionally "...present his independent expert opinions" as "based on his review of Rast's work" because her statements were then used only to show the basis of his opinion and not to prove their truth. *Id.* However, the Supreme Court rejected the Arizona Court's position, explaining the fallacy upon which it rested:

> ...consider it from the factfinder's perspective. In the view of the Arizona courts, an expert's conveyance of another analyst's report enables the factfinder to "determine whether [the expert's] opinion should be found credible." That is no doubt right. The jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based. If believed true, that basis evidence will lead the jury to credit the opinion; if believed false, it will do the opposite. **But that very fact is what raises the Confrontation Clause**

> **problem. For the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work.**[9]

Smith, 144 S. Ct. at 1798–99. The *Smith* Court stated Longoni's "independent opinions" were no more than what Rast had concluded. *Id.*, at 1799. This is so because:

> Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results. And likewise, the jury could credit Longoni's opinions identifying the substances only because it too accepted the truth of what Rast reported about her lab work (as conveyed by Longoni)."

Smith, 44 S. Ct. at 1799–800. Importantly,

> If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions.

Id.

The *Smith* Court held allowing a testifying expert to testify to another's findings "...as long as he bases an 'independent opinion' on that material" would "allow for easy evasion of the Confrontation Clause." *Id.* Further, the Supreme Court refused to condone Arizona's practice of allowing surrogate analysts to testify to the

[9] All emphasis supplied unless otherwise stated.

substance of another analyst's work "...as long as he bases an 'independent opinion' on that material" as it would permit admission in evidence of "...every testimonial lab report [] ... through any trained surrogate, however remote from the case." *Smith*, 44 S. Ct. at 1800. *Id.* It would deprive the accused of the "...right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted." *Id*. In stern terms, the *Smith* Court held: "In short, Arizona wants to end run all we have held the Confrontation Clause to require. It cannot." *Id.*

In the instant case, the prosecution was permitted to provide the same variation as Arizona did in the *Smith* case. That is, just like the testifying expert Longoni in *Smith*, even though Ms. Powers was not involved in any aspect of the testing done at Bode Technology's lab, she was permitted to testify to what Bode's analysts did and found in their testing, as long as she based an "independent opinion" on that material. See 6RR52 (Powers stated formed opinions after reviewing Bode's materials). Ms. Powers admitted her testimony is based on the prior work of others the Bode Lab, the Houston Forensic Science Center and also the lab in existence prior to the Houston Forensic Science Center, which was the Houston Police Department Crime Lab. [6RR53-4]. Powers admitted her reports were based on data obtained from others and she did not do all the work that generated the data for the reports. [6RR53]. Ms. Powers described her role thusly: "I interpreted the data. I never opened this kit. I

didn't analyze specifically; but the data that was generated from this kit, I was able to evaluate, interpret, and wrote reports." [6RR44].

Important to a determination of whether Ms. Powers rendered an "independent opinion," she stated she "didn't analyze" the data from Bode in the instant case. [6RR44]. That being the case, what data did she review and what did the review entail? First, and importantly, it is clear she considered not only raw machine-generated data but other "documentation and a report stating [Bode's] findings." [6RR35]. Second, Powers describes her own role in the partnership with Bode as being one of a report-reviewer, not an independent opinion renderer:

> "They process the kit. They write a report. And then we would evaluate that report once it comes back and make sure that we agree with all of their data, their findings, make sure they also followed their standard operating procedures.

[6RR20]. The following colloquy also shows that Powers's "independent opinion" was, like Longoni's "independent opinion" in *Smith*, was no more than what the non-testifying Rast had concluded:[10]

> Q. Okay. So after that is done, you have -- you have reports from this machine, this instrument, that are then printed up, I presume, or they're downloaded into a database and then someone interprets that, correct?
>
> A. Yes.
> Q. All right. And Bode had an individual who did that?

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[10] See *Smith*, at 1799.

A. Yes.

Q. Okay. And then you also checked what Bode did and did your own interpretation; is that correct?

A. Yes.

Q. All right. Are you -- is it your testimony you relied on their interpretation and then just kind of said, oh, yeah, that -- that was good, and basically adopted it or did you do your own?

A. Well, so our lab evaluated it. So I did not do this exact review or ownership review; but yes, people -- two people in our lab took this Bode information, looked at it individually, made sure that they saw the same things, made sure that if they called it a mixture, we also thought it was a mixture, if they called it single source, we also thought it was single source, that we -- the number of contributors to that mixture.

[6RR104-5]

In *Smith*, Longoni, the testifying expert, had the same role as that described by the testifying expert Ms. Powers in Mr. Jackson's case. In reviewing and testifying about Bode's data Powers did exactly the same as Longoni in rendering her "independent opinion." Indeed, Longoni testified to Rast's findings regarding the identity of the seized substances, the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. *Smith*, 144 S. Ct. at 1800–01. The *Smith* Court noted although Longoni was familiar with the lab's general practices, he had no personal knowledge of Rast's testing of the seized items. "Rather, as his testimony makes clear, what he

knew on that score came only from reviewing Rast's records:"

Longoni's Testimony Regarding His Independent Opinion of the Testing of Evidence in the Case:

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

A Yes

.

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

A Yes.

Q Were they followed?

A Yes.

.....

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

A Yes.

Q And what was used?

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

Q That was done in this case?

A Yes, it was.

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

A According to the notes, yes.

.....

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

A Yes.

Q What is that opinion?

A That is a usable quantity of marijuana.

Smith, 144 S. Ct. at 1799. The Supreme Court characterized Longoni's "independent opinions" as being predicated on the truth of Rast's factual statements. *Smith*, 144 S. Ct. 1785, 1799–800. Specifically, Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results." *Id.* In so doing, the *Smith* Court said "Longoni thus effectively became Rast's mouthpiece." *Id.*

Similarly, Ms. Powers testified to safeguards that are in place to make sure results are accurate [6RR25, 36] and she receives a copy of Bode's "standard operating procedures" and reads those to make sure Bode uses extraction blanks, reagent blanks, has positive and negative controls and that the analysts' work gets reviewed. [6RR37]. Although she was not involved in Bode's testing, in the context of testifying to the Bode analyst's findings, Powers assured Mr. Jackson's jury that

based on her training and experience, Bode analyzes samples in an accurate and reliable way. [6RR38]. However, when asked if there were any in errors in the data received from Bode, she stated " there were no errors in the data that I received that would have risen to the level of I need to say something or we wouldn't be at this point. It would have already been fixed before." [6RR39]. Powers continued, "so sometimes they might have an administrative error on the report. They missed the word "the." And we'll just say, we noticed that you missed this word, but we understand the scope of what the sentence means." [6RR39].

Powers's role in reviewing Bode's data and reports, as she described it, was the same as Longoni's. In this regard Powers, like Longoni, served as a mouthpiece for the factual findings of Bode Laboratories. The *Smith* Court explained therefore, that since Arizona offered up the missing analyst's factual findings for its truth; and, if it was also testimonial,[11] "Smith would then have had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records." *Smith v. Arizona*, 144 S. Ct. 1785, 1801, 219 L. Ed. 2d 420 (2024).

As discussed below, notwithstanding *pre-Smith v. Arizona* precedent from the Court of Criminal Appeals to the contrary, the absent Bode analyst's factual findings

[11] The *Smith* Court was not asked to decide if the evidence was testimonial, and thus did not decide this matter, but vacated and remanded to the State court to make that determination. *Smith*, 144 S. Ct. at 1802.

were indeed testimonial. Thus, their admission through Powers violated Mr. Jackson's right of Confrontation.

Paredes v. State and *Molina v. State*:

There are cases from the Court of Criminal Appeals that may appear to defeat Mr. Jackson's Confrontation Clause claim. *See Paredes v. State*, 462 S.W.3d 510, 512 (Tex. Crim. App. 2015)(holding analyst's testimony regarding a DNA match based on her analysis of raw data compiled by three technicians who performed steps in the process, did not violate Confrontation Clause) and *Molina v. State*, 632 S.W.3d 539 (Tex. Crim. App. 2021) (holding admission of analyst's expert testimony about DNA comparison analysis based on computer generated data from another lab did not violate Confrontation Clause). However, these cases were decided prior to the United State's Supreme Court's opinion in *Smith v. Arizona*, and as discussed below, in light of the holding in *Smith*, these cases are not controlling.

In *Paredes v. State*, the testifying expert Robin Freeman was from the same private lab, Identigene, as the three other Identigene analysts that participated in "each step of the DNA testing in order to generate raw DNA data." *Paredes v. State*, 462 S.W.3d 510, 512 (Tex. Crim. App. 2015). Even though she merely supervised the other analysts' work in conducting the DNA testing, Freeman testified to her conclusions as to a DNA match based on the data the other analysts developed. *Id*.

at 518. The Court of Criminal Appeals held the evidence in Paredes did not violate the Confrontation Clause because it was not "testimonial." Id. at 519. As discussed, *supra*, the Confrontation Clause "applies only to testimonial hearsay," *Davis v. Washington*, 547 U.S. 813, 823, 126 S.Ct. 2266, 165 L.Ed.2d 224, and thus is limited to 1) "witnesses"—or "those who bear testimony"—the Clause confines itself to "testimonial statements; and 2) the Clause bars only the introduction of hearsay—meaning, out-of-court statements offered "to prove the truth of the matter asserted." *Smith*, 144 S. Ct. at 1788. Where *Smith* focused on the second factor, finding the non-testifying expert's testing results were offered for their truth as the basis of the testifying expert's opinion [*Smith*, 44 S. Ct. at 1799–800], *Paredes* focused on whether the non-testifying analyst's data was testimonial. *Id.* at 519.

In reaching the conclusion the testimony did not violate the Confrontation Clause, the *Paredes* Court's analysis focused on several factors:

> 1) Without Freeman's independent analysis, the DNA profiles, the raw, computer-generated data produced by Identigene analysts (that the capillary electrophoresis instrument produced) stand for nothing on their own;
>
> 2) Machine generated data is not the functional equivalent of live, in-court testimony because it did not come from a witness capable of being cross-examined. They came from a computer; and

3)the testifying analysis used non-testimonial information—computer-generated DNA data—to form an independent, testimonial opinion and appellant was given the opportunity to cross-examine her about her analysis.

Paredes v. State, 462 S.W.3d 510, 519 (Tex. Crim. App. 2015). In *Molina v. State*, the Court of Criminal Appeals reiterated the *Paredes* holding and underlying rationale.[12]

The *Paredes* holding, however, is irreconcilable with what *Smith* says about basis evidence. First, like *Smith*, the "basis" evidence produced by the non-testifying analyst in *Paredes* was necessarily offered for its truth as a basis for Powers' opinions. *See Smith*, 144 S. Ct. at 1798 (holding "the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert's opinion;" and "'[t]here is no meaningful distinction between disclosing an out-of-court statement' to 'explain the basis of an

[12]*Molina v. State*, 632 S.W.3d 539, 547 (Tex. Crim. App. 2021).In *Molina* v. State, the Court or Criminal Appeals followed *Paredes* and further expounded on the non-testimonial nature of DNA data and remarked that admission of this evidence as the basis of a testifying witness's opinion reduced concerns about problems with human-error because the non-testifying witness could verify her conclusions were properly generated, and testify about the safety measures in place to detect errors. *Molina*, 632 S.W.3d at 544). Problematically, this reasoning leads back to the very problem the *Smith* Court held violated Confrontation: where the testifying Longoni became a "mouthpiece" for the non-testifying Rast by testifying to: "...the precautions ([Rast] said) she took, the standards ([Rast] said) she followed, the tests ([Rast] said) she performed, and the results (Rast] said) she obtained. *See Smith*, 144 S. Ct. at 1801.

expert's opinion' and 'disclosing that statement for its truth.'"). *Id.*

The issue in Mr. Jackson's case, as in *Smith*, is whether the non-testifying analyst's factual assertions upon which Powers predicated her opinions was "testimonial" for purposes of the Confrontation Clause. With regard to whether the evidence is testimonial, the *Smith* Court noted

> What remains is whether the out-of-court statements Longoni conveyed were testimonial. As earlier explained, that question is independent of everything said above: To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other. The latter, this Court has stated, focuses on the "primary purpose" of the statement, and in particular on how it relates to a future criminal proceeding. A court must therefore identify the out-of-court statement introduced, and must determine, given all the "relevant circumstances," the principal reason it was made

Smith, 144 S. Ct. at 1801. Under the "primary purpose" standard the document's primary purpose must have "a focus on court." *Id.* The issue of whether the DNA data produced by the non-testifying Bode analyst is created with a focus toward a "future criminal proceeding," Powers testified to the fact sexual assault forensic examination kits need to be processed within a certain time frame [6RR21]; she spoke of there being a two-way road with DNA information between the law enforcement agency and the lab, i.e., "we might get known references submitted to us and they would be excluded from the item of evidence. So then we would hope that they would collect more known references that they could submit to us, and then possibly one

could be included [6RR42-43];" Powers described the DNA results themselves are made with an eye toward reliability in matching a suspect to case evidence, i.e., a known reference from a suspect would be not be extracted next to evidence samples [6RR103]; Powers testified it is "very common" for the District Attorney's Office to make requests with regard to testing – furthermore, she stated that is what happened in Mr. Jackson's case [6RR72-73].

Furthermore, other jurisdictions have applied the primary purpose test to determine that DNA data and reports were testimonial. *People v. John*, 27 N.Y.3d 294, 307, 52 N.E.3d 1114 (2016). In *People v. John*, the New York court found the DNA data and reports' primary purpose was for proving a fact in a criminal proceeding. Id. Specifically the court noted:

> Swabs from the gun were then tested by an accredited public DNA crime laboratory with the primary (truly, the sole) purpose of proving a particular fact in a criminal proceeding—that defendant possessed the gun and committed the crime for which he was charged.

People v. John, 27 N.Y.3d at 307–08. For this reason, the court noted:

> The testing analysts purposefully recorded the DNA profile test results, thereby providing the very basis for the scientific conclusions rendered thereon. Under these circumstances, the laboratory reports as to the DNA profile generated from the evidence submitted to the laboratory by the police in a pending criminal case were testimonial. The DNA profiles were generated in aid of a police investigation of a particular defendant charged by an accusatory instrument and created for the purpose of substantively proving the guilt of a defendant in his pending criminal action.

Id, at 308.

Conclusion:

Mr. Jackson's right of Confrontation was violated when the State's testifying expert's reports and opinions, which were predicated on non-offered or admitted assertions of fact of a non-testifying analyst. Because the State chose to deny Mr. Jackson his right of Confrontation, error is presented and preserved. As for harm- the only evidence linking Mr. Jackson to T.T.'s sexual assault is from the DNA. There is no doubt he was harmed and the case should be reversed.

POINT OF ERROR NUMBER TWO: THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONIAL HEARSAY OF A COMPLAINING WITNESS TO AN EXTRANEOUS OFFENSE AT PUNISHMENT, OVER DEFENDANT'S CONFRONTATION CLAUSE OBJECTION,

A. Standard of Review:

Although the Court defers to a trial court's determination of historical facts and credibility, the Court reviews a constitutional legal ruling, i.e. whether a statement violates the Confrontation Clause, de novo. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006). See also *Lilly v. Virginia*, 527 U.S. 116, 136-37, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (explaining when reviewing the admissibility of out-of-court statements over a Confrontation Clause objection, courts should independently review whether the evidence satisfies the demands of the Constitution).

B. Applicable Facts:

The State agreed to Mr. Jackson changing his election as to punishment from the jury to the court, provided Jackson stipulate to his prior criminal record. [7RR47]. Per this agreement the State offered three exhibits: 1) SX41, a governmental record, and affidavit accompanied by records from Houston Fire and EMS regarding Mr. Jackson's other sexual assault case involving David Coronado [8RR5-6]; SX42, the SANE record from the other case in which David Coronado was a victim [8RR6]; and 3) SX43 a judgment of conviction showing Mr. Jackson was convicted of the offense of sexual assault in the case involving David Coronado. [8RR6; 9RRSX41, SX42, SX43]. Defense counsel had no objection State's Exhibit 42, the judgment of conviction and sentence. [8RR6]. However, defense counsel objected to State's Exhibit 41 and 42 based on relevance and the fact the witness is not present for cross-examination and confrontation, and the Sixth Amendment. [8RR7]. The State offered no explanation as to the why Mr. Coranado could not testify in person, subject to the Confrontation Clause. The Court overruled defense counsel's objections, finding they were business records and they had been on file, with an affidavit, for more than 14 days before trial. [8RR7]. State's Exhibits 41, 42, and 43 were admitted. [8RR7].

Using "language link Catalina 9195," the State then read SX42, the

complainant David Coronado's sexual assault allegation against Mr. Jackson. [8RR7]. Specifically, the following was read:

> After the guy, Jason, abused me I escaped. His back was to me and that's when I ran out and hid behind the house. He forced me to have oral sex, his penis in my mouth. He penetrated my anus with his penis and did not use a condom. I was screaming to let me go, but he was very strong. After he let me go, I felt weak and tired. I think he may have put something in my drink.

[8RR7-8].

C. Argument and Authorities:

The Court's Ruling

In overruling Mr. Jackson's Confrontation objections the court implied Jackson somehow waived his objection because the business records and they had been on file, with an affidavit, for more than 14 days before trial. [8RR7]. The Texas Rules of Evidence at issue, Rule 902 (10) provide a means to authenticate provides that business records accompanied by affidavit that is served in accordance with the rule is self-authenticating. Tex. R. Evid. 902 (10). Texas Rule of Evidence 803(6) provides an exception from the rule excluding hearsay for business records:

> made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack

> of trustworthiness.

TEX.R. EVID. 803(6). However, the law is clear the filing of business records with affidavit pursuant to Tex. R. Evid. 902(10) does not require the other party to respond to the filing. In a case involving this rule, *Landrum v. State*, a sister court of appeals held:

> ...Rule 902(10) does not require that the other party respond in any way. Instead, where a party has established an adequate predicate or foundation for the admission of business records, they may be admitted as an exception to the hearsay rule.

Landrum v. State, 153 S.W.3d 635, 638 (Tex. App.—Amarillo 2004, no pet.). As such, contrary to the trial court's implicit position otherwise, Mr. Jackson was not duty bound to respond to the State's filing of these business records with affidavit, and not having responded was not sufficient to waive a constitutional objection to violation of his right of Confrontation. Indeed, with regard to the right of Confrontation where testimonial statements are involved "...the Framers [did not mean]to leave the Sixth Amendment's protection to the vagaries of the rules of evidence." *Smith v. Arizona*, 144 S. Ct. 1785, 1797, 219 L. Ed. 2d 420 (2024). Further, "...federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules."

Id. It is axiomatic the Confrontation Clause trumps evidentiary rules. *Crawford*, 541 U.S. at 68; *Gonzalez*, 195 S.W.3d at 116.

The Right of Confrontation:

The Confrontation Clause of the Sixth Amendment, applicable to the states through the Fourteenth Amendment, requires "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." *Langham v. State,* 305 S.W.3d 568, 575 (Tex. Crim. App. 2010); U.S Const. Am. VI.

"Its main purpose is to afford the defendant "the opportunity of cross-examination because that is 'the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Johnson v. State*, 490 S.W.3d 895 (Tex. Crim. App. 2016) (*quoting Davis v. Alaska*, 415 U.S. 308, 316 (1974). *Gutierrez v. State*, 516 S.W.3d 593, 596 (Tex. App—Houston [1st Dist.] 2017, pet. ref'd.

In accordance with this constitutional right, out-of-court statements offered against the accused that are "testimonial" in nature are objectionable unless the prosecution can show that the out-of-court declarant is presently unavailable to testify in court and the accused had a prior opportunity to cross-examine him. *Langham v. State*, 305 S.W.3d 568, 575–76 (Tex. Crim. App. 2010) *citing Crawford*, 541 U.S. at 59. The burden is on the state, when confrontation is raised, to show either that the

evidence does not contain testimonial hearsay statements or that the statements are admissible nevertheless. *De La Paz v. State*, 273 S.W.3d 671, 681-82 (Tex. Crim. App. 2008).

As stated *supra*, the State made no effort to show the witness was unavailable to testify in a manner that afforded Mr. Jackson his right of Confrontation. Whether a statement is testimonial is a question of law that appellate courts review de novo. *Wall*, 184 S.W.3d at 742. The legal ruling of whether a statement is testimonial under *Crawford* is determined by the standard of an objectively reasonable declarant standing in the shoes of the actual declarant. On that question trial judges are no better equipped than are appellate judges, and the ruling itself does not depend upon demeanor, credibility, or other criteria peculiar to personal observation. *Id.* at 742-43 (citations omitted).

A statement is nontestimonial when "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822; 126 S.Ct. 2266, 2273 (2006). A statement is testimonial when its primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." *Id*. at 822, 126 S.Ct. at 2273-74); *Gutierrez v. State*, 516 S.W3d 593, 597 (Tex.App.—Houston [1st [Dist.] 2017, pet. ref'd).

A statement is testimonial when "the primary purpose of the interrogation is to

establish or prove past events potentially relevant to later criminal prosecution…. [Such statements] are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination" *Davis*, 547 U.S. at 822-30.

In this case, the primary purpose of the complainant's interview with the Sexual Assault Nurse Examiner was for a Sexual Assault Forensic Examination to assist law enforcement by gathering evidence in anticipation of future litigation- and the state in this case was using that evidence as a surrogate for the live testimony of the complainant.

This Court has rejected the argument that the Confrontation Clause does not apply at punishment. *Dixon v. State*, 244 S.W. 3d 472, 482-83 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), *citing Russeau v. State*, 171 S.W. 3d 871, 880-81 (Tex. Crim. App. 2005) and *Grant v. State*, 218 S.W.3d 225, 232 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

Constitutional violations require reversal unless the reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. Pr. 44.2(a).

The state made no showing of David Coranado's unavailability- a black-letter requirement of the *Crawford* ruling. *Crawford*, 541 U.S. at 59. The admission Coronado's statements to the forensic nurse examiner in the SANE report was a direct

violation of Jackson's right to Confrontation under the Sixth Amendment to the United States Constitutions.

The admission of the extraneous evidence violated the main purpose of the Confrontation Clause: to afford the defendant afford the defendant "the opportunity of cross-examination because that is 'the principal means by which the believability of a witness and the truth of his testimony are tested.' " *Johnson v. State*, 490 S.W.3d 895 (Tex. Crim. App. 2016) (*quoting Davis v. Alaska*, 415 U.S. 308, 316 1974).

There can be no reasonable doubt that Coronado's statement in the SANE report, produced for the criminal prosecution, contributed to the punishment. With regard to this error, Mr. Jackson's case should be reversed and remanded for a new punishment hearing. Tex. R. App. Pr. 44.2(a).

PRAYER

Mr. Jackson respectfully requests that this court reverse his judgment of conviction and remand for a new trial, or alternatively reverse for a new punishment trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing Brief for Appellant to the Harris County District Attorney via service through efiling on the day the brief was filed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

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