No. _____

In the Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Petitioner,

v.

ANGELA D. BREWER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether lab results requested not by law enforcement but by a forensic pathologist to assist in making a routine cause of death determination are testimonial in nature and their admission without cross-examination of the analyst violates a criminal defendant's right to confrontation as articulated in *Crawford v. Washington*, 541 U.S. 36, 51 (2004), *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Ohio v. Clark*, 576 U.S. 237 (2015).

STATEMENT OF RELATED PROCEEDINGS

The State of South Carolina v. Angela Brewer, Case No. 2014A3910300534 (S.C. Court of General Sessions) (December 14, 2017).

The State v. Angela D. Brewer, Case No. 2017-002563 (S.C. Court of Appeals) (October 26, 2020).

The State v. Angela D. Brewer, Case No. 2020-001345 (Supreme Court of South Carolina) (October 12, 2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of South Carolina, respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of South Carolina in this case.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 882 S.E.2d 156, and it is reproduced in the appendix hereto at App. 1-23. The opinion of the South Carolina Court of Appeals is unpublished but is reproduced at App. 24-42.

JURISDICTIONAL STATEMENT

The opinion of the Supreme Court of South Carolina was filed on October 12, 2022. The State did not seek a petition for rehearing and remittitur was issued November 22, 2022. On December 20, 2022, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including March 11, 2023. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right of the accused to confront witnesses against him secured by the Sixth Amendment of the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which

> district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend VI. The Sixth Amendment is applicable to South Carolina and the other states through the Fourteenth Amendment of the United States Constitution. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

STATEMENT OF THE CASE

A. Factual History

On October 17, 2014, first responders received a report of a fourteen-month-old infant not breathing. The infant, blue-gray in appearance, was on the floor while Respondent's husband performed CPR when the first officer arrived. The officer took over performing CPR until paramedics arrived. The infant was taken to the hospital where he was pronounced dead. The infant did not have any visible signs indicating a possible cause of death. (R.204).

At the hospital, officers began gathering information and establishing a timeline to the extent possible. The officers only obtained basic information including what the child ate and drank. (R.104). Respondent indicated the child was fussy, whining, and "might have been coming down with something."

(R.113; 306). Further, officers obtained a list of medications taken by Respondent.

Law enforcement obtained consent to search the residence, which was standard protocol after an unexplained child death. Officers took various items from the home to assist in determining the cause of death and conducted a reenactment of the day's events with Respondent. At the time, law enforcement "had no clue what had happened." (R.106).

The deputy coroner arrived at the hospital after being notified of the child's death. There were no physical signs of abuse, including no brises, cuts, or other marks on the child. (R.204). Law enforcement at the hospital noted no "outward trauma" indicating a possible cause of death. (R.276).

As part of the autopsy on October 18, 2014, to determine cause of death, a forensic pathologist extracted blood, tissue, and fluids from the infant and sent them to National Medical Services Laboratory (NMS), an out-of-state lab. The pathologist uses NMS roughly 650 times a year to process samples from autopsies including autopsies for non-criminal deaths. (R.391; 413).

On November 6, almost three weeks after the infant died and the toxicology testing was requested by the pathologist, a law enforcement officer interviewed Respondent for the first time since at the hospital. Respondent was not Mirandized because law enforcement "had no reason to believe it was a homicide at that time." (R.226-227). The intention behind the interview was to simply try to "get a timeline and try to figure out the cause of death."

(R.227). At the time of the interview, law enforcement had not been provided the toxicology or autopsy results. (R.227). Only after the forensic pathologist received the toxicology results showing the high level of oxycodone in the child's blood, and his subsequent determination cause of death was acute oxycodone toxicity, did the case become a homicide by child abuse. (R.403).

At trial, Respondent's counsel moved to exclude any discussion regarding the laboratory results and any testimony regarding the results by the pathologist. He maintained under *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009), the testimony was inadmissible. The circuit court allowed the testimony, finding no violation of the Confrontation Clause.[1]

B. State Appellate Court Decisions

Following the trial, Respondent appealed her conviction to the South Carolina Court of Appeals. (App.24-42). On appeal, the Court concluded the toxicology lab results were not testimonial in nature. The Court found the results were not issued with the primary purpose of assisting a criminal investigation. (App.40).

Subsequent to that decision, Respondent petitioned the Supreme Court of South Carolina for a writ of certiorari, and the petition was granted.

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[1] The State acknowledges the basis the circuit court relied on to allow the testimony—the ability to cross-examine the pathologist was sufficient to satisfy the Confrontation Clause—is different than the argument advanced on appeal before the South Carolina Court of Appeals and Supreme Court of South Carolina as well as before this Court.

Thereafter, on certiorari, the Supreme Court of South Carolina examined the evolution of the Confrontation Clause since this Court's opinion in *Crawford v. Washington*, 541 U.S. 36, 51 (2004). The Supreme Court of South Carolina noted this Court in *Williams v. Illinois*, 567 U.S. 50 (2012), has "muddied the waters" and that "even two members of the Supreme Court have acknowledged the lack of clarity in this area of the law." (App.17-18). Thereafter, the Supreme Court of South Carolina found the toxicology report was testimonial, analogizing it to autopsy reports, and stating: "[w]hile we must review the primary purpose of the evidence to ascertain whether it is testimonial, we cannot ignore the reality that if a criminal prosecution takes place, the NMS report would be critical to prove the State's case." (App. 20). The Supreme Court of South Carolina found the admission of the laboratory report without the forensic analyst testifying and being subject to cross-examination violated Respondent's federal confrontation right. (App. 22).

C. Legal Background

The Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Testimony, for purpose of the Confrontation Clause, means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Id.*

As a result, this Court "exempted [nontestimonial] statements from Confrontation Clause scrutiny altogether." *Id.* Only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006) (citing *Crawford*, 541 U.S. at 51). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.*

In *Davis*, 547 U.S. 813 (2006), this Court announced the "primary purpose" test for determining whether an out-of-court statement is testimonial in nature. This Court explained statements are testimonial where their primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*, at 822. In *Michigan v. Bryant*, 562 U.S. 344 (2011), this Court found where an out-of-court statement's primary purpose is "to create a record for trial" or "creating an out-of-court substitute for trial testimony" then the statement is testimonial and falls within the requirements of *Crawford* and the Confrontation Clause.

In 2009, this Court extended the holding of *Crawford* beyond testimony and to forensic "certificates of analysis" in which sworn statements indicating a substance submitted for testing during a criminal investigation was found to be cocaine were admitted in lieu of testimony by an analyst. *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009). The laboratory certificates were "within the 'core class of testimonial statements,'" making them inadmissible

under the reasoning of *Crawford*. *Melendez–Diaz*, 557 U.S. at 310. The majority explained the certificates were a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* Additionally, this Court articulated the certificates were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 311. Further, this Court noted: "under Massachusetts law the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance," and explained: "We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

This Court again examined an analyst's report in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). In that case, a blood alcohol report created as part of a DWI investigation was challenged as testimonial. In determining the report was testimonial, this Court found significant: "Here, as in *Melendez–Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations." *Bullcoming v. New Mexico*, 564 U.S. 647, 664–65 (2011) (citations omitted). The fact the report was specifically created to assist law enforcement and had the required level of formality rendered it testimonial in nature and required the testimony of the analyst who created the report.

In 2012, a DNA forensic report was utilized by an expert witness to opine a DNA match existed between the profile and defendant's DNA. *Williams v. Illinois*, 567 U.S. 50 (2012). A plurality of this Court found the expert witness could testify to the report and their opinion derived from the report because they were not testifying to the truth of the matter asserted—that the DNA profile was the defendant's. Instead, they were testifying to the contents of the report which was then utilized to render their opinion. *Id.* at 79. The same plurality also concluded the report was not testimonial because it was not created for purpose of trial, but to locate and identify a dangerous rapist on the loose. *Id.* at 84-85.

In 2015, this Court clarified the determination of testimonial versus non-testimonial statements, albeit related to a verbal statement as opposed to a laboratory report. "Our Confrontation Clause decisions . . . do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony." *Ohio v. Clark*, 576 U.S. 237 (2015). The Court stated: "We have never suggested . . . that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'" *Id.* at 250-251 (citing *Bryant*, 562 U.S. at 358).

REASONS FOR GRANTING THE PETITION

This Court's prior Confrontation Clause decisions related to the admission of various lab reports have involved reports requested by law enforcement for use as part of a criminal investigation or prosecution. The Supreme Court of South Carolina's decision finding toxicology results testimonial in nature directly relied on this Court's prior cases of *Melendez-Diaz* and *Bullcoming*, but the Court ignored the underlying circumstances behind the samples submitted and the report's use specifically to assist a pathologist in determining an infant's cause of death. Instead, the Supreme Court of South Carolina focused on law enforcement's subjective beliefs and the ultimate use of the report in a criminal trial. The case *sub judice* allows this Court to provide further clarity regarding the admission of laboratory reports at trial and the Confrontation Clause analysis necessary to determine whether the report is testimonial and the analyst that created it must be subject to cross-examination or whether it is non-testimonial and only a concern of state and federal rules of evidence.

A. Courts from various jurisdictions have considered statements such as laboratory reports or autopsy reports using various methods and come to conflicting conclusions regarding application of the Confrontation Clause.

Autopsy reports, toxicology reports, and similar reports which have as their primary goal either a determination of cause of death or providing

assistance in determining cause of death are not universally found to be non-testimonial. The conflict, as it relates to autopsy reports, was noted by the Second Circuit Court of Appeals in *United States v. James*, 712 F.3d 79 (2d Cir. 2013), when the Court stated: "It is worth noting that courts throughout the country have applied various approaches and reached differing conclusions when considering Confrontation Clause challenges to the introduction of autopsy reports." *Id.* at 97. Ultimately, the *James* court found the reports at issue in that case non-testimonial because there was no indication a criminal investigation was contemplated, the report was completed to assist in determining cause of death, and its primary purpose was not to generate evidence for use at a subsequent trial. *Id.* at 101-102.

Contrast *James* with *United States v. Ignsiak*, 667 F.3d 1217 (11th Cir. 2012), in which the Eleventh Circuit Court of Appeals found autopsy reports were testimonial. The Court, considering the admission of testimony of five autopsies indicating causes of death related to overdose of prescribed substances, found the testimony's admission violated the Confrontation Clause because the examiner who conducted each autopsy did not testify. The Court concluded the autopsies were testimonial, primarily as a result of the close relationship between the medical examiner and law enforcement. *Id.* at 1231-1232. Even though the Court acknowledged many autopsy reports would not be used at a subsequent trial, the reports were still made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial. *Id.* at 1232 (internal quotation and citation omitted).

Other courts have found autopsy reports, even when generated after a suspect is in custody and when the cause of death is fairly obvious, can be non-testimonial. In *People v. Leach*, 980 N.E.2d 570 (Ill. 2012), the Illinois Supreme Court found that even though the medical examiner who performed the autopsy did not testify, choking was the known cause of death, and the defendant was a suspect at the time of the autopsy, the report was still non-testimonial. *Id.* at 574-575. The Court concluded, quite the opposite of the Supreme Court of South Carolina (App. 19), that the report was created primarily to determine cause of death and "was not rendered testimonial merely because the assistant medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible." *Id.* at 593; see also, *State v. Hutchison*, 482 S.W.3d 893, 914 (Tenn. 2016) (finding autopsy was non-testimonial even though law enforcement was at the autopsy, law enforcement brought suspected murder weapons to be compared to wounds, and defendant was already in custody because the primary purpose was not to prove the guilt of a particular criminal defendant at trial).

As it relates to lab reports, a ruling such as the one in *United State v. Bass*, 80 M.J. 114 (C.A.A.F. 2020) is directly opposed to the Supreme Court of South Carolina's ruling in the underlying case. In *Bass*, the Court found a diagnostic test for gonorrhea was non-testimonial because it was for diagnosis and not prosecution. The Court in *Bass* found that even though the swab was from an infant, which meant it

was likely the results could be used in a criminal prosecution, that did not alter the primary purpose of the test results or create an "out-of-court substitute for trial testimony." *Id.* at 122 (quoting *Clark*, 576 U.S. at 245). Compare the *Bass* ruling to the South Carolina Supreme Court in the instant case, who found the toxicology report was testimonial, even though it was being used to determine cause of death, in part because the Court could not "ignore the reality that if a criminal prosecution takes place, the NMS report would be critical to prove the State's case." (App. 20).

This Court should conclude absent special circumstances toxicology reports, when used as part of a determination of cause of death, are non-testimonial. The subjective belief of law enforcement and the ultimate use of the statement at trial are not relevant to a determination of the primary purpose behind the report, and therefore, do not render testimonial an otherwise non-testimonial statement.

B. Law enforcement's subjective beliefs and the ultimate use of the statement during a criminal trial should not determine if a toxicology report is testimonial, and this case presents the opportunity to determine that laboratory, toxicology, or other reports prepared in the assistance of determining cause of death are non-testimonial absent unique circumstances.

In his concurrence to *Williams*, Justice Breyer asked a pertinent question that he indicated was not answered by the opinions of either the plurality or the dissent: "How does the Confrontation Clause apply to

the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians?" *Williams*, 567 U.S. at 86. This case enables the Court to provide guidance in answering Justice Breyer's question and allows the Court the opportunity to conclude reports created in furtherance of a determination of a cause of death are near universally non-testimonial and should only implicate the Confrontation Clause in unique circumstances.

In its opinion below, the Supreme Court of South Carolina analyzed the testimonial nature of the toxicology report admitted at trial from the point of view of law enforcement and its ultimate importance at trial, instead of determining the primary purpose behind the creation of the toxicology report which was to assist a forensic pathologist conducting a statutorily-mandated autopsy to determine of the cause of an infant's death.[2] The toxicology report is non-testimonial when viewed in light of the primary purpose for which it was created and not in light of the use of the testimony at trial. *Ohio v. Clark*, 576 U.S. 237, 250 (2015) ("Our Confrontation Clause decisions, however, do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. . . . We have never suggested, however, that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case.").

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[2] *See* S.C. Code Ann. § 17-5-520 (Supp. 2018).

Objectively, the purpose behind the NMS toxicology report was to assist the forensic pathologist in determining cause and manner of death for the minor victim. (R.403-404). He performed the autopsy on the minor victim on October 18, 2014. At that time, he extracted the various fluids and sent them to the lab for testing. The cause of the infant's death was entirely unexplained at the time, which no outward signs of abuse or other causes of death. The investigation being conducted by the forensic pathologist was not criminal in nature but was a scientific one to explain how the infant died. Even weeks after the autopsy was performed, law enforcement did not know the cause of death or have reason to believe it would be homicide by child abuse resulting in a criminal prosecution.

Importantly, the analyst issuing the report for NMS would not have any objectively reasonable belief the results of the toxicology would be used in a criminal case. The lab was merely providing a toxicology as part of a routine autopsy as requested many times by this specific forensic pathologist—as many as 650 times a year. (R.390; 413). He even noted he used NMS to make determinations quickly in insurance policy cases so that a family can resolve any issues surrounding a death and obtain insurance proceeds. (R.391). As a result, while the toxicology report was ultimately used as evidence at a criminal trial, it was not created with the primary purpose of substituting for testimony establishing or proving some fact in a criminal proceeding.

Unlike either *Melendez-Diaz* or *Bullcoming*, the report in this case was not created at the request of

law enforcement and was not an analysis of substances submitted by law enforcement. The forensic toxicology report in this case was not "prepared in connection with a criminal investigation or prosecution" *Bullcoming v. New Mexico*, 564 U.S. 647, 658 (2011), but was created at the request of a forensic pathologist to assist with the determination of an unexplained infant death.

While in the instant case, law enforcement may have had their suspicions and conducted part of their general investigation into the infant's death in a way that focused on the only caretaker present at the time of the death, the forensic pathologist was merely attempting to ascertain the infant's cause of death. The concern is on the primary purpose for which the report was created. In this case, the primary purpose was undoubtedly to allow the forensic pathologist to rule out or include possible causes of death which can only be determined from toxicological analysis. Law enforcement played no role in obtaining the samples or requesting the report, and law enforcement did not receive a copy of the report from NMS. The subjective beliefs of law enforcement, which played no role in the forensic pathologist's determination of a need for toxicology testing as part of an autopsy or the results of the testing, should not be a factor in determining the testimonial nature of the report.

In addition, the significance of the evidence at an ultimate criminal trial should not factor into a determination of the testimonial nature of the underlying statement. The Supreme Court of South Carolina found: "While we must review the primary purpose of the evidence to ascertain whether it is

testimonial, we cannot ignore the reality that if a criminal prosecution takes place, the NMS report would be critical to prove the State's case." (App. 20). This Court should reiterate "a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. 'Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 359 (2011)). Here, the primary purpose was non-testimonial—to assist a forensic pathologist in making a cause of death determination—and, therefore, this Court should conclude it was not a concern of the Confrontation Clause.

Again, this Court should find toxicology reports, when used as part of a determination of cause of death, are non-testimonial absent special or unique circumstances. The subjective belief of law enforcement and the ultimate use of the statement at trial are not relevant to a determination of the primary purpose behind the report, and therefore, do not render testimonial an otherwise non-testimonial statement.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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