No. _____

In the

Supreme Court of the United States

MARKERRION D'SHON ALLISON,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

Gena Bunn

GENA BUNN
Texas Bar No. 00790323
Gena Bunn, PLLC
P.O. Box 6150
Longview, Texas 75608
gbunn@genabunnlaw.com
(903)804-4003

Counsel for Petitioner

QUESTION PRESENTED

Whether a police officer's testimony relating an unidentified informant's out-of-court statement regarding the meaning of the phrase "pulling a Carlos"" – admitted pursuant to state evidentiary rules governing admission of expert testimony – violated Allison's constitutional right to confront adverse witnesses.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Allison v. State, No. 06-20-00020-CR, Court of Appeals for the Sixth Appellate District of Texas at Texarkana. Judgment entered on November 17, 2021.

Allison v. State, No. PD-0905-21, Court of Criminal Appeals of Texas. Judgment entered on April 19, 2023.

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In the

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PETITON FOR WRIT OF CERTIORARI

Petitioner Markerrion Allison respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in this case.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas, *Allison v. State*, No. PD-0905-21 (Tex. Crim. App. Apr. 19, 2023), appears as Appendix A to the petition, and is reported at 666 S.W.3d 750.

The opinion of the Court of Appeals for the Sixth Appellate District of Texas at Texarkana, *Allison v. State*, No. 06-20-00020-CR (Tex. App – Texarkana Nov. 17, 2021), *reversing Allison's conviction and sentence*, appears as Appendix B to the petition, and is unpublished.

JURISDICTION

The date on which the Texas Court of Criminal Appeals decided this case was April 19, 2023. A copy of that decision appears as Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI.

The State's case against Markerrion Allison was a house of cards. While Jose Jimenez was undoubtedly the victim of a brutal aggravated robbery, Jimenez did not identify Allison as one of the men who robbed him, and no physical evidence tied Allison to the offense. In fact, the only direct evidence implicating Allison as a fourth participant in the robbery was the testimony of co-defendant R.J.[1] Desperate to corroborate R.J.'s accomplice-witness testimony, the State attempted to link Allison to an extraneous shooting that occurred at the same house four months later, arguing that Allison's supposed participation in that shooting evinced a "consciousness of guilt" for the robbery of Jimenez. However, the State's only proof of Allison's involvement in the extraneous shooting was a jail phone call between Allison and another co-defendant, which, though innocuous on its face, was interpreted by an unidentified informant to mean that the co-defendant had directed Allison to commit the extraneous shooting.

Contrary to the opinion of the court below, admission of that unidentified informant's out-of-court statement through the "expert" testimony of a police officer was harmful Confrontation Clause error requiring reversal of Allison's conviction for aggravated robbery.

[1] Minors will be referred to by their initials to protect their identities. *See* Tex. R. App. P. 9.8, 9.10.

STATEMENT OF THE CASE

Markerrion Allison was charged by indictment with aggravated robbery, a first-degree felony. CR 5; *see* Tex. Penal Code Ann. § 29.03 (West 2015). Specifically, it was alleged that Allison "did then and there while in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally, knowingly, or recklessly cause bodily injury to Jose Jimenez by shooting a firearm in the direction of, and the defendant did then and there use or exhibit a deadly weapon, to-wit: firearm." CR 5.

On the evening of September 8, 2016, Jose Jimenez was alone at the home of some friends on Clearwood Street,[2] smoking marijuana and playing videogames, when a group of men forced their way into the house and jumped him. 6 RR 100, 107-109. After waking up in a pool of his own blood, Jimenez managed to text some friends and alert them to his condition. 6 RR 116, 198. His friends arrived at the house, found Jimenez beaten and bloody and the house in disarray, and rushed Jimenez to a nearby emergency room. 5 RR 221-223; 6 RR 117-118, 6 RR 40. Jimenez had been beaten and shot in the head.[3] 6 RR 170-171.

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[2] Jimenez had resided in the Clearwood house previously but had since moved back in with his parents. He frequently spent time there playing videogames, watching movies, and smoking marijuana. 5 RR 147-149; 6 RR 19; 6 RR 87.

[3] Jimenez suffered a non-penetrating gunshot wound to the head and a compound skull fracture as well as multiple lacerations. 6 RR 172-174; SX 1A. An emergency craniotomy saved his life. 6 RR 174.

Jimenez later told police that he was jumped by a group of three, possibly four, Black teenagers. 6 RR 127, 135. He was able to describe three individuals: a large, dark-skinned man, over six feet tall, armed with a shotgun; a lanky, mixed-race "Cuban-looking" man with a tattoo on his neck, armed with a laser-site handgun; and a third man, "scrawny" and taller than 5'8", wearing a mask. 6 RR 121-128, 135-136, 147. The men pushed Jimenez to the floor and began rummaging through the house, obviously looking for something. 6 RR 107-109. They repeatedly asked Jimenez where "it" was, but Jimenez did not know.[4] 6 RR 108. Jimenez recalled them calling for "T.K." and saying, "[Y]ou're going to die today. You're going to die today for no reason." 6 RR 108, 111. The last thing he recalled was the laser site of a handgun trained on the back of his head. 6 RR 113-114.

Law enforcement learned from William Benicaso and Justin Anderson, two of the residents of the Clearwood house, that a group of three men had come to the house at about noon on September 8th wanting to buy some marijuana[5]; they believed this earlier encounter might have been linked to the assault of Jimenez. 5 RR 213-216; 6 RR 27-31; *see also* 5 RR 149-152. Benicaso and Anderson identified

[4] Jimenez testified that he assumed they were looking for money or drugs. 6 RR 107. Evidence at trial showed that William Benicaso, one of the residents, was a drug dealer who frequently sold marijuana from the Clearwood house. 5 RR 206-208; 6 RR 23; 6 RR 151-152, 212-213.

[5] This encounter was captured by the surveillance camera of an automated teller machine across the street. 6 RR 48-49; 7 RR 116-117, 120; SX 10, 11.

Trekeymian ("T.K.") Allison[6] from a photographic lineup as one of the three men at the earlier encounter. 6 RR 44-49; 5 RR 219-220; 7 RR 123, 127. The two others were identified as Anthony Moreno and Davier Wells. 7 RR 140-141, 185, 193-194.

Jimenez identified T.K. from a photographic lineup as the large, dark-skinned man armed with a shotgun who assaulted him on September 8th. 6 RR 145; SX 12; 7 RR 129. Jimenez later identified Sean Owens-Toombs from a photographic lineup as the mixed-race man armed with the laser-site handgun. 6 RR 145-146; SX 14; 7 RR 143. But Jimenez did not identify Markerrion Allison as one of his assailants.[7] 6 RR 146-147, 176; 7 RR 185; SX 13.

Co-defendant R.J. testified that he, T.K., Sean Owens-Toombs, and Markerrion Allison all participated in the robbery of Jose Jimenez on September 8, 2016. 6 RR 268-275. R.J. had previously pled guilty to the aggravated robbery of Jose Jimenez pursuant to a plea agreement under which he received a sentence of ten years deferred adjudication community supervision; the plea agreement was contingent on his testifying at Allison's trial.[8] 6 RR 307. After school on September

[6] T.K. is Markerrion Allison's cousin. 6 RR 254.

[7] Jimenez testified that the masked assailant was taller than him, and Jimenez was five feet, eight inches tall. 6 RR 122, 147; 7 RR 173-174. Allison was five feet, four inches tall. 6 RR 291; 9 RR 44.

[8] At the time of Allison's trial, R.J. had been arrested for violating the terms of his community supervision and the State's motion to adjudicate guilt was pending. 6 RR 333-346.

8th, R.J. joined some friends at T.K.'s house on Shely Street, a few blocks away from the Clearwood house. 6 RR 252-254, 259-261. R.J. walked to the Clearwood house alone first, planning to purchase marijuana from Benicaso[9]; but Benicaso was not home, and R.J. returned to the Shely house empty-handed. 6 RR 258-261, 267. Several hours later, R.J. claimed that he, T.K., Sean Owens-Toombs, and Allison returned to the Clearwood house intending to steal marijuana. 6 RR 268-269. According to R.J., T.K. led the group into the house armed with the shotgun. 6 RR 273-276, 320. While the others rummaged through the house searching for marijuana and money, Owens-Toombs held a gun to Jimenez's head. 6 RR 281-293. R.J. testified that Allison wore a mask and carried a handgun. 6 RR 288, 290. According to R.J., he and Allison exited the house before Owens-Toombs shot Jimenez. 6 RR 293, 328, 348.

The State also called co-defendants Sean Owens-Toombs and Trekeymian (T.K.) Allison, both of whom refused to answer questions. 7 RR 27; 7 RR 37-40.

Proffered as evidence of Allison's "consciousness of guilt" for the September 8th robbery, the State presented evidence, over defense objection, regarding an extraneous incident that occurred at the Clearwood house four months after the robbery of Jose Jimenez. 5 RR 162-169. Shortly before 1 a.m. on January 8, 2017,

[9] R.J. testified that he had purchased marijuana from Benicaso on previous occasions and had even smoked marijuana with Benicaso in the Clearwood house; but he had never met Jose Jimenez. 6 RR 255-256, 261, 315-317.

a Black man with long dreadlocks or braids fired a gun toward the house, breaking a window; no one was injured. 5 RR 173-180, 185. None of the witnesses identified Allison as the gunman, and their descriptions of the gunman were inconsistent with Allison's appearance. 5 RR 185; 7 RR 189-190.

Attempting to connect Allison to the January 8th incident, the State presented a recorded telephone conversation from the day before (January 7, 2017) between T.K. (then in Gregg County Jail) and a cellular phone associated with Allison.[10] 7 RR 153-158; 8 RR 111; SX 24. The conversation, on its face, was innocuous. Nevertheless, over defense objection, police officer Jayson Reed testified that the phrase "pulling a Carlos" – used by T.K. during his conversation with Allison – was slang terminology which meant to commit a shooting. 8 RR 75. The State also presented cell phone location data showing that Allison was in the Longview area at the time of the January 8th shooting; but those same records showed that Allison was on a two-hour-plus telephone call during the time the shooting occurred. 7 RR 160-161; 8 RR 146-158, 166-172; SX 26. Notably, the lead detective testified that he did not have probable cause to seek a warrant for Allison's arrest in connection with the January 8th shooting. 7 RR 190-191, 211.

[10] T.K. and Markerrion Allison are cousins. 6 RR 254.

In his video-recorded interview with law enforcement, Allison denied any involvement in either the September 8th robbery of Jose Jimenez or the January 8th incident at the Clearwood house. 7 RR 158-159, 191; SX 23.

After about twelve hours of deliberations and a temporary deadlock, a jury found Allison guilty of the offense as charged in the indictment. 10 RR 15; CR 127.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for writ of certiorari in Allison's case because the Texas Court of Criminal Appeals has decided an important federal question in a way that conflicts with the decisions of other state courts of last resort and United States courts of appeals. U.S. Sup. Ct. R. 10(b). Further, the court below has decided an important question of federal law that has not been, but should be, settled by this Court. U.S. Sup. Ct. R. 10(c).

This case presents important questions – touched upon but not resolved by this Court's plurality opinion in *Williams v. Illinois*, 567 U.S. 50, 70 (2012) – arising from the intersection of the Confrontation Clause of the Sixth Amendment and evidentiary rules regarding the admission of expert testimony. Because this Court has only indirectly addressed the issue, lower state and federal courts are in disagreement as to whether the prosecution may evade the Confrontation Clause through the use of the rules governing testimony by expert witnesses. *Compare People v. Sanchez*, 374 P.3d 320, 334-35 (Cal. 2016) (concluding that "when "any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay"); *Martin v. State*, 60 A.3d 1100, 1107 (Del. 2013), *with State v. Roach*, 219 95 A.3d 683, 695-96 (N.J. 2014); *Com. v. Greineder*, 984 N.E.2d 804,

818 (Mass. 2013); *People v. Williams*, 939 N.E.2d 268, 278-80 (Ill. 2010), *aff'd sub nom. Williams v. Illinois*, 567 U.S. 50 (2012)).

Contrary to the opinion of the court below (and as the intermediate state court held), police officer Jayson Reed's "expert" testimony relating an unidentified informant's out-of-court statement regarding the meaning of the phrase "pulling a Carlos" breached Allison's constitutional right to confront adverse witnesses. Reed's testimony was not based on any expert knowledge. Rather, under the guise of offering an expert opinion, Reed simply "parroted" an unsubstantiated hearsay statement from an unidentified confidential informant whom the defense was denied the opportunity to confront.

The meaning of the phrase "pulling a Carlos" was not within Reed's personal knowledge; Reed testified that he did not know what the phrase meant and that he merely related to the jury what someone else had told him it meant. The State should not be permitted to circumvent application of the Confrontation Clause by cloaking an out-of-court statement in the guise of expert opinion testimony. The erroneous admission of Officer Reed's testimony was harmful constitutional error requiring reversal.

I. Officer Reed's testimony relating an unidentified informant's out-of-court statement regarding the meaning of the phrase "pulling a Carlos" violated the Confrontation Clause.

The trial court erred by permitting police officer Jayson Reed to testify as an expert that "pulling a Carlos" meant participating in a shooting. *See* 8 RR 75. Contrary to the trial court's holding, Reed's testimony was not based on any expert knowledge. Rather, under the guise of offering an expert opinion, Reed simply "parroted" an unsubstantiated hearsay statement from an unidentified confidential informant whom the defense was denied the opportunity to confront. *See* 8 RR 35-42, 49-50.

At trial, the State proffered Reed as an expert in the field of narcotics investigation and slang terminology specific to narcotics investigation. 8 RR 69. Reed testified outside the jury's presence that during his twenty-plus years' experience as a narcotics investigator, he had become familiar with various slang terms commonly used in illicit narcotics trafficking. 8 RR 29-31. Reed explained that his familiarity with these slang terms – most of which referred to different types and amounts of narcotics – was typically derived from his participation as an investigator in controlled buys and other undercover operations during which he had firsthand knowledge concerning the use and meaning of the terms. 8 RR 29-31, 46-47. Reed conceded that slang usage changes over time and varies depending on participants and region. 8 RR 31-32.

Notably, Reed was the husband of the trial prosecutor. 8 RR 32. He was not involved in the investigation of the instant case and only became aware of it a few weeks before trial when his wife (the trial prosecutor) asked if he knew what "pulling a Carlos" meant. 8 RR 31-33, 40. Reed did not know what the phrase "pulling a Carlos" meant and, in fact, in all his years as a narcotics investigator, had never heard the phrase. 8 RR 31-32, 47-48. Nevertheless, at his wife's request, Reed put the question to a couple of his confidential informants, one of whom gave Reed an answer.[11] 8 RR 32-33. And based on that response, Reed provided his "expert opinion" that "pulling a Carlos" meant to participate in a shooting. 8 RR 35, 75.

Allison objected to the admission of Reed's testimony, arguing that Reed was not qualified as an expert and that his testimony constituted hearsay and a violation of the Confrontation Clause. 8 RR 35-42, 49-51. The trial court overruled Allison's objections and permitted Reed to testify before the jury that in his expert opinion, "pulling a Carlos" meant to participate in a shooting. 8 RR 42, 50-51, 75.

A. The Confrontation Clause guarantees the accused the right to confront adverse witnesses.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in both federal and state prosecutions to confront adverse witnesses. U.S. Const. amends. VI, XIV; *Pointer v. Texas,* 380 U.S. 400, 406 (1965); *Woodall v.*

[11] The trial court denied the defense's request that Reed (or the State) be required to reveal the identity of his informants. 8 RR 41-42.

State, 336 S.W.3d 634, 641 (Tex. Crim. App. 2011). The principal concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig,* 497 U.S. 836, 845 (1990). *See also Delaware v. Fensterer,* 474 U.S. 15, 19-20 (1985) (per curiam) (quoting *Davis v. Alaska,* 415 U.S. 308, 315-16 (1974)).

Whether a statement is admissible under state evidentiary rules and whether that same statement is admissible under the Confrontation Clause are separate questions. *Crawford v. Washington,* 541 U.S. 36, 50-51 (2004). Thus, even when a statement offered against a defendant is admissible under evidentiary rules, the statement may implicate the Sixth Amendment's Confrontation Clause.

The Confrontation Clause bars the admission of out-of-court testimonial statements of a witness unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford,* 541 U.S. at 53-54. After *Crawford,* the threshold question in any Confrontation Clause analysis is whether the statements at issue are testimonial or nontestimonial in nature. Generally, a statement is testimonial when the surrounding circumstances objectively indicate that the primary purpose of the interview or interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington,* 547 U.S. 813, 822-23 (2006).

This Court has yet to define the outer boundaries of what constitutes a testimonial out-of-court statement, but it has identified three kinds of statements that can be regarded as testimonial: (1) ex parte in-court testimony or its functional equivalent that declarants would reasonably expect to be used prosecutorially; (2) statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions; and (3) statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

With respect to this last category of out-of-court statements, and particularly statements made in response to police inquiries, such a statement is "testimonial" if the circumstances, viewed objectively, show that it was not made "to enable police assistance to meet an ongoing emergency" and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.[12]

[12] Notably, the Texas Court of Criminal Appeals has warned against allowing statements into evidence as "background" to justify testimony that might otherwise be hearsay, to avoid a Confrontation Clause objection. *See Langham v. State*, 305 S.W.3d 568, 580-581(Tex. Crim. App. 2010) (holding that officer's testimony relating confidential informant's out-of-court statements violated Confrontation Clause).

B. The informant's out-of-court statement was testimonial in nature and was offered for the truth of the matter asserted.

Reed's "expert" testimony relating his informant's out-of-court statement constituted inadmissible hearsay which subverted Allison's Sixth Amendment right to confront the witnesses against him. *See* 8 RR 37-42, 49-50.

The informant's out-of-court statement that "pulling a Carlos" meant participating in a shooting was testimonial in nature, and it was offered to prove the truth of the matter asserted. As Reed testified, the informant's statement was given in direct response to Reed's questioning of the informant. 8 RR 33. Reed's questioning took place at the request of the trial prosecutor (Reed's wife) during her preparation for Allison's trial for the express purpose of finding out what the phrase "pull a Carlos" meant. 8 RR 32-33. The statement was not obtained in response to an emergency, and it was not merely "background." Rather, it "was procured specifically to be used against Allison at trial." Appendix B, at *11. The statement was offered solely for the truth of the matter asserted: that to "pull a Carlos" meant to shoot someone. And the statement was critical to the State's efforts to connect Allison to the January 8th shooting and, in turn, to the charged September 8th robbery.[13] Thus, as the intermediate court of appeals concluded, the primary purpose

[13] As the intermediate court of appeals explained, the statement was "directly relevant to the State's theory of Allison's consciousness of guilt." Appendix B, at *11. Specifically, the State urged the jury to conclude that T.K. instructed his cousin Allison to orchestrate the January 8th shooting for

of Reed's questioning of the informant was to establish or prove past events (what it meant to "pull a Carlos") relevant to Allison's criminal prosecution. Appendix B, at *11.

Moreover, there is no evidence in the record to indicate that the informant was unavailable to testify at Allison's trial, and Allison was never permitted to cross-examine the informant. The trial court did not even permit the defense to learn the informant's identity. 8 RR 41-42, 49-50.

Reed's testimony relating the informant's out-of-court statement violated Allison's right to confront the informant about the basis of his testimony. As the intermediate court of appeals aptly noted, "Only the source would be able to testify as to why, when, how, and on what basis he had reached the conclusion that 'pull a Carlos' meant to shoot someone. Allison had the right to ask him those questions." Appendix B*, id.* at *12.

C. The meaning of the phrase "pull a Carlos" was not within Reed's personal knowledge.

The State argued in the court below that Reed's testimony did not violate the Confrontation Clause because, once he had questioned the informant about it, the meaning of the phrase "pull a Carlos" was within his personal knowledge. *See*

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the purpose of dissuading potential State's witnesses, thus tending to prove that Allison participated in the September 8th robbery.

State's Brief at 15-21. This argument improperly conflates expert opinion testimony and testimony based on personal knowledge. It is also belied by the record.

Reed frankly conceded that, prior to speaking with the informant, he did not know what the phrase "pull a Carlos" meant and that he merely related what someone else had told him it meant. 8 RR 38, 47-48. Nevertheless, the State contended that "at the time he testified at the trial," the meaning of the phrase was within Reed's personal knowledge. State's Brief at 16-17. The State essentially proposed that once a police officer questions a witness regarding the meaning of a specialized phrase, that witness' knowledge is subsumed within the officer's "personal knowledge," giving the officer free reign to testify directly to the truth of the matter asserted and shield the true witness from confrontation. The State should not be permitted to sidestep the Sixth Amendment in this manner.

This Court's plurality opinion in *Williams v. Illinois*, 567 U.S. 50, 70 (2012), does not support the proposition that no Confrontation Clause violation occurs when a witness testifies to facts within her personal knowledge. In *Williams*, the Court considered the question whether an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. Under the evidentiary scenario considered by the Court, it is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert. *Id*. at 57. Relying on a DNA profile produced by Cellmark from semen found in the rape

victim's vaginal swab, which she played no role in producing, the State's DNA expert testified, based on her own independent testing of the data received from Cellmark, that the Cellmark profile matched a profile purported to have originated from the defendant. *Id*. at 63. According to petitioner Williams, the expert strayed from permissible expert testimony when she answered affirmatively the State's question which assumed chain of custody, facts not within the expert's personal knowledge. *Id*. at 71-72. But as Justice Alito noted:

> In order to assess petitioner's Confrontation Clause argument, it is helpful to inventory exactly what [DNA expert] Lambatos said on the stand about Cellmark. She testified to the truth of the following matters: Cellmark was an accredited lab; the ISP occasionally sent forensic samples to Cellmark for DNA testing; according to shipping manifests admitted into evidence, the ISP lab sent vaginal swabs taken from the victim to Cellmark and later received those swabs back from Cellmark; and, finally, the Cellmark DNA profile matched a profile produced by the ISP lab from a sample of petitioner's blood. *Lambatos had personal knowledge of all of these matters, and therefore none of this testimony infringed petitioner's confrontation right*.

Id. at 70 (plurality) (emphasis added). And as Justice Alito further explained, "Lambatos did not testify to the truth of any other matter concerning Cellmark. She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact. Nor did she testify to anything that was done at the Cellmark lab, and she did not vouch for the quality of Cellmark's work." *Id*. at 71. As the plurality noted, "the putatively offending phrase in Lambatos' testimony was not admissible for the purpose of proving the truth of the

matter asserted – *i.e.,* that the matching DNA profile was 'found in semen from the vaginal swabs.'" *Id*. at 72. Justice Alito also went to great lengths to explain the outcome would have been different had the case involved a jury trial rather than a bench trial. *Id*. at 73.

Thus, the circumstances considered by this Court in *Williams* stand in stark contrast to Reed's testimony in the instant case. Reed testified that he asked the informant what the phrase "pulling a Carlos" meant, and that the informant "immediately told me what it was." 8 RR 33. Reed vouched for the informant's credibility in no uncertain terms. 8 RR 33, 73. And Reed related to the jury the substance of the informant's out-of-court statement explicitly for the truth of the matter asserted: That "to pull a Carlos" meant to participate in a shooting. 8 RR 75.

Importantly, Reed did not receive "specialized training" regarding the meaning of the phrase "pulling a Carlos." Nor did he acquire the knowledge through his experience as a police officer, as he had acquired knowledge regarding other slang terms.[14] Rather, at the prosecutor's behest, in preparation for Allison's trial, Reed queried his informants about the meaning "pulling a Carlos." Reed admitted that he did not know what the phrase meant and that he merely related what someone

[14] Reed explained that his familiarity with slang terms referring to different types and amounts of narcotics was typically derived from his participation as an investigator in controlled buys and other undercover operations during which he had firsthand knowledge concerning the use and meaning of the terms. 8 RR 29-31, 46-47.

else had told him it meant. 8 RR 38, 47-48. Yet the State was allowed to circumvent application of the Confrontation Clause by simply slapping on an "expert testimony" label.

Allison does not contest that Reed had some expertise in the field of narcotics investigation. Reed explained that his familiarity with many slang terms – most of which referred to different types and amounts of narcotics – was typically derived from his participation as an investigator in controlled buys and other undercover operations during which he had firsthand knowledge concerning the use and meaning of the terms. 8 RR 29-31, 46-47. Thus, Reed likely would have been qualified under Rule 702 to testify as an expert regarding the meaning of "ice" or "eight ball" or "wet." *See* 8 RR 29-31. But Reed's testimony regarding the meaning of "pulling a Carlos" was not based on that expertise. Rather, Reed himself admitted that he did not know what the phrase meant and that he merely relayed to the jury what someone else had told him it meant. 8 RR 38, 47-48. Indeed, it appears the only "expertise" Reed relied on was whether to believe his confidential informant, an issue that falls outside the realm of expert testimony and squarely within the province of the jury.

As the intermediate court of appeals recognized, to accept the State's argument would permit an end run of the Confrontation Clause. *See* Appendix B, at *12. Reed merely regurgitated what he was told by his unidentified informant (and

to a lesser extent by Bethard and Reavis).[15] There is nothing in the record to indicate that Reed did anything more than relay what he was told by others regarding the meaning of the phrase "pulling a Carlos." Presenting Reed's testimony under the guise of expert opinion does not change the essential fact that Reed did not know what the phrase meant and merely relayed to the jury what someone else told him it meant.

II. The erroneous admission of Officer Reed's testimony was harmful constitutional error requiring reversal.

The intermediate court of appeals correctly determined that admission of Officer Reed's testimony relating the informant's out-of-court statement was harmful and therefore necessitated reversal of the conviction.

This Court has long held that, in constitutional error cases, the standard of review "requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 23-24 (1967)); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017); *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 297 (1991); *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). *See also* Tex. R. App. P. 44.2(a) (West 2021).

[15] The record indicates that whatever Bethard and Reavis relayed to Reed regarding their understanding of the phrase's meaning was likewise based on inadmissible hearsay.

In cases of constitutional error, reversal is required unless the reviewing court can determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *Chapman v. California,* 386 U.S. 18, 24 (1967); Tex. R. App. P. 44.2(a). If there is any reasonable likelihood that the error materially affected the jury's deliberations, the error was not harmless. The reviewing court must consider any factor revealed by the record that may shed light on the probable impact of the trial court's error on the minds of average jurors.

The Texas Court of Criminal Appeals has recognized the following factors to be relevant in determining whether *Crawford* error is harmless: (1) the importance of the out-of-court statement to the State's case; (2) whether the out-of-court statement was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the out-of-court statement on material points; and (4) the overall strength of the prosecution's case. *Langham,* 305 S.W.3d at 582; *Scott v. State,* 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). The emphasis of an analysis for constitutional harm should not be on the propriety of the outcome of the trial, *i.e.*, whether the jury verdict was supported by the evidence.

> Instead, the question is the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict—whether, in other words, the error adversely affected the integrity of the process leading to the conviction. In reaching that decision, the reviewing court may also consider, in addition to the factors listed above, *inter alia,* the source and nature of the error, to what extent, if any, it was emphasized by the State, and how weighty

> the jury may have found the erroneously admitted evidence to be compared to the balance of the evidence with respect to the element or defensive issue to which it is relevant. With these considerations in mind, the reviewing court must ask itself whether there is a reasonable possibility that the *Crawford* error moved the jury from a state of non-persuasion to one of persuasion on a particular issue. Ultimately, after considering these various factors, the reviewing court must be able to declare itself satisfied, to a level of confidence beyond a reasonable doubt, that the error did not contribute to the conviction before it can affirm it.

Langham, 305 S.W.3d at 582 (quoting *Scott,* 227 S.W.3d at 690-91).

The importance of Reed's impermissible testimony to the State's case is evident. The unidentified informant's out-of-court statement relating the meaning of the phrase "pulling a Carlos" was integral to the State's case against Allison. *See* Appendix B, at *13. The State proffered evidence of the January 8th shooting as proof of Allison's "consciousness of guilt" for the charged offense. 5 RR 162-169. However, there was no physical evidence linking Allison to the January 8th shooting, and witnesses' descriptions of the shooter were inconsistent with Allison. 5 RR 173-180, 185; 7 RR 189-190. And though cell phone location data indicated that Allison's phone was in the Longview area at the time, those same records showed that Allison was on a telephone call during the time the shooting took place.[16] 7 RR 160-161; 8 RR 146-158, 166-172; SX 26.

[16] Further, the jail phone call between T.K. and Allison did not prove that Allison had any involvement in the January 8th shooting, much less the September 8th robbery. 7 RR 153-158; 8 RR 111; SX 24. Nothing in the phone call supported the State's dubious definition of the phrase

Thus, without the out-of-court statement that when T.K. told Allison to "pull a Carlos," he was instructing Allison to perpetrate a shooting, there was effectively no evidence linking Allison to the January 8th shooting. And without any connection between Allison and the January 8th shooting, the State had little to corroborate the accomplice-witness testimony of co-defendant R.J. implicating Allison in the September 8th robbery of Jose Jimenez.[17] As the intermediate court of appeals noted,

> This record strongly suggests that the State needed, or at least believed that it needed, this evidence. The State spent a significant amount of trial time dealing with the January 8 shooting. The State brought up the January 8 shooting through several witnesses, including Prater, Benicaso, Anderson, Juarezortega, and Taylor. It was mentioned every day during the four-day guilt/innocence phase of the trial.

Appendix B, at *13. Therefore, this factor weighs in favor of a finding of harm.

Further, the out-of-court statement was not cumulative of other evidence. It stands alone without corroborating or conflicting evidence.

Regarding the overall strength of the prosecution's case, the only direct evidence the State presented connecting Allison to the September 8th aggravated robbery of Jose Jimenez was the accomplice-witness testimony of R.J. The jury also heard the recording of the jail telephone call between T.K. and Allison; but contrary

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"pulling a Carlos." In fact, the context of the conversation suggested that the phrase referred to T.K.'s request that Allison place money on his commissary account. SX 24.

[17] The State admitted in the intermediate court below its "clear need" for evidence linking Allison to the January 8th shooting in its argument in the court of appeals in support of the trial court's admission of the extraneous-offense evidence. State's COA Brief at 50-51.

to the State's arguments, the recording did not prove that Allison had any involvement in the January 8th shooting or the September 8th robbery. 7 RR 153-158; 8 RR 111; SX 24.

Significantly, Allison's jury was instructed that R.J. was an accomplice and that it could not convict Allison based on R.J.'s testimony unless it believed R.J.'s testimony beyond a reasonable doubt and it found R.J.'s testimony is corroborated by other evidence tending to connect Allison with the September 8th aggravated robbery.[18] CR 125. The jury was further instructed: "The corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the Defendant with its commission, and then from all the evidence, you must believe beyond a reasonable doubt that the Defendant is guilty of the offense charged against him." CR 125. The State was keenly aware of its obligation to corroborate R.J.'s testimony, as evinced by its monumental efforts to get testimony regarding the January 8th shooting – and anything that could tie Allison to that shooting – before the jury.

[18] Allison's jury was also instructed that it was prohibited from considering evidence of the extraneous offense unless it found beyond a reasonable doubt that Allison committed the extraneous offense. CR 125. But as the intermediate court of appeals noted, "without Reed's testimony, nothing would connect Allison with the January 8 shooting, rendering the evidence legally insufficient on that point. We should not, therefore, find that this limiting instruction weighs against a finding of harm." Appendix B, at *14.

Moreover, the State emphasized the January 8^{th} shooting and the "pulling a Carlos" testimony during its closing argument to the jury. 9 RR 70-71, 80-85. The State argued:

> T.K. makes a phone call to who? Markerrion. . . . Lo and behold the very next day Clearwood. . . . Why else do you go back and shoot a place up? Because I don't want you to testify. I don't want you to come to court. I want you to shut your mouth, and if you don't shut your mouth, I'm going to shut you up.

9 RR 70-71. The State specifically pointed to Allison's purported participation in the January 8^{th} shooting as corroboration for R.J.'s testimony implicating Allison in the September 8^{th} aggravated robbery. 9 RR 80-85.

> Do a Carlos, it means to do a shooting. It says it five times. We know that's the reason. You have to believe that Markerrion committed this offense in order to consider it. If you do, then you can use it. Okay? You can use for consciousness of guilt, knowledge by Markerrion, the identity of Markerrion.
>
> The address is never used in that phone call, but lo and behold the very next day after five times – listen to it. Contextually it makes no sense. Do a Carlos, it doesn't make any sense throughout their whole conversation. So I believe either he was present or he planned or directed it.
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> ▪▪▪
>
> It doesn't matter. Maybe Markerrion wasn't there, but I can guarantee you he either planned it, organized it, orchestrated it. Doesn't matter what his exact role is, before, during, or after. Just like this one, law of parties.

9 RR 82-83, 85. Finally, the record shows that the jury deliberated for about twelve hours and was deadlocked for some time before finally returning a guilty verdict. 10 RR 15; CR 127.

Considering the errant testimony in the context of the entire trial, there is a reasonable possibility that admission of that evidence "moved the jury from a state of non-persuasion to one of persuasion on a particular issue" during the guilt-innocence phase of Allison's trial. Therefore, the Confrontation Clause violation was not harmless beyond a reasonable doubt, and the conviction cannot stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Gena Bunn

GENA BUNN
Texas Bar No. 00790323

Gena Bunn, PLLC
P.O. Box 6150
Longview, Texas 75608
gbunn@genabunnlaw.com
(903) 804-4003

ATTORNEY FOR PETITIONER