No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JENNIFER MAE LEVIN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether – in a case involving the charge of DUI manslaughter – the prosecution can meets its burden of proving "cause of death" through the testimony of a "hospitalist" who did not treat the alleged victim and who merely reviewed the alleged victim's medical records?

2. Whether a criminal defendant's Sixth Amendment right of confrontation is violated when a "hospitalist" – who is not a medical examiner and who did not treat the alleged victim – testifies as to the alleged victim's cause of death (i.e., can such an expert simply review the alleged victim's medical record and give an opinion based on the review of the medical record)?

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other

The Petitioner, JENNIFER MAE LEVIN, requests the Court to issue a writ of certiorari to review the opinion/judgment of the Florida Fifth District Court of Appeal entered in this case on November 26, 2019. (A-3-4).[1]

D. CITATION TO OPINION BELOW

Levin v. State, 284 So. 3d 1072 (Fla. 5th DCA 2019).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

Florida Fifth District Court of Appeal.[2]

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Constitution requires the prosecution to prove guilt beyond a reasonable doubt. *See* U.S. Const. amends. V and XIV; *In re Winship*, 397 U.S. 358, 361 (1970).

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

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[2] Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

G. STATEMENT OF THE CASE

1. Statement of the case.

The Petitioner was charged in Florida state court with "driving under the influence" (hereinafter "DUI") manslaughter. The charge stemmed from a vehicle accident that occurred on December 19, 2016, and Octavie Lydia Morand died following the accident.

The case proceeded to a jury trial, and at the conclusion of the trial, the jury found the Petitioner guilty as charged. The trial court sentenced the Petitioner to fifteen years' imprisonment. (A-15). The Florida Fifth District Court of Appeal subsequently *per curiam* affirmed the Petitioner's conviction without discussion. (A-3-4).

2. Statement of the trial facts.

a. The State's Case in Chief.

Dante Palmer. Mr. Palmer testified that at

approximately 7:45 p.m. on December 19, 2016, he was in his vehicle traveling south on I-95 and he swerved to avoid a vehicle traveling in the wrong direction towards him (i.e., the vehicle was traveling north in the southbound lanes). (T-108-109).[3] Mr. Palmer stated that shortly after he passed the vehicle that was traveling in the wrong direction, he observed a black vehicle crash into another vehicle. (T-109). Mr. Palmer testified that after he observed the accident, he pulled over, got out of his vehicle, and ran towards the accident. (T-110). Mr. Palmer stated that he observed the vehicle that had been traveling in the wrong direction (a black Audi SUV), and he identified the Petitioner as the driver of that vehicle. (T-112-115).

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[3] References to the trial transcripts will be made by the designation "T" followed by the appropriate page number.

Naomi Garvin. Ms. Garvin testified that on the evening of December 19, 2016, she was traveling on I-95 near Exit 329 and she observed an accident on the highway. (T-132). Ms. Gavin stated that an Audi SUV was involved in the accident, and she said that she observed the Petitioner exit the Audi SUV. (T-132-136). Ms. Gavin testified that the Petitioner appeared "out of it" and she said that the Petitioner's eyes were "low and heavy." (T-137).

James Jackson. Mr. Jackson, a detective/corporal with the St. Johns County Sheriff's Office, testified that he responded to the accident on I-95 on the evening of December 19, 2016. (T-158). Corporal Jackson stated that when he arrived at the scene, he came into contact with the Petitioner – who was sitting in the driver's seat of the SUV. (T-159-160). Corporal Jackson testified that he later escorted

the Petitioner to his patrol vehicle, and he said that he "noticed an odor of alcoholic beverage coming from her." (T-161-163).

Scott Miller. Mr. Miller stated that at the time of trial, he was a deputy with the St. Johns County Sheriff's Office, and he said that prior to June of 2017, he was employed by the Florida Highway Patrol. (T-190). Deputy Miller testified that he responded to the accident on I-95 on the evening of December 19, 2016. (T-192). Deputy Miller stated that when he arrived at the scene, he spoke to the emergency personnel who were attending to Octavie Lydia Morand (the driver of the red Toyota Avalon that was involved in the accident) and he said that he was told that Ms. Morand's injuries were not "life-threatening." (T-197). Deputy Miller testified that he also came into contact with the Petitioner at the scene, and he said that the

Petitioner's "speech was severely slurred" and therefore he conducted field sobriety exercises with her (and he said that he videotaped the exercises and the video was played for the jury during Deputy Miller's testimony). (T-198, 203-230). Deputy Miller stated that he arrested the Petitioner based on her performance on the field sobriety exercises. (T-201-202).

Deputy Miller testified that he subsequently transported the Petitioner to the jail and he said that once they arrived at the jail (at approximately 11 p.m.), he obtained two breath samples from her (using the Intoxilyzer 8000 machine). (T-236-243). Deputy Miller stated that the result of the first sample was .153 and the result of the second sample was .148. (T-247).

Payal Patel. Dr. Patel, a medical doctor, stated that she was working at the hospital on the evening of

December 19, 2016 – the same night that Octavie Lydia Morand was admitted to the hospital. (T-322). Dr. Patel testified that Ms. Morand was born in 1925 (i.e., she was ninety-one years old at the time of the accident). (T-328). Dr. Patel stated that after Ms. Morand arrived, her condition deteriorated to "critical" and she was diagnosed with multiple rib fractures, a punctured lung, and internal abdominal hemorrhaging. (T-323). Dr. Patel testified that following multiple surgeries, Ms. Morand died on December 20, 2016, as a result of her injuries. (T-325).

Paul Beasley. Mr. Beasley, a deputy with the St. Johns County Sheriff's Office, testified that he is an "agency inspector" – which means that he conducts monthly inspections of the Intoxilyzer 8000 machines. (T-366-368). Deputy Beasley stated that the particular Intoxilyzer 8000 machine that was utilized in this case

was inspected (pursuant to a monthly inspection) prior to the date that the machine was used to obtain the breath samples from the Petitioner and Deputy Beasley said that the machine was "working correctly" during the inspection. (T-369-384).

Jake Shanahan. Mr. Shanahan, the department inspector for the Alcohol Testing Program with the Florida Department of Law Enforcement, testified that he has inspected – on two occasions – the particular Intoxilyzer 8000 machine that was utilized to obtain the breath samples from the Petitioner, and Mr. Shanahan stated that the machine passed the inspections. (T-415-426).

Justin Rountree. Mr. Rountree, a trooper with the Florida Highway Patrol, testified that he conducted the accident reconstruction analysis for the December 19, 2016, accident. (T-455). Based on his analysis,

Trooper Rountree opined that the accident in this case occurred because the Petitioner's vehicle was traveling in the wrong direction on I-95 – resulting in an impact between the Petitioner's vehicle and the vehicle driven by Octavie Lydia Morand. (T-474-478).

Scott Miller (recalled). Deputy Miller stated that on December 6, 2017, he and the prosecutor traveled to the intersection of County Road 210 and I-95 and he said that the two took pictures of that area (and during Deputy Miller's testimony, the State displayed the pictures for the jury). (T-527-531).

At the conclusion of Deputy Miller's testimony, the State rested. (T-534).

b. The Petitioner's Case in Chief.

Laura Barfield. Ms. Barfield, a consultant in the area of forensic toxicology and former program manager for the Alcohol Testing Program of the

Florida Department of Law Enforcement, testified that she reviewed the inspection records for the Intoxilyzer 8000 machine that was utilized to obtain the breath samples from the Petitioner, and she said that the records from 2013 to 2016 indicated that there were problems with the machine (including the replacement of the light source). (T-572-601). Ms. Barfield stated that the inspection records also demonstrated that the machine had numerous inspections in October of 2013, which she said was unusual. (T-576-584).

At the conclusion of Ms. Barfield's testimony, the defense rested. (T-724).

c. The State's Rebuttal.

Paul Beasley (recalled). Mr. Beasley stated that the Intoxilyzer 8000 machine that was utilized to obtain the breath samples from the Petitioner was used for training in October of 2013 (i.e., Mr. Beasley

testified that he "delivered the instrument to the school for the class"). (T-731-732).

Patrick Murphy. Mr. Murphy, the department inspector with the Florida Department of Law Enforcement Alcohol Testing Program, testified that he reviewed records pertaining to the Intoxilyzer 8000 that was utilized to obtain the breath samples from the Petitioner, and he said that in 2015, the light source was replaced as a preventative maintenance because "[i]t was an older instrument, and probably time to replace the light source." (T-743-744).

At the conclusion of Mr. Murphy's testimony, the State rested. (T-782).

d. The Petitioner's Surrebuttal.

Laura Barfield (recalled). Ms. Barfield stated that she disagreed with Patrick Murphy's testimony about the light source of the Intoxilyzer 8000 being

repaired because it was old, and she said that repair record showed that the part was replaced because it was "erratic." (T-792).

At the conclusion of Ms. Barfield's testimony, the defense rested. (T-795).

H. REASON FOR GRANTING THE WRIT

The questions presented are important.

The questions presented in this case are as follows:

> 1. Whether – in a case involving the charge of DUI manslaughter – the prosecution can meets its burden of proving "cause of death" through the testimony of a "hospitalist" who did not treat the alleged victim and who merely reviewed the alleged victim's medical records?
>
> 2. Whether a criminal defendant's Sixth Amendment right of confrontation is violated when a "hospitalist" – who is not a medical examiner and who did not treat the alleged victim – testifies as to the alleged victim's cause of death (i.e., can such an expert simply review the alleged victim's medical record and give an opinion based on the review of the medical record)?

The Petitioner requests the Court to grant her certiorari petition and thereafter consider these important questions. As explained below, (1) the

State's evidence failed to prove that Octavie Lydia Morand died as a result of the accident in this case and (2) the trial court erred by allowing Dr. Payal Patel to give an opinion regarding Ms. Morand's cause of death.

During the trial, the State presented the testimony of Dr. Patel, a "hospitalist" who was working at the hospital (Baptist South) the night Ms. Morand was brought to the hospital following the accident in this case. During Dr. Patel's testimony, the prosecutor asked Dr. Patel whether Ms. Morand died as a result of the injuries that she suffered from the accident, defense counsel objected, and the following occurred:

> Q Was the cause of her death and the injuries she suffered the result of that crash?
>
> A Yes.
>
> MR. STONE [defense counsel]: Objection, your Honor.
>
> May we approach?

THE COURT: All right. Let me see counsel at sidebar.

(The following proceedings were held at the bench out of the hearing of the jury:)

THE COURT: I guess you'll be doing the cross?

MR. STONE: I will.

THE COURT: Okay. All right. We're at sidebar outside the presence of the jury.
Mr. Stone?

MR. STONE: Your Honor, I don't believe that the witness has the – the State has presented a proper foundation for the witness to deliver that expert opinion.

THE COURT: She's a medical doctor, treating physician.

MR. STONE: *She wasn't the treating physician.*

MR. BISHOP: There were multiple treating physicians.

THE COURT: Lay some foundation exactly as to her type of

> medical expertise and that she was one of the many treating physicians. Once you lay that foundation, I'll overrule the objection, if you can lay that foundation.

(A-26-28) (emphasis added). The prosecutor subsequently elicited the following testimony from Dr. Patel:

> Q Were there many physicians that treated her?
>
> A Yes.
>
> Q You, as a hospitalist, treated her. Was there also a surgeon?
>
> A Correct.
>
> Q Was the cause of Ms. Morand's death and the injuries she suffered a result of the motor vehicle crash that she came to the emergency department for?
>
> MR. STONE: Objection, Your Honor. Foundation.
>
> THE COURT: Overruled.
>
> A Yes.

(A-28-29). On cross-examination, defense counsel

established that during the time that Ms. Morand was in the hospital, *Dr. Patel never came into contact with Ms. Morand*:

> Q Okay. But from the moment that she was brought into the hospital to the moment you left, you never laid eyes on her?
>
> A No, I did not.
>
> Q Okay. So you don't know what happened other than looking at the chart?
>
> A Right. And discussion with the other physicians involved.
>
> . . . .
>
> Q And then the next day when you arrived, you indicated that – well, she was going in for surgery again. Correct?
>
> A Yes, sir.
>
> Q And that – and so you were basically – again, you did not actually lay eyes on Ms. Morand?

A Correct.

(A-30-33).

After the State rested its case in chief, defense counsel moved for a judgment of acquittal and made the following argument (which was denied by the trial court):

> Your Honor, in terms of the element of death in this case, which is a – the element of a DUI manslaughter, the State has the requirement to prove beyond a reasonable doubt the cause of death. And that is typically done by calling a medical examiner who would – who actually performed an autopsy. In this case, that wasn't done. In this case the cause of death was testified to by Dr. Patel. Now, Dr. Patel was obviously at the scene – at the hospital when Ms. Morand was admitted. And she testified, essentially, that Ms. Morand was alert, coherent, and had a normal heart rate, and later on went into distress and there was an operation performed. But that during that entire time, although she was at the hospital, she never saw Ms. Morand.
>
> She never treated her. She was not part of the team of surgeons or

anyone in the room with her when she – when the surgery was performed. She then went home and the next day she came back.

THE COURT: The doctor, the doctor went home, not Ms. Morand.

MR. STONE: The doctor. I apologize. Dr. Patel went home still having spent the entire day or evening, her entire shift, where Ms. Morand was at the hospital and she was at the hospital, but never saw her. Never went into the room. Has no personal firsthand knowledge of any treatment or anything that – that any doctor or any nurse or anybody else may have had with Ms. Morand. So Dr. Patel went home. And the next day came back for her shift and when she got there, a – the – the doctor – and I'm not recalling the doctor's name. I want to say Atkins.

THE COURT: Adkisson.

MR. STONE: Dr. Adkisson was the doctor who actually performed the surgeries. And then there was also a Dr. Patou who was present. And there was also Dr. Margerum, I believe. And they all had something to do with the treatment. They all had something to do with the – with what happened at the

hospital. But Dr. Patel did not, she was a hospitalist, as she testified to. And ultimately, later on, after she had been there for – and I think she had indicated sometime in the afternoon when she arrived, Ms. Morand was going in for surgery number two or was already in for surgery number two. And then after that surgery, she was out again and in a recovery room. And it was much later that a Code Blue went out. And that was the one and only time that Dr. Patel actually laid eyes on Ms. Morand. And – she was not part of the resuscitation team. I think she indicated that she went – she went there to see if she could assist in any way. She didn't really testify as to anything that she actually did medically for Ms. Morand or in the resuscitation efforts. But she talked about the fact that there was some discussion with the family about – about not going in for a third surgery and the decision was made by Dr. Patou not to do that. The problem here is –

THE COURT: That discussion wasn't with the family. The discussion was amongst the doctors with regards to the third surgery, was my recollection.

MR. STONE: Correct, correct. But there was – I believe she testified that there was some discussion with the

family. Somebody – somebody addressed the family.

THE COURT: But not about the third surgery, was my recollection.

MR. STONE: Correct. Correct. It was about the discussion whether they were – and then – the was on – was on those matters.

However, Dr. Patel, that was the one and only time she actually had been in the room with Ms. Morand. I'm not sure exactly what her role was, other than – other than to just be there to assist in case they needed another set of hands. Importantly when she testified, and the State put her on the stand, they handed her the medical records that Ms. – that Dr. Patel relied upon, and that's how she drew her opinions, that's how she drew her testimony from, was essentially what other doctors what other people had done. And so we run into the difficulty of – of her ability to declare a cause of death.

And I'm not saying that in her position, because she signed a death certificate if, in fact, she did, and that's not in evidence, but let's – for purposes of an argument, let's say that she did sign a death certificate and she did declare Ms. Morand deceased at a particular time on a particular date, that is something

probably within her capabilities as a doctor at Baptist South. However, that is not within her expertise, knowledge, education, or anything that we heard about with regard to declaring a cause of death. And I know that this may seem –

THE COURT: What if somebody showed up at the hospital with a gunshot wound to their chest, it went right through their heart, do you think that an emergency room doctor or a hospitalist can say that gunshots is what caused their death? And you don't need the medical examiner to say that.

MR. STONE: Possibility. But I think that under the circumstances it's not a – it's not a matter of what we think we know, it's a matter of what the State actually can prove, and that is why, typically, medical examiners are called as the – as the – to establish causation. The medical examiner doesn't come into court without the credentialing that is required. A medical examiner obviously has to have certain credentials, certain education, certain experience and certain knowledge in order to make – draw such opinions. Because at the end of the day, that's what the testimony involves. It's an opinion as to a cause of death. It could be disputed by experts. It can be agreed

to by experts, but it must be established by legal – by legal authority to do so. Legal authority to do so means that the witness is qualified and has the education, training, and experience, and ability to make the call.

And, in fact, in some cases, this would be – this would fly in the face of the Sixth Amendment right to confront witnesses that was established in Crawford v. Washington, which is a United States Supreme Court case at 541 U.S. 36 in 2004. Which basically said that the right to confront witnesses applies to testimonial hearsay. Later in Melendez-Diaz versus Massachusetts at 557 U.S. 305, which is a 2009 U.S. Supreme Court case, that – ruled that Crawford ruling was expanded to reports of forensic analysis. And essentially, they determined that forensic analysis reports would, in fact, be testimonial hearsay.

And then later on in Bullcoming versus New Mexico, which, in fact, was a DUI case that made it all the way to the Supreme Court, 131 Supreme Court 2705, which is 2011. In that case, interestingly enough, we have a very similar situation here. And that's a United States Supreme Court case where they reversed the conviction based upon the fact that a blood alcohol content that was established through a toxicology analysis and resulted in a lab report – and ended

up in a lab report. But that was brought in to court to be done for purposes of establishing someone's blood alcohol content.

THE COURT: But doesn't the Florida Rules of Evidence, as well as the Federal Rules of Evidence allow experts to come in and give their opinion based upon hearsay. As long as they don't testify to that hearsay, they can give their opinion based upon hearsay, what they've seen from other experts or what they've seen from – every day it happens with physicians. I've reviewed these records and, in my opinion, this person's back was not caused by this car accident or this person's death was caused from this car accident. It happens probably every week in this courthouse and courthouses all over the state in personal injury cases. And the Evidence Code is the Evidence Code, whether it's a criminal case or a personal injury case, that allows for expert opinion testimony to be based upon review of medical records.

MR. STONE: I understand, but I think that this goes – this goes into what I'm referring to here. Which is in Bullcoming, essentially that – they had that situation where they brought in a substitute lab analyst, because the lab

analyst who had conducted the analysis was not available, so they brought in a substitute lab analyst to testify about the blood alcohol content that was contained in the lab report. And he looked at all the reports of the other lab analysts –

THE COURT: I'm familiar with that case and I'm familiar with the host of cases after that deal with urine drug tests in the context of violations of probation that talk about when the witness can testify to that hearsay and when they cannot.

But are you familiar or are you aware of any cases anywhere in the United States where an appellate court has said that a medical doctor cannot take the witness stand and opine as to cause of death, even though they're not the ones who did an autopsy or maybe even an autopsy wasn't done?

MR. STONE: Well, and I'm referring to Rosario v. State, which is at 175 So. 3d 843, which is a 2015 Fifth DCA case that dealt with cause of death and with the – with the – ultimately all of these issues. The testimonial hearsay, the failure to call the medical examiner conducting the autopsy.

THE COURT: What did that case say?

MR. STONE: Well, that's what I was reading.

THE COURT: When you're talking about a DUI breath test or blood test, that's testimonial hearsay.

MR. STONE: If I could have one moment, Your Honor.

THE COURT: Because there are cases out there, that I'm aware of, where the medical examiner who conducted the autopsy, was no longer available. Either they died or the situation – even up in Jacksonville, where you-all are located – where the medical examiner was no longer capable of performing her job, and other medical examiners came in to testify to the cause of death in murder cases, based upon their review of the records.

MR. STONE: What I would say is that the Rosario case stands for the fact that it states that an autopsy report admitted at the defendant's trial for aggravated child abuse and first-degree murder, was testimonial hearsay under the Confrontation Clause, such that failure to give the defendant the opportunity to cross-examine the medical examiner who prepared the report, violated the defendant's Sixth

Amendment right to confront witnesses. Even though the report was not sworn or certified, the report included out-of-court statements made by the examiner and was offered by the State to prove the truth of the matter asserted.

THE COURT: Well, that's markedly different from what we have here. We don't have the State tendering an autopsy report, saying here's the report. We have an expert coming in and giving her opinion as to the cause of death. An expert who happened to be a treating physician to some degree.

MR. STONE: And I would certainly disagree that she was qualified as an expert to declare cause of death.

As indicated –

THE COURT: You didn't object to the opinion during the course of her testimony. I didn't hear anybody object to her rendering the opinion.

MR. STONE: I objected to the foundation of her – of her testimony. Of her – of her being called for that purpose. She wasn't a treating physician. She – she had no hands-on experience with this – with this case, other than to review medical records and ultimately declare the – the death at a certain place in time.

> But that did not – that does not, then, extend to her credentialing or ability to declare a cause of death. So I would ask that the Court grant a Judgment of Acquittal as to the element of causing death in the DUI manslaughter count. Thank you.
>
> THE COURT: Okay. Thank you. I appreciate your arguments, and I understand where you-all are coming from. However, there's been clearly a prima facie case of impairment.
>
> So I will deny the Motion for Judgment of Acquittal that Mr. Lockett had argued.
>
> And then I do find that Dr. Patel is qualified to render the opinion that she did with regards to cause of death, so I'll deny the Motion for Judgment of Acquittal.

(A-35-49). For all of the reasons expressed by defense counsel, the trial court erred by denying the motion for a judgment of acquittal.

In *Rosario v. State*, 175 So. 3d 843, 858 (Fla. 5th DCA 2015), the state appellate court – citing this Court's opinions in *Crawford v. Washington*, 541 U.S.

36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) – held that an autopsy report prepared is testimonial hearsay under the Confrontation Clause of the Sixth Amendment to the Constitution:

> In sum, we conclude that an autopsy report prepared pursuant to chapter 406[, Florida Statutes], is testimonial hearsay under the Confrontation Clause. With respect to the broad statement in *Banmah* [*v. State*, 87 So. 3d 101 (Fla. 3d DCA 2012),] that "autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution," we respectfully disagree. 87 So. 3d at 103. Regardless of whether the report is actually used at trial, it is reasonably foreseeable to believe that it may be used prosecutorially, especially when the medical examiner concludes that the cause of death was a homicide, as in this case. *See Crawford*, 541 U.S. at 51 (stating that testimonial statements include "material such as affidavits . . . or similar pretrial statements that declarants *would reasonably expect to be used* prosecutorially" (emphasis added)). The Confrontation Clause has never

> mandated that a statement's sole use must be for prosecution in order for it to be testimonial. Moreover, the fact that an autopsy report is not "accusatory" or "inherently inculpatory" in some circumstances does not make it nontestimonial in all circumstances. *See Bullcoming*, 564 U.S. at 664 (rejecting respondent's argument that the affirmations made by the analyst were not testimonial because they were not "adversarial" or "inquisitorial"); *Melendez-Diaz*, 557 U.S. at 313-315 (rejecting respondent's argument that the analysts were not subject to confrontation because they were not "accusatory" or conventional witnesses). When a report prepared pursuant to chapter 406 is introduced "against" the defendant at trial, as in this case, he must be given an opportunity to cross-examine the medical examiner who prepared the report. Because Appellant was not afforded an opportunity to cross-examine Dr. Gore, we find that his Sixth Amendment right to confront witnesses was violated.

(Some citations omitted). Consistent with *Rosario*, Dr. Patel's testimony was insufficient to establish Ms. Morand's cause of death. As argued by defense counsel during the trial, Dr. Patel did not treat Ms. Morand –

she simply reviewed Ms. Morand's medical record and gave an opinion based on her review of the medical record. Because a proper foundation was not laid by the State for Dr. Patel to give such an opinion, Dr. Patel's testimony does not satisfy the State's burden of establishing that Ms. Morand died as a result of the accident in this case. Thus, the trial court erred by denying the Petitioner's motion for a judgment of acquittal.

Alternatively, the trial court erred by allowing Dr. Patel to give an opinion regarding Ms. Morand's cause of death. Because Dr. Patel was not a medical examiner and she relied on testimonial hearsay in testifying as to the cause of Ms. Morand's death, her testimony was not constitutionally satisfactory under the Confrontation Clause. *See Crawford*, *Melendez-Diaz* & *Bullcoming*.

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to consider these important questions. Accordingly, the Petitioner requests the Court to grant her petition for a writ of certiorari.

I. CONCLUSION

The Petitioner requests the Court to grant her petition for writ of certiorari.

Respectfully Submitted,

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER