No. 21-269

In The
Supreme Court of the United States

ANTHONY CARTER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should create a new sufficiency standard for technical evidence supported by expert testimony and depart from the uniformly applied standard developed by this Court in *Jackson v. Virginia* in 1979.

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INTRODUCTION

The Texas Rules of Evidence, modeled after the Federal Rules of Evidence, allow for expert testimony that will "help the trier of fact to understand the evidence or determine a fact in issue." TEX. R. EVID. 702. The very purpose of the rule is to assist the factfinder in understanding complex or specialized evidence. This most basic and common notion of evidence undercuts Petitioner's argument that the evidence in this case was too difficult for a rational juror to comprehend. The subject material—the chemical makeup of harmful synthetic cannabinoids—is

admittedly difficult, but that is the very reason the rules of evidence allow for experts to assist factfinders in understanding the evidence or determining a fact in issue. Despite this well accepted practice, Petitioner now seeks to create two different standards of review: one to apply to offenses with non-technical elements, and another, more stringent standard, to apply to offenses with technical elements. Or perhaps also to cases involving technical subject matter? The extent of the argument is unclear and quickly leads to the unsustainability of such a bifurcated, offense-dependent, standard of review system that lacks any precedent. As the court below observed:

> At first glance, it seems irrational to expect an ordinary factfinder to make an inference regarding positioning of certain components in a synthetic compound. But, the mere fact that an ordinary factfinder, prior to any evidence being presented, could not make the required inferential step, does not mean that an informed factfinder could not reasonably make such an inference. That is all to say that an ordinary jury could still draw a reasonable inference from an expert's testimony about technical elements as long as each inference is supported by the evidence presented at trial. And the jury's inference here that the components were positioned according to the requirements of Section 481.1031(b) is supported by the evidence. Pet. App. B, 10.[1]

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[1] Petitioner's appendices are mislabeled. Petitioner's Appendix A is actually the Seventh District Court of Appeals' opinion,

In declining to create a second standard to evaluate the sufficiency of evidence, the Texas Court of Criminal Appeals (TCCA) decided in a unanimous opinion that there was sufficient evidence for a rational juror to conclude beyond a reasonable doubt that fluoro-ADB is a controlled substance within the scope of Texas Health and Safety Code section 481.1031(b)(5). Pet. App. B, 9. Jurors have long been permitted to draw inferences from basic facts to ultimate facts. With wholly uncontroverted testimony that fluoro-ADB is controlled by Penalty Group 2-A, the TCCA did not stretch reasonable inferences from the evidence beyond an informed jury's understanding to reach the correct result.

JURISDICTION

The TCCA is the state court of last resort for criminal cases in Texas. The TCCA affirmed the judgment in this case on March 31, 2021. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a).

and Petitioner's Appendix B is the Texas Court of Criminal Appeals' opinion. This Brief in Opposition will reference appendices A and B as they are included in the Petition for Writ of Certiorari notwithstanding the incorrect captions.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Legislative history

Before 2015, the Texas Controlled Substances Act classified synthetic cannabinoids by name. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.1031 (West 2013). Because of the way synthetic drugs are made, drug makers were able to evade the law by changing the synthetic compounds by one or two molecules to create equally potent synthetic drugs that were not covered by the statute. Pet. App. B, 2. In response, the legislature changed section 481.1031 to classify synthetic compounds by structure instead of by name. TEX. HEALTH & SAFETY CODE ANN. § 481.1031 (West 2015). The amended statute identifies three different parts of a molecule and prohibits the positioning of the listed components in certain sequences that would make up a harmful synthetic substance. *Id*. Finally, the law could stay ahead of the drug makers instead of vice versa.

Section 481.1031 now lists some compounds by name like the traditional penalty groups name cocaine or methamphetamine, for example, but it also classifies synthetic compounds by structure. *Id*. The legislative history of the bill shows that the legislature understood exactly how it was changing the law and that it was eager to do so to stay ahead of the drug makers that were endangering lives with ever-changing synthetic substances. Pet. App. B, 2; *see also* Deb. on Tex. S.B. 173 Before the Senate Crim. Justice Comm. at

1:29, 84th Leg., R.S. (March 10, 2015). Nothing in the legislative history of the statute indicates that "not even the legislators who drafted and passed 481.1031(b)(5) understood what it prohibits" or "even the legislators who passed the bill did not know what the statute's language meant." Pet. 5, 8. The quoted portions of the senate floor debate in the Petition for Writ of Certiorari are in reference to Senate Bill 172, not Senate Bill 173 that ultimately resulted in section 481.1031. *Id*.; *see also* Tex. S.B. 173, 84th Leg., R.S. (2015). Legislatures throughout the country were making similar efforts as Texas to curb the rising trend of harmful synthetic cannabinoids during the same time period.

Trial evidence

In 2014, the Lubbock County Criminal District Attorney and the Lubbock City Attorney sent a joint letter to Petitioner and fifty-two other local business owners warning against the continued sale of synthetic marijuana. The letter warned that the sales would no longer be tolerated in Lubbock County. Petitioner received a copy of the letter in 2014. Pet. App. B, 4.

From 2014 to 2017, investigators from the District Attorney's Office and officers from the Lubbock Police Department (LPD) continued to monitor Petitioner and his businesses. Several search warrants were executed at Petitioner's business and eventually his home, each one turning up significant inventories of synthetic cannabinoids and other evidence consistent

with narcotics trafficking. Pet. App. B, 4-5. During the execution of each warrant, Petitioner was told the products he was selling were illegal.

In May of 2017, LPD executed a final search warrant at Petitioner's home. Officers seized a large quantity of a product labeled "Chilly Willy" that ultimately tested positive for the controlled substance fluoro-ADB. Pet. App. B, 4-5. Petitioner claimed he had toxicology reports that showed he had tested his product for illegal compounds. Pet. App. B, 4. There is no evidence in the record to support Petitioner's assertion that the lab that allegedly tested the substances was DEA-certified. None of the lab reports obtained from Petitioner tested the Chilly Willy for fluoro-ADB, the substance alleged in the indictment. Pet. App. B, 4. Further, there was no evidence submitted to tie the lab reports in Petitioner's possession to the actual drugs that were seized.[2]

Following the final raid on his home, Petitioner was charged by indictment with knowingly possessing, with the intent to deliver, "'Chilly Willy; 2g Chronic Hypnotic' which contains a compound controlled in Penalty Group 2-A, Chapter 481.1031(b)(5) of the

[2] Petitioner also alleges that the TCCA "admittedly had a problem with this case" because he allegedly had his products tested by a DEA-certified lab. Pet. 11. Just as with the record evidence at trial, there is no mention of the lab being DEA-certified in the TCCA's opinion. The TCCA instead noted that Appellant's lab reports did not test for fluoro-ADB, the illegal chemical compound Petitioner was ultimately charged with possessing. Pet. App. B, 4.

Texas Health and Safety Code, to wit: fluoro-ADB, by aggregate weight including adulterants and dilutants 400 grams or more." Pet. App. B, 5. John Keinath, a forensic analyst with the Texas Department of Public Safety, testified at trial about the current structure of Penalty Group 2-A and how it classifies synthetic substances. Keinath began with a broad overview of Penalty Group 2-A generally, telling the jury that Penalty Group 2-A is covered by Health and Safety Code chapter 481, section 1031. While some synthetic substances are still listed by name, Keinath explained that most synthetic cannabinoids are now classified by their structure. Pet. App. B, 5.

With a demonstrative molecule chart displayed to the jury,[3] Keinath focused his testimony on fluoro-ADB, the substance alleged in the indictment:

> Q. And specifically, you are here today to talk about one specific synthetic compound, correct?
>
> A. Correct.
>
> Q. And what compound is that?
>
> A. The way we report it, it's fluoro-ADB.
>
> Q. And that is—is it listed under Penalty Group 2-A?
>
> A. Based off of the structural class, yes.

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[3] The demonstrative exhibit is reproduced in the TCCA opinion, and depicts the chemical structure of fluoro-ADB. Pet. App. B, 6.

> Q. And you listed off the long chapter number 481.1031, and specifically this one is in subpart (b)(5), correct?
>
> A. That's correct.

Pet. App. B, 6-7. Keinath did not expressly say the specific positions of each component within fluoro-ADB, but the testimony from Keinath that fluoro-ADB fell within section 481.1031(b)(5) went unchallenged by Petitioner at trial.

Keinath further explained that the relevant statute classifies three different parts of a molecule: the core component, the group A component, and the link component. Depending on how you grouped the components, "you can . . . make quite a few different structures. But by doing so, it changes what the structure is called or what it is named." Pet. App. B, 6. While looking at the demonstrative exhibit that depicted fluoro-ADB, the jury heard how the law requires one core component, one group A component, and one link component as listed in the statute to be situated in certain positions—otherwise it would change the structure and what it is named. Pet. App. B, 6.

The jury then learned how the core component indazole fits within the chemical structure of fluoro-ADB. Next, the jury heard that the group A component contained in flouro-ADB is methoxy dimethyl oxobutane. Last, Keinath told the jury that the link component contained in fluoro-ADB was carboxamide. Pet. App. B, 7. The State then asked "So if we put all of those together, then that's what we see here. We see

the portions of fluoro-ADB that are relevant to this, is that correct?" Keinath answered affirmatively, and added that "based off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written." Pet. App. B, 7. The jury found Petitioner guilty as indicted, and sentenced him to ninety years imprisonment and assessed a $100,000 fine. Pet. App. B, 1.

B. PROCEDURAL HISTORY

Petitioner was indicted under Texas Health and Safety Code section 481.113 for possession of a controlled substance, penalty group 2-A, in an amount of 400 grams or higher. TEX. HEALTH & SAFETY CODE ANN. 481.113. A jury convicted Petitioner of the offense as indicted. Petitioner appealed the judgment and, after briefing and oral arguments, the Seventh District Court of Appeals at Amarillo, Texas, affirmed judgment. Petitioner next petitioned for discretionary review in the TCCA. The TCCA granted discretionary review on the sole question of whether there was sufficient evidence to support the verdict. In a unanimous decision, TCCA affirmed the judgment, noting that "[w]e granted Petitioner's petition for discretionary review to determine whether, in a legal sufficiency analysis, a reviewing court may uphold a conviction if expert testimony as to certain technical elements of an offense is merely conclusory. Having concluded that the testimony in this case is not merely conclusory, we affirm." Pet. App. B, 1-2.

REASONS FOR DENYING THE PETITION

I. Petitioner complains of a misapplication of the well-settled *Jackson* sufficiency standard, not of any actual conflict.

Petitioner argues that an ordinary factfinder cannot draw reasonable inferences from complex evidence supported by expert testimony. Instead of directing this Court to an actual conflict in the TCCA's application of the *Jackson* sufficiency standard, however, Petitioner makes a conclusory allegation that the decision by the TCCA decided an important federal question in a way that conflicts with relevant decisions of this Court and has decided an important question of federal law that has not, but should be, decided by this Court. Pet. 3. This Court's rule 10 states that the Court will rarely grant petitions when the asserted error consists of the misapplication of a properly stated rule of law. S. Ct. R. 10. This Court has reiterated that "an unreasonable application of federal law is different from an *incorrect* application of federal law." *Renico v. Lett*, 559 U.S. 766, 773, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010) (emphasis in original) (citing *Williams v. Taylor*, 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). At its core, Petitioner's argument is that the TCCA stretched the holding of *Jackson v. Virginia* beyond its original intent. While meritless, the argument is also one based on unreasonableness, not incorrectness.

A. The settled *Jackson* standard.

Jackson held that an applicant is entitled to federal habeas relief if no rational juror could have found proof of guilt beyond a reasonable doubt based on the evidence adduced at the trial. *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Since that time, both federal and state courts have applied *Jackson*'s basic holding outside of the federal habeas context. This is because courts must apply the same constitutional standard when reviewing convictions for sufficiency of the evidence. *See Martinez v. Johnson*, 255 F.3d 229, 244 n.21 (5th Cir. 2001); *see also Dretke v. Haley*, 541 U.S. 386, 395, 124 S.Ct. 1847, 1853, 158 L.Ed.2d 659 (2004) (noting that the "constitutional hook" in *Jackson* was *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), where this Court held that due process requires proof of each element of a criminal offense beyond a reasonable doubt). Since its inception, the *Jackson* standard has permitted the trier of fact to draw reasonable inferences from basic facts to ultimate facts, while viewing all evidence in the light most favorable to the verdict. *Jackson v. Virginia*, 443 U.S. at 319. "Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they nonetheless must uphold." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011).

In arguing that the TCCA unreasonably expanded the holding of *Jackson*, Petitioner has not cited to a single authority with which the TCCA

decision conflicts. To the contrary, a basic tenet of *Jackson*—that jurors may draw reasonable inferences from basic facts to ultimate facts—has been applied uniformly to both lay opinion testimony and expert opinion testimony. *See, e.g.*, *Cavazos v. Smith*, 565 U.S. 1, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011) (reversing the Ninth Circuit's grant of habeas relief because it substituted its own judgment for that of the factfinder's in weighing extensive and complex expert testimony). Indeed, *Jackson* "makes clear that it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 565 U.S. at 3-4.

B. *Jackson*'s consistent application

This case does not present the first time a reviewing court has been tasked with evaluating the sufficiency of evidence in light of complex expert testimony. In *Parker v. Matthews*, this Court noted that expert testimony is evaluated the same as other testimony, and resolving any perceived conflict in favor of expert testimony was error. *Parker v. Matthews*, 567 U.S. 37, 44, 132 S.Ct. 2148, 2153, 183 L.Ed.2d 32 (2012); *see also McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 175 L.Ed.2d 582 (2010) (applying the *Jackson* sufficiency standard to a review of expert testimony). Federal courts of appeals have similarly used the *Jackson* standard to perform sufficiency analyses in cases with difficult expert testimony. *See Nash v. Russell*, 807 F.3d 892, 899 (8th Cir. 2015) (holding that the Missouri Supreme Court did not err in

noting a number of pieces of evidence that the jury could have drawn inferences from that pointed to the appellant's guilt, including technical DNA evidence); *Mora v. Williams*, 111 F. App'x 537, 544 (10th Cir. 2004) (holding that circumstantial evidence requiring several inferences from expert testimony was sufficient and was not a prohibited instance of inference piling), *cert. denied*, 543 U.S. 1147 (2005) (declining to grant certiorari on the question of "whether the court of appeals' holding that sufficient evidence supported Mora's felony-murder conviction—which the appellate court noted was based on 'several inferences' from purely circumstantial evidence—conflicts with *Jackson v. Virginia*, 443 U.S. 307 (1979)"); *Bishop v. Kelso*, 914 F.2d 1468, 1470 (11th Cir. 1990) (applying the *Jackson* standard to difficult expert testimony regarding embolisms and causation). There is simply no support for the argument that this Court should create a new standard to apply to the sufficiency of technical evidence.

While this Court has not directly addressed the complexity of a synthetic marijuana statute, interpretations of the Analogue Act are illustrative. Wholly unrelated to § 481.1031(b)(5), the Analogue Act is equally complex and riddled with chemistry textbook terms. *See* 21 U.S.C.A. § 802(32)(A). Like § 481.1031, the Analogue Act was also passed to "make illegal the production of designer drugs and other chemical variants of listed controlled substances that otherwise would escape the reach of the drug laws." *U.S. v. Hodge*, 321 F.3d 429, 437 (3d Cir.

2003) (citing 131 Cong. Rec. 19114 (1985) (statement of Sen. Thurmond) ("This proposal will prevent underground chemists from producing dangerous designer drugs by slightly changing the chemical composition of existing illegal drugs.")). The Analogue Act allows for the prosecution of compounds that are substantially similar to or have the same effect of controlled substances even if not specifically enumerated in the Controlled Substances Act if the substances are intended for human consumption. *McFadden v. U.S.*, 576 U.S. 186, 188, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015). In determining the mens rea requirement for the Analogue Act in *McFadden*, this Court recounted equally complex evidence and expert witness testimony regarding the chemical composition of bath salts as that in the instant case. The *McFadden* court ultimately found that the trial court did not adequately instruct the jury on the knowledge required to sustain a conviction under the Analogue Act, but had no trouble acknowledging the ways in which an accused could have the requisite knowledge of the complicated federal drug schedules and analogues. *Id*.

The Analogue Act has also withstood numerous constitutional attacks based on vagueness. *See*, *e.g*., *U.S. v. Turcotte*, 405 F.3d 515, 533 (7th Cir. 2005) (holding that the analogue provision of the CSA is not unconstitutionally vague). A penal statute "is void for vagueness if it does not define an offense with sufficient clarity to allow people of ordinary intelligence to understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75

L.Ed.2d 903 (1983). It follows, then, that if a statute is so clear that a person of ordinary intelligence can understand what is prohibited, then a rational juror, also of ordinary intelligence, can do the same. The inverse would also be true: if a statute was so complex that a rational juror could not understand and apply it, then it must also be void for vagueness. To be sure, the constitutional validity of § 481.1031 is not the question before this Court, but the broader argument remains: this Court has simply never applied a different standard—either for vagueness or for sufficiency review—to complex subject matter than it has to more simple matters. Petitioner fails to identify a compelling reason for this Court to now create such a bifurcated standard.

II. The issue is unlikely to recur because the Texas synthetic statutory scheme is unique.

Texas was not the only state that grappled with how to effectively criminalize synthetic marijuana. Faced with the rising popularity of synthetic marijuana and the dilemma of easily changed criminal structures, legislatures across the country began to pass laws targeted at "designer drugs" such as bath salts and synthetic marijuana. Before 2010, no State or the federal government had a law regulating synthetic marijuana. *See* Synthetic Drugs (a.k.a. K2, Spice, Bath Salts, etc.), https://obamawhitehouse.archives.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts. In 2012, Congress passed the Synthetic Drug Abuse Prevention Act and made synthetic

cannabinoids a permanent part of Schedule 1 of the Controlled Substances Act (CSA). *See* 21 U.S.C.A. § 812(d).

The CSA now lists fifteen specific compounds that fall within the definition of "cannabimetic agents," but also regulates compounds by structural class. *Id*. The structural class descriptions in the CSA include positioning language, but do not require the matching of components to specific positions like the Texas statute. *See*, *e.g*., § 812(d)(2)(A)(i) (prohibiting "2-(3-hydroxycyclohexyl)phenol with substitution at the 5-position of the phenolic ring by alkyl or alkenyl, whether or not substituted on the cyclohexyl ring to any extent"). To contrast, Texas begins with listing the different components that can make up a synthetic compound:

> (a) In this section:
>
> (1) "Core component" is one of the following: azaindole, benzimidazole, benzothiazole, carbazole, imidazole, indane, indazole, indene, indole, pyrazole, pyrazolopyridine, pyridine, or pyrrole.
>
> (2) "Group A component" is one of the following: adamantine, benzene, cycloalkylmethyl, isoquinoline, methylpiperazine, naphthalene, phenyl, quinolone, tetrahydronaphthalene, tetramethylcyclopropone, amino oxobutane, amino dimethyl oxobutane, amino phenyl oxopropane, methyl methoxy oxobutane, methoxy dimethyl oxobutane, methoxy phenyl oxopropane, or an amino acid.

> (3) "Link component" is one of the following functional groups: carboxamide, carboxylate, hydrazide, methanone (ketone), ethanone, methanediyl (methylene bridge) or methine.[4]

Penalty Group 2-A is then defined as:

> (b) Penalty Group 2-A consists of any material, compound, mixture, or preparation that contains any quantity of a natural or synthetic chemical substance, including its salts, isomers, and salts of isomers, listed by name in this subsection or contained within one of the structural classes defined in this subsection.[5]

Subsection (b) identifies some chemical compounds by name, but also groups compounds by structural class:

> (b)(5) any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component, whether or not the core component or group A component are further substituted to any extent.[6]

Most state laws resemble the federal CSA, not the Texas statute. A separate handful of states take vastly different approaches from Texas or federal law in

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[4] TEX. HEALTH & SAFETY CODE § 481.1031(a)(1-3).

[5] TEX. HEALTH & SAFETY CODE § 481.1031(b).

[6] TEX. HEALTH & SAFETY CODE § 481.1031(b)(5).

regulating synthetic cannabinoids. *See*, *e.g.*, CONN. GEN. STAT. ANN. § 21a-243(i) (West 2019) (listing only seven synthetic cannabinoids by name in Connecticut); DEL. CODE ANN. tit. 16 § 4714(d)(26) (West 2019) (Defining synthetic cannabinoid as "a substance containing one or more of the following compounds" and listing twenty-two compounds by name in Delaware); MD CODE ANN. CRIM. LAW § 5-402(d) (West 2020) (listing synthetic substances by name only in Maryland); NEV. REV. STAT. ANN. SB 49 § 1 (West 2021) (defining synthetic cannabinoid as "a cannabinoid that is: 1. Produced artificially, whether from chemicals or from recombinant biological agents, including, without limitation, yeast and algae; and 2. Is not derived from a plant of the genus *Cannabis*, including, without limitation, biosynthetic cannabinoids" in Nevada); UTAH CODE ANN. § 58-37-4.2 (listing seventy-nine synthetic substances by name only in Utah). While § 481.1031 employs similar language as the CSA, it is unique in the way in which it lists specific group components, core components, and link components, and then bans specific combinations thereof without actually making the combination in the statutory text. § 481.1031. As a result, the issue raised in the instant case makes the decision below both rare and fact bound. Based on the unique way section 481.1031 is written, the specific issue regarding molecular positioning raised in this case is not likely to recur.

Further, efforts to curb the proliferation of these dangerous substances appear to be working. In a 2020

National Drug Threat Assessment Report, the Drug Enforcement Agency reported that in 2019 there were 18,591 reports of synthetic cannabinoids, marking a 21 percent decrease from the 23,416 reports in 2018. DEA, *2020 National Drug Threat Assessment* 59. The American Association of Poison Control Centers reported that calls to poison centers about synthetic cannabinoid exposure decreased by eighty-five percent in 2019 from the record-high number of calls in 2015. Whether due to successful prosecution or a decline in popularity, the sudden surge of these substances appears to have stalled. *Id*. at 61 (noting that decreases in calls to poison centers could also be attributed to medical providers becoming more familiar with appropriate treatments). This issue is not likely to arise again due to the uniqueness of the Texas law and the effectiveness of the nationwide efforts to legislate the problem, as well as the declining popularity of synthetic cannabinoids.

III. The TCCA reached the correct result.

Petitioner argues that the TCCA stretched *Jackson* "too far" when it applied the sufficiency standard to a highly technical drug possession statute. The root of Petitioner's argument is that Texas's synthetic marijuana statute is too complex for any rational juror to understand. Yet, the constitutionality of section 481.1031(b)(5) is not at issue. The question is only whether, with the help of an expert witness, a rational juror could have taken the necessary inferential step to support the verdict. Keinath's testimony,

taken as a whole, explained the statute in a methodical way and explained to the jury how the substance seized from Petitioner was controlled under the statute. The TCCA both correctly stated and applied the *Jackson* standard when it affirmed the judgment.

A. The TCCA correctly stated the *Jackson* sufficiency standard.

The question before the TCCA was "whether, in a legal sufficiency analysis, a reviewing court may uphold a conviction if expert testimony as to certain technical elements of an offense is merely conclusory." Pet. App. B, 12. Directly quoting this Court, the TCCA outlined the correct standard of review in a challenge to the sufficiency of the evidence. Pet. App. B, 3-4 ("The appellate court must give deference to 'the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts,'" citing *Jackson*, 443 U.S. at 319). The TCCA accurately stated that the evidence is to be viewed in the light most favorable to the prosecution and should be analyzed for whether any rational trier of fact could have found each element of the offense beyond a reasonable doubt. Pet. App. B, 4. The TCCA also correctly acknowledged the appropriate deference that is to be given to the factfinder to resolve conflicts in the testimony and to draw reasonable inferences from basic facts to ultimate facts, again directly quoting this Court. Petitioner also correctly points out that under *Jackson*, most cases will

survive sufficiency review even where there is no direct evidence of every element. Pet. 9.

To secure a conviction, the State was required to prove that the molecular components making up fluoro-ADB were positioned as described by the statute. Although the State's forensic chemist did not *expressly* state that the compounds contained within fluoro-ADB were in the numeric positions required by the statute, there was direct testimony that fluoro-ADB was controlled by the statute, leading to the rational inference that the components were in the statutorily required positions. Further, there was nothing to refute the reasonable inference that, based on Keinath's testimony that fluoro-ADB is controlled by section 481.1031(b)(5), the compounds were in the statutorily prescribed positions. This is not a case where a reviewing court is tasked with weighing conflicting inferences, which it must do in favor of the verdict. Here, the testimony that fluoro-ADB was controlled by section 481.1031(b)(5) was uncontroverted. The combined and cumulative force of the evidence supports only the very rational inference that the components were in the required positions.

B. The TCCA correctly applied the *Jackson* sufficiency standard.

The State was required to prove that Petitioner knowingly possessed, with the intent to deliver, "'Chilly Willy; 2g Chronic Hypnotic' which contains

a compound controlled in Penalty Group 2-A, Chapter 481.1031(b)(5) of the Texas Health and Safety Code, to wit: fluoro-ADB" Pet. App. B, 5. Instead of viewing Keinath's testimony in a series of isolated statements as Petitioner would have this Court do, the TCCA relied on the entirety of the State's evidence at trial in affirming the judgment. First, Keinath testified about the current structure of Penalty Group 2-A, and how it classifies synthetic substances. Keinath began with a broad overview of Penalty Group 2-A generally, telling the jury that Penalty Group 2-A is covered by Health and Safety Code chapter 481, section 1031. While some synthetic substances are still listed by name, Keinath explained that most synthetic substances are now classified by their structure: "So there are a whole bunch of different combinations of structures, and depending on what kinds of groups create that molecule, it's classified by different subsections in the law." Pet. App. B, 5. Keinath then focused his testimony on fluoro-ADB and explicitly stated that it is listed under Penalty Group 2-A based on its structure class.

Keinath further explained that the relevant statute classifies three different parts of a molecule: the core component, group A component, and the link component. Depending on how you grouped the components, "you can . . . make quite a few different structures. But by doing so, it changes what the structure is called or what it is named." Pet. App. B, 6. While looking at a demonstrative exhibit that depicted fluoro-ADB, the jury then heard how the law requires one core component, one group A component, and one

link component as listed in the statute be situated in certain positions—otherwise it would change the structure and its name. The jury heard how the core component indazole fits within the chemical structure of fluoro-ADB. Next, the jury heard that the group A component contained in flouro-ADB is methoxy dimethyl oxobutane. Last, Keinath told the jury that the link component contained in fluoro-ADB was carboxamide, and that "based off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written." Pet. App. B, 6-7.

On cross-examination, trial counsel for Petitioner remarked "Q: y'all spent a lot of time, [the State] and you, on how the chemical compounds work with the placement of the . . . molecules. [W]here the molecules are. *And that's what makes a compound, the place where the molecules are stuck, correct*." A: Correct." Pet. App. B, 7. From the tenor of trial counsel's question, it is apparent that Keinath had just explained that each of the components of fluoro-ADB had to be in a particular location to make a specific compound. Pet. App. B, 7. Defense counsel's questioning illustrates that there was extensive testimony from the State's forensic analyst about the importance of the positions of the structural components, and how integral those positions were to making specific substances. Importantly, defense did not challenge whether the components at issue were in the statutorily required positions.

The Court's Charge instructed the jury that Petitioner was accused of committing an offense under § 481.113, and that "'Controlled Substance' means a substance, including a drug, an adulterant, and a dilutant, listed in Schedules I through V or Penalty Group 1, 1-A, 2, 2-A, 3, or 4." Neither the indictment nor the Court's Charge contained the position of the molecules as elements of the offense.[7] The State was required to prove the substance was fluoro-ADB, a controlled substance under Penalty Group 2-A. The testimony the jury heard at trial was that the substance seized from Petitioner was fluoro-ADB, a controlled substance under Penalty Group 2-A. The rational inference from the evidence is that indazole,

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[7] Another Texas court of appeals recently addressed a similar attack on the proof of a controlled substance in a synthetic cannabinoid trial in *Bridges v. State*. No. 04-17-00683-CR, 2018 WL 5268855 (Tex. App.—San Antonio, Oct. 24, 2018, no pet.) (not designated for publication). There, the appellant argued that the State failed to prove the charged substances were illegal. *Id*. at *3. In upholding the conviction, the Fourth District Court of Appeals noted that the forensic analyst testified at trial that the substances tested positive for "5-fluoro ADB, MMB-FUBINACA," the chemical that was alleged in the indictment. *Id*. The analyst explained to the jury the chemical combinations that were required under the statute, and that the substance in the case contained the statutorily required components. *Id*. The *Bridges* court held "the evidence at trial showed that the same chemical compound found in the substances seized from Bridges was also included in the indictment and the charge. We therefore conclude the evidence was sufficient to prove beyond a reasonable doubt that Bridges possessed a controlled substance." *Id*. at *4. Just as in *Bridges*, the evidence at trial showed that the same chemical compound found in the substance seized from Petitioner was also included in the indictment and the charge.

carboxamide, and methoxy dimethyl oxobutane are located in the statutorily required positions to make up the substance alleged in the indictment as fluoro-ADB. The testimony at trial was sufficient to sustain the conviction.

Jurors have long been permitted to draw rational inferences from basic facts to ultimate facts. When Keinath stated his ultimate conclusion as an expert witness: that based on its structural class, fluoro-ADB was controlled under Penalty Group 2-A, having explained what all of those terms mean, the rational inference was that the parts of fluoro-ADB were arranged in the statutorily required positions. It would be completely irrational to conclude, viewing the evidence in the light most favorable to the verdict, that the unchallenged testimony could lead to any other conclusion. It was the evidence at trial, not the reviewing court, that permitted the jury to rationally conclude, beyond a reasonable doubt, that fluoro-ADB is a controlled substance within the scope of § 481.1031(b)(5).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

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