No. 21-____

In the Supreme Court of the United States

KARINA RAFTER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the admission of out-of-court statements of a decedent, offered under the state-of-mind exception, violate the Confrontation Clause of the Sixth Amendment where there is evidence of unreliability and bias?

LIST OF PROCEEDINGS

Supreme Court of Virginia
No. 210183
Karina Rafter *Appellant,* v.
Commonwealth of Virginia *Appellee*
Date of Denying Petition for Appeal: Nov 4, 2021

Court of Appeals of Virginia
No. 0382-20-2
Karina Rafter, s/k/a Karina Malgorzata Rafter,
Appellant, v. Commonwealth of Virginia, *Appellee*
Date of Final Opinion: November 20, 2020

Circuit Court of the County of Powhatan, Virginia
No. CR#19000001-00 & 01
Commonwealth of Virginia v. Karina Rafter
Date of Final Order: March 30, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karina Rafter, an inmate at Fluvanna Correctional Center for Women in Troy, Virginia, represented by Counsel, respectfully petitions for a writ of certiorari to review the judgments of the Supreme Court of Virginia and Virginia Court of Appeals affirming her conviction for murder and use of a firearm.

OPINIONS BELOW

Petitioner was sentenced to a term of incarceration of twenty (20) years for the charge of murder and three (3) years for the charge of use of a firearm. App.22a. Petitioner appealed her conviction to the Virginia Court of Appeals and on November 20, 2020, the Court of Appeals issued a per curiam decision denying Petitioner's petition for appeal. App.5a. Petitioner appealed this decision and on January 13, 2021, a three-judge panel denied Petitioner's petition for appeal. App.3a. Petitioner timely noted her appeal to the Supreme Court of Virginia who denied her petition for appeal on November 4, 2021. App.1a.

JURISDICTION

The judgment of the Virginia Supreme Court was entered on November 14, 2021. App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT LAW

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Fed. R. Evid. 803(3)

> Federal Rule of Evidence 803(3) provides:
>
> A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered of believed unless it relates to the validity or terms of the declarant's will.[1]

STATEMENT OF THE CASE

The Sixth Amendment to the United States Constitution provides, in part, that an accused has the right to confront witnesses against her. The Confrontation Clause is a bedrock principle of criminal law, protecting an accused by ensuring that witnesses are subject to cross-examination and rebuttal. The Court utilized *Crawford* to re-establish the importance in the context of testimonial hearsay. *See generally Crawford*

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[1] The Supreme Court of Virginia and thus the Court of Appeals of Virginia relied on Virginia Supreme Court Rule 2:803(3) which is identical to Federal rule 803(3).

v. Washington, 541 U.S. 36 (2003). Karina Rafter was convicted of first degree murder and use of a firearm based entirely on circumstantial evidence, after her estranged husband was found dead on December 9, 2016 at their former home in Powhatan, Virginia. App.22a. There was absolutely no evidence placing Petitioner at the scene of her husband's death. There was no DNA or fingerprints linking Petitioner to the crime. Her whereabouts were primarily accounted for elsewhere on the morning of her husband's death. App. 9a. At trial, over the defense objection, the Commonwealth was permitted to call witnesses to testify to Mr. Rafter's alleged fear of his wife. The witnesses included Mr. Rafter's divorce attorney, his co-worker, a friend, and his step-daughter (who was estranged from Mrs. Rafter). App.8a. These witnesses were permitted, over objection, to testify that Mr. Rafter had expressed fear of Mrs. Rafter in the months leading up to his death. App.14a, App. 33a-34a. The trial court relied on a Virginia Supreme Court decision in *Clay v. Commonwealth* permitting statements of a decedent under the state of mind exception. App.15a.

At the time of Mr. Rafter's death, the Rafters were divorcing. Mr. Rafter lived in the marital home with their son, M.R. Mrs. Rafter lived with her parents in Chesterfield, Virginia with their daughter, M.R. App.8a. Although they were divorcing, the Rafters maintained cordial communication via text message. *Id.* On the morning after Mr. Rafter's death, before Mrs. Rafter was notified by police, she made a substantial retainer payment to her divorce attorney in preparation for an upcoming court date. App.9a.

Mr. Rafter had a long, well-documented history of mental illness including paranoia, hallucinations,

depression, and suicidal ideations. App.10a, 13a-14a, 50a-53a. The trial record reflects that he had previous hospitalizations for self-harm and suicide ideation, and a history of hallucinations of people and other creatures trying to kill him. His therapist had recently requested Mrs. Rafter to remove a shotgun from the home after Mr. Rafter expressed a desire to harm himself. App.9a, 78a, 80a-81a. He was anxious over the divorce, and particularly afraid of losing custody of the children. App.8a. In sum, he had both an extensive history of paranoia and delusions of danger, a history of self harm, and a motive to malign Mrs. Rafter to his friends and co-workers. Nonetheless, the trial court permitted the Commonwealth to admit these untested out-of-court statements against Petitioner.

This petition raises the question whether the state-of-mind exception to the Sixth Amendment right to be confronted with witnesses applies to highly prejudicial hearsay testimony allegedly made by a person suffering with paranoia, hallucinations, and an ongoing divorce without placing a temporal requirement on the statements and allowing for statements with an undercurrent of memory.

A. Legal Background

The Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. "The Confrontation Clause's ultimate goal is to ensure reliability of evidence. . . . It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, (2004). This Court found in *Crawford* that the right to confront witnesses against the accused overrode the hearsay exceptions if the

statement was testimonial. In *Davis v. Washington*, this Court found that the intent of the declarant mattered. *Davis v. Washington*, (2006). In *Michigan v. Bryant*, this Court held that in order to be testimonial the statement must be "accusatory" with some degree of formality usually after investigation has begun. *Michigan v. Bryant*, (2011). Finally, in *Melendez-Diaz v. Massachusetts*, the Court said that whether the hearsay statement goes to prove the truth of the matter is also testimonial.

The state-of-mind hearsay exception is well-established. Almost every state and federal circuit recognizes the state-of-mind exception; however, this Court has never addressed the requirements for establishing what qualifies as a state-of-mind exception. Beyond federal courts establishing that determine whether to accept the state-of-mind exception is a "fact-intensive inquiry" and this Court establishing that backward-looking statements of memory are not admissible there is no cohesion amongst the courts on the exact temporal requirements or the mental stability of the speaker. *See United States v. Rivera-Hernandez*, 497 F.3d 71, 81 (1st Cir. 2007); *see also Shepard v. United States*, 290 U.S. 96, 105-06 (1933).

B. Factual and Procedural History

In this case, the Virginia courts applied a Virginia Supreme Court case, *Clay v. Commonwealth*, to allow the State to use hearsay in order to convict Petitioner of a murder.

On December 9, 2016 at 8:41 A.M., then thirteen (13) year-old M.R. called 9-1-1 to report the death of his father, John Rafter, in their home in Powhatan County, Virginia. App.7a. The Rafters, although married, had

separated and Petitioner and her daughter were living with Petitioner's parents in Chesterfield County, Virginia. App.7a-8a. On December 9, 2016, Detective Marilyn Durham met and notified Petitioner about her husband's death at her youngest daughter's middle school. App.8a. When Detective Durham told Petitioner about her husband's death, Petitioner was so distraught that she nearly collapsed.

The entire case against Appellant was circumstantial. The Commonwealth relied on the parties' pending divorce as a specter for a motive to kill, despite the evidence of their amicable relationship and cordial communication. Petitioner testified that she maintained a healthy relationship with Mr. Rafter for the wellbeing of her children. App.8a. Text messages exchanged between Petitioner and Mr. Rafter up to his death showed kind and respectful communication. *Id.* Moreover, the very last exchange between Petitioner and Mr. Rafter was a friendly exchange about how they could best discuss their divorce with their children.

Mr. Rafter had a long history of depression, anxiety, and suicidal ideations. App.10a, 13a-14a, 50a-53a. Mr. Rafter's therapist testified that as recent as December 5, 2016, Mr. Rafter had never expressed any fear of Petitioner to his therapist. He did, however, express feeling afraid and anxious and wondering how he would cope with his feelings if since Petitioner had filed for full custody of both their children and for spousal support. Just one year prior to his death, Mr. Rafter expressed stress, depression, and suicidal ideations to his therapist. App.50a-53a. Mr. Rafter also conveyed to his therapist that he kept a gun in the trunk of his car. Mr. Rafter's therapist contacted Petitioner in order to implement a safety plan for Appellant

to take Mr. Rafter's gun to Appellant's parent's home. App.9a.

Mr. Rafter began hallucinating and sleeping with an ax prior to his death. App.80a. Mr. Rafter had a history of fearful delusions, including a fear of gnomes and people from the forest coming to attack him. At one time, he was afraid of his step-daughter and developed a habit of not turning his back to her while he was washing dishes. App.78a. Testimony was introduced, over the objection of trial counsel, that Mr. Rafter had expressed fear of Petitioner. *See* App. 27a-62a.

REASONS FOR GRANTING THE PETITION

The decision below merits the Court's review. First, the decision violates the Confrontation Clause of the Sixth Amendment. Additionally, the state-of-mind exception is codified in the rules of evidence in almost every state on both the state and federal level. However, there is no uniformity in application of the state-of-mind exception. The requirements for the rule currently only require the lack of memory or belief statements to prove a fact remembered or believed.

There is no uniform test for a when statements qualify for this exception, or what indicia of reliability is necessary for admissibility. The lower courts require guidance on what standards a hearsay statement must meet to qualify for the state of mind exception.

I. THE DECISION BELOW CONFLICTS WITH ESTABLISHED PRECEDENT IN LIGHT OF *CRAWFORD*.

An accused's right to confront adverse witnesses is a fundamental right established by the Sixth Amendment of the United States. The Court has found that the Confrontation Clause is "the bedrock procedural guarantee of the confrontation of witnesses applies to both federal and state prosecutions" alike. *Crawford*, 541 U.S. at 42. *Citing Pointer v. Texas*, 380 U.S. 400, 406 (1965). The Confrontation Clause's "ultimate goal is to ensure reliability of evidence . . . it commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. *Crawford* works to prevent testimonial hearsay from being admitted when the accused has not had a right to cross-examine the witness. Furthermore, *Crawford* prevents statements that would fall into a traditional hearsay exception if the statements are testimonial. *Id.* at 56. A statement qualifies as testimonial if the primary purpose of that statement was to create an out-of-court substitute for trial testimony. *See Michigan v. Bryant*, 562 U.S. 344, 369 (2011).

Petitioner and Mr. Rafter were living separately in 2016 prior to Mr. Rafter's death. App.8a. Mr. Rafter had filed for divorce from Petitioner in July 2016 and requested sole custody of their two minor children. App.8a. The parties had a divorce hearing scheduled for December 13, 2016. According to his friends and co-worker, Mr. Rafter claimed to be afraid of Petitioner during their separation. He told his divorce attorney that he wanted to purchase a gun and change the locks on the martial home. *Id.* Mr. Rafter then told a friend and co-worker that he was

afraid that Petitioner would harm him. *See* App.8a; App.42a; App.57a; and App.63a.

This evidence was the unreliable and biased statements made during a divorce, by a party with a history of serious mental illness. The evidence shows that Mr. Rafter was obsessive over the factors surrounding his divorce to the point that it caused him great stress and limited his ability to sleep at night. *See* App.42a. Mr. Rafter began making these claims after he had requested sole custody of the children leading up to his hearing date. Claiming fear of his estranged wife to his divorce attorney and friends and family during their divorce litigation was self-serving, and the statements were inherently unreliable. *See* App.8a. As such, these statements were testimonial, as they were made in the course of divorce litigation. Additionally, they were simply inherently unreliable given Mr. Rafter's bias, motive to fabricate, and history of delusions. Accordingly, Petitioner the statements Mr. Rafter made to his attorney, friends, and co-workers was testimonial hearsay and without cross-examination, the testimony was barred under *Crawford* and it was a constitutional error to admit them at trial.

II. THE LOWER COURTS NEED FURTHER GUIDANCE ON THE TEMPORAL AND RELIABILITY REQUIREMENTS FOR THE *STATE-OF-MIND* EXCEPTION.

The trial court and the Court of Appeals relied on *Clay v. Commonwealth*, a Supreme Court of Virginia case, in affirming the admission of hearsay statements regarding Mr. Rafter's alleged statements of fear. *See Clay v. Commonwealth*, 263 Va. 253 (2001). In *Clay*, the Supreme Court of Virginia held that "a victim's statements regarding fear of the accused are admissible to rebut claims by the defense of self-

defense, suicide, or accidental death." *Id.* at 257. The Virginia courts found that the state-of-mind exception applied to the testimony in this case. *Id.* However, Petitioner's case differs from *Clay* and other cases where the state-of-mind exception was used, and there is a lack of uniformity across the courts. Specifically, the temporal element is different in almost every case allowing for hearsay using the state-of-mind exception. *See Clay v. Commonwealth*, 263 Va. 253 (2001) (statements made two months prior to death); *United States v. Smallwood*, 299 F. Supp. 2d 578 (E.D. Va. 2004) (statements made the night of the incident); *Coy v. Renico*, 414 F. Supp.2d 744 (E.D. Mich. 2006) (statements made the night of the incident).

In this case, the court allowed for testimony regarding Petitioner's alleged state of mind from six months prior to the death of Mr. Rafter. App.60a. Currently, as Federal Rule of Evidence 803(3) stands, there is no temporal requirement for the exception. This leaves a lack of uniformity lower courts and circuits rulings on the state-of-mind exception.

The lack of temporal parameters on the exception blurs the line between state of mind and memory and belief, the latter of which is inadmissible under Federal Rule of Evidence 803(3). Where a witness is permitted to testify to statements heard months or years prior, there is an inherent risk that the witness is relying more on memory. *See* App.64a. Petitioner asserts that in order to cure this defect, the Court should set a clear timeframe in which state-of-mind hearsay can be admitted. Specifically, Petitioner asserts that the timeframe for state-of-mind hearsay should be in close proximity to the decedent's death in order to assure that the testimony actually reflects the

defendant's alleged state-of-mind at the time of the decedents death.

III. WHERE A DECEDENT SUFFERS WITH HALLUCINATIONS AND PARANOIA, THE *STATE-OF-MIND* EXCEPTION SHOULD NOT APPLY.

This case presents a novel issue, where the declarant was known to suffer paranoid hallucinations. In this case, there is a clear documented history of the mental illness of the decedent. *See* App.10a, 13a-14a, 50a-53a. Mr. Rafter hallucinated people coming from the woods, gnomes attacking him, and believed that his step-daughter was going to attack him from behind while washing dishes. App.78a. His paranoia kept him from sleeping and caused him to be suspicious that cameras were planted in his home although no evidence was found of those cameras. App.53a. Mr. Rafter was tormented by his paranoia and even said to his therapist that he did not know if he was blowing his fears out of proportion by reading Petitioner's "cryptic" texts to him. App.43a.

Petitioner argues that when a person has clear documented evidence of mental illness that cause hallucinations and paranoia, that the state-of-mind exception should not apply. As mentioned above, the Sixth Amendment's ultimate goal is to establish reliability be established through cross-examination. *Crawford*, 541 U.S. at 61. This is especially important in situations like Petitioners' where the statements depicting her state-of-mind and the alleged fear that the decedent felt are paramount in establishing Petitioner's guilt. Here, the words of a person, clearly going through a mental health crisis were testified to as a basis to show that the defendant was threatening Mr. Rafter and making him afraid. However, these

statements were driven by his mental health, hallucinations, and paranoia. As there was no opportunity for Petitioner's attorney to cross-examine Mr. Rogers in order to understand his mental state at the time of making these statements, Petitioner submits that they should not have been permitted. The Commonwealth Attorney of Virginia was permitted to parade the deceased's friends to testify about one-sided statements he allegedly made while in the midst of an apparent mental crisis. When viewed through the context of the ongoing divorce, his contemporaneous history of depression, paranoia, and hallucinations, the statements lack integrity and should not have been permitted.

CONCLUSION

Karina Rafter respectfully requests that her petition for a writ of certiorari be GRANTED in light of the aforementioned reasons.

Respectfully submitted,

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