No. 21-

IN THE

Supreme Court of the United States

WILLIAM LEE, SUPERINTENDENT OF EASTERN CORRECTIONAL FACILITY,

Petitioner,

v.

JAMES GARLICK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DARCEL D. CLARK
DISTRICT ATTORNEY
BRONX COUNTY
Bronx, New York 10451
(718) 838-6229
killiann@bronxda.nyc.gov

Counsel for Petitioner

GINA MIGNOLA
NANCY D. KILLIAN*
PETER D. CODDINGTON
JOSHUA P. WEISS
ROBERT C. MCIVER
ASSISTANT DISTRICT ATTORNEYS
of Counsel

**Counsel of Record*

307471

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. In granting habeas corpus relief to a state court prisoner, did the Second Circuit create a circuit split and deny the state court judgment the deference mandated by 28 U.S.C. §2254(d)(1) when it relied on a test that was not clearly established by this Court's precedents to determine that an autopsy report was testimonial under the Confrontation Clause?

2 Whether the Second Circuit violated *Yarborough v. Alvarado* (541 U.S. 652 (2004)) by applying an overly specific "unreasonable application" analysis.

3. Whether the Second Circuit violated the harmless error standard in *Brecht v. Abrahamson* (507 U.S. 619 (1993)) in ruling that the admission of the autopsy report was not harmless despite (a) uncertainty as to whether the report was admissible to form the basis of an in-court expert opinion, and (b) overwhelming evidence of guilt including surveillance video of Garlick stabbing the victim to death.

RELATED CASES

- *Garlick v. Lee*, No. 20-1796, U.S. Court of Appeals for the Second Circuit. Judgment entered June 11, 2021, petition for rehearing denied July 30, 2021.

- *Garlick v. Lee*, No. 18-cv-11038, U.S. District Court of the Southern District of New York. Judgment entered June 2, 2020.

- *Garlick v. Miller*, No. 18 Civ. 11038, U.S District Court of the Southern District of New York. Recommendation signed April 27, 2020.

- *Garlick v. New York*, No. 17-5385, Supreme Court of the United States. Judgment entered December 4, 2017.

- *People v. Garlick*, Bronx Indictment 3681/2011, Court of Appeals of New York. Judgment entered March 3, 2017.

- *People v. Garlick*, Bronx Indictment 3681/2011, Supreme Court of the State of New York, Appellate Division, First Department. Judgment entered November 29, 2016.

- *People v. Garlic*k, Bronx Indictment 3681/2011, Supreme Court of the State of New York, Bronx County. Judgment rendered November 1, 2013.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

Table of Appendices

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

Page

Page

Page

STATUTES AND OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

William Lee, Superintendent of the Eastern Correctional Facility, respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case. Garlick has been ordered released from state custody and is currently in the custody of the New York City Department of Corrections pending retrial.

OPINIONS BELOW

The opinion of the Second Circuit (Appendix A: 1a-27a) is reported at 1 F.4th 122. The opinion of the district court (Appendix B: 28a-46a) is reported at 464 F.Supp.3d 611. The opinion of the magistrate judge (Appendix C: 47a-126a) is unreported, but can be found at 2020 WL 2857464. The opinion of the Appellate Division, First Department (Appendix D: 127a-129a) can be found at 144 A.D.3d 605 or 42 N.Y.S.3d 2. The Court of Appeals of New York declined to review Garlick's state appeal (76 N.E.3d 1082, 29 N.Y.3d 948) and this Court denied Garlick's petition for a writ of certiorari (--- U.S. ---, 138 S.Ct. 502).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254. The Second Circuit entered its judgment on June 11, 2021 (Appendix A: 1a-28a). A petition for rehearing en banc was denied on July 30, 2021. (Appendix G: 148a-149a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.

Sixth Amendment to the United States Constitution

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.

28 U.S.C. §2254 (d) (1)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

SUMMARY

In a state murder prosecution, a medical examiner who did not participate in the autopsy of the victim testified at trial. Relying on information contained in an autopsy report and photographs that memorialized the autopsy, the medical examiner gave her independent expert opinion about the nature of the victim's injuries and the cause of death. The defense objected that the medical examiner's testimony and her reliance on the autopsy report violated the Confrontation Clause. Although the People had offered not to admit the autopsy report into evidence, the defense insisted that, if the medical examiner were allowed to testify, the report should be admitted so that the defense could use the report as part of its cross-examination of the medical examiner. Accordingly, the report was admitted into evidence and used by both parties to support their positions. In fact, relying on the autopsy report, the defense argued to the jurors that the nature of the injuries sustained—multiple shallow stab wounds and one more significant five and one-half inch stab wound—showed that Garlick did not intend to kill the victim. The jury agreed and acquitted Garlick of intentional murder and only convicted him of first-degree manslaughter.

On appeal, the state courts affirmed the conviction and rejected Garlick's claim that the autopsy report was testimonial for Confrontation Clause purposes. Garlick then sought a writ of certiorari, which this Court declined to grant.

Subsequently, Garlick sought a writ of habeas corpus before the federal district court again challenging the testimonial nature of the autopsy report. The

magistrate judge determined, among other things, that the controlling federal law regarding the testimonial nature of the autopsy report was not "clearly established" within the meaning of 28 U.S.C §2254(d)(1). The district court and Second Circuit Court of Appeals reached the opposite conclusion. Most notably, the Second Circuit found "clearly established federal law" by focusing on this Court's decisions 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)). The Second Circuit acknowledged that the plurality opinion in *Williams v. Illinois* (567 U.S. 50 (2012)) was a key Confrontation Clause decision. However, because there was no single rationale to explain the result, the court simply set the decision aside and treated the plurality opinion as though it did not exist. In other words, the Second Circuit was able to find "clearly established federal law" only by ignoring the essential disagreements inherent in the varying opinions in *Williams*. Additionally, the court concluded that the admission of the autopsy report was not harmless. Accordingly, Garlick's conviction was set aside.

This case presents an important issue that has caused a significant split among federal courts: whether, in accordance with the deference that is mandated by the text of 28 U.S.C. §2254(d)(1) for habeas review of state court convictions, this Court's precedents have "clearly established" the test to determine whether an autopsy report constitutes testimonial hearsay for Confrontation Clause purposes.

The resolution of this issue depends on an even more thorny and unsettled question that has plagued lower

courts and litigants for forty years: how are the federal and state courts to understand the precedential value of a plurality decision by this Court? More to the point, if the last word on the subject is a fractured plurality opinion in which five justices agree on the result but disagree on the reasoning or analysis to be applied so that there is no common narrowest ground—other than the result—may the lower federal courts conclude, as the Second Circuit did here, that the governing federal law is "clearly established" for the purposes of habeas review? Professor Ryan C. Williams observes the difficulty in applying plurality decisions:

> Understanding the precedential significance of Supreme Court plurality decisions is a task that has long confounded lower court judges. Surprisingly, the Supreme Court has offered little direct guidance on this question from a single sentence in *Marks v. United States*, [430 U.S. 188, 193 (1977),] which instructed that where the Justices fail to converge on a single majority rationale, the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." But this single, cryptic directive from a decision handed down more than four decades ago offers little meaningful guidance to lower courts struggling to apply the "narrowest grounds" rule to the Court's fractured majority decisions.

Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 795 (Mar. 2017). This Court should resolve

this important question and explain how it applies in the context of AEDPA.

This case also implicates a third question about how federal courts assess harmlessness under *Brecht*. For these reasons, this Court should grant the petition for a writ of certiorari.

STATEMENT OF THE CASE

A. Facts

The Trial

The People's Case

On November 1, 2011, Gabriel Sherwood verbally harassed Lisa Rivera and Johanna Rivera. Lisa Rivera called her then-boyfriend, James Garlick, who arrived at the scene about ten minutes later (T.65-68, 299-301).[1] Garlick and Sherwood spoke and physically fought. That fight spilled into the lobby of an apartment building, where their actions were recorded by the building's surveillance video (T.67-68, 302-03). Garlick struck Sherwood repeatedly about his chest with an object. After Sherwood fell to the ground, Garlick got on top of him and continued to strike him in the chest. Johanna also punched and kicked Sherwood while Garlick stood nearby. Garlick

1. Citations to the materials contained in the appendix filed with this Court are identified by specific page and specific appendix (i.e. "Appendix F: 144a"). Citations with the prefix "T." refer to the trial transcript. Citations with the prefix "2d Cir. A." refer to the appendix filed at the United States Court of Appeals for the Second Circuit.

pulled Johanna off of Sherwood, and Garlick, Johanna, and Lisa fled (T.68-70, 303-05).

Police arrived and saw Sherwood lying on the ground, surrounded by blood, and exhibiting no signs of life (T.155-58). EMS arrived and took Sherwood to a hospital where medical staff pronounced him dead at 6:40 P.M. (T.49, 159-60; 2d Cir. A.298-291).

Police located the security footage depicting that evening's events and arrested Johanna on November 2, 2011 (T.70-71, 185-86, 188, 218-19, 271). Subsequently, on November 11, 2011, Garlick was arrested (T.188-189). After police administered *Miranda* warnings, Garlick gave oral and written statements admitting that he had fought Sherwood on the date in question, but claiming that he "was trying to defend [himself] and [his] girlfriend" and that he "wasn't trying to hurt anybody." Garlick also stated that while he and Sherwood were fighting outside, he saw Sherwood reach into his waistband and, although Garlick did not see what Sherwood was reaching for,[2] he was able to wrest it away from Sherwood. Garlick said the fight continued inside and that Sherwood was "stronger than" Garlick and "wasn't trying to let [Garlick] go" so he "kept fighting trying to get [Sherwood] off of [him]." Garlick continued that he eventually left the building, returned to pull Johanna off of Sherwood, and left again (T.190-97).

---

2. At times, Garlick has contended that Sherwood "brandished" a weapon (Garlick's Brief at Second Circuit, pp. 9-10). Garlick stated he "didn't know what [Sherwood] had" and that he "never s[aw] what it was in the course of the fight" (T.198-199).

Autopsy and Autopsy Report

On November 1, 2011, the Office of the Chief Medical Examiner (hereinafter "OCME") received Sherwood's body. Damien Lee, a Medico-Legal Investigator, completed a "Supplemental Case Information" form that indicated that, according to a doctor at the hospital, Sherwood was "found by EMS supine on the floor . . . in cardiac arrest and with multiple (4) stab wounds to the chest and abdomen." The form further indicated that Lee called the precinct and "Per Detective Degrasio the case is pending further information and no additional information is available." (2d Cir. A.289). Also, the "Notice of Death" form, completed at the same time, indicated under "Circumstances of Death," "App. Manner: Homicide," and "Other Info: call. loc[ation] ? no ems.sheet. stab wound to abdomen & chest n[ext].o[f].k[in]. unk[nown]. at this time.pct#?" (2d Cir. A.290).

On November 2, 2011, Dr. Katherine Maloney, with Dr. James Gill present, performed an autopsy on Sherwood's body and issued a report (T.28-29; 2d Cir. A.273-291). Based on Dr. Maloney's "Case Worksheet," completed the same day and included in the report, Sherwood's "Immediate cause" of death was a "stab wound of torso with perforation of heart." This same cause of death was articulated in the final report on December 29, 2011 (2d Cir. A.275, 285).

Detectives Speranza and Farmer were present during the autopsy (T.243; 2d Cir. A.292), though the record provides no indication that they offered input in the performance of exam. A police report completed on the day of the autopsy and included as part of the report

stated "Victim was assaulted and stabbed by unknown perp(s) for unknown reason" (2d Cir. A.292).

In September 2013, when trial began, Dr. Maloney and Dr. Gill were no longer employed at OCME.[3] Accordingly, the People called Dr. Susan Ely, Deputy Chief Medical Examiner of OCME, to testify (T.23). Before the start of trial, defense counsel argued that the autopsy report was testimonial and that this testimony would violate his right of confrontation (Appendix E: 130a-139a). Counsel renewed his application immediately before Dr. Ely testified (Appendix F: 140a-141a). In response to counsel's objections, the prosecutor suggested that the autopsy be certified as a business record and that Dr. Ely be permitted to rely on the report as a foundation for her testimony, but that the report not be admitted into evidence (Appendix F: 142a-143a). Defense counsel "would not agree to [the prosecutor's] suggestion" because he did not see how he could have "an effective cross-examination without the document being placed into evidence" (Appendix F: 144a).[4] As a result of defense counsel's rejection of this proposal, the report was ultimately admitted into evidence.

In Dr. Ely's direct testimony (T.23-46), she explained OCME procedures used for documenting autopsies,

---

3. Dr. Gill became the Chief Medical Examiner of Connecticut (T.29). Dr. Ely believed that Dr. Maloney was practicing in Rochester, New York.

4. Although the Court ordered the report be admitted "subject to certain redactions" (T.59), when the parties addressed what redactions were necessary, defense counsel simply reiterated his position that Dr. Ely's testimony was inadmissible and stated he had no "further application" with respect to redactions (T.524-26).

testified that she had reviewed Sherwood's autopsy report, and laid the foundation necessary to have the report admitted into evidence as a business record (T.28-34). When the report was introduced, defense counsel acknowledged he had reviewed the document, did not object, and declined to *voir dire* the witness (T.34).

Dr. Ely offered her own independent conclusions about the manner and cause of Sherwood's death. Based on her review of the autopsy report and related photographs (T.41-43, 47), Dr. Ely described Sherwood's wounds, including their location, nature, and depth. She testified that Sherwood had suffered two stab wounds and four incised wounds to his torso and blunt force trauma to his face (T.35-36). In particular, she opined that the fatal injury was a 4½-5½ inch stab wound to his chest that penetrated and perforated Sherwood's skin and rib cage, continued between two ribs, and perforated his heart (T.41). This injury caused internal bleeding around his heart and within his left chest cavity, totaling 1½ liters of blood (1/3 of his total blood volume), which, in her opinion, caused shock and the collapse of his left lung (T.37-41; *see* 2d Cir. A.277). Further, Dr. Ely stated that, in her professional opinion, wounds of this nature were most commonly caused by a knife (T.35-37). These opinions were subjected to cross-examination (T.48-58).

The jurors acquitted Garlick of second-degree murder, but found him guilty of first-degree manslaughter.

B. The Direct Appeal

On direct appeal, Garlick argued, among other things, that the introduction of an autopsy report through Dr.

Ely's testimony violated the New York State and Federal Constitutions.

On November 29, 2016, the Appellate Division, First Department, unanimously affirmed the conviction. *People v. Garlick*, 42 N.Y.S.3d 28 (N.Y. App. Div. 2016). In addressing Garlick's Confrontation Clause contention, the Court held:

> "Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" (*People v. Acevedo*, 976 N.Y.S.2d 82 [1st Dept. 2013], *lv. denied* 16 N.E.3d 1280 [2014]), since the report, which "d[id] not link the commission of the crime to a particular person," was not testimonial (*People v. John*, 52 N.E.3d 1114 [2016]). Defendant's contention that *People v. Freycinet*, 892 N.E.2d 843 (2008) has been undermined by subsequent decisions of the United States Supreme Court is unavailing (*see Acevedo*, 976 N.Y.S.2d 82).

(Appendix D:129a).

On March 3, 2017, the Court of Appeals of New York denied Garlick's application for leave to appeal to that court. *People v. Garlick*, 76 N.E.3d 1082, 29 N.Y.3d 948 (N.Y. 2017).

On June 28, 2017, Garlick, represented by Jeffrey Fisher of the Stanford Law School Supreme Court Litigation Clinic, filed a petition for a writ of certiorari.

In his petition, he stressed that this Court "has never considered how *Crawford* applies to autopsy reports" and that "[l]acking clear guidance on this issue, state and federal courts have become intractably split over whether an autopsy report is testimonial hearsay" (2d Cir. A.195) (quotations omitted). The petition detailed the lower court split on this issue for five pages (2d Cir. A.195-199). The People opposed the petition (2d Cir. A.216-256). On December 4, 2017, this Court denied Garlick's petition for a writ of certiorari (*Garlick v. New York*, --- U.S. ---, 138 S. Ct. 502, 503, 199 L. Ed. 2d 390 (2017).

C. The Petition for a Writ of Habeas Corpus

The Petition

On November 27, 2018, Garlick, now represented by the Center for Appellate Litigation, sought a writ of habeas corpus based upon the claim he raised on appeal in state court and in his petition for a writ of certiorari. The People opposed, arguing that the Appellate Division's rejection of the Confrontation Clause claim was neither contrary to nor an unreasonable application of Supreme Court precedent.

The Magistrate's Report and Recommendation

In a Report and Recommendation, dated April 27, 2020, Magistrate Judge Sarah L. Cave found that the Appellate Division erred in concluding that the autopsy report at issue was not testimonial under the relevant definitions (Appendix C: 94a-116a). The Report, however, recommended that the District Court deny the writ, reasoning that it was constrained by 28 U.S.C. §2254(d) "to

conclude that the Supreme Court's Confrontation Clause precedent as to autopsy reports is unsettled, and therefore insufficiently 'established' to grant relief to Garlick here." (Appendix C: 120a). Most notably, the Report pointed to federal decisions that acknowledged that the Supreme Court's Confrontation Clause jurisprudence "does not conclusively establish under which guidelines the use of forensic reports at trial . . . may intrude on a defendant's right to confrontation." *Soler v. United* States, No. 10-cv-4342 (LAP), 2015 WL 4879170, *17 (S.D.N.Y. Aug. 14, 2015); *Vega v. Walsh*, 669 F.3d 123, 127 (2d Cir. 2012) (finding "reasonable jurists could disagree" whether a medical examiner's testimony about an autopsy report he had not prepared violated the confrontation clause).

The District Court's Judgment and Order

On June 2, 2020, the District Court (Colleen McMahon, J.) granted the petition. The court found that the Report correctly focused on the "unreasonable application" prong, and not the "contrary to" prong. (Appendix B: 39a-40a). The court rejected the Report's conclusion, however, that habeas relief was unavailable to Garlick due to the unsettled state of the law at the time of the Appellate Division's decision. The court distinguished *Soler* and *Vega* on the theory that the decisions that were the subject of habeas review in those cases preceded this Court's decisions in *Bullcoming* and *Melendez-Diaz*. The district court further found that disagreements between lower state and federal courts did not preclude a finding of clearly established law. It also found the error was not harmless. (Appendix B: 43a-45a).

The Second Circuit Decision

On June 11, 2021, the Second Circuit affirmed. (Appendix A: 1a-27a). In particular, the panel decided that the First Department's decision approving the admission of the autopsy report involved an unreasonable application of "clearly established federal law" as determined by this Court. The panel acknowledged that this Court had never analyzed whether, or under what circumstances, it might be a violation of the Confrontation Clause to admit an autopsy report. Nevertheless, the panel believed that this Court had "plainly rejected the reasoning on which the Appellate Division relied to hold the autopsy report admissible in Garlick's case." (Appendix A: 21a n.5 (quoting *White v. Woodall*, 572 U.S. 415, 427 (2014) (citations omitted)). The panel focused on the portion of the First Department's decision that noted that the autopsy report was not testimonial since it "d[id] not link the commission of the crime to a particular person" (Appendix A: 26a; Appendix D: 129a).

The panel acknowledged that, following *Bullcoming*, this Court decided another Confrontation Clause case in the same line, *Williams v. Illinois*, which is a plurality opinion. The panel looked to *Marks v. United States*, 430 U.S. 188, 193 (1977), which instructed that where the Justices fail to converge on a single majority rationale, the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." The panel found that the varying opinions in *Williams* did not "yield a single, useful holding relevant to the case before us." (Appendix A: 21a) (quoting *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013)). Accordingly, the panel simply cast *Williams* aside and resolved the case relying only on pre-*Williams* cases.

The People subsequently filed a petition for rehearing en banc. On July 30, 2021, the Second Circuit denied the petition. (Appendix G: 148a-149a.)

REASONS FOR GRANTING CERTIORARI

The Second Circuit violated 28 U.S.C. §2254(d) and created a circuit split when it faulted the Appellate Division for failing to extend *Melendez-Diaz v. Massachusetts* and its progeny to the distinct issue of autopsy reports.

The panel wrongly concluded that this Court has "squarely rejected" the Appellate Division's reasoning in the context of autopsy reports. With this holding, the panel improperly faulted the New York courts for failing to extend the holding of *Melendez-Diaz v. Massachusetts* (557 U.S. 305 (2009)) and *Bullcoming v. New Mexico* (564 U.S. 647 (2011)) to the distinct situation of autopsy reports. This Court has rejected this failure-to-extend rationale. Perhaps more importantly, with this holding, the panel created a circuit split. This Court should grant certiorari to resolve this split and correct this misapplication of its case law.

A. Certiorari is warranted because the Second Circuit's opinion directly conflicts with the First Circuit and numerous district-level courts.

Certiorari is warranted because the Second Circuit's opinion directly conflicts with the First Circuit's opinion in *Hensley v. Roden* (755 F.3d 724 (1st Cir. 2014)). This Court's guidance on this issue is needed to resolve this

split, correct the AEDPA analysis in the Second Circuit, and avoid unwarranted vacatur of homicide convictions.

Here, the Second Circuit found that the holdings in *Melendez-Diaz* and *Bullcoming* could simply be extrapolated to the autopsy report that was admitted at trial in this case. The panel acknowledged that this Court had not previously determined whether, or under what circumstances, an autopsy report could be considered testimonial. Nevertheless, the court ruled that "Garlick need not identify 'an identical factual pattern before a legal rule must be applied.'" (Appendix A: 21a n.5) (quoting *Woodall*, 572 U.S. at 427). Instead, the panel held that this "Court has plainly rejected the reasoning on which the Appellate Division relied to hold the autopsy report admissible in Garlick's case." (Appendix A: 21a n.5). Relying on *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the Second Circuit concluded that the autopsy report at issue in this case was testimonial.

This holding cannot be reconciled with the First Circuit's holding in *Hensley v. Roden* (755 F.3d 724 (1st Cir. 2014)). There, Hensley argued that *Melendez-Diaz* clearly established that an autopsy report was testimonial. The First Circuit disagreed, holding that *Melendez-Diaz* "in no way—explicitly or implicitly—indicated that autopsy reports are testimonial in nature." *Hensley*, 755 F.3d at 732. The First Circuit noted that this Court has declined to produce exhaustive definitions of what may be considered testimonial and that there are significant differences between autopsy reports and the report in *Melendez-Diaz*. *Hensley*, 755 F.3d at 733. The First Circuit also noted that lower courts had been deeply divided on the issue. *Id.* at 733-35. The court concluded

"that the Supreme Court had given no clear answers relative to this issue, [and] it cannot be said that the [state court's] decision was contrary to clearly established law." *Id.* at 735.

Petitioner is unaware of any other habeas decision that has found the application of the Confrontation Clause to autopsy reports to be "clearly established" by this Court's precedents. Numerous cases, however, have recognized that the holdings of *Melendez-Diaz* and *Bullcoming* cannot be extended to autopsy reports to justify relief under AEDPA. *E.g., Hensley*, 755 F.3d at 734-35; *Johnston v. Mahally*, 348 F. Supp. 3d 417, 435 (E.D. Pa. 2018); *Portes v. Capra*, 420 F. Supp. 3d 49, 56 (E.D.N.Y. 2018); *Herb v. Smith*, No. 14-CV-4405 (NGG), 2017 WL 1497936, at *8-9 (E.D.N.Y. Apr. 25, 2017). The holding below also conflicts with AEDPA Circuit Court cases interpreting pre-*Melendez-Diaz* state court opinions. *See, e.g.*, *Mitchell v. Kelly*, 520 Fed. Appx. 329, 331 (6th Cir. 2013); *McNeiece v. Lattimore*, 501 Fed. Appx. 634, 636 (9th Cir. 2012); *see also Hacheney v. Obenland*, 732 Fed. Appx. 541, 543 (9th Cir. 2018) *cert. denied*, 139 S. Ct. 388, 202 L. Ed. 2d 296 (2018).[5]

This Court should grant certiorari to resolve this divide. *Garlick* is a published opinion and represents powerful precedent because it is the only circuit case to analyze this issue in the wake of *Williams v. Illinois* and

5. Several of these courts noted that, although they could resolve their cases based on the state of the law prior to *Melendez-Diaz*, "even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial." *Nardi v. Pepe*, 662 F.3d 107, 111-12 (1st Cir. 2011); *see Vega v. Walsh*, 669 F.3d 123, 128 n.2 (2d Cir. 2012).

Bullcoming v. New Mexico. Indeed, the current state of the law actually conceals the depth of the divide created by the Second Circuit. There was consensus prior to the Second Circuit's opinion that it was not clearly established whether or under what circumstances an autopsy report was testimonial. The conclusion that there is no clearly established federal law on this topic has been considered so unremarkable that federal courts have routinely denied certificates of appealability on this issue. *See, e.g.*, *Millender v. Johnson*, No. 19-CV-2809 (KS), 2020 WL 1331053, at *27 (C.D. Cal. Mar. 20, 2020) (appeal filed, but lacking certificate of appealability); *Alger v. MacDonald*, No. 15-CV-04568 (WHO), 2018 WL 3054757, at *12 (N.D. Cal. June 20, 2018), *certificate of appealability denied* No. 18-16339, 2019 WL 7602252 (9th Cir. Sept. 27, 2019). *Green v. Cain*, No. 14-CV-2073, 2016 WL 6477038, at *14 (E.D. La. May 13, 2016), *report and recommendation adopted*, No. 14-CV-2073, 2016 WL 6441232 (E.D. La. Nov. 1, 2016), and *certificate of appealability denied* No. 16-CV-31175, 2017 WL 7736485, at *1 (5th Cir. Aug. 3, 2017). Thus, this case creates a compelling divide that only this Court can resolve.

B. The Second Circuit wrongly concluded that this Court's precedent clearly established the proper test for determining whether the autopsy was testimonial at the time of the Appellate Division's decision.

In addition to creating a divide among the lower courts, the Second Circuit wrongly found this area of the law clearly established. This incorrect holding imperils numerous New York homicide convictions and creates a de facto statute of limitations upon homicides that has no

basis in law. Review is warranted to correct the court's error and stave off this undesired societal repercussion.

On federal habeas review, a federal court must "as a threshold matter . . . first decide what constitutes clearly established Federal law, as determined by the Supreme Court of the United States." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (internal quotations and citations omitted). Supreme Court precedent is not clearly established law under § 2254(d)(1) unless it squarely addresses the issue in the case before the state court or establishes a legal principle that "clearly extends" to the case before the state court. *Wright v. Van Patten*, 552 U.S. 120, 123-25 (2008); *see Harrington v. Richter*, 562 U.S. 86, 101, 131 (2011).

Of course, AEDPA does not require a "nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). The legal rule, however, must be "squarely established" by this Court. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). Clearly established federal law refers to the holdings, as opposed to the dicta, of decisions of this Court at the time of the relevant state court decision. *Carey v. Musladin*, 549 U.S. 70, 74 (2006). The inquiry requires a federal court to "'focu[s] on what a state court knew and did,' and to measure the state-court ruling against this Court's precedents as of 'the time the state court renders its decision.'" *Greene v. Fisher*, 565 U.S. 34, 38 (2011).

Here, the Second Circuit incorrectly found that this Court's precedents had clearly established the testimonial nature of the autopsy report in this case when the state court rejected Garlick's confrontation claim on direct appeal in 2016. Relying on *Crawford*, *Melendez-Diaz*, and

Bullcoming, the panel believed that the appropriate test to apply was whether the autopsy report was created under circumstances that would have led any objective witness "to believe that the [autopsy report] would be available for use at a later trial." (Appendix A: 22a). Using this test, the panel concluded that the autopsy report at issue was testimonial and that the First Department's decision was an unreasonable application of this Court's precedent.

In so holding, the panel oversimplified this Court's Confrontation Clause precedent and improperly disregarded *Williams v. Illinois*. As of 2016, it was unclear how the various articulations and elements of the primary purpose test applied to the autopsy report.

The test to be applied to determine whether and under what circumstances an autopsy report may be considered testimonial is not clearly established by this Court's precedent. The lack of clarity is manifest in *Williams v. Illinois*. While a majority of the Court agreed on the result in *Williams*—the expert testimony and reliance on out-of-court statements in a report that the expert did not prepare did not violate the Confrontation Clause—the fragmented opinion shows that the Justices disagreed on the reasoning and analysis to be applied. *See Williams*, 567 U.S. at 141 (Kagan, J., dissenting) (stating that the prior "clear rule is clear no longer" and that the opinions "have left significant confusion in their wake"); *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013) ("*Williams* does not, as far as we can determine . . . yield a single, useful holding relevant to the [autopsy report] before us"); *see also Brewer v. Quarterman*, 550 U.S. 286, 296 (2007) (Roberts, C.J., dissenting) ("If the law were clearly established by our decisions … it should not take the Court

more than a dozen pages of close analysis of plurality, concurring, and even dissenting opinions to explain what the 'clearly established' law was").

In *Williams*, Justice Breyer wrote a concurrence observing that the plurality and dissent did not answer how "the Confrontation Clause appl[ies] 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 (Breyer, J., concurring). That concurring opinion specifically contemplated the difficulty in applying this Court's precedents to autopsy reports. *Id.* at 97-98.

The *Garlick* panel cited the analytical approach of *Marks v. United States* (430 U.S. 188, 193 (1977)) and found that *Williams* did not provide a relevant holding. As a result, the Second Circuit cast *Williams* aside and consciously "rel[ied] on Supreme Court precedent predating *Williams*." (Appendix A: 21a). This was error and warrants review. Habeas relief is concerned with whether the state court unreasonably applied clearly established precedent. After observing that *Williams* did not provide a "useful holding" (*id.*) under the *Marks* standard, the Second Circuit should have logically concluded that at the time the Appellate Division made its ruling, Supreme Court precedent on the analysis and the test to apply to determine whether an autopsy report was testimonial was decidedly unsettled, not "clearly established." Consequently, under the deferential standards required by AEDPA, the federal court was wrong to upend the state court conviction. Instead, the Circuit intentionally disregarded a key source of confusion on this issue and applied insufficient deference under AEDPA.

Unsurprisingly, in the wake of *Williams*, the lower courts have become divided on how the Confrontation Clause applies to autopsies and which factors will control post-*Williams*. *See Hensley*, 755 F.3d at 734-35 (collecting cases); *compare James*, 712 F.3d at 99 (routine autopsy report not testimonial); *State v. Hutchison*, 482 S.W.3d 893, 914 (Tenn. 2016); *State v. Maxwell*, 9 N.E.3d 930, 950 (Ohio 2014); *State v. Medina*, 306 P.3d 48, 63 (Ariz. 2013); *People v. Leach*, 980 N.E.2d 570, 590 (Ill. 2012); *People v. Taylor*, 2019 IL App 150628-U, ¶ 131, 2019 WL 6840329 (Ill. Ct. App. 2019); *State v. Hagee*, No. 1 CA-CR 15-0417, 2016 WL 3176446, at *4 (Ariz. Ct. App. June 7, 2016); *with e.g.*, *United States v. Ignasiak*, 667 F.3d 1217, 1231 (11th Cir. 2012); *Miller v. State*, 313 P.3d 934, 969 (Okla. Crim. App. 2013), *overruled on other grounds* by *Harris v. State*, 450 P.3d 933 (Okla. Crim. App. 2019); *see also Commonwealth v. Williams*, 60 N.E.3d 335, 350 (Mass. 2016). This lower court divide represents fair-minded disagreement among jurists and should have precluded habeas relief. *Carey*, 549 U.S. at 71 (habeas relief inappropriate where "lower courts have diverged widely").

The panel also misapplied *White v. Woodall* in finding this area sufficiently established. In fact, the holding in *Woodall* cautions that a finding of clearly established law cannot be derived by extrapolating legal principles to factual scenarios this Court has never addressed.

In *White v. Woodall*, Woodall pleaded guilty to capital murder. At the sentencing phase of the trial, he called character witnesses but declined to testify. The defense requested a no-adverse-inference charge, and that request was denied. The Kentucky Supreme Court affirmed the

judgment, noting that the Fifth Amendment required such a charge in the guilt phase, but not the sentencing phase of trial. *Woodall*, 572 U.S. at 418. On habeas review, the District Court and Sixth Circuit applied *Carter v. Kentucky* (450 U.S. 288 (1981)) and held that the Kentucky Supreme Court had unreasonably applied federal precedent.

This Court reversed, holding that it had not clearly established how *Carter* would apply at a sentencing phase. *Woodall*, 572 U.S. at 421. This Court reasoned that the permissiveness of drawing a negative inference from a defendant's silence at sentencing "fell within the class of inferences as to which" the Court's precedents had "le[ft] the door open," and it rejected Woodall's contention that relief could be granted if the state court unreasonably refused to extend a governing principle. *Id.* at 423-26. AEDPA relief is available "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fair-minded disagreement' on the question." *Id.* at 427 (quoting *Harrington*, 562 U.S. at 103). "'If a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *Woodall*, 572 U.S. at 426 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)).

Here, the Second Circuit engaged in the same analysis as the Sixth Circuit in *Woodall*. It assumed that the rule from prior Supreme Court cases addressing incriminating blood alcohol or cocaine test reports would apply in the same manner to this autopsy report, notwithstanding fundamental dissimilarities. *See generally* Daniel J. Capra & Joseph Tartakovsky, *Autopsy Reports and the*

Confrontation Clause: A Presumption of Admissibility, 2 Va. J. Crim. L. 62, 72-96 (2014) ("Why Autopsies are Different").

It is not clearly established how the primary purpose test applies to autopsy reports. Nor is it clearly established that the factors previously rejected in *Melendez-Diaz* or *Bullcoming* will be given equal weight in the context of autopsy reports, which are not created for the sole purpose of creating testimony. *E.g.*, *Hensley*, 755 F.3d at 734-35; *Johnston*, 348 F. Supp. 3d at 435 ("whatever the clearly established law is, the Circuit Courts disagree about how to apply it to autopsy reports."); *Portes*, 420 F. Supp. 3d at 56; *Herb*, 2017 WL 1497936, at 8-9. Certiorari should be granted to evaluate this ruling before lower federal courts vacate homicide convictions.

C. The Second Circuit framed the issue at the wrong level of generality.

The Second Circuit's "unreasonable application" analysis also ran afoul of this Court's interpretation of AEDPA. An unreasonable application of a Supreme Court holding must be "objectively unreasonable, not merely wrong; even 'clear error' will not suffice." *Woodall*, 572 U.S. at 419 (quoting *Andrade*, 538 U.S. at 75-76). The latitude afforded to state courts depends upon the nature of the rule. "If a legal rule is specific, the range [of reasonable applications] may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

The meaning of "testimonial" within the primary purpose test has continued to emerge. *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"); *James*, 712 F.3d at 97 (referring to *Crawford* as "a set of guideposts"); *United States v. Burden*, 600 F.3d 204 (2d Cir. 2010). This Court has never articulated the test for determining whether or under what circumstances an autopsy report is testimonial. Nor has it decided a case on facts that are sufficiently analogous to those underlying the creation of the autopsy report here such that the necessity of applying a certain rule was "beyond doubt." *Woodall*, 572 U.S. at 417 (quoting *Yarborough,* 541 U.S. at 666). Accordingly, the panel erred in attempting to extrapolate from this Court's prior decisions addressing distinguishable laboratory reports prepared under vastly different circumstances.

The panel disapproved of the Appellate Division's partial recitation of the specific New York rule, incorrectly characterizing it as involving two components: (1) that an autopsy report does not directly link the defendant to the crime, and (2) that a report consists of observations of independent scientists. (Appendix A: 24a-26a). The Second Circuit reasoned that both conclusions contradicted *Melendez-Diaz* and *Bullcoming* and therefore represented an unreasonable application of that precedent.

But the language in the Appellate Division's decision does not fully encapsulate the broader New York rule. Rather, the Appellate Division in this case cited to *People v. John* and *People v. Freycinet* and incorporated those holdings by reference. New York courts employ a non-exhaustive list of "various indicia of testimoniality." *People v. Freycinet*, 892 N.E.2d 843 (N.Y. 2008). *John*

reasoned that the Court had "considered two factors of particular importance in deciding whether a statement is testimonial—'first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses defendant of criminal wrongdoing," but also held that those factors are informed by "purpose of making or generating the statement, and the declarant's motive for doing so." *People v. John*, 52 N.E.3d 1114, 1122-23 (N.Y. 2016). Moreover, in *Garlick*, the Appellate Division cited its earlier ruling in *People v. Acevedo* (976 N.Y.S.2d 82 (N.Y. App. Div. 2013)), which in turn cited *People v. Hall* (923 N.Y.S.2d 428, 431 (N.Y. App. Div. 2011)). In *Hall*, the Appellate Division squarely rejected the argument that *Melendez-Diaz and Bullcoming* abrogated *Freycinet*. The Appellate Division in *Hall* discussed several factors supporting the conclusion that the autopsy report there was non-testimonial. *Hall*, 923 N.Y.S.2d at 430-32.

Ultimately, the Second Circuit panel did not consider "'what arguments or theories . . . could have supported the state court's' determination" that there was no confrontation clause violation. *Shinn v. Kayer*, --- U.S. ---, 141 S.Ct. 517, 524 (2020) (quoting *Harrington*, 562 U.S. at 102) (omission in original). For one, the Appellate Division could have found, as it did in *Hall,* that the report was not a sworn or formalized document because it was unsworn, bearing only a file-keeping certification (*see Hall*, 923 N.Y.S.2d at 431) and thus did not "certify[] the truth of the analysist's representations." *Williams*, 567 U.S. at 112 (Thomas, J., concurring). The Second Circuit panel improperly analyzed this issue de novo and made its own independent finding that the report was formalized as it contained various indicia of solemnity. While "perhaps

some jurists would share [that] view…that is not the relevant standard. The question is whether a fairminded jurist could take a different view." *Kayer*, 141 S.Ct. at 525.

Likewise, the panel discounted the import of the OCME's independence and the fact that its employees are subject to a discrete legal mandate that requires an autopsy be performed in circumstances beyond when homicide is suspected. *Hall*, 923 N.Y.S.2d at 431 (citing New York City Charter § 557[f][1]); *see Williams*, 567 U.S. at 86 (Breyer, J. concurring) (the "need for cross examination is considerably diminished when the out-of-court statement was made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work."). OCME's independence may have renewed importance because it conducts autopsy reports in a variety of situations. *See James*, 712 F.3d at 97 ("Key to determining the resolution of the case before us is the particular relationship between the OCME and law enforcement both generally and in this particular case.").

Additionally, the panel overlooked the argument that the live testimony regarding the victim's cause of death did not derive from the written contents of the report, but was based on the independent conclusions of the testifying medical examiner. Those opinions were subject to cross-examination, unlike the situation addressed in *Melendez-Diaz* and *Bullcoming*. *See Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring in part); *Hall*, 923 N.Y.S.2d at 432. It was not unreasonable to conclude that the cross-examination of the independent conclusion as to cause of death (the most important aspect of the testimony) satisfied the requirements of the Clause. Similarly, the

fact that the autopsy did not implicate Garlick may have different weight because it is also not prima facie proof of a crime, unlike the reports in *Melendez-Diaz* and *Bullcoming*. *See Williams*, 567 U.S. at 57-58, 84-86. The existence of such unresolved questions is the essence of why this Court has eschewed the failure-to-extend doctrine for AEDPA cases. *See Woodall*, 572 U.S. at 427; *Johnston*, 348 F. Supp. 3d at 435.

Consequently, the Appellate Division's good faith effort to apply *Melendez-Diaz* and its progeny cannot be fairly characterized as relying on the only two factors that the panel analyzed. The existence of reasonable arguments on both sides of this hotly contested issue has divided courts around the nation. This illustrates that the testimonial nature of autopsies was not "so obvious" as to eliminate all possibility of "fairminded disagreement" when the Appellate Division affirmed Garlick's conviction in 2016. *Woodall*, 572 U.S. at 427; *Harrington*, 562 U.S. at 102.

Ultimately, AEDPA and the principles of comity that it embodies demand more deference to state rules. AEDPA review is concerned not with whether every published opinion by high-volume and overworked intermediate appellate courts flawlessly articulate their state's established precedent. Rather, the inquiry focuses solely on whether it is clearly established that a defendant's constitutional rights were violated at trial. It is simply not an "extreme malfunction" in state court to quote from a portion of a broader rule on an issue with no clear answer from this Court. *Harrington*, 562 U.S. at 102. Review of this analysis is warranted.

D. Review is warranted because the Second Circuit erred on an issue that is likely to recur and cause significant societal and legal problems.

In addition to misapplying AEDPA and this Court's precedent, review is warranted because the error in this case is likely to recur and will cause significant societal and legal problems. The Second Circuit's decision may require vacatur of numerous homicide convictions in New York state before this Court has had an opportunity to evaluate New York's practice. This is particularly troubling for "cold cases" in which the autopsy was conducted years or decades ago, but no arrest or prosecution was made at that time. The panel's decision contains no limiting provision and could function as a de facto statute of limitations for homicide. *Contra* N.Y. C.P.L. 30.10 (2) (a) (no current statute of limitations for class A felony). Re-prosecution of these cases will be difficult or impossible, particularly if the medical examiner has died or moved. *Melendez-Diaz*, 557 U.S. at 335 (Kennedy, J., dissenting) (citing Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal. L. Rev. 1093, 1094, 1115 (2008)).

Moreover, numerous states, including Illinois, California, and New York, permit the introduction of autopsy reports through the testimony of an examiner who did not perform the autopsy. The holding in this case could therefore invalidate other state rules if left uncorrected. For example, the panel faulted the Appellate Division for relying on the fact that autopsy reports are conducted by independent scientists and that they do not directly accuse a defendant of wrongdoing. Other

state courts employ similar factors in determining that autopsies are not testimonial. *Leach*, 980 N.E.2d at 590 (Illinois autopsy report not testimonial because it was "not prepared for the primary purpose of accusing a targeted individual" and the "medical examiner's office is not a law enforcement agency."); *People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012), *as modified on denial of reh'g* (Dec. 12, 2012). The Second Circuit's improper failure-to-extend analysis could be considered powerful precedent against state court practice.

Critically, this ruling violates the very purpose of AEDPA, which is a "carefully constructed framework" designed to respect principles of comity. These principles are considerably undermined "if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Woodall*, 572 U.S. at 426 (quoting *Yarborough*, 541 U.S. at 666). Finding that the New York rule for autopsies articulated in *Freycinet* and *John* violates the Confrontation Clause will call into question homicide convictions throughout New York state that justifiably relied upon this rule. Comity demands that this Court weigh in on this issue before homicide convictions are overturned.

E. The Second Circuit violated the harmless error standard in *Brecht v. Abrahamson* (507 U.S. 619 (1993)).

Finally, the Second Circuit holding that the law was clearly established tainted its harmlessness analysis. In evaluating whether a Confrontation Clause error is harmless in the AEDPA context, this Court analyzes whether the error "had substantial and injurious

effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). That determination is guided by the five-factor test articulated in *Delaware v. Van Arsdall*: (1) the overall strength of the prosecution's case; (2) the importance of the witness's testimony; (3) whether the testimony was cumulative; (4) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; and (5) the extent of cross-examination otherwise permitted. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). This standard "protects the State's sovereign interest in punishing offenders and 'good-faith attempts to honor constitutional rights,' while ensuring that the extraordinary remedy of habeas corpus is available to those 'whom society has grievously wronged[.]' " *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (quoting *Brecht*, 507 U.S. at 634). Of course, this standard also focuses on the social costs of retrial. *Brecht*, 507 U.S. at 637. There are few greater social costs than a wrongfully vacated homicide conviction.

Under this Court's precedents, the precise nature of the error (if any) that occurred in this case remains unclear. This Court has not clearly established that the admission of out-of-court statements relied upon by an expert violates the Confrontation Clause. *Nardi*, 662 F.3d at 112; *Hill v. Virga*, 588 Fed. Appx. 723, 724 (9th Cir. 2014); *see Jimenez v. Allbaugh*, 702 Fed. Appx. 685, 688 (10th Cir. 2017); *Millender*, 2020 WL 1331053, at *7. The Circuit ignored the import of this uncertainty and incorrectly presumed that the Confrontation Clause prohibited any reference to the autopsy report. Nonetheless, it is still an open question whether the error resulted from any reference to the report at all (as the

Panel held), or whether the report could have been relied upon, but the error was that the report was admitted for its truth without a limiting instruction. *See United States v. Moore*, 651 F.3d 30, 74 (D.C. Cir. 2011), *aff'd sub nom. Smith v. United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013) (assuming that the error was admission of the report and "thus not reaching the question left open in *Bullcoming*") (citations omitted).

If the error was occasioned solely by the absence of a limiting instruction, the improperly admitted report would be cumulative to Dr. Ely's testimony in which she relayed her own independent conclusions about the manner and cause of Sherwood's death. The propriety of this analysis warrants review by itself.

Initially, the Second Circuit did not address the fact that the jury was unconvinced that Garlick intended to kill Sherwood and acquitted him of second-degree murder. Garlick's acquittal of that top charge likely owed to defense counsel's skillful use of the report's contents throughout the trial to show his diminished *mens rea*. Indeed, during his summation, defense counsel stressed that the depth and size of the puncture wounds evinced Garlick's lack of homicidal intent (T.424-25, 429). As a result, Garlick was convicted solely of first-degree manslaughter, a lesser included offense that only required proof that he intended to cause Sherwood "serious physical injury" (N.Y. Penal Law § 125.20(1)).

Nevertheless, assuming that any reference to the autopsy report was impermissible under the circumstances, the error was harmless. At trial, the People introduced a surveillance video that clearly depicted Garlick repeatedly

thrusting an object into the Sherwood's chest. While the video subsequently shows Joanna punching and kicking the victim when he was already on the ground, it was apparent that she was unarmed, and, therefore, that her ancillary participation could not have produced the injuries that resulted in Sherwood's death. Importantly, Garlick never contested Sherwood was deceased, that he fought Sherwood, or that Sherwood succumbed to injuries he sustained during their altercation. Police arrived at the scene and observed the victim bleeding profusely and exhibiting no signs of life. He was pronounced dead at a local hospital.

As to the second, third, and fourth factors, Dr. Ely's testimony was immaterial and cumulative. In addition to the surveillance footage, Garlick's statements to police admitting that he fought with Sherwood and wrestled an object away from him, as well as surveillance of the incident, independently established that he disarmed Sherwood and subsequently stabbed him to death in the building lobby. Further, the circumstances that precipitated the dispute, as well as Garlick's motive, were not contested. After Garlick received a phone call from his girlfriend that Sherwood was verbally harassing her, Garlick arrived within minutes at the location where the altercation then ensued. The Second Circuit undervalued the other compelling proof of Garlick's guilt, dismissing the significant likelihood that Garlick would have been convicted without regard to the autopsy evidence. The final factor, the extent of the cross-examination permitted, also demonstrates that the error was harmless. At trial, Garlick cross-examined the expert extensively about her opinions and conclusions tying him to the crime.

The panel overstated the prosecution's reliance on the report to pinpoint Garlick as the assailant, believing that the autopsy's findings led police to drop the charges against Johanna (Appendix A: 26a-27a). That was incorrect, however. By the time the autopsy report was finalized on December 29, 2011 and made available, Joanna had already agreed to testify for the People pursuant to a cooperation agreement and Garlick had been indicted for the murder (T.72-75, 2d Cir.A.280, 283).[6] The Circuit's suggestion that the People modified their charging decision based upon the results of the autopsy was thus unfounded.

F. This case is an ideal vehicle for resolution of this issue.

Finally, this case is an ideal vehicle for resolution of this issue. The Magistrate's Report, District Court Opinion, and Second Circuit Opinion made detailed factual findings, which are not in significant dispute. The District Court and Second Circuit opinions were published. All courts below expressly decided the issue and all courts recognized that the issue was outcome-dispositive. Finally, the record in this case is full and complete and presents no procedural issues. The issues currently being argued were fully briefed below.

The denial of Garlick's initial certiorari petition does not impact this analysis. That merits-based analysis required detailed review of the record and potential preservation problems, such as defense counsel disagreeing about the redaction of the report. At this

6. The Grand Jury indicted Garlick on November 28, 2011.

juncture, the focus of this case turns upon the AEDPA statute and whether the standard for addressing the admissibility of autopsy reports is clearly established, not a granular aspect of state court proceedings.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted and this Court should reverse the judgment of the Second Circuit.

Respectfully Submitted,

DARCEL D. CLARK
DISTRICT ATTORNEY
BRONX COUNTY
Bronx, New York 10451
(718) 838-6229
killiann@bronxda.nyc.gov

Counsel for Petitioner

GINA MIGNOLA
NANCY D. KILLIAN*
PETER D. CODDINGTON
JOSHUA P. WEISS
ROBERT C. MCIVER
ASSISTANT DISTRICT ATTORNEYS
of Counsel

**Counsel of Record*

October 26, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 11, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

March 12, 2021, Argued;
June 11, 2021, Decided

No. 20-1796

JAMES GARLICK,

Petitioner-Appellee,

v.

SUPERINTENDENT WILLIAM LEE,
EASTERN CORRECTIONAL FACILITY,

Respondent-Appellant.

On Appeal from the United States Distirct Court
for the Southern District of New York

MENASHI, *Circuit Judge*:

Respondent-Appellant William Lee, Superintendent of the Eastern Correctional Facility, appeals from the final judgment of the district court granting Petitioner-Appellee James Garlick's petition for a writ of habeas corpus pursuant to the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254. In 2013, Garlick

was convicted by a jury in state court of first-degree manslaughter. At trial, an autopsy report—prepared at the request of law enforcement during an active homicide investigation—was admitted into evidence over Garlick's objection through a witness who had not participated in the autopsy or in the preparation of the autopsy report. Garlick appealed his conviction, arguing that the introduction of the autopsy report violated his Sixth Amendment right of confrontation. The state appellate court affirmed the conviction on the ground that Garlick's right of confrontation was not violated because the autopsy report did not link the commission of the crime to Garlick and therefore was not testimonial. *People v. Garlick*, 144 A.D.3d 605, 606, 42 N.Y.S.3d 28 (N.Y. App. Div. 1st Dep't 2016). We conclude that this decision involved "an unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Accordingly, we **AFFIRM** the judgment of the district court granting a writ of habeas corpus to Garlick.

BACKGROUND

I

On November 1, 2011, police responded to a report of an assault at an apartment building in the Bronx. The responding police officer found the victim, Gabriel Sherwood, bleeding on the floor in the building lobby. The victim was pronounced dead at the hospital.

That same evening, Detective Thomas DeGrazia, the lead homicide detective assigned to the case, initiated

an investigation and sought video footage from the building's surveillance video. The video footage showed a man struggling with the victim in the lobby and a woman repeatedly striking the victim on the head. Both attackers—and another woman present during the attack—fled the scene.

Later that evening, the police identified the female attacker as Johanna Rivera and arrested her as a suspect in the victim's homicide. In a post-arrest interrogation, Rivera identified Garlick as the male attacker in the video. At 4:45 a.m. on November 2, 2011, Detective DeGrazia issued a department-wide notification to arrest Garlick for his involvement in the homicide.

On November 1, 2011, the same evening as the murder, Detective DeGrazia also notified staff at the New York City Office of the Chief Medical Examiner ("OCME") of the need for an autopsy of the victim's body and arranged for the body's transport. He informed the OCME staff of details of the incident, including that the body appeared to have multiple stab wounds. With this information, the OCME prepared a "Notice of Death" form, dated November 1, 2011, that stated: "Circumstances of death: App. manner: Homicide." App'x 290. The OCME also prepared a "Supplemental Case Information" sheet, which documented the conversation with Detective DeGrazia and noted that the victim was found with multiple stab wounds in the lobby of a Bronx apartment building. App'x 291.

The following day, on November 2, 2011, Dr. Katherine Maloney of the OCME performed the autopsy with Dr.

James Gill and two Bronx homicide detectives present. Dr. Maloney then prepared an autopsy report concluding that the victim's cause of death was a "stab wound of torso with perforation of heart" and the manner of death was "homicide." App'x 275. The autopsy report is titled "Report of Autopsy" and bears several official seals including that of the OCME. App'x 275. The first page of the autopsy report includes the following certification:

> I hereby certify that I, Katherine Maloney, M.D., City Medical Examiner — I, have performed an autopsy on the body of Gabriel Sherwood, on the 2nd of November, 2011, commencing at 9:00AM in the Bronx Mortuary of the Office of Chief Medical Examiner of the City of New York.

App'x 276. Fiber recovered during the autopsy was "submitted to evidence per the usual protocol." App'x 280.

A "Case Worksheet" was prepared at the same time as the report by Dr. Maloney and bears her signature. According to the Case Worksheet, the immediate cause of death was a "[s]tab wound of torso with perforation of heart." App'x 285. After receiving Dr. Maloney's findings, the police decided not to pursue a murder charge against Johanna Rivera and instead sought to charge Garlick with murder because, as Detective DeGrazia testified, "the medical examiner made it clear that it was the stab wounds that caused the death." Trial Tr. at 277, *Garlick v. Lee*, 464 F. Supp. 3d 611 (S.D.N.Y. 2020) (No. 18-CV-11038), ECF No. 13-7.

Following his arrest on November 11, 2011, Garlick told the police that the victim had been sexually harassing his girlfriend, Lisa Rivera; that he and the victim began fighting outside of the apartment building and then moved into the lobby; that the victim brandished what he thought was a weapon; that the two struggled for it; and that he did not have a knife. He asserted that he was only trying to defend himself and his girlfriend.

On December 29, 2011, after receiving the forensic toxicology and microscopic analysis reports, Dr. Maloney finalized the autopsy report. Dr. Maloney certified that she performed the autopsy, and she signed the autopsy report.[1] The OCME certified the autopsy report as a business record under New York's statutory business-record rule and affixed the official OCME seal. As mandated by state and local law, the OCME then delivered the signed autopsy report to the Bronx District Attorney's Office. *See* N.Y. County Law § 677(4); *see also* N.Y. City Charter § 557(g); N.Y. C.P.L.R. § 4520.

II

On November 28, 2011, Garlick was indicted for murder, first-degree manslaughter (intent to cause serious physical injury), and assault with a dangerous weapon (first and second degree) in Bronx County Court. *See* N.Y. Penal Law §§ 125.25(1), 125.20(1), 120.10(1), 120.05(2).

---

1. The report notes that the draft report was prepared on November 2, 2011, and the final report was prepared on December 29, 2011. Those dates are separately signed and dated. App'x 280.

At trial, the State introduced the autopsy report through the testimony of Dr. Susan Ely of the OCME. Garlick objected, arguing that introducing the autopsy report through Dr. Ely's testimony would violate his right of confrontation under the Sixth Amendment because Dr. Ely did not prepare the autopsy report and was not involved in the victim's autopsy.[2] Relying on *People v. Freycinet*, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008), and *People v. Hall*, 84 A.D.3d 79, 923 N.Y.S.2d 428 (N.Y. App. Div. 1st Dep't 2011), the trial court held that it was "proper to allow a witness to testify to the contents of an autopsy" even if the witness had not participated in the autopsy or the preparation of the autopsy report. Trial Tr. at 22, *Garlick*, 464 F. Supp. 3d 611, ECF No. 13. The trial court admitted the autopsy report as a business record, based on Dr. Ely's testimony laying a foundation, and Dr. Ely then testified about the contents of the report as an expert in the fields of clinical, anatomic, and forensic pathology.

The State relied heavily on the autopsy report throughout the trial. In its opening statement, the State referenced the report to describe the victim's wounds and promised that Dr. Ely would provide the details. The State used the autopsy report to eliminate Johanna Rivera as a potential cause of the victim's death. Because the video of the incident presented at trial did not clearly show that Garlick had a knife and because Garlick denied ever

2. The State indicated that Dr. Maloney, who prepared the report, and Dr. Gill, who was present at the autopsy, no longer worked at the OCME but did not otherwise explain why they were unavailable to testify.

possessing a knife, the State connected Garlick to the victim's knife wounds by relying on the conclusions in the autopsy report. The State also offered the autopsy report as evidence of Garlick's intent to cause serious physical injury. Finally, the State relied on the autopsy report in its closing argument, recounting Dr. Ely's testimony about the victim's wounds and describing the report's conclusions as the "final diagnosis" of the victim's "cause of death." Trial Tr. at 449, 452-53, *Garlick*, 464 F. Supp. 3d 611, ECF No. 13-12.

The jury convicted Garlick of first-degree manslaughter and acquitted him of the murder charge. He was sentenced to twenty years' imprisonment and five years of supervised release. He is currently serving that sentence.

III

Garlick appealed his conviction to the Appellate Division, First Department, arguing that the autopsy report was testimonial and therefore should not have been admitted through a surrogate witness. The First Department disagreed and held that Garlick's right of confrontation "was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" because the report "did not link the commission of the crime to a particular person" and therefore "was not testimonial." *People v. Garlick*, 144 A.D.3d 605, 606, 42 N.Y.S.3d 28 (2016) (alteration omitted) (quoting *People v. Acevedo*, 112 A.D.3d 454, 455, 976 N.Y.S.2d 82 (N.Y. App. Div. 1st Dep't 2013), and *People v.*

John, 27 N.Y.3d 294, 315, 33 N.Y.S.3d 88, 52 N.E.3d 1114 (2016)). The First Department also rejected Garlick's argument that *People v. Freycinet*, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008), which held that an autopsy report was not testimonial, had been undermined by subsequent decisions of the Supreme Court of the United States. *Garlick*, 144 A.D.3d at 606 (citing *Acevedo*, 112 A.D.3d at 455). Garlick unsuccessfully applied for leave to appeal to the New York Court of Appeals, *People v. Garlick*, 29 N.Y.3d 948, 54 N.Y.S.3d 379, 76 N.E.3d 1082 (2017), and unsuccessfully petitioned the Supreme Court for a writ of certiorari, *Garlick v. New York*, 138 S. Ct. 502, 199 L. Ed. 2d 390 (2017).

IV

On November 27, 2018, Garlick sought a writ of habeas corpus pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1). The magistrate judge concluded that *People v. Freycinet* and its progeny did not reflect current Supreme Court precedent applying the Sixth Amendment's Confrontation Clause but nevertheless denied Garlick's petition for not meeting the exacting standard for habeas relief under the AEDPA. *Garlick v. Miller*, No. 18-CV-11038, 2020 U.S. Dist. LEXIS 74546, 2020 WL 2857464, at *5-29 (S.D.N.Y. Apr. 27, 2020), *report and recommendation adopted in part, rejected in part sub nom. Garlick*, 464 F. Supp. 3d 611.

The district court rejected the recommendation. Adopting substantially all of the magistrate judge's

analysis of the issues and conclusions of law, the district court granted habeas relief on the ground that the First Department's ruling unreasonably applied clearly established federal law. *Garlick*, 464 F. Supp. 3d at 618-21. Respondent-Appellant Lee timely appealed.

STANDARD OF REVIEW

We review *de novo* a district court's decision to grant a petition for a writ of habeas corpus. *Harris v. Kuhlmann*, 346 F.3d 330, 342 (2d Cir. 2003).

Because of the deference afforded to state courts under the AEDPA, we consider a state court's error to be harmless "unless it had substantial and injurious effect or influence in determining the jury's verdict." *Alvarez v. Ercole*, 763 F.3d 223, 233 (2d Cir. 2014). Whether a Confrontation Clause violation amounts to harmless error depends on "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case." *Cotto v. Herbert*, 331 F.3d 217, 254 (2d Cir. 2003) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

DISCUSSION

On appeal, Garlick argues that the state court's decision approving the admission of the autopsy report

through a surrogate witness at trial was an unreasonable application of clearly established federal law under the AEDPA. *See* 28 U.S.C. § 2254(d)(1). We agree and affirm the district court's grant of habeas relief.

I

A federal court may grant habeas relief if the state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). When judging whether a state court decision was contrary to, or an unreasonable application of, Supreme Court precedent, we measure the last state-court adjudication of the petitioner's claim on the merits "against [the Supreme] Court's precedents as of the time the state court render[ed] its decision." *Cullen v. Pinholster*, 563 U.S. 170, 182, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (internal quotation marks omitted); *Greene v. Fisher*, 565 U.S. 34, 40, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011).

"A principle is clearly established Federal law for § 2254(d)(1) purposes only when it is embodied in a Supreme Court holding, framed at the appropriate level of generality." *Washington v. Griffin*, 876 F.3d 395, 403 (2d Cir. 2017) (internal quotation marks, citation, and alteration omitted). "A state court decision is contrary to such clearly established law when the state court either has arrived at a conclusion that is the opposite of the conclusion reached by the Supreme Court on a question of law or has decided a case differently than the Supreme

Court has on a set of materially indistinguishable facts." *Id.* (internal quotation marks omitted). An unreasonable application of clearly established federal law occurs when "the state court correctly identifies the governing legal principle but unreasonably applies it to the facts of the particular case, so that the state court's ruling on the claim was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (internal quotation marks, alterations, and citation omitted). The question therefore "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

II

To decide whether the First Department's adjudication involved an unreasonable application of clearly established federal law, we begin with the Supreme Court's Confrontation Clause precedents.

A

In *Crawford v. Washington*, the Supreme Court considered whether the defendant's wife's tape-recorded statement to police could be entered into evidence even though the wife was exempt from cross-examination by the marital privilege. 541 U.S. 36, 40, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court held that regardless of its "indicia of reliability," a testimonial statement such as the tape recording is inadmissible without an opportunity

for cross-examination of the declarant. *Id.* at 68-69. The Court noted "[v]arious formulations" for defining the "core class of 'testimonial' statements":

> - "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,"
>
> - "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and
>
> - "statements that 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 51-52 (alterations and citations omitted). The Court explained that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard," *id.* at 52, and therefore the Confrontation Clause would not allow the admission of the tape recording absent "unavailability [of the declarant] and a prior opportunity for cross-examination," *id.* at 68. The reliability of a testimonial statement may be determined only "by testing in the crucible of cross-examination." *Id.* at 61.

B

The Supreme Court applied this holding to forensic reports in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), in which the Court concluded that certificates attesting to the laboratory analysis of a suspected controlled substance fell "within the core class of testimonial statements" that required an opportunity for cross-examination. *Id.* at 310.

In *Melendez-Diaz*, the defendant objected to the trial court's admission into evidence of three certificates that confirmed that the substance seized from his person was cocaine. *Id.* at 308-09. The defendant argued that because he had no opportunity to confront the analysts who performed the forensic tests, the admission violated his Sixth Amendment right of confrontation. *Id.* at 309. The Supreme Court agreed. *Id.* at 329.

The Court explained that the certificates were "quite plainly affidavits"; the certificates were "sworn to by the declarant before an officer authorized to administer oaths" and thus "incontrovertibly" amounted to a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 310 (quoting *Crawford*, 541 U.S. at 51). The Court further noted that the certificates were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* at 310-11 (internal quotation marks omitted). And 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," especially because "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." *Id.* at 311 (internal quotation marks and citation omitted). For these reasons, "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [Melendez-Diaz] had a prior opportunity to cross-examine them," the certificates were inadmissible without an opportunity to cross-examine the analysts who prepared those documents. *Id.*

The Court addressed several arguments advanced by the State in favor of admissibility. First, the Court rejected the argument that the analysts who prepared the certificates were not subject to confrontation "because they are not 'accusatory' witnesses, in that they do not directly accuse petitioner of wrongdoing" and their "testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband." *Id.* at 313. The Court explained that "the analysts were witnesses" and "provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine." *Id.* There is no category of witnesses who are "helpful to the prosecution" but "somehow immune from confrontation." *Id.* at 314.

Second, the Court rejected the argument that scientific reports should be admissible based on indicia of reliability. *Id.* at 318. The Court explained that even statements which result from purportedly "neutral scientific testing" must be subject to cross-examination because such tests are not

necessarily "as neutral or as reliable" as advertised and are not "uniquely immune from the risk of manipulation." *Id.* Because confrontation "is designed to weed out not only the fraudulent analyst, but the incompetent one as well ... an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination" and may reveal the "[s]erious deficiencies [that] have been found in the forensic evidence used in criminal trials." *Id.* at 319-20. Even scientific testing and expert analysis rely on subjective judgments about which tests to perform and how to interpret the results. *See id.* at 320. The exercise of such judgment "presents a risk of error that might be explored on cross-examination." *Id.* The Court said this is "true of many of the other types of forensic evidence commonly used in criminal prosecutions" because there is "wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material." *Id.* at 320-21.

Third, the Court rejected the argument that the Confrontation Clause allows an exception for public or business records. *Id.* at 321. While a document kept in the regular course of business ordinarily may be admitted at trial despite its hearsay status, such a document may not be admitted without confrontation if "the regularly conducted business activity is the production of evidence for use at trial." *Id.* Similarly, public records are generally admissible unless such records reflect "matters observed by police officers and other law-enforcement personnel" in criminal cases. *Id.* at 322 (quoting Fed. R. of Evid. 803(8)). Accordingly, testimonial statements cannot be

admitted into evidence as business or public records without confrontation. *Id.* at 324.[3]

C

In *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), the Court reaffirmed that forensic reports—even those prepared by analysts who purportedly act as "mere scrivener[s]" of machine-generated results—are testimonial statements that are inadmissible without confrontation. *Id.* at 659. The defendant was arrested on charges of driving while intoxicated, and the principal evidence against him was a laboratory report certifying that his blood-alcohol concentration was above the legal limit. *Id.* at 651. The trial court admitted the report through a surrogate witness on the ground that the analyst who prepared the report "'was a mere scrivener,' who 'simply transcribed the results generated by the gas chromatograph machine.'" *Id.* at 657.

The Supreme Court disagreed, holding that "[i]n all material respects, the laboratory report in this case resembles those in *Melendez-Diaz*." *Id.* at 664. "[A]s in *Melendez-Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations," and in both cases an analyst "tested the evidence and prepared a certificate concerning the result of his analysis" that was "'formalized' in a signed document" and thus was an affirmation "made

3. At Garlick's trial, the court admitted the autopsy report as a business record, but Lee does not argue in this appeal that the report was admissible solely on that basis.

for the purpose of establishing or proving some fact in a criminal proceeding." *Id.* at 664-65 (internal quotation marks omitted). The Court found it "[n]oteworthy" that the laboratory report contained a legend to aid law enforcement in the admission of certified blood-alcohol analyses in municipal and magistrate courts, making clear that the report would be available for use at a later trial. *Id.* at 665; *see also Melendez-Diaz*, 557 U.S. at 311; *Crawford*, 541 U.S. at 50-52.

Again, the Court addressed several counter-arguments for admitting the report without confrontation. First, the Court rejected the argument that the laboratory report was merely the number resulting from the blood alcohol test "scrivened" by the analyst; rather, the analyst who signed the report certified that he had received the sample intact, had checked that the sample corresponded to the correct report number, and had performed a particular test following a specified protocol. *Bullcoming*, 546 U.S. at 660. The testimony of a surrogate witness could not convey what the analyst who conducted the test "knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed," and could not "expose any lapses or lies on the certifying analyst's part." *Id.* at 661-62. Moreover, the report allowed the analyst to identify any "circumstance or condition" that "affected the integrity of the sample or the validity of the analysis." *Id.* at 660 (alterations omitted). Representations relating to the presence or absence of such circumstances relate "to past events and human actions not revealed in raw, machine-produced data" and are "meet for cross-examination." *Id.*

Second, the Court rejected the argument that forensic reports that are purely observational and that do not accuse the defendant of wrongdoing are nontestimonial and therefore not subject to confrontation. The Court explained that *Melendez-Diaz* clarified that a document created "for an evidentiary purpose," and "made in aid of a police investigation," is testimonial. *Id.* at 664 (internal quotation marks omitted). Thus, even "observations of an independent scientist made according to a non-adversarial public duty" are testimonial if made in aid of a police investigation or if it were reasonably known that the observations would be available for use at a later trial. *Id.* (internal quotation marks and alteration omitted).

Third, the Court held that the absence of notarization does not change the report's testimonial status. Otherwise, the right to confrontation would become "easily erasable" because distinguishing between reports that are notarized and those that are not would "render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements, 'perfectly OK.'" *Id.* (quoting *Crawford*, 541 U.S. at 52 n.3).

D

In a later decision in which no opinion had the support of a majority of the Court, the Supreme Court considered whether "[o]ut-of-court statements that are related by [a testifying] expert solely for the purpose of explaining the assumptions on which [the expert's] opinion rests" are subject to the restrictions of the Confrontation Clause. *Williams v. Illinois*, 567 U.S. 50, 58, 132 S. Ct. 2221, 183 L.

Ed. 2d 89 (2012) (plurality opinion). In *Williams*, a forensic expert testified at a bench trial that a DNA profile—prepared by an outside laboratory with evidence taken from the victim's body—matched another DNA profile produced by the state police from the defendant's blood. *Id.* at 56. A plurality of the Court concluded that the DNA profile prepared by the outside laboratory was not offered for its truth and therefore was not a testimonial statement subject to the Confrontation Clause. *Id.* at 57-58. The plurality reasoned that in a bench trial the judge sits as the trier of fact and will presumably "understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose." *Id.* at 69. The Court affirmed the judgment of the trial court admitting the testimony.

The plurality suggested that even if the underlying profile had been admitted for its truth, evidence that does not serve the primary purpose of accusing a targeted individual of wrongdoing is not testimonial. *Id.* at 84-86. But five justices disagreed, noting that *Melendez-Diaz* held that the Sixth Amendment contemplates only "two classes of witnesses—those against the defendant and those in his favor," *id.* at 116 (Thomas, J., concurring in the judgment) (quoting *Melendez-Diaz*, 557 U.S. at 313), and that prior cases had not held that a testimonial statement "must be meant to accuse a previously identified individual; indeed, in *Melendez-Diaz*, we rejected a related argument that laboratory analysts are not subject to confrontation because they are not 'accusatory' witnesses," *id.* at 135 (Kagan, J., dissenting) (internal quotation marks omitted).

The plurality also suggested that the match provided "strong circumstantial evidence" that the outside laboratory's analysis was reliable and not the product of "shoddy or dishonest work." *Id.* at 76-77 (plurality opinion). But five justices objected that such evidence of reliability did not render the outside laboratory's profile admissible. *See id.* at 109 (Thomas, J., concurring in the judgment) ("The existence of other evidence corroborating the basis testimony ... does not change the purpose of such testimony and thereby place it outside of the reach of the Confrontation Clause."); *id.* at 138 (Kagan, J., dissenting) ("It is not up to us to decide, *ex ante*, what evidence is trustworthy and what is not.").

Justice Thomas, concurring in the judgment, disagreed with the plurality's conclusion that the report was admissible because it was not offered for its truth. *Id.* at 106. Rather, he reasoned that the DNA profile was "not a statement by a witness within the meaning of the Confrontation Clause" because it lacked "the solemnity of an affidavit or deposition." *Id.* at 111 (internal quotation marks and alteration omitted). Justice Thomas concluded that the profile could be admitted because it was "neither a sworn nor a certified declaration of fact" and it did not "attest that its statements accurately reflect the DNA testing processes used or the results obtained." *Id.* No other justices embraced this reasoning.

Ordinarily, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who

concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (internal quotation marks omitted). That rule produces no clear answer here because neither the plurality's nor Justice Thomas's rationale is necessarily narrower than the other. We have previously concluded that "*Williams* does not ... yield a single, useful holding relevant to the case before us." *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013). That is the case here, and we therefore rely on Supreme Court precedent predating *Williams*. *Id.* [4]

III

The First Department's decision, which was the last state-court adjudication of Garlick's claim on the merits, was an unreasonable application of clearly established federal law.

First, the state court adjudication was an incorrect application of clearly established Supreme Court precedent, under which the autopsy report is testimonial and admissible only with confrontation.[5] The autopsy

4. As we explain below, however, applying either the rationale of the *Williams* plurality or that of the Thomas concurrence would not alter our conclusion in this case. *See infra* note 6.

5. Contrary to Lee's argument that Garlick's petition must be denied because the Supreme Court has never specifically held that an autopsy report is testimonial for purposes of the Confrontation Clause, Garlick need not identify "an identical factual pattern before a legal rule must be applied." *White v. Woodall*, 572 U.S. 415, 427, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014). While the Supreme Court has

report was "[a] solemn declaration or affirmation made for the purposes of establishing or proving some fact." *Crawford*, 541 U.S. at 52; *see also Bullcoming*, 564 U.S. at 652. As in *Melendez-Diaz* and *Bullcoming*, law enforcement provided seized evidence—the victim's body—to a state laboratory required by law to assist in police investigations.

The autopsy was performed in aid of an active police investigation. Preparations for the autopsy commenced at Detective DeGrazia's request and the preliminary documents—including the "Notice of Death" and "Supplemental Case Information" forms—were created in anticipation of the autopsy and included details of the OCME staff's conversation with Detective DeGrazia. The autopsy was performed in the presence of another medical examiner and two detectives. After completing the autopsy, Dr. Maloney promptly notified law enforcement of her findings, and the police consequently dropped charges against Rivera and pursued a murder charge against Garlick. The circumstances under which the autopsy report was created would lead any objective witness to "believe that the [report] would be available for use at a later trial." *Crawford*, 541 U.S. at 52; *see also Melendez-Diaz*, 557 U.S. at 310; *Bullcoming*, 564 U.S. at 664. Later, the final, signed autopsy report was delivered to the Bronx District Attorney's Office; again, any objective witness—and Dr. Maloney in particular—would have expected that the statements contained in the report would be used

---

not addressed autopsy reports in particular, the Court has plainly rejected the reasoning on which the First Department relied to hold the autopsy report admissible in Garlick's case.

in a later prosecution. *See Crawford*, 541 U.S. at 51-52; *Melendez-Diaz*, 557 U.S. at 310.

Just as in *Melendez-Diaz* and *Bullcoming*, the medical examiner "prepared a certificate concerning the result" of the examination that was "'formalized' in a signed document." *Bullcoming*, 564 U.S. at 664-65. Further indications of the report's solemnity include its formal title, "Report of Autopsy," the OCME seal, the certification that Dr. Maloney performed the autopsy at the indicated date and time, and the initialed and dated "draft" and "final" dates indicating when the draft report was prepared and when it was finalized.

As intended, the autopsy report was used extensively at trial for the purpose of proving key facts—including, notably, that it was Garlick rather than Rivera who caused the victim's death. *See Crawford*, 541 U.S. at 40-41; *Bullcoming*, 564 U.S. at 655-66. The State used the autopsy report in its opening and closing statements to describe the victim's wounds. The State also used the autopsy report's conclusions on the manner and cause of death to eliminate Rivera as a potential cause of the victim's death and to prove Garlick's intent to cause serious physical injury. The conclusions contained in the autopsy report with respect to the nature of the wounds and the cause and manner of death were out-of-court substitutes for trial testimony, *see Bullcoming*, 564 U.S. at 670 (Sotomayor, J., concurring in part), that presented the very "risk of error that might be explored on cross-examination," *Melendez-Diaz*, 557 U.S. at 320. Under the applicable Supreme Court precedents, our

conclusion is clear: the autopsy report is testimonial and was erroneously admitted without an opportunity for cross-examination.[6]

Second, the state court adjudication not only incorrectly but also unreasonably applied clearly established law. Under the AEDPA, our inquiry does not end with the conclusion that the admission of the report was erroneous; the relevant question is not whether the state court's determination was incorrect but "whether that determination was unreasonable," which is "a substantially higher threshold." *Schriro*, 550 U.S. at 473. We hold that it was.

The First Department's decision affirming Garlick's conviction relied on *People v. Freycinet*, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008), and its progeny, *People v. John*, 27 N.Y.3d 294, 33 N.Y.S.3d 88, 52 N.E.3d 1114 (2016), and *People v. Acevedo*, 112 A.D.3d 454, 976 N.Y.S.2d 82 (N.Y. App. Div. 1st Dep't 2013). In *Freycinet*—decided after *Crawford* but before *Melendez-*

6. Our conclusion would remain the same under either the plurality opinion or the Thomas concurrence in *Williams*. The autopsy report was not "related by" an expert during a bench trial "solely for the purpose of explaining the assumptions" behind the expert's testimony. *Williams*, 567 U.S. at 57-58 (plurality opinion). It was offered to prove the truth of the matter asserted to a jury, which would be impermissible even under the plurality's view. *See id.* at 72 ("Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury."). And the autopsy report did not lack "indicia of solemnity." *Id.* at 111 (Thomas, J., concurring in the judgment). It was certified, formalized, and bore an official seal.

Diaz and *Bullcoming*—and more recently in *John*, the New York Court of Appeals held that statements which do not "directly link" the defendant to the crime are not testimonial. *Freycinet*, 11 N.Y.3d at 42; *see id.* ("The report is concerned only with what happened to the victim, not with who killed her."); *see also John*, 27 N.Y.3d at 315 ("[G]iven the primary purpose of a medical examiner in conducting autopsies, such redacted reports—'a contemporaneous, objective account of observable facts that do not link the commission of the crime to a particular person'—are not testimonial.") (alteration omitted).[7] Relying on *Freycinet*, the First Department held in *Acevedo* that a "[d]efendant's right of confrontation [is] not violated when an autopsy report prepared by a former medical examiner, who did not testify, [is] introduced through the testimony of another medical examiner." 112 A.D.3d at 455.

In this case, the First Department drew on these precedents to conclude that Garlick's right of confrontation was not violated because "the report, which '[did] not link the commission of the crime to a particular person,' was not testimonial." *Garlick*, 144 A.D.3d at 606 (quoting *John*, 27 N.Y.3d at 315).

---

7. We note that *John* purported to find support for this proposition in this court's decision in *James*. *See John*, 27 N.Y.3d at 315 (citing *James*, 712 F.3d at 99). Yet *James* did not hold that autopsy reports do not "link the commission of the crime to a particular person." *John*, 27 N.Y.3d at 315. In fact, *James* cautioned that *Melendez-Diaz* and *Bullcoming* "cast doubt on any categorical designation of certain forensic reports as admissible in all cases." *James*, 712 F.3d at 88. Nor did *James* hold that such linkage determines whether a statement is testimonial.

This conclusion contradicts clearly established Supreme Court precedent. The Supreme Court has squarely rejected the argument that forensic reports that "do not directly accuse [the defendant] of wrongdoing," *Melendez-Diaz*, 557 U.S. at 313-14, or that are only "observations of an 'independent scientist' made 'according to a non-adversarial public duty,'" *Bullcoming*, 564 U.S. at 665 (alteration omitted), are not testimonial. There is no category of witnesses who are "helpful to the prosecution" but "somehow immune from confrontation." *Melendez-Diaz*, 557 U.S. at 314. The First Department's decision unreasonably relied on the existence of such a category. Even if a forensic report contains only "a contemporaneous, objective account of observable facts" that does not accuse a defendant, *John*, 27 N.Y.3d at 315, it is testimonial and the Confrontation Clause requires that the defendant be afforded the opportunity to cross-examine the declarant. *Melendez-Diaz*, 557 U.S. at 318-21; *Bullcoming*, 564 U.S. at 661-62; *Crawford*, 541 U.S. at 68-69. "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials"—cross-examination—"and we, no less than the state courts, lack authority to replace it with one of our own devising." *Crawford*, 541 U.S. at 67.

IV

The unreasonably erroneous admission of the autopsy report at Garlick's trial was not harmless. At trial, the State introduced the autopsy report as its first exhibit and heavily relied on it in its opening and closing statements. The State used the autopsy report to eliminate Rivera as a potential cause of the victim's death. No other medical

evidence was offered at trial to establish the cause and manner of the victim's death. The State also offered the autopsy report as evidence of Garlick's intent to cause serious physical injury. Moreover, no witness testified that Garlick had or used a knife during the attack, and Garlick denied that he had a knife. The autopsy report was the strongest evidence in the State's case and was not cumulative of other inculpatory evidence connecting Garlick to the victim's death.

Dr. Ely, who did not conduct or even participate in the autopsy, could not testify with respect to the procedures and methods that were followed in reaching its conclusions or to the qualifications of the examiner. Even rigorous cross-examination of Dr. Ely could not have adequately revealed any defects in the autopsy's methods, conclusions, and reliability.

CONCLUSION

In sum, we conclude that the admission of the autopsy report at Garlick's trial through a surrogate witness was an unreasonable application of clearly established Supreme Court precedent. Accordingly, we **AFFIRM** the judgment of the district court.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JUNE 2, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 18-cv-11038 (CM) (SLC)

JAMES GARLICK,

Petitioner,

-against-

SUPERINTENDENT WILLIAM LEE,
EASTERN CORRECTIONAL FACILITY,

Defendants.

June 2, 2020, Decided
June 2, 2020, Filed

DECISION AND ORDER

McMahon, C.J.:

I have received and reviewed the Report and Recommendation of The Hon. Sarah L. Cave, dated April 27, 2020 (Dkt. No. 29; hereinafter the "R&R"), denying Petitioner James Garlick's petition for a writ of habeas corpus. Garlick seeks relief on the grounds that the prosecution relied on an autopsy report prepared by an individual whom Garlick was not given the opportunity

to cross examine at trial, in violation of the Confrontation Clause of the Sixth Amendment. He claims that the decision of the First Judicial Department of the Supreme Court of the State of New York affirming his conviction "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1),

Judge Cave concluded that Garlick's petition did not meet the exacting standard for relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Nonetheless, the R&R acknowledges that Garlick's petition "made a substantial showing of the denial of a constitutional right," and recommends that this Court certify the following questions for appeal (*see* 28 U.S.C. § 2253(c)(2)): (1) whether the Supreme Court's Confrontation Clause precedent clearly established, as of the date Garlick's conviction was affirmed by the First Department, that an autopsy report was testimonial; and (2) if so, whether the First Department's decision denying Galrick's Confrontation Clause claim was contrary to, or involved an unreasonable application of, that precedent (R&R at 63).

Timely objections to the R&R were received from Petitioner and Respondent Christopher L. Miller, Superintendent of the Great Meadows Correctional Facility, where Petitioner Garlick was housed at the time he filed his petition. (Dkt. Nos. 32, 33.)[1] The Court

1. Garlick was recently transferred from Great Meadows to Eastern Correctional Facility; accordingly, the Court has substituted the superintendent of that facility, William Lee, as respondent in the case caption. *See* Fed. R. Civ. P. 25(d).

has considered thoroughly all of the Petitioner's and Respondent's arguments in support of their objections, and has considered *de novo* all of the points raised. *See* 28 U.S.C. § 636(b)(1)(c).

Although I adopt substantially all of Judge Cave's analysis of the issues and conclusion of law in the R&R, I respectfully disagree with the recommendation that I deny Garlick's petition for failure to meet the standard set forth in § 2254(d)(1). Garlick has, in fact, made the necessary showing to obtain habeas relief. Accordingly, the petition for a writ of habeas corpus is GRANTED.

BACKGROUND

A. Factual Background

A thorough treatment of the facts is set forth in the R&R. (R&R at 2-9.) In sum: at Garlick's trial on charges of Second Degree Murder, First Degree Manslaughter, First Degree Assault, and Second Degree Assault, the prosecution entered into evidence a report prepared by Dr. Katherine Maloney of the New York Office of the Chief Medical Examiner ("OCME"), summarizing an autopsy she had performed on Garlick's alleged victim. The autopsy occurred after Garlick and another individual had been identified as suspects, with two homicide detectives in attendance. In the autopsy report, Dr. Maloney stated that the cause of death was homicide resulting from multiple stab wounds, which caused the police to rule out the other suspect in the case and focus on Garlick.

Although Garlick admitted to having used force against the victim (in defense of his girlfriends), he disputed throughout the trial that he had possessed or used a knife during the altercation. The prosecution did not call Dr. Maloney at the trial, since she was no longer employed by OCME, instead calling Dr. Susan Ely, who had not attended the autopsy, to lay the foundation and testify about Dr. Maloney's report. Garlick's counsel objected that Dr. Ely's testimony violated Garlick's right to confrontation, but was overruled.

The jury convicted Garlick on the manslaughter charge, and the First Department affirmed the trial court's ruling on the Confrontation Clause issue. The appellate court ruled unanimously:

> "'Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner' (*People v Acevedo*, 112 AD3d 454, 455, 976 N.Y.S.2d 82 [1st Dept 2013], *lv denied* 23 N.Y.3d 1017, 992 N.Y.S.2d 800, 16 N.E.3d 1280 [2014]), since the report, which '[did] not link the commission of the crime to a particular person,' was not testimonial (*People v John*, 27 NY3d 294, 315, 33 N.Y.S.3d 88, 52 N.E.3d 1114 [2016]). Defendant's contention that *People v Freycinet* (11 NY3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 [2008]) has been undermined by subsequent decisions of the United States Supreme Court is unavailing (*see Acevedo*, 112 AD3d at 455)."

People v. Garlick, 144 A.D.3d 605, 606, 42 N.Y.S.3d 28 (N.Y. App. Div. 2016).

Garlick's habeas petition was timely filed within one year after he exhausted his available remedies on direct review.

B. Confrontation Clause Precedent

This Court adopts the R&R's thorough and well-reasoned discussion of several recent Supreme Court decisions dealing with out-of-court statements subject to the defendant's right to confrontation under the Sixth Amendment. The following is reproduced to focus the scope of this Court's review of the R&R.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This entitles a criminal defendant the right to cross examine all those "who bear testimony" against him, including those who make out-of-court statements "that declarants would reasonably expect to be used prosecutorially," and "statements that 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." *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (internal quotation marks omitted).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed. 2d 314 (2009), the Supreme

Court ruled that forensic reports — certified by state laboratory analysts and identifying a controlled substance as cocaine — fell within the "core class of testimonial statements" covered by the Confrontation Clause, and that the defendant had a right to confront the analysts at trial. *Id.* at 311. In so holding, the court rejected the argument that the Sixth Amendment only guarantees a criminal defendant the right to confront "accusatory witnesses" — those that specifically accuse him or her of committing the crime. *Id.* at 313. Justice Scalia, writing for the majority, made clear that the constitution "contemplates two classes of witnesses — those against the defendant and those in his favor . . . there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 313-14.

Two years later, the Supreme Court extended the reasoning of *Melendez-Diaz* to another type of certified report: analyses of blood alcohol collected from persons suspected of driving under the influence. In *Bullcoming v. New Mexico*, 564 U.S. 647, 661, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), the court held that "analysts who write reports introduced as evidence must be made available for confrontation," even where those analysts do nothing more than transcribe the results generated by a gas chromatograph machine. *Id.* at 661. In doing so, the Supreme Court rejected the respondent's argument that "observations of independent scientists" are not covered by the Confrontation Clause, reiterating the holding in *Melendez-Diaz* that certified analyses submitted "for the purpose of establishing or proving some fact in a criminal proceeding" are testimonial in nature. *Id.*

at 664 (internal quotation marks omitted). Therefore, when the prosecution "elected to introduce [an analyst's] certification, [the analyst] became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way." *Id.* at 663.

To be sure, the Supreme Court has not ruled that every certified, out-of-court scientific report is a testimonial statement that gives rise to a right to confrontation. For example, in *Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), a plurality found that the prosecution's introduction of a DNA profile that had been certified and "produced before any suspect was identified," and "sought not for the purposes of obtaining evidence," did not require "calling the technicians who participated in preparation of the profile." *Id.* at 58. In other words, the DNA report in *Williams* was not created during the course of the criminal proceeding in which it was ultimately offered as evidence, it was not the type of statement made "against" the defendant that *Meledendez-Diaz* defined as testimonial in nature.

C. The conclusions of the Report and Recommendation

After reviewing that precedent, Judge Cave determined that: (i) "the Autopsy Report qualifies as testimonial and should not have been admitted into evidence at trial without giving Garlick the opportunity to cross examine Dr. Maloney [the medical examiner who conducted the autopsy" (R&R at 46); (ii) surrogate testimony from an expert witness who was not present at the autopsy "was not a constitutionally sufficient substitute

for cross examination of Dr. Maloney herself" (*id.* at 47); and (iii) the First Department's decision to affirm Garlick's conviction on the grounds that the autopsy report was not testimonial was not consistent with Supreme Court precedent (*id.* at 48-49); and (iv) admission of the autopsy report under such circumstances was not harmless error, (*id.* at 59-63.)

The R&R correctly stated that the certified autopsy report, prepared during the course of an investigation that had already identified Garlick as a suspect, was the sort of "declaration of facts written down and sworn to by the declarant" that the Supreme Court deemed testimonial in *Melendez-Diaz* and *Bullcoming*. (R&R at 34-46.) The R&R also recognized that the First Department's decision, as well as the authorities it cited, relied on the "accusatory witnesses" distinction rejected by the Supreme Court in 2009. (*Id.* at 51-55.) Therefore, the R&R provided a roadmap to conclude that the First Department's 2016 affirmance of Garlick's conviction was either contrary to, or an unreasonable application of, Supreme Court precedent. Judge Cave also concluded that the admission of the report did not constitute harmless error.

Nonetheless, Judge Cave ruled that "the Supreme Court's Confrontation Clause precedent is unsettled, and therefore insufficiently 'established' to grant relief to Garlick here." (R&R at 58.) She had two reasons: for one thing, not all lower courts have agreed that autopsy reports are testimonial statements within the ambit of the Confrontation Clause have agreed that they were; for another, some courts in this Circuit have commented

that the Supreme Court's Confrontation Clause "does not conclusively establish under which guidelines the use of forensic reports at trial . . . may intrude on a defendant's right to confrontation." *Soler v. U.S.*, No. 10-cv-4342 (LAP), 2015 U.S. Dist. LEXIS 107338, 2015 WL 4879170, at *16 (S.D.N.Y. Aug. 14, 2015); *Vega v. Walsh*, 669 F.3d 123, 127 (2d Cir. 2012) (finding "reasonable jurists could disagree" whether a medical examiner's testimony about an autopsy report he had not prepared violated the confrontation clause).

D. The Parties' objections to the Report and Recommendation

i. Petitioner's Objections

Petitioner objects to: (1) the R&R's failure to analyze the First Department's error under the "contrary to" prong of the habeas statute, a process that entails *de novo* review; (2) the Report's failure to find that the autopsy report here was materially indistinguishable from forensic reports found testimonial by the Supreme Court; and (3) the Report's conclusion that no "clearly established" Supreme Court precedent rendered an autopsy report—created during a homicide investigation and declaring that the cause of death was "homicide"—testimonial. (Dkt. No. 33 at 2.)

ii. Respondent's Objections

The Respondent objects to two findings in the R&R on two grounds. First, Respondent asserts that Judge

Cave should not have found "that the introduction of the autopsy report into evidence through a witness other than the medical examiner who performed the autopsy runs afoul of controlling federal jurisprudence." (Dkt. No. 32 at ¶ 8.) The rationale for this argument is similar to Judge Cave's contention that the law in this area was not "clearly established" as of the time of the First Department's decision, discussed in greater detail below.

Second, Respondent challenges certain of Judge Cave's characterization of the trial record. (*Id.* ¶ 10.) I have reviewed the material Judge Cave cited in the R&R, and find both her conclusions and characterizations faithful and accurate. Respondent's objections in this regard are overruled.

STANDARDS OF REVIEW

I. Reviewing a Magistrate's Report and Recommendation

In reviewing a report and recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]." 28 U.S.C.A. § 636(b)(1)(C). The Court must make a *de novo* determination to the extent that a party makes specific objections to a magistrate's findings. *See* 28 U.S.C. § 636(b)(1)(C). To the extent, however, that a party makes only conclusory or general objections, or simply reiterates original arguments, the Court will review the Report strictly for clear error. *Pearson-Fraser v. Bell Atl.*, 2003 U.S. Dist. LEXIS 89, 2003 WL 43367, at *1 (S.D.N.Y. Jan. 6, 2003).

Appendix B

II. The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1)

AEDPA constrains a federal court's ability to grant a state prisoner's application for a writ of habeas corpus for claims adjudicated on the merits in state court. AEDPA limits issuance of the writ to circumstances in which the state proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

A state court decision is contrary to federal law if the state court applies "a conclusion opposite to that reached by [the Supreme] Court on a question of law or if [it] decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. A state court's merely incorrect application of the correct legal rule to the particular facts of the case "would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* at 406.

Under the "unreasonable application" prong of Section 2254(d)(1), federal court may only overrule state court decisions found to be "objectively unreasonable." *Id.* at 409. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting

Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). The more general the rule announced by the Supreme Court, the more leeway state courts enjoy in applying it. *Id.* "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S.Ct. 1411, 1413-14, 173 L.Ed.2d 251 (2009) (internal quotation marks omitted).

When judging whether a state court ruling was contrary to or an unreasonable application of Supreme Court precedent, a federal court measures state court decisions "against [the Supreme] Court's precedents as of the time the state court renders its decision." *Cullen v. Pinholster*, 563 U.S. 170, 182, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

DISCUSSION

Garlick's habeas petition meets the standard set forth in § 2254(d)(1). The First Department unreasonably applied clearly established law when it affirmed Garlick's conviction. The Court having adopted the portions of the R&R to which Respondent objects, Petitioner's objections are disposed of as follows.

I. The First Department's decision was not "contrary to" Supreme Court Precedent.

In discussing the impact of the scope of habeas review on Garlick's petition, the R&R focuses entirely

on the unreasonable application prong. Petitioner's first two objections claim that Judge Cave committed error by passing over the "contrary to" prong. Had she not done so, the magistrate would have enjoyed free reign to "determine the principles necessary to grant relief," as opposed to deferring to the rule announced by the state court, and determining whether that rule was applied correctly. *Lafler v. Cooper*, 566 U.S. 156, 173, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) (citing *Panetti v. Quarterman*, 551 U.S. 930, 948, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007)).

The "contrary to" prong is inapplicable in this case. A state court decision is only contrary to Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in our cases," or "confront a set of fact that are materially indistinguishable from a decision of [the Supreme] Court and arrives at a different result from out precedent." *Williams*, 529 U.S. at 405-6. Neither is the case here. The First Department located the correct rule: out-of-court statements are only subject to confrontation to the extent that they are testimonial. And, although not subject to a different legal rule than those addressed in *Crawford*, *Melendez-Diaz*, and *Bullcoming* (as will be discussed in greater detail below), the out-of-court statements at issue here were collected in manner factually distinguishable from the circumstances presented to the Supreme Court in those cases.

Because it identified the correct rule and applied it to facts distinguishable from the Court's prior decisions, the First Department's decision was not "contrary to"

Supreme Court Precedent, and Judge Cave correctly focused on whether the state court had unreasonably applied the relevant law. Therefore, Petitioner's first two objections to the R&R are overruled.

II. The First Department's decision was an unreasonable application of clearly established law.

The R&R concluded that the Supreme Court's Confrontation Clause precedent was not "clearly established" at the time of the First Department's decision, and thus the decision could not merit habeas relief under either prong. (R&R 55-59.) Garlick objects to that finding. This Court agrees, and concludes that the First Department unreasonably applied clearly established law when affirming Garlick's conviction. For the following reasons, Petitioner's third objection to the R&R is sustained.

As an initial matter, Garlick was not required to find a Supreme Court opinion holding autopsy reports testimonial in order to prevail on his claim that "clearly established law" mandated a different result in his case. The federal habeas statute does not demand "an identical factual pattern before a legal rule must be applied." *White v. Woodall*, 572 U.S. 415, 427, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014). So the question raised by Garlick's petition is not whether autopsy reports are testimonial, but whether the First Department unreasonably applied the Supreme Court's precedents to conclude that a certified report (of any kind), prepared in the course of a criminal investigation and tending to prove the victim's cause and manner of death, was testimonial in nature.

There are, no doubt, many types of forensic reports containing the types of statements deemed testimonial in *Crawford*, *Melendez-Diaz*, and *Bullcoming*. But the fact that different types of documentation exist does not mean that each type must be deemed subject to the Supreme Court's recent Confrontation Clause precedents before those precedent can be applied to them. The relevant question in all such cases is whether the out-of-court statements are testimonial in nature, not what label appears on the document that the prosecution seeks to introduce to bring those statements into evidence. The Supreme Court's Confrontation Clause precedents clearly instruct courts to examine the nature of potentially testimonial statements -- rather than the classification of the document in which they appear -- to determine whether the statement triggers the defendant's right to confront the speaker.

Nor do disagreements between lower state and federal courts on the testimonial nature of particular autopsy reports preclude a finding of "clearly established law" in the area of out-of-court certifications. The habeas statute is clear: it is the word of the Supreme Court, and only the Supreme Court, that matters when determining what is "clearly established law." 28 U.S.C. § 2254(d)(1). As the court made clear in *Marshall v. Rodgers*, 569 U.S. 58, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013), lower courts are not free to "canvass circuit decisions to determine whether a particular rule of law . . . would, if presented to the Court, be accepted as correct." 569 U.S. at 64. Respondent may not substitute conflicts between lower courts in cases that happen to apply *Crawford* and its progeny to

autopsy reports for "clearly established law" announced by the Supreme Court regarding certified out-of-court statements made in the course of a criminal investigation.

Limiting "clearly established law" to the statutory definition quickly reveals that the First Department unreasonably applied the Supreme Court's precedents when denying Garlick's appeal. The court ruled that the autopsy report was not testimonial since it did "not link the commission of the crime to a particular person," *Garlick*, 144 A.D.3d at 606, even though *Melendez-Diaz* definitively did away with the accusatory/non-accusatory distinction some seven years earlier. *Melendez-Diaz*, 557 U.S. at 313-14. What is more, the First Department ignored the holding in *Bullcoming* that the only sensible way to read the Supreme Court's prior Confrontation Clause decisions demands that a certified statement prepared during a criminal investigation which tends to prove some fact in the case is testimonial in nature. *Id.* at 663.

Bullcoming not only demonstrates the merit of Garlick's petition; it also fits quite neatly with *Harrington*'s formulation of the "unreasonable application" standard, which denies relief to any petition that challenges a state court ruling subject to "fairminded disagreement." *Harrington*, 562 U.S. at 103. But fairminded jurists could not possibly disagree about the testimonial nature of certified reports prepared to aid a criminal investigation, given that the Supreme Court previously held that those reports are testimonial and that its precedents "cannot sensibly be read any other way." *Bullcoming*, 564 U.S. at 663.

As for *Vega* and *Soler* — two cases from this Circuit that Judge Cave cited for the proposition that the Supreme Court "has not developed a clear set of rules" governing the testimonial nature of autopsy reports (R&R at 58) - they provide no insight into the state of "clearly established law" at the time that the First Department affirmed Garlick's conviction. That is because a federal court reviewing a state court decision must "'focus on what a state court knew and did,' and . . . measure state-court decisions 'against this Court's precedents *as of the time the state court renders its decision*." *Greene v. Fisher*, 565 U.S. 34, 38, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011) (emphasis in original) (quoting *Cullen*, 563 U.S. at 182). That date, the R&R correctly stated, was November 29, 2016, several years after the Supreme Court decided the cases relevant to this petition. (R&R at 13.)

Neither Vega nor Soler could avail themselves of the Confrontation Clause principles announced in *Melendez-Diaz* and *Bullcoming* that the First Department disregarded when affirming Garlick's conviction. *Vega* challenged a conviction affirmed in 2005. *Vega*, 669 F.3d at 125. *Soler* challenged a federal conviction, as opposed to a state court decision, under 28 U.S.C. § 2254(d)(1), arguing that he received ineffective assistance of counsel at his 2007 trial when his attorney failed to raise a Confrontation Clause objection to the introduction of a forensic report. *Soler*, 2015 U.S. Dist. LEXIS 107338, 2015 WL 4879170, at *16. The court in *Soler* denied the petition on the grounds that an attorney in 2007 could not have anticipated the Supreme Court's subsequent decisions, which "represented a distinct change in the

state of the law." *Id.* Therefore, both *Vega* and *Soler* highlight the importance of the Supreme Court's post-2007 Confrontation Clause decisions, which expressly eliminated the accusatory witness distinction on which the First Department rested its decision, and which made clear that statements contained within certified reports composed in the course of a criminal investigation are testimonial in nature.

For the same reason that it would be unfair to state courts (and a misapplication of § 2254(d)(1)) to second-guess their judgment in light of law that only became "clearly established" after they delivered a final decision on the merits, *see, e.g.*, *Greene*, 565 U.S. at 38, it would be unfair to Garlick deny him the benefit of the holdings in *Melendez-Diaz* and *Bullcoming*. Taking the view from 2016, as this Court must, the First Department's affirmance was an unreasonable application of clearly established law regarding the testimonial nature of certified out-of-court statements.

CONCLUSION

I hereby adopt the following conclusions from the R&R: (i) the Autopsy Report was testimonial; (ii) surrogate testimony from a qualified expert in medical examination was not a sufficient substitute for cross examination; (iii) the First Department's ruling on the testimonial nature of the autopsy report was incorrect under Supreme Court precedent; and (iv) the trial court's admission of the autopsy report without providing Garlick the opportunity to confront the medical examiner who prepared it did not constitute harmless error. I do not

adopt the portion of the R&R recommending denial of the petition on the grounds that the First Department's decision was not an unreasonable application of clearly established law.

For the reasons set forth above, Garlick's habeas petition is GRANTED. Accordingly, Respondent is directed to release Garlick from custody unless the People of the State of New York decide to re-try him within the next ninety days. Because I have granted the petition, there is no need to issue a Certificate of Appealability for purposes of appeal. The Clerk of the Court is directed to close this case.

Dated: June 2, 2020

/s/ Colleen McMahon
Chief Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED APRIL 27, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO.: 18 Civ. 11038 (CM) (SLC)

JAMES GARLICK,

Petitioner,

-v-

SUPERINTENDENT CHRISTOPHER L. MILLER, GREAT MEADOWS CORRECTIONAL FACILITY,

Respondent.

April 27, 2020, Decided
April 27, 2020, Filed

REPORT AND RECOMMENDATION

SARAH L. CAVE, United States Magistrate Judge.

TO THE HONORABLE COLLEEN McMAHON, Chief United States District Judge, Southern District of New York:

Appendix C

I. INTRODUCTION

Petitioner James Garlick, who is incarcerated at Green Meadows Correctional Facility, filed a petition pursuant to 28 U.S.C. § 2254 seeking a writ of habeas corpus (the "Petition") on the grounds that the trial court violated the Confrontation Clause of the Sixth Amendment when it permitted the prosecution to introduce an autopsy report without producing for cross examination the witness who prepared it (ECF No. 5 at 5), and that the First Department's affirmance of that decision was "contrary to" and constituted an "unreasonable application" of clearly established Supreme Court precedent (ECF No. 4 at 20-21). Respondent Christopher L. Miller, Superintendent of the Green Meadows Correctional Facility, acting through the Attorney General of the State of New York (the "State"), opposes the Petition on the ground that introduction of the autopsy report at trial and the First Department's rejection of the Confrontation Clause claim were neither contrary to nor an unreasonable application of Supreme Court precedent. (ECF No. 12 at 9).

For the reasons set forth below, the Court respectfully recommends that the Petition be denied. Given, however, that the Petition raises significant questions whether, at the time the First Department affirmed Garlick's conviction, the Supreme Court's Confrontation Clause precedent clearly established that an autopsy report was a "testimonial" statement, and if so, whether the First Department's decision was contrary to or involved an unreasonable application of clearly established Federal law, the Court also recommends that a certificate of appealability be granted.

Appendix C

II. BACKGROUND

A. Factual Background

During the early evening of November 1, 2011, police responded to a report of an assault at an apartment building in the Bronx. (ECF No. 13-4 at 11; ECF No. 13-5 at 1). Police Officer Bagan, who was on foot patrol on nearby Fordham Road, responded to the call, and found Gabriel Sherwood ("Sherwood") lying bleeding on the floor in the building lobby. (ECF No. 13-4 at 11). Officer Bagan accompanied Sherwood in an ambulance to the hospital, where Sherwood was pronounced dead. (*Id.* at 14).

That same evening, Detective Thomas DeGrazia, the lead homicide detective assigned to the case, initiated an investigation and sought video footage of the incident. (ECF No. 13-5 at 2). The building's surveillance video showed a man struggling with Sherwood in the lobby, and a female repeatedly striking Sherwood on the head. (ECF No. 4 at 7). The two assailants then fled the scene. (*Id.*) Surveillance video then showed the same man who had struggled with Sherwood and a second woman enter an apartment building down the street. (ECF No. 13-6 at 22).

1. Identifying the suspects

Later that evening, police identified one of the women in the video as Lisa Rivera. (ECF No. 13-5 at 2). After interviewing Lisa Rivera, police identified Johanna Rivera as the woman seen in the video hitting and kicking Sherwood, and promptly arrested her as a

suspect in Sherwood's homicide. (*Id.* at 3-4). During her post-arrest interrogation, Johanna Rivera explained that she and Lisa Rivera were being harassed by Sherwood, and implicated Garlick as the male assailant seen in the video. (*Id.* at 5; ECF No. 13-1 at 33-34). The next morning, November 2, 2011, the District Attorney's office authorized an intentional murder charge against Johanna Rivera on the theory that her blows to Sherwood's head caused his death. (ECF No. 13-6 at 32; ECF No. 13-8 at 1-4). At 4:45 a.m. on November 2, 2011, Detective DeGrazia issued a department-wide notification (an "I-Card") to arrest Garlick for his involvement in the apparent homicide. (ECF No. 13-5 at 5).

On November 11, 2011 the police arrested Garlick on a charge of murder. (*Id.*) In his oral and written statements following his arrest, Garlick stated that he had arrived at the scene because Sherwood was sexually harassing his girlfriend, Lisa Rivera. (*Id.* at 11, 14). He claimed that when he arrived, he and Sherwood began fighting outside of the apartment building and then moved into the lobby. (*Id.* at 15). Garlick stated that Sherwood brandished what he thought was a weapon and that the two struggled for it. (*Id.*) He told his interrogators that he did not have a knife and that all he was trying to do was defend himself and his girlfriend. (*Id.* at 11, 15). He apologized, stating, "I wasn't trying to hurt anybody." (*Id.* at 15).

2. The Autopsy Report

On November 1, 2011, the evening of Sherwood's death, staff at the New York City Office of the Chief Medical

Examiner ("OCME")—the agency that determines cause of death in homicide or suspicious cases—discussed the examination of Sherwood's body with Detective DeGrazia and arranged for the body's transport.[1] (ECF No. 13 at 24; ECF No. 11-7 at 17). Detective DeGrazia told the OCME staff that the body had multiple stab wounds, and that he was in the process of securing additional information about the incident. (ECF No. 11-7 at 17).

With the information from Detective DeGrazia, OCME then prepared a "Notice of Death" form, which stated: "Circumstances of death: App. manner: Homicide." (*Id.* at 18). OCME also prepared a "Supplemental Case Information" sheet, which documented the conversation with Detective DeGrazia (a "call was placed to the 52nd PCT Detective Squad . . . and conversation was had with Detective Tommy Degrasio [sic] who is assigned to the case"), and noted that Sherwood was found with "multiple (4) stab wounds" in the lobby of a Bronx apartment building. (ECF No. 4 at 8; ECF No. 11-7 at 17).

---

1. *See* N.Y. County Law § 673 ("A coroner or medical examiner has jurisdiction and authority to investigate the death of every person dying within his county, or whose body is found within the county, which is or appears to be: (a) A violent death, whether by criminal violence, suicide or casualty; (b) A death caused by unlawful act or criminal neglect; (c) A death occurring in a suspicious, unusual or unexplained manner; (d) A death caused by suspected criminal abortion; (e) A death while unattended by a physician, so far as can be discovered, or where no physician able to certify the cause of death as provided in the public health law and in form as prescribed by the commissioner of health can be found; [and] (f) A death of a person confined in a public institution other than a hospital, infirmary or nursing home.").

The next day, November 2, 2011, Dr. Katherine Maloney of the OCME performed an autopsy on Sherwood. (ECF No. 13 at 29). Another pathologist, Dr. James Gill, was present during the examination, as were two Bronx homicide detectives, Detectives Speranza and Farmer. (ECF No. 13-6 at 25; ECF No. 11-7 at 4, 20 ("Det. Speranza Bx Homicide present @ autopsy 11-02-11")).

On the same day she performed the autopsy, Dr. Maloney prepared an autopsy report (the "Autopsy Report"), which declared that Sherwood's cause of death was a "stab wound of torso with perforation of heart" and that the manner of death was "homicide." (ECF No. 11-7 at 3). The "Case Worksheet," prepared at the same time, repeated that finding, indicating that the perceived immediate cause of death was a "stab wound of torso with perforation of heart." (*Id.* at 13). After Dr. Maloney notified the police of her findings, the police decided not to pursue the murder charge against Johanna Rivera and instead sought to charge Garlick with murder because, as Detective DeGrazia later testified, "the medical examiner made it clear that it was the stab wounds that caused the death." (ECF No. 13-7 at 23).

On December 29, 2011, after OCME received the toxicology and microscopic analysis reports (dated December 21, 2011 and December 29, 2011, respectively), Dr. Maloney finalized the Autopsy Report. (ECF No. 11-7 at 8-10). Dr. Maloney certified that she performed the autopsy, signed the Autopsy Report, and OCME certified the Autopsy Report as a business record under New York's statutory business-record rule and affixed

the official OCME seal. (*Id.* at 2-8). As mandated by state and local laws,[2] OCME delivered the Autopsy Report to the Bronx District Attorney's office after it was signed. (ECF No. 4 at 9).

B. Procedural History

1. Indictment

On November 28, 2011, Garlick was indicted on charges of Second Degree Murder (Penal Law § 125.25(1)), First Degree Manslaughter (Penal Law § 125.20(1)), First Degree Assault (Penal Law § 120.10(1)), and Second Degree Assault (Penal Law § 120.05 (2)). (Bronx Cty. Ind. No. 3681/11; ECF No. 11-2 at 7-8).

---

2. *See* N.Y. County Law § 677(4) ("The . . . medical examiner shall promptly deliver to the district attorney copies of all records pertaining to any death whenever, in his opinion, or in the judgment of the person performing the autopsy, there is any indication that a crime was committed."); *see also* N.Y. City Charter § 557(g) (same); N.Y. C.P.L.R. § 4520 ("Where a public officer is required or authorized, by special provision of law, to make a certificate or affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated."); N.Y. Pub. Health Law § 4103(3) ("A certified copy of the record of a birth or death, a certification of birth or death, a transcript of a birth or death certificate, a certificate of birth data or a certificate of registration of birth, when properly certified by the commissioner or persons authorized to act for him, shall be prima facie evidence in all courts and places of the facts therein stated.").

2. Trial

At trial, the State introduced the Autopsy Report as its first exhibit. (ECF No. 13 at 34). Garlick's counsel objected to the Autopsy Report as testimonial evidence, citing "[t]he difference . . . between introducing something as a business record and introducing it for the purpose of the opinions and observations contained therein." (*Id.* at 31). The Trial Court admitted the Autopsy Report into evidence as a business record, and, relying on *People v. Hall*, 84 A.D.3d 79, 923 N.Y.S.2d 428 (1st Dep't 2011), "allow[ed] the People to establish that it's a document that th[e] witness can use to express an opinion based on its contents." (*Id.* at 31, 33-34). The Trial Court told defense counsel he could reiterate his objections as the testimony continued. (*Id.*)

Over Garlick's Confrontation Clause objection, the Trial Court permitted Dr. Susan Ely, who did not prepare the Autopsy Report and was not involved in Sherwood's autopsy, to testify about the Autopsy Report. (*See id.* 16-34). The State did not assert that Dr. Maloney or Dr. Gill were unavailable to testify, only that they no longer worked at OCME. (*Id.* at 29). Before Dr. Ely's testimony, Garlick's counsel repeated his Confrontation Clause objection, and reiterated that Dr. Ely should not be allowed to testify to the Autopsy Report because "she [had] no participation in this autopsy at all" and there could not be "an effective cross-examination" without Dr. Maloney. (*Id.* at 21). The Trial Court overruled the objection and allowed Dr. Ely to testify. (*Id.* at 23).

Appendix C

Dr. Ely testified as an expert in the fields of clinical, anatomic, and forensic pathology. (*Id.* at 28). She laid the foundation for and testified about the Autopsy Report. (*Id.* at 28-29). At the end of her testimony, Garlick's defense counsel reiterated his "objection to permitting Dr. Ely to testify as to the autopsy report and the introduction of the report," and the Trial Court overruled the objection. (ECF No. 13-1 at 26).

The State relied on the Autopsy Report throughout the trial. In its opening statement, the State used the Autopsy Report to describe Sherwood's wounds, the placement of the wounds, and promised that the medical examiner would go through each in detail. (ECF No. 13 at 2-3). As noted above, Dr. Ely methodically testified about the contents and conclusions of the Autopsy Report. (*See id.* at 28-34; ECF No. 13-1). The State also used the Autopsy Report to eliminate Johanna Rivera as a potential cause of Sherwood's death, to illustrate Garlick's perceived intent to cause "serious harm," and to support its argument during the charging conference that the jury be allowed to consider a murder charge against Garlick. (ECF No. 13-11 at 5) ("The testimony from the Medical Examiner is the victim died as a result of the seven knife wounds."). In its closing argument, the State again relied on the Autopsy Report, describing its conclusions as the "final diagnosis" of Sherwood's "cause of death" (ECF No. 13-12 at 23), and recounting Dr. Ely's testimony about Sherwood's wounds (*id.* at 26-27).

Ultimately, the jury found Garlick not guilty of the murder charge, but found him guilty of first-degree

manslaughter. (ECF No. 4 at 6). The Trial Court sentenced him to 20 years' imprisonment and five years of supervised release. (ECF No. 5 at 1).

3. Direct appeal to the First Department

On appeal to the First Department, Garlick argued that the Autopsy Report was testimonial and therefore inadmissible through a surrogate witness. (ECF No. 11-1 at 49). The State argued that the Confrontation Clause "does not bar the use of out-of-court statements by declarants who are not 'witnesses'—that is, those who do not 'bear testimony.'" (ECF No. 11-2 at 44). The State rested its argument on *People v. Freycinet*, in which the New York Court of Appeals listed four factors to analyze whether a statement is testimonial: (1) "the extent to which the entity conducting the procedure is an arm of law enforcement;" (2) "whether the contents of the report are a contemporaneous record of objective fact, or reflect the exercise of fallible human judgment;" (3) "whether a pro-law-enforcement bias is likely to influence the contents of the report;" and (4) "whether the report's contents are directly accusatory in the sense that they explicitly link the defendant to the crime." 11 N.Y.3d. 38, 41, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008) (internal citations omitted).

The First Department held that the introduction of the Autopsy Report through Dr. Ely, who was not involved in Sherwood's autopsy, did not violate Garlick's Confrontation Clause right because the Autopsy Report, which "'[did] not link the commission of the crime to a particular person,' was not testimonial (*People v. John*, 27

NY3d 294, 315, 33 N.Y.S.3d 88, 52 N.E.3d 1114 [2016])." *People v. Garlick*, 144 A.D.3d 605, 606, 42 N.Y.S.3d 28 (1st Dep't 2016). The First Department cited *People v. Acevedo*, 112 A.D.3d 454, 455, 976 N.Y.S.2d 82 (1st Dep't 2013) in rejecting Garlick's "contention that *People v. Freycinet* (11 NY3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 [2008]) has been undermined by subsequent decisions of the United States Supreme Court." *Id.*

4. Discretionary appeals

On March 3, 2017, the New York Court of Appeals denied leave to appeal, *People v. Garlick*, 29 N.Y.3d 948, 54 N.Y.S.3d 379, 76 N.E.3d 1082 (2017), and on December 4, 2017, the United States Supreme Court denied Garlick's petition for a writ of certiorari. *Garlick v. New York*, 138 S. Ct. 502, 199 L. Ed. 2d 390 (2017).

C. Federal Habeas Corpus Petition

1. Garlick's arguments

In his Petition, Garlick argues that the trial court violated the Sixth Amendment's Confrontation Clause when it permitted the State to introduce the Autopsy Report at trial without producing for cross examination the witness who prepared it (ECF No. 5 at 5), and that the First Department's affirmance was "contrary to" and constituted an "unreasonable application" of clearly established Supreme Court precedent (ECF No. 4 at 20). Garlick argues that, by holding that an autopsy report is not testimonial unless it "link[s] a defendant with a crime,"

the First Department's decision contradicted the Supreme Court's holding in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), which established that the Confrontation Clause is not limited to evidence that identifies the defendant. (ECF No. 4 at 22). He asserts that under *Melendez-Diaz*, the First Department was required to consider whether the Autopsy Report's primary purpose was to "establish or prove past events potentially relevant to later criminal prosecution" (*id.* at 24 (quoting *Michigan v. Bryant*, 562 U.S. 344, 357, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) and *Melendez-Diaz*, 577 U.S. at 310)), but that, instead, it violated clearly established Confrontation Clause precedent when it considered whether the Autopsy Report directly linked Garlick to the crime. (*Id.*)

In the alternative, Garlick argues that even if a link to a specific defendant is required for a statement to be testimonial, the Autopsy Report here *was* testimonial because, before the autopsy was performed, police had identified Garlick as a suspect and had issued the I-Card for his arrest. (*Id.* at 28-29). He asserts that, because the State had already isolated Garlick as a suspect, the determination that Sherwood's death was a homicide implicated Garlick in his death. (*Id.*)

Finally, Garlick argues that the Autopsy Report meets the formality requirements of a testimonial document, and that admitting the Autopsy Report into evidence without making its author available for cross examination was not harmless error. (*Id.* at 31-33).

2. The State's arguments

In opposition to the Petition, the State argues that the Trial Court's decision was neither contrary to nor an unreasonable application of Supreme Court precedent because the Supreme Court has not specifically addressed whether an autopsy report is testimonial. (ECF No. 12 at 10). The State argues that the state courts correctly applied that precedent, and that *Melendez-Diaz* and *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), are distinguishable because the reports in those cases "directly linked the accused to the charged crime." (*Id.* at 17-18). Here, the State argues, Dr. Maloney did not know the suspect's identity or that the police were conducting a homicide investigation, and thus the Autopsy Report could not have directly targeted Garlick. (*Id.* at 20-21).

Finally, the State argues that even if *Melendez-Diaz* and *Bullcoming* are controlling, the Autopsy Report here was not "formalized," and any error in admitting the Autopsy Report using Dr. Ely instead of Dr. Maloney was harmless. (*Id.* at 24 n.7, 25-26).[3]

3. On November 21, 2019, this Court heard oral arguments on the Petition.

Appendix C

III. DISCUSSION

A. Applicable Legal Standards

1. Exhaustion

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not consider a petition for a writ of habeas corpus by a prisoner in state custody unless the petitioner has exhausted all state judicial remedies. 28 U.S.C. § 2254(b)(1)(A); *see Jackson v. Conway*, 763 F.3d 115, 133 (2d Cir. 2014). To satisfy the exhaustion requirement, the petitioner must have "fairly presented" his claims to the state courts, thereby affording those courts the opportunity to correct the alleged violations of federal rights. *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). The exhaustion requirement is fulfilled once the federal claims have been presented to "the highest court of the state." *Galdamez v. Keane*, 394 F.3d 68, 73 (2d Cir. 2005) (internal citation omitted).

Here, Garlick raised his Confrontation Clause claim on direct appeal to the First Department and in seeking leave to appeal to the Court of Appeals. *Garlick*, 144 A.D.3d at 605; *Garlick*, 29 N.Y.3d at 948. He has therefore exhausted his claim for the purposes of federal court review. *See Galdamez*, 394 F.3d at 74 (explaining that "one complete round" of New York's appellate review process involves appeal to Appellate Division and then application to Court of Appeals for certificate granting leave to appeal). Further, the Petition is timely because

it was filed on November 28, 2018, within one year of December 4, 2017, the date on which the Supreme Court denied Garlick's petition for writ of certiorari. *Garlick*, 138 S. Ct. at 502.

2. Standard of Review

Where the state court has adjudicated the merits of a claim, this Court must apply a "highly deferential" standard in reviewing that claim in a habeas corpus proceeding. 28 U.S.C. § 2254(d); *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010); *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A claim has been "adjudicated on the merits" when the state court ruled on the substance of the claim itself, rather than on a procedural or other ground. *See Bell v. Miller*, 500 F.3d 149, 154-55 (2d Cir. 2007); *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001) (noting that "adjudicated on the merits" means "a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced").

Here, the First Department considered and rejected Garlick's Confrontation Clause objection on its merits. *Garlick*, 144 A.D.3d at 605. Therefore, this Court must adhere to the standard of review set forth in section 2254(d), which permits, in relevant part, a court to grant a writ of habeas corpus on a claim that has been previously adjudicated on the merits by a state court only if the state adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

a) Clearly established federal law

The relevant date for determining applicable "clearly established Supreme Court law" is the date of the last state court adjudication of the petitioner's claim "on the merits." *Greene v. Fisher*, 565 U.S. 34, 40, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011). Here, that date is November 29, 2016, the date of the First Department's decision affirming Garlick's conviction. *See DeJesus v. Superintendent of Attica Corr. Facility*, No. 17 Civ. 3932 (GBD) (AJP), 2017 U.S. Dist. LEXIS 205858, 2017 WL 6398338, at *14 (S.D.N.Y. Dec. 13, 2017) ("The relevant Supreme Court jurisprudence is that in effect at the time of the state court's adjudication on the merits (in New York, usually the decision of the Appellate Division), not at the time of a subsequent decision (*e.g.*, the New York Court of Appeals) denying leave to appeal.").

As to what constitutes clearly established federal law, "a principle is clearly established Federal Law

for § 2254(d)(1) purposes only when it is embodied in a Supreme Court holding, framed at the appropriate level of generality." *Washington v. Griffin*, 876 F.3d 395, 403 (2d Cir. 2017) (internal citations omitted). In *White v. Woodall*, the Supreme Court discussed "clearly established Federal law" in the habeas context:

> Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error. Thus, if a habeas court must extend a rationale before it can apply it to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision.

The Court went on to explain:

> This is not to say that § 2254(d)(1) requires an identical factual pattern before a legal rule must be applied. To the contrary, state courts must reasonably apply the rules "squarely established" by this Court's holdings to the facts of each case.

572 U.S. 415, 426-27, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014) (internal citations omitted).

Federal courts have reached differing conclusions as to what constitutes "clearly established" law for purposes

of section 2254 in this context. The Sixth Circuit found Supreme Court Confrontation Clause precedent to be clearly established as of 2008. *See McCarley v. Kelly*, 801 F.3d 652, 664-65 (6th Cir. 2015) (finding that, by 2008, after *Crawford* and *Davis*, the state of the Supreme Court's Confrontation Clause precedent was clearly established). In contrast, one court in this District found the state of the law to be unsettled as of the same time period. *See Soler v. United States*, No. 15 Civ. 4342 (LAP), 2015 U.S. Dist. LEXIS 107338, 2015 WL 4879170, at *14-16 (S.D.N.Y. Aug. 14, 2015) (finding Confrontation Clause precedent as to testimonial statements at the time of 2007 trial to be unsettled and subsequent case law had not developed a clear set of rules). The passage of time has not aligned courts' interpretation of how to define "testimonial" statements for Confrontation Clause purposes. *See, e.g.*, *Hensley v. Roden*, 755 F.3d 724, 734 (1st Cir. 2014) (finding the state of the Confrontation Clause precedent as of 2009 uncertain, and rejecting petitioner's claim that testimonial nature of autopsy reports was clearly established). (*See infra* § III.C.3 & nn. 11-14).

b) Contrary to clearly established federal law

Under section 2254(d)(1), a state court decision is "contrary to" clearly established federal law where the state court either applies a rule that contradicts Supreme Court precedent or confronts a case with materially similar facts to a Supreme Court case and arrives at a different result. *See Rosario v. Ercole*, 601 F. 3d 118, 123 (2d Cir. 2010) (quoting *Williams*, 529 U.S. at 412-13). This is a very high bar to meet. "A state court's

determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Woods v. Etherton*, 136 S. Ct. 1149, 1151, 194 L. Ed. 2d 333 (2016) (quoting *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)). In fact, "[t]he state court decision must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (internal citations omitted).

c) An unreasonable application of clearly established federal law

An "unreasonable application" of clearly established federal law occurs when the state court identifies and applies the correct governing legal principle, but its application was "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 73-76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (citing *Williams*, 529 U.S. at 409). Under section 2254(d)(2), the Court must consider the reasonableness of the decision in light of the evidence presented at the proceeding under review. *See Cardoza v. Rock*, 731 F.3d 169, 182 (2d Cir. 2013). Even if the standard under section 2254(d)(2) is met, the petitioner "still bears the ultimate burden of proving by a preponderance of the evidence that his constitutional rights have been violated." *Id.* (internal citation omitted). The question under the AEDPA "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable, which is a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

d) Harmless error

A Confrontation Clause violation is considered harmless error unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); *accord Fry v. Pliler*, 551 U.S. 112, 116, 121-22, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007) (clarifying that the *Brecht* standard applies when reviewing a state court judgment under 28 U.S.C. § 2254(d)). When considering whether a limit or preclusion of cross examination was harmless error, courts consider: "(1) the strength of the state's case; (2) the importance of the witness's testimony; (3) whether the excluded testimony would have been cumulative; (4) the presence of evidence that would have corroborated the testimony; and (5) the extent of the cross-examination that was permitted." *McGhee v. Uhler*, No. 17 Civ. 1103 (CM) (SDA), 2019 U.S. Dist. LEXIS 67271, 2019 WL 4228352, at *9 (Apr. 18, 2019). *See also Nappi v. Yelich*, 793 F.3d 246, 252 (2d Cir. 2015); *Brinson v. Walker*, 547 F.3d 387, 395 (2d Cir. 2008). Courts in this Circuit also "consider a sixth factor in addition to the Supreme Court's five: '[W]hether the cross-examination of which the defendant was deprived was of a nature that was likely to affect the result.'" *Alvarez v. Ercole*, 763 F.3d 223, 233 (2d Cir. 2014) (quoting *Brinson*, 547 F.3d at 396).

B. Confrontation Clause Claim

Garlick argues that the First Department's decision was "contrary to" and constituted an "unreasonable

application" of clearly established Supreme Court precedent. (ECF No. 5 at 5). The Supreme Court's modern Confrontation Clause jurisprudence has not defined an exhaustive list of "testimonial" statements, and, as a result, lower courts apply by extension and analogy the principles set forth in the Supreme Court's Confrontation Clause cases, namely, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), and *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012).

1. The status of Confrontation Clause precedent

"Clearly established" Supreme Court precedent refers to the state of the law as of the date of the First Department's decision, and thus this Court must review Supreme Court Confrontation Clause precedent as of November 29, 2016. *Garlick*, 144 A.D.3d at 605; *see Greene*, 565 U.S. at 40; *DeJesus*, 2017 U.S. Dist. LEXIS 205858, 2017 WL 6398338, at *14. Although certain Confrontation Clause principles can be divined from *Crawford* and its progeny, as set forth below, what constitutes "clearly established" law for purposes of section 2254 review, however, is a more complicated matter.

a) The Confrontation Clause

The Sixth Amendment's Confrontation Clause 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. In *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), the Supreme Court established that the out-of-court statement of an unavailable witness was admissible provided it has adequate indicia of reliability, *i.e.*, it fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." 448 U.S. at 66.

b) *Crawford v. Washington*

In *Crawford v. Washington*, the Supreme Court revisited its Confrontation Clause precedent, abrogating its decision in *Roberts*, and establishing modern Confrontation Clause standards. 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Following a historical analysis of the Confrontation Clause, the Court held in *Crawford* that the "indicia of reliability" test impermissibly relied on tenants of evidence law, rather than following the procedure of examination prescribed in the Constitution, namely, confrontation through cross examination. *Id.* at 51 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."). The Court emphasized in *Crawford* that, regardless of reliability, the Constitution requires confrontation for testimonial evidence to be admitted against a criminal defendant. *Id.* at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one that the Constitution actually prescribes: confrontation.").

Appendix C

As to whether a statement is testimonial, the Court in *Crawford* looked to the definition of "testimony" as of 1828: "[a] solemn declaration or affirmation made for the purposes of establishing or proving some fact." *Id.* at 51 (citing 2 N. Webster, Am. Dictionary of the English Language (1828)). The Court then set out two additional formulations of a "testimonial" statement: (1) statements that were "*ex parte* in-court testimony or its functional equivalent—that, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," and (2) "statements that 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 51-52.

Applying this framework, the Court considered whether the tape-recorded statement to police made by the wife of for the defendant, who was accused of stabbing another man, could be entered into evidence, even though the wife was exempt from cross examination by the marital privilege. *Id.* at 40. The Court held that the wife's statements were testimonial, and thus their admission into evidence without the opportunity for cross examination violated the Confrontation Clause. *Id.* at 67-69 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.").

Following *Crawford*, then, lower courts essentially had a Confrontation Clause tool-box containing a small category of explicitly testimonial statements, a Court-endorsed definition of "testimony," and two formulations to determine whether a statement is testimonial: (1) "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," and (2) "statements that 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 51-52.

c) *Melendez-Diaz v. Massachusetts*

Five years later in *Melendez-Diaz v. Massachusetts*, the Supreme Court again addressed the testimonial standard, this time as applied to certificates attesting to the laboratory analysis of a suspected controlled substance. 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

After seizing a substance during Melendez-Diaz's arrest, police submitted a sample of the substance to the state laboratory for chemical analysis. *Id.* at 308. At trial, the prosecution introduced three "certificates of analysis" indicating that the substance was cocaine. *Id.* Melendez-Diaz objected to the admission of the certificates, arguing that *Crawford* required the analysts who performed the chemical analyses to testify in person. *Id.* at 309. The

trial court overruled the objection, and admitted the certificates into evidence, a decision the appellate court affirmed. *Id.*

On its review, the Supreme Court began by reiterating the testimonial formulations described in *Crawford*: whether the statement was "ex-parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was able to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; whether the statement was "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and whether the "[s]tatements [] 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 310 (quoting *Crawford*, 541 U.S. at 51-52).

Applying these formulations, the Court stated that there was "little doubt that the documents in this case fall within the core class of testimonial statements thus described." *Id.* (internal citation omitted). The Court explained that, although Massachusetts labeled the documents "certificates," they were "quite plainly affidavits" because they were notarized and were "incontrovertibly" a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* (quoting *Crawford*, 541 U.S. at 51). Thus, the certificates were functionally equivalent to live, in-court testimony. *Id.* at 310-11. Further, the Court found that

the affidavits 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 (quoting *Crawford*, 541 U.S. at 52). The Court demonstrated that under any of these formulations, the certificates were testimonial and could not be admitted against a defendant unless he had the opportunity to cross examine the analyst who had conducted the test.

The Court then assessed and rejected each of the prosecution's arguments. First, the prosecution argued that "the analysts [were] not subject to confrontation because they [were] not 'accusatory' witnesses, in that they [did] not directly accuse the petitioner of wrongdoing; rather, their testimony [was] inculpatory only when taken together with other evidence" that linked the conclusions in the certificates to Melendez-Diaz. *Id.* at 313. The Court rejected the proposition that statements are not "testimonial" unless they identify or accuse a specific witness as an argument that "finds no support in the text of the Sixth Amendment or our case law." *Id.* In fact, the Court explained, the Confrontation Clause and adjacent Compulsory Process Clause set up a clear dichotomy of witnesses against a criminal defendant: those against him, whom the defendant has the right to confront, and those in his favor: "[t]he prosecution *must* produce the former; the defendant *may* call the latter . . . there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 313-14. Thus, the Court held, a statement need not identify a specific suspect for it to be testimonial under the Confrontation Clause. *Id.*

Second, the prosecution argued that the analysts should be immune from confrontation because they were not "conventional" witnesses "whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh," which had "long been thought a paradigmatic confrontation violation" that exemplified "the core of the right to confrontation[.]" *Id.* at 315 (quoting *Crawford*, 541 U.S. at 52). The Court noted that conventional witnesses "recall[] events observed in the past," and that the analysts in *Melendez-Diaz* "observe[d] neither the crime nor any human action related to it." *Id.* at 315-16. The Court found no basis for limiting the confrontation right based on the "conventionality" of the witnesses and rejected the notion that a witness must observe a crime or related activity for confrontation to be required. *Id.* at 315-16 ("The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation.").

Third, the prosecution contended that there was a difference between testimony that was "prone to distortion or manipulation" and the testimony in *Melendez-Diaz*, which it described as the "result of neutral, scientific testing." *Id.* at 317 (internal citation omitted). The Court rejected this argument, stating that it was "little more than an invitation to return to [the] overruled decision in *Roberts*," which used the purported reliability and trustworthiness of evidence at issue to determine when cross examination was necessary. *Id.* at 318. The Court explained that statements that are the result of supposedly "neutral, scientific testing" should still be subject to the rigor of cross examination because not only are such tests not "as neutral or as reliable" as suggested, but they are not

"uniquely immune from the risk of manipulation." *Id.* The Court elaborated that confrontation "is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 319. Because "[s]erious deficiencies" have been found in the forensic evidence used in criminal trials, "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 319-20.

Discussing forensic evidence more generally, the Court noted that even scientific tests and expert analysts rely on subjective decisions, such as which tests to perform and how to interpret the results. *See id.* at 320. This inevitable subjective element, "presents a risk of error that might be explored on cross-examination." *Id.* Quoting a National Academy of Sciences report, the Court discussed the "wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material." *Id.* at 320-21.

Fourth, the prosecution argued that the "analysts' affidavits are admissible without confrontation because they are akin to the types of official and business records admissible at common law." *Id.* at 321 (internal citation omitted). The Court explained that the certificates at issue did not qualify as traditional official or business records, but even if they did, "their authors would be subject to confrontation nonetheless." *Id.* Thus, although Federal Rule of Evidence 803 sets forth exceptions to the general prohibition against the entry of hearsay evidence, including that documents kept in the regular course of

business may ordinarily be admitted at trial despite their hearsay status, the Court explained, "that is not the case if the regularly conducted business activity is the production for evidence for use at trial." *Id.*

The Court clarified that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Id.* at 324. The Court distinguished the accident reports in *Palmer v. Hoffman*, which, even though kept in the regular course of business, were not admissible without confrontation because they were "calculated for use essentially in the court, not in business." *Id.* at 321 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 114, 63 S. Ct. 477, 87 L. Ed. 645 (1943)). Thus, even though functionally similar to other business records, whether the statements contained in those records were testimonial was a separate question, and the one that determined whether confrontation of the declarant was required under the Sixth Amendment. The Court also noted that the certificates at issue in *Melendez-Diaz* were not admissible as public records because Federal Rule of Evidence 803(8) specifically excludes "matter[s] observed by law-enforcement personnel" in a criminal case, and thus required confrontation through cross examination. *Id.* Thus, even if a statement qualifies as a business or public record, the declarant must testify to the statement if it is testimonial under one of the tests endorsed by the Court.

In sum, the Court in *Melendez-Diaz* rejected the concepts that: (1) a statement is not testimonial unless it directly accuses a known suspect, 557 U.S. at 313; (2) testimonial statements can only be made by "conventional witnesses," *id.* at 315; (3) evidence produced as the "result[t] of neutral, scientific testing" is not testimonial, *id.* at 317; and (4) business and public records are admissible without confrontation because such records were "admissible at common law," *id.* at 321 (internal citations omitted). At the same time, the Court reaffirmed the formulations of testimonial statements outlined in *Crawford*: (1) a statement that is "*ex-parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was able to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) an extrajudicial statement "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; or (3) a statement "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 310. The Court also reaffirmed the use of the 1828 definition of "testimony" when analyzing whether the documents at issue, here labeled "certificates," were testimonial. *Id.* (finding the certificates were "incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'").

The Court concluded that because the certificates established the fact that the substance found on the

defendant was cocaine, which is the precise testimony the analyst would provide if called at trial, the "certificates [we] re functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* at 311-12 (internal citations omitted). Therefore, the Court held that the admission of the certificates into evidence without providing the defendant the opportunity to cross examine the analyst was error. *Id.* at 329.

d) *Bullcoming v. New Mexico*

In 2011, the Court in *Bullcoming v. New Mexico* undertook to clarify the contours of the Confrontation Clause in relation to forensic evidence, this time in connection with a blood alcohol test. 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). Bullcoming was arrested on charges of driving while intoxicated, and the principal evidence against him was a laboratory report certifying that his blood-alcohol concentration was above the legal limit. *Id.* at 651.

At trial, the prosecution did not call the analyst who signed the laboratory report, and instead called another analyst who was familiar with the laboratory's testing procedures, but had no role in testing the sample. *Id.* Over Bullcoming's objection, the trial court admitted the laboratory report into evidence as a business record, and allowed the prosecution to use a surrogate witness to testify about the laboratory procedures. *Id.* at 656.

On appeal to the New Mexico Supreme Court, and now with the guidance of *Melendez-Diaz*, the court held

that, like the affidavits in *Melendez-Diaz*, the blood-alcohol report introduced at Bullcoming's trial constituted testimonial evidence because it was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* The court held, however, that the report's admission did not violate the Confrontation Clause because the analyst "'was a mere scrivener,' who 'simply transcribed the results generated by the gas chromatograph machine,'" and that the surrogate witness "'qualified as an expert witness with respect to the gas chromatograph machine.'" *Id.* at 657 (internal citations omitted). Thus, the New Mexico Supreme Court concluded, there was no Confrontation Clause violation because Bullcoming could not have cross examined the machine or the written report, and was able to cross examine "a qualified analyst" who served as an acceptable surrogate. *Id.*

The Supreme Court disagreed. *Id.* The Court found that the blood alcohol report was more than a mere number; it certified that the analyst had received the sample intact, had checked that the sample corresponded to the correct report number, and had performed a particular test following a specified protocol. *Id.* at 660. The Court concluded that, "[t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination." *Id.* "[T]he comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar," the Court continued, noting that it had "settled in *Crawford* that the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the

Confrontation Clause." *Id.* at 661 (quoting *Crawford*, 541 U.S. at 62).

The Supreme Court also disapproved of the use of surrogate expert testimony, because such testimony "could not convey what [the analyst conducting the test] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed." *Id.* Further, surrogate testimony could not "expose any lapses or lies on the certifying analyst's part." *Id.* at 662. The Court stated that,

> [m]ore fundamentally, as this Court stressed in *Crawford*, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." . . . Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

Id. (quoting *Crawford*, 541 U.S. at 54).

The state argued that the affirmations by the analyst were not testimonial because they were observations of an "independent scientis[t]" made "according to a non-adversarial public duty." *Id.* at 663-64 (internal citation omitted). The Supreme Court quickly dispensed of this justification as "far[ing] no better here than it did in *Melendez-Diaz*. A document created solely for an

'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial." *Id.* at 664. The state attempted to distinguish the certificate at issue from that in *Melendez-Diaz* by emphasizing that the report there was sworn before a notary public, in contrast to the blood-alcohol report, which was unsworn. *Id.* The Court disagreed, holding that "[t]he same purpose was served by the certificate in question here" as the certificates in *Melendez-Diaz*, which the Court held were "'incontrovertibly . . . affirmation[s] made for the purpose of establishing or proving some fact' in a criminal proceeding." *Id.* (citing *Melendez-Diaz*, 557 U.S. at 310). The Court rejected as overly formalistic and easily avoidable any interpretation of the Confrontation Clause "that would render inadmissible only sworn *ex parte* statements, while leaving admission of formal, but unsworn statements, 'perfectly OK.'" *Id.* at 664. Rather, the Court held that, "[i]n all material respects, the laboratory report in this case resembles those in *Melendez-Diaz* ." *Id.* The similarities between the report at issue in *Bullcoming* and those in *Melendez-Diaz* were intractable: in both cases, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations; both analysts tested the evidence and prepared a certificate containing the result of the analysis; and, both certificates were "formalized" in a signed document labeled "report." *Id.* at 665. These elements, the Court held, were "more than adequate to qualify [the analyst's] assertions as testimonial." *Id.* Thus, admission of the report, even as a business record, did not render the report immune from confrontation. *Id.*

Appendix C

Justice Sotomayor issued a concurring opinion in which she agreed that the report at issue was testimonial, but wrote separately to highlight her rationale. *Bullcoming*, 564 U.S. at 668. Justice Sotomayor explained her position, as outlined in *Michigan v. Bryant*,[4] that "[t]o determine if

4. In *Davis v. Washington*, the Court considered "when statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." 547 U.S. 813, 817, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). A few years later in *Michigan v. Bryant*, the Court again considered whether statements made to police were testimonial. 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). In both cases, the Court focused its analysis on the presence of an "ongoing emergency" as an important factor in determining whether such statements were testimonial. *Davis*, which also decided the companion case *Hammond v. Indiana*, No. 05 Civ. 5705, considered statements made to a 911 operator in response to an ongoing domestic assault and statements made to police responding to a report of a domestic disturbance, while *Bryant*, 562 U.S. at 344, considered statements made to police officers after the declarant had been shot and was found mortally wounded.

In *Davis*, the Court explained that *Crawford* set forth "various formulations" of testimonial statements, without endorsing a single test. *Davis*, 547 U.S. at 822 (quoting *Crawford*, 541 U.S. at 52). For this context, the Court held, "[w]ithout attempting to produce an exhaustive classification" that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

Davis also reaffirmed several formulations of testimonial statements discussed in *Crawford*. It reiterated the definition of

a statement is testimonial, we must decide whether it has 'a primary purpose of creating an out-of-court substitute for trial testimony.'" *Id.* at 669. (quoting *Bryant*, 562 U.S. at 358). When the "primary purpose" of a statement is "not to create a record for trial," she continued, "the admissibility of [the] statement" is governed by the state and federal rules of evidence, rather than the Confrontation Clause. *Id.* In *Bullcoming*, as in *Melendez-Diaz*, she concluded that the certificates had the "primary purpose of creating an out-of-court substitute for trial testimony" and were therefore testimonial. *Id.* at 670 (quoting *Bryant*, 562 U.S. at 358).

Justice Sotomayor also found the formality of the statements important to determining their purpose. *Id.* at 671. Although "'[f]ormality is not the sole touchstone of our primary purpose inquiry,' a statement's formality or informality can shed light on whether a particular statement has a primary purpose for use at trial." *Id.* (quoting *Bryant*, 562 U.S. at 366). Under this "primary purpose" analysis, Justice Sotomayor agreed that the blood-alcohol certification was a formal statement, despite the lack of notarization. *Id.* Thus, she explained that "the report ha[d] a primary purpose of creating an

---

"testimony" as "'a solemn declaration or affirmation made for the purpose of establishing or proving some fact,'" *Davis*, 547 U.S. at 824 (quoting *Crawford*, 541 U.S. at 51), and that formal, ex parte statements and the evidentiary products of such statements are testimonial. *See id.*; *see also Crawford*, 541 U.S. at 51-52. Notably, *Davis* also introduced the "primary purpose" language as a formulation to determine whether statements made to police officers are testimonial.

out-of-court substitute for trial testimony, which renders it testimonial." *Id.* at 671-72 (internal citations omitted).

In sum, the *Bullcoming* Court considered and rejected the propositions that: (1) testimonial evidence does not implicate the Confrontation Clause on the basis that the forensic analyst is a "mere scrivener" who "simply transcribed" machine-generated results, *id.* at 660; (2) testimonial evidence could be subject to cross examination by a surrogate expert witness, and does not require the certifying expert to testify, *id.* at 664; and, (3) blood-alcohol analysis was not testimonial because the analyst was not "adversarial" or "inquisitorial" because it simply contained observations of an "independent" scientist made "according to a non-adversarial public duty." *Id.* The Court reaffirmed the formulations of testimony outlined in *Crawford*: (1) *ex parte* communications contained in formalized documents are testimonial, even if not sworn before a notary, *id.* at 664-65, 671; (2) statements made for use at a later trial are testimonial, *id.* at 664, 670 (Sotomayor, J., concurring); and (3) an out-of-court statement made for the purpose of proving some fact is testimonial, *id.* at 652. Justice Sotomayor's concurrence employed the primary purpose test for the first time outside of the context of statements to police officers. *Id.* at 669.

e) *Williams v. Illinois*

In its most recent Confrontation Clause case, the Supreme Court addressed whether "*Crawford* bar[s] an expert from expressing an opinion based on facts about a

case that have been made known to the expert but about which the expert is not competent to testify[.]" *Williams v. Illinois*, 567 U.S. 50, 56, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). The Justices did not agree on an answer to this question and issued a fractured opinion with no single approach endorsed by a majority.

At Williams's bench trial, a forensic expert at the Illinois State Police laboratory testified about a report that concluded that a DNA profile, prepared by an outside laboratory from the victim's swab, matched a DNA profile produced by the state police from Williams's blood. *Id.* at 56. The expert, who had no role in the DNA analysis, attested to the central issue in the case: that the DNA on the victim's swab matched Williams's DNA profile. *Id.* In response to confrontation clause objections to the expert testimony, the State explained that under Illinois Rule of Evidence 703 (identical to the federal rule), "an expert is allowed to disclose the facts on which the expert's opinion is based, even if the expert is not competent to testify to those underlying facts." *Id.* at 63. The trial judge agreed and declined to exclude the expert's testimony. *Id.* at 63-64. The Illinois Appellate Court and Illinois Supreme Court found no Confrontation Clause violation because the statement that the DNA profiles matched "was not admitted for the truth of the matter asserted; rather, it was offered to provide a basis for [the expert's] opinion." *Id.* at 64.

The plurality opinion, written by Justice Alito and joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer, affirmed the Illinois Supreme Court

decision on two independent bases, first, "that this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted," and second, that the report was not testimonial because "it was produced before any suspect was identified," it was not made to obtain evidence, "but for the purpose of finding a rapist who was on the loose," and the report "was not inherently inculpatory." *Id.* at 58. The *Williams* plurality heavily relied on the fact that the trial had been a bench trial, noting that a jury would be less likely to discern between evidence admitted for its truth and evidence admitted to explain the basis of the expert's opinion. *Id.* at 70.

In his concurrence, Justice Thomas agreed with the plurality's judgment, but "share[d] the dissent's view of the plurality's flawed analysis." *Id.* at 103-04. In addition to rejecting the plurality's finding that the DNA report was not offered for its truth, *id.* at 106, Justice Thomas's testimonial analysis focused solely on the formality of the statement. *Id.* at 110-11. He concluded that the DNA report was "not a statement by a witness within the meaning of the Confrontation Clause" because it lacked "the solemnity of an affidavit or deposition," it was "neither a sworn nor a certified declaration of fact," and it did not "attest that its statements accurately reflect[ed] the DNA testing processes used or the results obtained." *Id.* at 111. He distinguished this report from those in *Melendez-Diaz* and *Bullcoming* because, unlike the reports in those cases, the report here "certifie[d] nothing." *Id.* at 112.

Appendix C

Justice Thomas also rejected the "primary purpose" test the plurality invoked. He noted that the original formulation of that test, in *Davis*, "asked whether the primary purpose of an extrajudicial statement was 'to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 113 (quoting *Davis*, 547 U.S. at 822). In contrast, "[t]he new primary purpose test asks whether an out-of-court statement has 'the primary purpose of accusing a targeted individual of engaging in criminal conduct.'" *Id.* at 114 (quoting plurality op. at 81-82). He then posited that such a test "lacks any grounding in constitutional text, in history, or in logic." *Id.* ("There is no textual justification, however, for limiting the confrontation right to statements made after the accused's identity became known."); *id.* at 115 ("Historical practice confirms that a declarant could become a 'witness' before the accused's identity was known."). As in *Melendez-Diaz*, Justice Thomas read the text of the Sixth Amendment as contemplating "two classes of witnesses—those against the defendant and those in his favor." *Id.* at 116 (quoting *Melendez-Diaz*, 557 U.S. at 313-14). He also reiterated the Court's previous finding that these two exclusive categories necessarily preclude a third category of witnesses "helpful to the prosecution, but somehow immune from confrontation" *id.* (quoting *Melendez-Diaz*, 557 U.S. at 314), and thus the "distinction between those who make 'inherently inculpatory' statements and those who make other statements that are merely 'helpful to the prosecution' has no foundation in the text of the Amendment." *Id.*

Appendix C

The dissent, written by Justice Kagan and joined by Justices Scalia, Ginsburg, and Sotomayor, found the DNA report to be testimonial under the Court's Confrontation Clause precedent. *Id.* at 119. The dissent viewed Justice Alito's plurality opinion as a dissent "in all except its disposition" because "[f]ive Justices specifically reject[ed] every aspect of its reasoning and every paragraph of its explication." *Id.* at 120. The dissent concluded that the DNA report was "identical to the one in *Bullcoming* (and *Melendez-Diaz*) in 'all material respects.'" *Id.* at 123 (quoting *Bullcoming*, 564 U.S. at 664). Justice Kagan explained that, as in those cases, the DNA report was "made to establish some fact at a criminal proceeding" and "detail[ed] the results of forensic testing of evidence gathered by the police." *Id.* (internal citations omitted). Like the report in *Bullcoming*, the DNA report in *Williams* had "a comparable title; similarly describ[ed] the relevant samples, test methodology, and results; and likewise include[d] the signatures of laboratory officials." *Id.* On these facts alone, the dissent concluded that the report should have only come into evidence if Williams had the opportunity to cross examine the analyst. *Id.* But, he did not have this opportunity, and thus could not question the appropriate analyst as to what he knew or observed during the testing, and did not have the opportunity to expose any lapses or shortcomings with the procedures. *Id.* at 124. In the dissent's view, "[u]nder our case law [these facts are] sufficient to resolve this case." *Id.*

As to the plurality's second basis for finding the DNA report nontestimonial, the dissent, in tandem with Justice Thomas, rejected the proposition that in order to be testimonial, evidence must "be prepared for the

primary purpose of accusing a targeted individual." *Id.* at 135-37. The dissent responded, "[w]here that test comes from is anyone's guess. Justice Thomas rightly shows that it derives neither from the text nor the history of the Confrontation Clause . . . And it has no basis in our precedents." *Id.* at 135 (internal citations omitted) ("None of our cases have ever suggested that, in addition, the statement must be meant to accuse a previously identified individual; indeed, in *Melendez-Diaz*, we rejected a related argument that laboratory 'analysts are not subject to confrontation because they are not 'accusatory' witnesses.'"). The dissent also rejected the plurality's attempt to re-introduce reliability as a tenet of whether a statement was testimonial. *Id.* at 138 ("Dispensing with [cross examination] because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.").

Finally, in response to Justice Thomas's formality approach, the dissent found that the reports in *Bullcoming, Melendez-Diaz*, and *Williams* were all functionally similar, and that the similarities "dwarf[ed] the distinctions." *Id.* at 139. In each case, the report "[wa]s an official and signed record of laboratory test results, meant to establish a certain set of facts in a legal proceeding." *Id.* Because five justices rejected the plurality's proposed "identification" requirement of testimonial evidence, no single test was endorsed by a majority of the justices. In response to this fractured opinion, lower courts have found that *Williams* does not alter the Court's Confrontation Clause jurisprudence, and should be limited to the set of facts in that case. *See, e.g.*, *United States v. James*, 712 F.3d 79 (2d Cir. 2013).

2. Second Circuit application of Supreme Court Confrontation Clause precedent

In *United States v. James*, with the benefit of all of the Supreme Court Confrontation Clauses cases discussed above, the Second Circuit carefully analyzed the effects of *Williams* on the Court's Confrontation Clause jurisprudence, and reviewed its own precedent in *United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006), which had held that autopsy reports could be admitted as business records without violating the Confrontation Clause. 712 F.3d 79, 88 (2d Cir. 2013).

In *James*, the defendant argued that the district court erred in admitting testimony regarding an autopsy that the witness had not personally conducted, and in allowing a foreign medical examiner to testify to the results of a toxicology test that he had ordered but did not conduct. *Id.* at 87. The Second Circuit held that the autopsy report and toxicology report were not testimonial "because they were not created 'for the purpose of establishing or proving some fact at trial.'" *Id.* at 88 (quoting *Melendez-Diaz*, 557 U.S. at 324).

In reviewing the Supreme Court's pre-*Williams* precedent, the Second Circuit distilled the guiding principle to be that "a laboratory analysis is testimonial if the circumstances under which the analysis was prepared, viewed objectively, establish that the primary purpose of a reasonable analyst in the declarant's position would have been to create a record for use at a later criminal trial." *Id.* at 94. The Second Circuit considered whether

Williams changed that rule, but found that "[n]o single rationale disposing of the *Williams* case enjoys the support of a majority of the Justices." *Id.* at 95. Unable to discern a single controlling holding, the Second Circuit concluded that it must "rely on Supreme Court precedent before *Williams* to the effect that a statement triggers the protections of the Confrontation Clause when it is made with the primary purpose of creating a record for use at a later criminal trial." *Id.* at 96.

Notably, because the defendants in *James* had not made a Confrontation Clause objection to the surrogate testimony concerning the OCME autopsy report at trial, the Second Circuit reviewed the Confrontation Clause challenge only for "plain error." *Id.* at 96.[5] The Second Circuit stated that it must "determine whether, under the circumstances, the autopsy report (including the toxicology report) was prepared with the primary purpose of creating a record for use at a later criminal trial." *Id.* at 97.

In its discussion of the facts, the court reviewed the relationship between OCME and law enforcement. *Id.* at 97-98. The court explained that OCME is independent, but that "the police are required to notify it when someone

5. Had the defendant preserved his Confrontation Clause challenge, the Second Circuit would have reviewed the issue for "harmlessness," "which requires [the Court] to ask whether [they] are satisfied 'upon a review of the entire record . . . beyond a reasonable doubt that the error complained of . . . did not contribute to the verdict obtained.'" *James*, 712 F.3d at 99 (citing *United States v. Lee*, 549 F.3d 84, 90 (2d Cir. 2008)).

has died 'from criminal violence, by accident, by suicide, suddenly when in apparent health, when unattended by a physician, in a correctional facility or in any suspicious or unusual manner[.]'" *Id.* at 98 (quoting N.Y.C. Charter § 557(a), (f)(1)). Because the defendants did not object to the introduction of the surrogate testimony at trial, the court was left with a "scant record of the circumstances under which [the OCME analyst] produced her autopsy report." *Id.* Based on the limited record, the Second Circuit found that no one involved in the autopsy suspected foul play, nor anticipated that the autopsy report would be used at a criminal trial. *Id.* at 99. The autopsy report referred to the cause of death as "undetermined" and was conducted "substantially before any criminal investigation into [the] death had begun." *Id.* The Second Circuit held that "the autopsy report was not testimonial because it was not prepared primarily to create a record for use at a criminal trial." *Id.* On that basis, the court found no error in admitting the report into evidence or allowing a surrogate witness to testify to the report. *Id.*

The *James* defendants had objected at trial to the foreign medical examiner's testimony about forensic testing he had ordered but not conducted himself, thus adequately preserving their Confrontation Clause challenge. *Id.* The Second Circuit found the district court's basis for admitting the forensic testimony "of questionable validity" in light of the development of Supreme Court jurisprudence on the issue, but nevertheless held the evidence was properly admitted. *Id.* at 101. The Second Circuit reasoned that there was "no indication in [the foreign medical examiner's] testimony or elsewhere in

the record that a criminal investigation was contemplated during the inquiry" and therefore found that the report was nontestimonial. *Id.*

Judge Eaton filed a separate concurrence, stating that "[b]ecause of the unsettled state of the law," he agreed that "the admission into evidence of the autopsy report prepared by [the OCME pathologist] did not constitute plain error," but disagreed with the majority's conclusion that the report was not testimonial. *Id.* at 108. Judge Eaton would have found that "the admission of any medical examiner's report prepared by OCME would trigger the protections in the Confrontation Clause" because "[a]ll such reports are made to establish facts about the cause of death of the decedent; they are made by and to government officials in a formalized recording; they contain statements a medical examiner could reasonably foresee would be used in a criminal prosecution; and if a prosecutor seeks to introduce the report for its truth, it would substitute for live testimony adverse to the defendant." *Id.* at 111.

C. Application of Supreme Court Precedent

This Court follows the Second Circuit in *James* in largely relying on pre-*Williams* case law to guide its analysis of Garlick's Confrontation Clause claim. *Id.* at 95-96. In applying the pre-*Williams* principles to this case, the Court analyzes first the Trial Court's decision to allow the Autopsy Report into evidence at Garlick's trial, and then the First Department's affirmation of the Trial Court's decision.

Appendix C

1. Introduction of the Autopsy Report at trial

Relying on *People v. Freycinet*, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008) and *People v. Hall*, 84 A.D.3d 79, 923 N.Y.S.2d 428 (1st Dep't 2011), the Trial Court entered the Autopsy Report into evidence, and allowed Dr. Ely to testify about the Autopsy Report as an expert. (*See supra* § II.B.2).

In allowing Dr. Ely to testify to the Autopsy Report over Garlick's Confrontation Clause objection, the Trial Court rejected defense counsel's interpretation of *Freycinet*, and noted that, "more recently in People against Hall . . . similar issues were before the court and it was held that it was proper to allow a witness to testify to the contents of an autopsy report, even though the witness had not participated in the autopsy." (ECF No. 13 at 21-22). During Dr. Ely's testimony, when defense counsel repeated the Confrontation Clause objection, the State asserted that "[t]he autopsy report is admissible as a business record. Once it's admissible, I can call any expert witness, whether they're connected with the medical examiner's office or not, so long as they're an expert to interpret it." (*Id.* at 32). The Trial Court agreed, and, citing *Hall*, allowed the Autopsy Report and the surrogate testimony. (*Id.* at 32-34). Thereafter, the Trial Court allowed Dr. Ely to testify to both the factual findings and the opinions in the Autopsy Report. (ECF No. 13-1 at 1-13). Dr. Ely essentially read the Autopsy Report into evidence, recounting what Dr. Maloney observed from Sherwood's body (ECF No. 13-1 at 1), noting the age Dr. Maloney believed Sherwood to be (*id.* at 2), describing

the differences between the different types of wounds that Dr. Maloney had identified (*id.* at 2-3), and opining as to which injuries contributed to Sherwood's death (*id.* at 3 ("[Sherwood] also had some blunt force trauma to his face. That's a different kind of injury which I can describe in a moment and was not part of his cause of death ultimately."), 13 ("The cause of death is stab wound of torso with preformation of heart.")).

As discussed further below, this Court concludes that the Autopsy Report was testimonial, and thus its introduction into evidence without providing Garlick an opportunity to cross examine the pathologist who performed the autopsy violated the Confrontation Clause.

a) The Autopsy Report is testimonial under Supreme Court precedent

As set forth above (*supra* §§ III.B.1.b-d), pre-*Williams* Supreme Court precedent endorsed the following formulations of testimonial statements:

1. "A solemn declaration or affirmation made for the purposes of establishing or proving some fact."[6]

6. *Crawford*, 541 U.S. at 52 (citing 2 N. Webster, Am. Dictionary of the English Language (1828)); *Bullcoming*, 564 U.S. at 652 ("The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purposes of proving a particular fact—through the in-court testimony of a [surrogate witness].").

2. "[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[7]

3. "[S]tatements that 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."[8]

4. Statements that have "a primary purpose of creating an out-of-court substitute for trial testimony."[9]

---

7. *Crawford*, 541 U.S. at 52; *Melendez-Diaz*, 557 U.S. at 310 (quoting *Crawford*, 541 U.S. at 51-52) (also formulating testimonial statements as "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"); *Bullcoming*, 564 U.S. at 664-65 ("[T]he formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the analyst's] assertions as testimonial. The absence of notarization does not remove his certification from Confrontation Clause governance."); *Bullcoming*, 564 U.S. at 671 (Sotomayor, J., concurring) ("I agree with the Court's assessment that the certificate at issue here is a formal statement, despite the absence of notarization.").

8. *Crawford*, 541 U.S. at 52; *Melendez-Diaz*, 557 U.S. at 310 (quoting *Crawford*, 541 U.S. at 51-52); *Bullcoming*, 564 U.S. at 664 ("A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial.").

9. *Bullcoming*, 564 U.S. at 670 (Sotomayor, J., concurring) (quoting *Bryant*, 562 U.S. at 358) ("[T]he BAC report and [the analyst's] certification on it clearly have a 'primary purpose of creating an out-of-court substitute for trial testimony.'").

Under each of these formulations, the Autopsy Report qualifies as a testimonial statement.

(i) Solemn declaration or affirmation

The Autopsy Report is "[a] solemn declaration or affirmation made for the purposes of establishing or proving some fact." *Crawford*, 541 U.S. at 52. According to Supreme Court precedent, a document need not be notarized to be testimonial. *Bullcoming*, 564 U.S. at 664-65 ("[T]he formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the analyst's] assertions as testimonial. The absence of notarization does not remove his certification from Confrontation Clause governance."); *id.* at 671 (Sotomayor, J., concurring) ("I agree with the Court's assessment that the certificate at issue here is a formal statement, despite the absence of notarization."). In its discussion of requisite formalities of testimonial evidence in *Bullcoming*, the Court considered that the report there, as in *Melendez-Diaz*, was sufficiently formal because in both cases, a law-enforcement officer provided seized evidence (white powder and blood, respectively) to a state laboratory required by law to assist in police investigation; both analysts tested the evidence and prepared a certificate containing the result of the analysis; and, both certificates were "formalized" in a signed document labeled "report." *Id.* at 665.

All of these factors are met here. After Detective DeGrazia communicated with OCME, the state agency charged with assisting police in cases of unusual death, Sherwood's body was transported to OCME for an

autopsy. (ECF No. 13 at 24; ECF No. 4 at 8). Then, the OCME pathologist (Dr. Maloney) conducted the autopsy, prepared a certificate containing the results of the procedure, and formalized the process and conclusions in a signed document labeled "Report." (ECF No. 11-7). Thus, the Autopsy Report is testimonial under the first formulation.

(ii) Functional equivalent of ex parte in-court testimony

The second formulation is whether the Autopsy Report is "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford*, 541 U.S. at 51. Here, the Autopsy Report is the functional equivalent of in-court testimony, and the Court finds that a reasonable pathologist in the same situation would expect the findings could be used prosecutorially. Like the reports in *Palmer v. Hoffman*, where the Supreme Court held that railroad company accident reports, even though kept in the regular course of business, were not admissible without confrontation because they were "calculated for use essentially in the court, not in the business," so too are autopsy reports. 318 U.S. at 114. OCME regularly conducts autopsies, (*see* ECF No. 13 at 24 (Dr. Ely testifying that the OMCE performs "thousands" of autopsies a year)), and even though not all autopsy reports will be used in litigation, it is a distinct possibility, and

one of which a pathologist would be aware.[10] In New York City, OCME conducts autopsies in suspicious cases or in cases of suspected homicide. *See* N.Y. County Law § 673(1)(a) ("A coroner or medical examiner has jurisdiction and authority to investigate the death of every person dying within his county, or whose body is found within the county, which is or appears to be: A violent death, whether by criminal violence, suicide or casualty). By statute, the facts contained in autopsy reports created by OCME are considered "prima facie" evidence of the facts they state. *See* N.Y. C.P.L.R. § 4520 ("Where a public officer is required or authorized, by special provision of law, to make a certificate or affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated."); N.Y. Pub. Health Law § 4103(3) ("A certified copy of the record of a birth or death, a certification of birth or death, a transcript of a birth or death certificate, a certificate of birth data or a certificate of registration of birth, when properly certified by the commissioner or persons authorized to act for him, shall be prima facie evidence in all courts and places of the facts there in stated.").

---

10. *See James*, 712 F.3d at 111 (Eaton, J., concurring) (noting that he would have found "the admission of any medical examiner's report prepared by OCME would trigger the protections in the Confrontation Clause" because "[a]ll such reports are made to establish facts about the cause of death of the decedent; they are made by and to government officials in a formalized recording; they contain statements a medical examiner could reasonably foresee would be used in a criminal prosecution; and if a prosecutor seeks to introduce the report for its truth, it would substitute for live testimony adverse to the defendant.").

In addition, several circuit courts and highest state appellate courts have held that autopsy reports are testimonial in all, or certain, circumstances. *See United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012) (holding that in light of the medical examiner's duty to assist the police, autopsy reports were testimonial, even though not all would be used in criminal trials); *United States v. Moore*, 651 F.3d 30, 397 U.S. App. D.C. 148 (D.C. Cir. 2011) (finding an autopsy report testimonial when the autopsy had been conducted in the presence of law enforcement officers, and when the findings were formalized in documents titled "reports"); *State v. Kennedy*, 229 W. Va. 756, 735 S.E.2d 905 (W. Va. 2012) (holding that for purpose of use in criminal prosecutions, autopsy reports are, under all circumstances, testimonial hearsay under the Confrontation Clause); *Wood v. State*, 299 S.W.3d 200 (Tex. Ct. App. 2009) (finding autopsy reports testimonial when the nature of death was suspect and a police officer attended the autopsy, because it was reasonable to believe that the medical examiner would assume the report and her opinions would be used prosecutorially).

In *Melendez-Diaz*, the forensic analysis established that the seized substance was cocaine, in *Bullcoming*, the blood-alcohol report established the impermissibly high blood-alcohol level, and here, the Autopsy Report established Sherwood's cause of death. *Melendez-Diaz*, 557 U.S. at 308; *Bullcoming*, 564 U.S. at 651. All three reports "are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Melendez-Diaz*, 557 U.S. at 310-11 (internal citations omitted); *see Bullcoming*, 564 U.S. at 656

(quoting *Melendez-Diaz*, 557 U.S. at 310-11). If called to testify, Dr. Maloney, the pathologist who prepared the Autopsy Report in this case, would likely have testified as to the report's conclusion as to Sherwood's cause of death, and what the wounds revealed, if anything, as to Garlick's motive or the type of weapon used. Therefore, the Autopsy Report is testimonial under the second formulation.

(iii) Objective witness standard

Under the third formulation, the Autopsy Report is testimonial because it contains "statements that 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." *Crawford*, 541 U.S. at 52; *Melendez-Diaz*, 557 U.S. at 310; *Bullcoming*, 564 U.S. at 664. Several facts in this case illustrate that a pathologist in the same situation as Dr. Maloney in this case would have reasonably believed that her report would be used at a later criminal trial. First, Detective DeGrazia spoke with OCME, which thereafter prepared a "Supplemental Case Information" sheet noting that the victim had multiple stab wounds. (ECF No. 4 at 8, ECF No. 11-7 at 17). Second, before the autopsy, OCME prepared a "Notice of Death" form, which stated: "Circumstances of death: App[arent] manner: Homicide." (ECF No. 11-7 at 18). Third, two homicide detectives, Detectives Speranza and Farmer, were present during the autopsy. (*Id.* at 21, ECF No. 13-6 at 25). Finally, the "Case Worksheet," prepared at the same time as the Autopsy Report, repeated the finding as to the cause of death as "stab wound of torso with perforation of heart." (ECF No. 11-7

at 13). A reasonable pathologist conducting an autopsy under these circumstances should have reasonably believed that a criminal investigation was underway, and that the subsequent autopsy report would very likely be used in that criminal investigation. *See James*, 712 F.3d at 111 (Eaton, J., concurring) (noting that he would find all OCME autopsy reports testimonial because "they contain statements a medical examiner could reasonably foresee would be used in a criminal prosecution").

(iv) Primary purpose

The Autopsy Report is also testimonial under the "primary purpose" formulation discussed in *Bryant* and Justice Sotomayor's concurrence in *Bullcoming* —whether the statement has "'a primary purpose of creating an out-of-court substitute for trial testimony.'" *Bullcoming*, 564 U.S. at 669 (quoting *Bryant*, 562 U.S. at 358). As discussed above, the Autopsy Report itself constitutes an out-of-court substitute for trial testimony, in that it contains the same information that Dr. Maloney would have testified to had she been called as a witness.

In considering the primary purpose of a statement, several Justices have pointed to the formalities of the document at issue. *Bullcoming*, 564 U.S. at 671 (while "'[f]ormality is not the sole touchstone of our primary purpose inquiry,' a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial") (quoting *Bryant*, 562 U.S. at 366). Here, the document, titled "Report of Autopsy," certified that Dr. Maloney performed the autopsy of

Gabriel Sherwood on November 2, 2011, and is affixed with the seal of the City of New York. (ECF No. 11-7 at 3). The Autopsy Report indicates that the final version was sent to the Bronx District Attorney's Office on December 30, 2011 and was signed by Dr. Maloney in three places. (*Id.* at 1, 8, 10, 14). Just as the report in *Melendez-Diaz* had the primary purpose of establishing the contents of the seized substance, and the report in *Bullcoming* had the primary purpose of determining blood-alcohol level, here, the Autopsy Report had the primary purpose of establishing Sherwood's cause of death. *See Bullcoming*, 564 U.S. at 670 (discussing why the reports in *Melendez-Diaz* and *Bullcoming* had the "primary purpose of creating an out-of-court substitute for trial testimony"). Thus, the Autopsy Report is testimonial under the "primary purpose" analysis.

(v) The Autopsy Report is testimonial under James and Williams

In *James*, the Second Circuit distilled from the Supreme Court's pre-*Williams* case law the principle that "a laboratory analysis is testimonial if the circumstances under which the analysis was prepared, viewed objectively, establish that the primary purpose of a reasonable analyst in the declarant's position would have been to create a record for use at a later criminal trial." *James*, 712 F.3d at 94. As noted above, the circumstances surrounding the Autopsy Report indicate that Dr. Maloney reasonably should have been aware of the pending criminal investigation into Sherwood's death. (*See supra* §§ II.A.2, III.C.1.a.iii).

Although the Second Circuit in *James* concluded that the autopsy report before it was not testimonial, this case differs in several important respects. In *James*, first of all, the court was applying only plain error review because the Confrontation Clause objection had not been preserved, unlike in this case, where it is undisputed that defense counsel preserved the issue. (*See* ECF No. 11-2 at 42 (State's First Dep't Brief) ("During *voir dire*, defense counsel argued that the autopsy report was testimonial and that, therefore, allowing a medical examiner who did not conduct the autopsy to testify at trial about the contents of the report would violate defendant's confrontation right."). As a result, from the "scant record of the circumstances" under which the autopsy report was produced, the Second Circuit found no suggestion anyone suspected foul play or suspected that a criminal investigation might ensue. *James*, 712 F.3d at 98-99. The report in *James* also stated the cause of death as "undetermined" and the autopsy was conducted before any criminal investigation had begun. *Id.* In contrast, here there is a thorough record of the circumstances under which Sherwood's autopsy was conducted, and that record contains multiple indications of an on-going criminal investigation into a potential homicide. (*See supra* §§ II.A.1-2).

In addition, this Court agrees with Judge Eaton's concurrence in *James* that "the admission of any medical examiner's report prepared by OCME would trigger the protections in the Confrontation Clause" because "[a]ll such reports are made to establish facts about the cause of death of the decedent; they are made by and to government officials in a formalized recording; they contain statements

a medical examiner could reasonably foresee would be used in a criminal prosecution; and if a prosecutor seeks to introduce the report for its truth, it would substitute for live testimony adverse to the defendant." *James*, 712 F.3d at 111.

Finally, even under the plurality's formulation in *Williams*, the Autopsy Report is testimonial because it was "inherently inculpatory." 567 U.S. at 58. At the time of Sherwood's autopsy, the police had issued an I-Card for Garlick's arrest. (ECF No. 13-5 at 5) (discussing that at 4:45 a.m. on November 2, 2011, Detective DeGrazia issued an I-card to arrest Garlick for his involvement in the apparent homicide). The Autopsy Report is also inculpatory because it clarified the cause of death as a stab wound, not head trauma, thus incriminated Garlick and exculpated Johanna Rivera. (ECF No. 11-7 at 3). The Autopsy Report was "prepared for the primary purpose of accusing a targeted individual," and is therefore testimonial. *Williams*, 567 U.S. at 82-86; *but see Griffin*, 876 F.3d at 409 (discussing *Williams*, and noting that "both Justice Thomas in his concurrence and Justice Kagan in her dissent specifically reject the proposition that Confrontation Clause protections should be limited to circumstances in which a suspect has been identified").

Accordingly, under any of the five formulations of "testimonial," the Autopsy Report qualifies as testimonial and should not have been admitted into evidence at trial without giving Garlick the opportunity to cross examine Dr. Maloney, the pathologist who conducted the autopsy. *Crawford*, 541 U.S. at 52, 61 ("[T]he Confrontation Clause

applies to 'witnesses' against the accused—in other words, those who 'bear testimony'" and "commands . . .that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

b) Surrogate expert testimony does not satisfy the Confrontation Clause

Because the Autopsy Report is testimonial, surrogate testimony, even by an expert, was not a constitutionally sufficient substitute for the cross examination of Dr. Maloney herself. In *Bullcoming*, the New Mexico Supreme Court had approved the admission of surrogate testimony about the DNA report because the witness "qualified as an expert witness with respect to the gas chromatograph machine and the . . . laboratory procedures." *Bullcoming*, 564 U.S. at 661 (internal citations omitted). The Supreme Court rejected this justification, stating that surrogate testimony "could not convey what [the analyst conducting the test] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed." *Id.* Further, surrogate testimony could not "expose any lapses or lies on the certifying analyst's part." *Id.* at 662. As emphasized in *Crawford*,

> "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." . . . Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements

> provides a fair enough opportunity for cross-examination.

Id. (quoting *Crawford*, 541 U.S. at 54). Just as in *Bullcoming*, Dr. Ely's surrogate testimony regarding the Autopsy Report could not convey which tests were used, why those tests were employed, and whether there were any potential lapses in the autopsy process.

In addition, *Williams* may suggest that when the underlying testimonial statement is not being offered for its truth, but rather as the evidence on which the expert testimony is based, no Confrontation Clause issue exists. 567 U.S. at 58. In *Williams*, however, the plurality relied on the fact that the case involved a bench trial and speculated that a jury would be less able to discern between evidence admitted for its truth and evidence admitted to explain the basis of the expert's opinion. *Id.* at 70. Here, the Autopsy Report was offered for its truth—in fact, the prosecutor argued, "[t]he autopsy report is admissible as a business record. Once it's admissible, I can call any expert witness, whether they're connected with the medical examiner's office or not, so long as they're an expert to interpret it." (ECF No. 13 at 32). Contrary to the prosecutor's argument, however, as the Supreme Court established, when the business records are regularly used as evidence for trial, an expert's interpretation does not satisfy the Confrontation Clause. *Melendez-Diaz*, 557 U.S. at 321 ("Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at

trial.") (internal citations omitted); *Bullcoming*, 564 U.S. at 661; *Crawford*, 541 U.S. at 54. Accordingly, the Trial Court should not have permitted Dr. Ely to testify to the contents of the Autopsy Report, even as an expert.

c) The cases on which the state courts relied do not reflect current Supreme Court Confrontation Clause precedent

In allowing Dr. Ely to testify to the Autopsy Report at trial, the Trial Court relied on *People v. Freycinet*, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008) and *People v. Hall*, 84 A.D.3d 79, 923 N.Y.S.2d 428 (1st Dep't 2011). On close review, however, these cases do not reflect current Supreme Court Confrontation Clause precedent.

People v. Freycinet was decided on June 26, 2008, after *Crawford*, but before *Melendez-Diaz* and *Bullcoming*. 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (2008). In that case, the defendant's girlfriend died of a knife wound, and the defendant was indicted for murder, among other crimes. *Id.* at 39. As in the current case, a pathologist with OCME performed the autopsy and prepared a report with his findings. *Id.* at 40. Although the pathologist who performed the autopsy did not testify at trial, the report was entered into evidence, over the defendant's objection. *Id.* Notably, the report had been "redacted to eliminate [the pathologist's] opinions as to the cause and manner of the victim's death[.]" *Id.* The court permitted surrogate testimony of another OCME pathologist as an expert, who in theory was only providing her own opinions based on the underlying facts in the autopsy report. *Id.* After

a bench trial, the trial judge acquitted the defendant of murder, but convicted him of manslaughter in the second degree. *Id.*

On appeal, both the Appellate Division and the Court of Appeals affirmed the conviction, finding no Confrontation Clause violation. *Id.* The Court of Appeals stated that the question presented was "whether the redacted version of [the pathologist's] autopsy report was 'testimony' as that term is used in *Crawford*." *Id.* at 41. The court considered several factors outlined in *People v. Rawlins*, 10 N.Y.3d 136,153-56, 884 N.E.2d 1019, 855 N.Y.S.2d 20 (2008): (1) "the extent to which the entity conducting the procedure is an arm of law enforcement;" (2) "whether the contents of the report are a contemporaneous record of objective fact, or reflect the exercise of fallible human judgment;" (3) "whether a pro-law-enforcement bias is likely to influence the contents of the report;" and (4) "whether the report's contents are directly accusatory in the sense that they explicitly link the defendant to the crime." *Id.* (internal citations omitted). Considering these factors, the *Freycinet* court found that the autopsy report was not testimonial because OCME was an independent agency, the report was redacted to eliminate opinions, the report was a contemporaneous record of objective facts, and the report was unlikely to have been affected by pro-law-enforcement bias. *Id.* at 42. Finally, the court concluded that the report was not testimonial because "it did not directly link defendant to the crime." *Id.* As discussed further below, Supreme Court precedent does not support using these factors.

The first *Freycinet* factor—the extent to which the entity conducting the procedure is an arm of law enforcement—is not found in Supreme Court precedent. The integral role OCME plays in police investigations suggests that its employees are aware that their reports and findings may be used in future criminal prosecutions. (*See supra* § III.C.1.a.iii).

The second and third factors—whether the contents of the report are a contemporaneous record of objective fact, or reflect the exercise of fallible human judgment, and whether a pro-law-enforcement bias is likely to influence the contents of the report, respectively—consider the reliability of statements, but the Supreme Court in *Crawford* and *Melendez-Diaz* soundly rejected the reliability formulation of testimonial statements. (*See supra* §§ III.B.1.b-c).

The final *Freycinet* factor, whether statements are "directly accusatory," also refers to a concept the Supreme Court has rejected. *Melendez-Diaz* explicitly found that evidence need not identify a specific individual or be "directly accusatory" to be considered testimonial. 557 U.S. at 313 (stating that the identification requirement "finds no support in the text of the Sixth Amendment or our case law."). Accordingly, in relying on *Freycinet*, the Trial Court did not apply the Supreme Court's modern Confrontation Clause precedent.

The Trial Court also relied on *People v. Hall*, 84 A.D.3d 79, 923 N.Y.S.2d 428 (1st Dep't 2011). (ECF No. 13 at 22). The defendant in *Hall* appealed his murder

conviction, asserting that "the admission of an unredacted autopsy report violated his right under the Confrontation Clause." *Hall*, 84 A.D. at 81. At the trial in *Hall*, an OCME pathologist testified as an expert to the autopsy report performed by another OCME pathologist. *Id.* at 82. The First Department, following *Freycinet*, found that the "factual part of the autopsy report is nontestimonial and thus admissible, and, in this case, *Melendez-Diaz* does not mandate a contrary result." *Id.* The First Department then discussed the *Freycinet* factors in the context of *Melendez-Diaz*, reasoning that because "*Melendez-Diaz* did not explicitly hold that autopsy reports are testimonial . . . the Court of Appeals' decision in *Freycinet* is directly on point as applicable to this case." *Id.* The First Department explained that the holding in *Melendez-Diaz* could be arguably limited to the "formalized testimonial materials" that Justice Thomas discussed, and because "here, the autopsy report, which was unsworn, cannot fairly be viewed as formalized testimonial material." *Id.* at 83 (internal citation omitted). The Supreme Court's decision in *Bullcoming*, however, directly addressed the issues of notarization and surrogate testimony through an expert, and unequivocally stated that a document need not be notarized to be testimonial, and that surrogate expert testimony does not satisfy the Confrontation Clause. *Bullcoming*, 564 U.S. at 662-64. Therefore, by relying on *Hall*, the Trial Court was also not applying the most recent Supreme Court precedent.

2. The First Department's decision

On appeal to the First Department, Garlick argued that the introduction of the Autopsy Report through

surrogate testimony violated his Confrontation Clause rights. (ECF No. 11-1 at 49). The First Department held:

> "Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" (*People v. Acevedo*, 112 AD3d 454, 455, 976 N.Y.S.2d 82 [1st Dept 2013], *lv denied* 23 N.Y.3d 1017, 992 N.Y.S.2d 800, 16 N.E.3d 1280 [2014], since the report, which "[did] not link the commission of the crime to a particular person," was not testimonial (*People v. John*, 27 NY3d 294, 315, 33 N.Y.S.3d 88, 52 N.E.3d 1114 [2016]). Defendant's contention that *People v. Freycinet* (11 NY3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 [2008] has been undermined by subsequent decisions of the United States Supreme Court is unavailing (*see Acevedo*, 112 AD3d at 455).

Garlick, 144 A.D.3d at 606. Because the First Department's discussion of this issue relied heavily on *People v. Acevedo*, and *People v. John* in addition to *Freycinet*, in reviewing whether the First Department's decision was contrary to or an unreasonable application of clearly established law, this Court now considers how those cases interpreted and applied Supreme Court precedent.

a) People v. Acevedo

The First Department cited *People v. Acevedo*, 112 A.D. 3d 454, 976 N.Y.S.2d 82 (1st Dep't 2013) for the

propositions that Garlick's Confrontation Clause right was not violated when Dr. Ely was allowed to testify to the Autopsy Report Dr. Maloney prepared, and that *Freycinet* was still good law. (*See supra* § II.B.3). The First Department's reliance on this case is questionable, however, because *Acevedo* did not correctly apply Supreme Court precedent, and does not support the propositions for which the First Department cited it.

In *Acevedo*, the First Department held that the defendant's Confrontation Clause rights were not violated when a medical examiner was permitted to testify to an autopsy report that he did not conduct, and upheld Acevedo's jury conviction for murder. 112 A.D. 3d at 454. In its opinion, the First Department concluded, without discussion, that surrogate testimony by a medical examiner who did not perform the autopsy report at issue was not a confrontation clause violation. The court summarily stated, "[t]he report was not testimonial," citing *Freycinet* and *Hall*, and added, "neither *Bullcoming v. New Mexico* nor any other decision of the Supreme Court of the United States is contrary," citing pages 87 and 88 of the Second Circuit's opinion in *James. Id.* at 455.

As explained above, at the time of the trial in *Acevedo*, and on review by the First Department in this case, *Freycinet* propounded a test that did not reflect Supreme Court precedent. (*See supra* § III.C.1.c). Thus, the First Department's reliance on those cases for the proposition that Acevedo's right of confrontation was not violated by surrogate testimony was not consistent with Supreme Court precedent.

In addition, the First Department's citation to pages 87 and 88 of *James* does not support the proposition that *Freycinet* is consistent with Supreme Court precedent. *Id.* On page 87 of the *James* opinion, the Second Circuit outlines the facts of the case and begins the discussion of the Confrontation Clause issue, 712 F.3d at 87, and on the beginning of page 88, the Second Circuit summarizes its analysis, finding that "the autopsy reports in this case are nevertheless not testimonial—and therefore do not implicate the Confrontation Clause—because they were not created 'for the purpose of establishing or proving some fact at trial,'" *id.* at 88 (quoting *Melendez-Diaz*, 557 U.S. at 324). These pages reflect the Second Circuit's use of the "primary purpose" test when confronted with the question of whether an autopsy report is testimonial, but the First Department did not actually apply the primary purpose analysis to the facts in *Acevedo*. Thus, the conclusion it reached, that Acevedo's Confrontation Clause rights were not violated by surrogate testimony, is not supported by *James*.

Just as the First Department did not engage in the primary purpose analysis in *Acevedo*, it also did not do so in its review of the Trial Court's decision in this case. Here, the First Department did not consider the primary purpose of the Autopsy Report; if it had, it would have been compelled to find that the Autopsy Report was testimonial, as it had the primary purpose of serving as evidence in a homicide investigation and trial. (*See supra* §§ II.A.2, III.C.1.a). Just as the primary purpose of a road-side blood-alcohol test is not to determine a driver's blood alcohol level in isolation, but rather is primarily

used to determine whether the blood-alcohol level is above the legal limit, so too, here, the primary purpose of the autopsy was not to determine the cause of death in a vacuum, but was primarily used to determine whether the death was a homicide, which naturally would lead to a criminal action. *See Bullcoming*, 564 U.S. at 668.

Accordingly, the First Department's reliance on *Acevedo* for the propositions that Garlick's Confrontation Clause right was not violated when Dr. Ely was allowed to testify to the Autopsy Report prepared by Dr. Maloney, and that *Freycinet* was still good law, are unsupported and do not reflect modern Confrontation Clause principles endorsed by the Supreme Court.

b) *People v. John*

The First Department also relied on *People v. John*, 27 N.Y.3d 294, 315, 33 N.Y.S.3d 88, 52 N.E.3d 1114 (2016), for the proposition that the Autopsy Report was not testimonial because it did not link the crime to a particular person. *Garlick*, 144 A.D. 3d at 606. Setting aside the fact that the Autopsy Report *did* link Garlick to the crime (*see supra* § III.C.1.a.), the Supreme Court has rejected this formulation of testimonial evidence. (*See supra* §§ III.B.1.b-d). Further, the First Department did not engage in the analysis discussed in *John*, which found that a DNA report *was* testimonial and that the facts "fit into even the narrow primary purpose test articulated by the *Williams* plurality," while also noting the "continued viability of the *Bullcoming* and *Melendez-Diaz* decisions[.]" *John*, 27 N.Y.3d at 308, 311.

John also cited *James* for the "link-to-a-particular-person" standard. *Id.* at 315. In *James*, as discussed above, however, the Second Circuit rejected that standard. *James*, 712 F.3d at 95 ("Nor do we think we can apply the [ ] narrowed definition of testimonial," proposed by the plurality decision in *Williams*, "which would require that the analyst had 'the primary purpose of accusing a targeted individual of engaging in criminal conduct[.]'"). (*See supra* §§ III.B.1.e, III.B.2). The *John* court found that, even under *Williams*, the facts of the case established that the DNA report *was* testimonial because there was a criminal action pending against the defendant at the time the report was prepared, the primary purpose of the DNA evidence was to establish a fact in a criminal trial—that the defendant possessed the gun—and the OCME laboratory reports noted that the police requested the test because "the 'perp' handled the gun." *John*, 27 N.Y.3d at 307-08. Similarly, in this case, police had already identified Garlick as a suspect and were seeking his arrest, the primary purpose of the autopsy report was to establish Sherwood's cause of death, and communications between OCME and the police indicated that this autopsy was to be conducted as part of a homicide investigation. (*See supra* §§ II.A.1-2, III.C.1.a.iv).

Finally, the First Department cited to page 315 of *John* to support its proposition that a link to a particular defendant is required, but that page discussed which analysts should testify, redactions of autopsy reports, and began the dissent authored by Judge Garcia. *Id.* at 315. Nowhere does it support the conclusion that the Autopsy Report was not testimonial because it did not link Garlick

to the crime. Thus, the analysis in *John* actually supports the conclusion that the Autopsy Report was testimonial, the opposite of the First Department's decision here.

3. The impact of the scope of habeas review

Because the First Department adjudicated Garlick's Confrontation Clause objection on its merits, this Court may grant a writ of habeas corpus only if the state adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (*See supra* § III.A.2).

As set forth above, this Court has concluded that the cases on which the Trial Court and the First Department relied do not reflect current Supreme Court Confrontation Clause precedent. (*Supra* §§ III.C.1-2). As this Court has explained, under any formulation provided by the Supreme Court, including *Williams*, the Autopsy Report is testimonial. (*See supra* § III.C.1.a). Nevertheless, this Court is constrained by the requirement that the Supreme Court's precedent be "clearly established," 28 U.S.C. § 2254(d)(1), and must consider, for purposes of habeas review, whether this line of precedent was "clearly established" at the time of the First Department's decision.

Appendix C

In considering whether the Supreme Court's Confrontation Clause precedent was "clearly established," this Court has considered how other federal district and circuit courts have interpreted the law in connection with autopsy reports. While many courts have found autopsy reports testimonial on direct review,[11] others have found

11. *See United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012) (holding that in light of the medical examiner's duty to assist the police, autopsy reports were testimonial, even though not all would be used in criminal trials); *United States v. Moore*, 651 F.3d 30, 397 U.S. App. D.C. 148 (D.C. Cir. 2011) (finding an autopsy report testimonial when the autopsy had been conducted in the presence of law enforcement officers, and when the findings were formalized in documents titled "reports"); *State v. Bass*, 224 N.J. 285, 132 A.3d 1207 (N.J. 2016) (finding an autopsy report testimonial where the police were engaged in an active homicide investigation and had a suspect, and the autopsy was conducted in the presence of two law enforcement officers, even when the report was not entered into evidence); *Rosario v. State*, 175 So.3d 843 (Fl. App. 2015) (holding that an autopsy report created during a homicide investigation and asserting that the cause of death was homicide was testimonial); *Commonwealth v. Carr*, 464 Mass. 855, 986 N.E.2d 380, 389-400 (2013) (finding that a death certificate created during a homicide investigation that stated the cause of death was a "gunshot wound of the head with fracture of skull and perforation of the brain" was testimonial) (abrogated on other grounds by *Commonwealth v. Crayton*, 470 Mass. 228, 21 N.E. 3d 157 (2014)); *Miller v. State*, 2013 OK CR 11, 313 P.3d 934, 967-70 (Okla. Crim. App. 2013) (finding an autopsy report testimonial and surrogate testimony a Confrontation Clause violation "because the current state of the law so clearly established that it violated the Confrontation Clause to allow [the surrogate witness'] to give voice to the analysis, findings and conclusions [in the autopsy report]."); *State v. Navarette*, 2013-NMSC 003, 294 P.3d 435, 440-42 (N.M. 2013) (finding an autopsy report testimonial and surrogate testimonial a Confrontation Clause violation when the autopsy report contained statements

the opposite.[12] There are few cases that review this issue in the highly deferential habeas context,[13] and even fewer

---

"made with the primary intention of establishing facts that the declarant understood might be used in a criminal prosecution and where the statements in the report were relayed to the jury as the basis for the pathologist's opinions"); *State v. Kennedy*, 229 W. Va. 756, 735 S.E.2d 905 (W. Va. 2012) (holding that for purpose of use in criminal prosecutions, autopsy reports are, under all circumstances, testimonial hearsay under the Confrontation Clause); *Wood v. State*, 299 S.W.3d 200 (Tex. Ct. App. 2009) (finding autopsy reports testimonial when the nature of death was suspect and a police officer attended the autopsy, because it was reasonable to believe that the medical examiner would assume the report and her opinions would be used prosecutorially); *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (N.C. 2009) (finding autopsy reports to be the "type of forensic report discussed in *Crawford*").

12. *Ackerman v. State*, 51 N.E.3d 171 (Ind. 2016) (finding autopsy report nontestimonial when there was no evidence linking the defendant to the death at the time of the autopsy); *State v. Medina*, 232 Ariz. 391, 306 P.3d 48 (Ariz. 2013) (finding an autopsy report not testimonial after considering "the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances."); *People v. Leach*, 2012 IL 111534, 980 N.E.2d 570, 366 Ill. Dec. 477 (Ill. 2012) (finding an autopsy report not testimonial because it was not prepared for the primary purpose of accusing a targeted individual or for the primary purpose of providing evidence in a criminal trial).

13. *McCarley v. Kelly*, 801 F.3d 652, 664-65 (6th Cir. 2015) (finding the state of the Supreme Court's law to be clearly established after *Crawford* and *Davis*); *Vega v. Walsh*, 669 F.3d 123 (2d Cir. 2012) (finding the date of the law as of 2005 unclear); *Portes v. Capra*, 420 F. Supp. 3d 49, 2018 WL 4288627 (E.D.N.Y. 2018) (finding an autopsy report nontestimonial by relying on the *Freycinet* factors and relying on *Vega*, which only considered the state of the law after *Crawford*); *Soler v. United States*, No. 15 Civ. 4342 (LAP), 2015 U.S.

have reviewed this issue in the habeas context after *Williams*.[14]

As the Second Circuit stated in *Griffin* when faced with the question whether Supreme Court precedent was clearly established, "[a] state court cannot be faulted for declining to apply a specific legal rule 'that has not been squarely established by [the Supreme] Court', nor even for incorrectly applying an established rule where reasonable jurists could disagree as to its application." *Griffin*, 876 F.3d at 407 (citing *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2009)); *White v. Woodall*, 572 U.S. 415, 426-27, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014); *see Jimenez v. Walker*, 458 F.3d 130, 147 (2d Cir. 2006) ("[W]e must conclude not only that the trial court's [action] was unconstitutional but that it was so plainly unconstitutional that it was objectively unreasonable for the Appellate Division to conclude otherwise.").

This Court also recognizes Judge Eaton's concurrence in *James*, in which he agreed that "the admission of any medical examiner's report prepared by OCME" would be testimonial, but ultimately concurred in the denial of habeas relief, explaining that "[b]ecause of the unsettled

---

Dist. LEXIS 107338, 2015 WL 4879170 (S.D.N.Y. Aug. 14, 2015) (finding the law at the time of the trial in 2007 to be unsettled and discussing that the subsequent case law has not developed a clear set of rules on this point).

14. *Hensley v. Roden*, 755 F.3d 724 (1st Cir. 2014) (finding the state of confrontation clause precedent uncertain, and rejecting the habeas petitioner's claim that the testimonial nature of autopsy reports was clearly established).

state of the law, I agree that the admission into evidence of the autopsy report prepared by [the OCME] did not constitute plain error." *James*, 712 F.3d at 108. Accordingly, on this limited habeas review, this Court is constrained by *James* to conclude that the Supreme Court's Confrontation Clause precedent as to autopsy reports is unsettled, and therefore insufficiently "established" to grant relief to Garlick here. *See id.*; *Soler v. United States*, No. 15 Civ. 4342 (LAP), 2015 U.S. Dist. LEXIS 107338, 2015 WL 4879170 (S.D.N.Y. Aug. 14, 2015) (finding the law in 2007 to be unsettled and discussing that the subsequent case law has not developed a clear set of rules on this point); *see also Hensley v. Roden*, 755 F.3d 724 (1st Cir. 2014) (finding the state of the law uncertain, undercutting the habeas petitioner's claim that the testimonial nature of autopsy reports was clearly established); *Vega v. Walsh*, 669 F.3d 123 (2d Cir. 2012) (finding the state of Supreme Court Confrontation Clause precedent as of 2005 unclear).

4. Harmless error

Garlick argues that the Autopsy Report "played a critical role in this prosecution" and thus had a "substantial and injurious effect or influence" on the verdict that does not amount to a harmless error. (ECF No. 4 at 33) (citing *Brecht*, 507 U.S. at 623). He argues that the Autopsy Report pinpointed Sherwood's cause and manner of death, prompting the police to drop the charges against Johanna Rivera, and turn their attention to Garlick as the only suspect. (*Id.* at 33-34). Garlick notes that the Autopsy Report was also used to prove his intent to cause injury, which was especially important because of his post-arrest

statement that he had no intention to harm Sherwood. (*Id.* at 34). Garlick argues that the Autopsy Report's assertions as to the depth of the wounds and the blood loss contradicted Garlick's position regarding his intent. (*Id.*) Accordingly, he argues, the admission of these findings was not harmless. (*Id.*)

In response, the State contends that its evidence against Garlick was strong. (ECF No. 12 at 26). In support of this proposition, the State points to the lobby surveillance footage, Johanna Rivera's testimony regarding the events leading up to the incident, medical testimony of the EMT who arrived on the scene, and the fact that Garlick admitted that he had fought Sherwood. (*Id.*) As to Garlick's intent, the State contends that even absent the Autopsy Report, the remaining evidence offered at trial would have still permitted the jury to find that Garlick "intended to seriously injure Sherwood." (*Id.* at 27).

A Confrontation Clause violation may be harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). When reviewing preclusion of cross examination for harmless error, courts in this Circuit consider: (1) the strength of the state's case; (2) the importance of the witness's testimony; (3) whether the excluded testimony would have been cumulative; (4) the presence of evidence that would have corroborated the testimony; (5) the extent of the cross examination that was permitted; and (6) whether the cross examination of

which the defendant was deprived was of a nature that was likely to affect the result. *McGhee*, 2019 U.S. Dist. LEXIS 67271, 2019 WL 4228352, at *9; *Alvarez*, 763 F.3d at 233.

a) Strength of the State's case

The State's case relied heavily on the surveillance video that showed Garlick fighting with Sherwood, and allegedly showed Garlick stabbing Sherwood. The State contends that "the stabbing . . . was clearly captured on surveillance video." (ECF No. 12 at 26). But, as Garlick points out, the Trial Court found during the charge conference that, "[t]he video itself presents a jury question whether a knife or sharp object is visible on the film." (ECF No. 13-11 at 20). There was no other account of the initial encounter between Sherwood and Garlick in the lobby, as Johanna Rivera testified at trial that she was outside of the building when Garlick initially chased Sherwood into the building lobby. (ECF No. 13-1 at 35). The Autopsy Report, as discussed, concluded that Sherwood had been stabbed. (ECF No. 11-7 at 3). Had the Autopsy Report not been admitted, the only evidence that would have suggested Garlick had a knife or sharp object would have been the lobby surveillance video, which did not clearly show a knife. (ECF No. 13-11 at 20). Although Garlick admitted to fighting with Sherwood on the night of his death, without the Autopsy Report, the jury would have had to determine whether Garlick had a sharp object in his hand, whether he intended to harm Sherwood based on only the surveillance video, and whether the stab wounds caused Sherwood's death. Accordingly, the Court finds that, absent the Autopsy Report, the State's case is considerably weaker.

b) Importance of Dr. Ely's testimony

The Court next considers the importance of Dr. Ely's testimony in the State's case, and finds that her testimony, through which the Autopsy Report was entered into evidence, played a central role in the case. The State discussed the Autopsy Report twice in its opening statement, called Dr. Ely as its first witness, and introduced the Autopsy Report as its first exhibit. (ECF No. 13 at 2 ("And he stabbed the victim through the heart, in the left chest, in the right chest, in the back. You'll get that testimony tomorrow from medical examiner, Dr. El[]y."); 7 ("You'll learn from the autopsy report that the deceased, Gabriel Sherwood, was drunk."); 17 ("We have Dr. Ely here who [will] be the first witness."); 33 ("At this time I would offer into evidence as People's 1 the certified autopsy report on the body of Gabriel Sherwood.")). The State also relied on the Autopsy Report during summation, recounting the location and depth of Sherwood's wounds and the loss of blood. (ECF No. 13-12 at 26-27). The State, during summation, also told the jury that "we know from the medical examiner none [of Johanna Rivera's actions] contributed in any way to the death[.]" (*Id.* at 28). "And remember" the prosecutor said, "the stab that did the killing, the deepest wound went in a distance of up to five and one-half inches. Five and one-half inches into the body of the victim." (ECF No. 13-13 at 10). Thus, Dr. Ely's testimony regarding the Autopsy Report was one of the most important elements of the State's case.

c) Cumulative and corroborating evidence

As to the issue of cumulative and corroborating evidence, there was no other medical evidence offered at trial as to the cause or manner of Sherwood's death. Although the video showed part of the fight, and what may have been a weapon, and Officer Bagan also testified that Sherwood was found with stab wounds and could not be revived (ECF No. 4 at 7; ECF No. 13-11 at 20; ECF No. 13-4 at 13), the Autopsy Report was the only evidence that indicated Sherwood's cause of death was stabbing, as opposed to Johanna Rivera's blows to his head and body, and was the only evidence that indicated the depth of the wounds, which the State used to prove intent. (*See supra* § III.C.1). Accordingly, the Court finds that there was little additional evidence that corroborated the findings in the Autopsy Report, and it was not cumulative of other evidence offered at trial.

d) Extent of cross examination

This Court also considers the extent of cross examination that was permitted and whether cross examination of Dr. Maloney would have affected the result of the case. Here, defense counsel cross examined Dr. Ely, but at the crux of the Confrontation Clause is the premise that even cross examination of a surrogate witness is insufficient because, not having conducted the autopsy, she could not testify to any particulars of the procedures apart from what was contained in the Autopsy Report. *Bullcoming*, 564 U.S. at 662. Of course, had Dr. Maloney been permitted to testify, these same facts would have

been presented at trial, but Dr. Maloney would have had to answer on cross examination questions regarding her process and qualifications. *Id.* at 661 (surrogate testimony "could not convey what [the analyst conducing the test] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed.").

Taken together, these factors indicate that the Trial Court's introduction of the Autopsy Report may not have been harmless error. Because, however, the Court finds that the Supreme Court's Confrontation Clause precedent regarding autopsy reports remains unsettled under the habeas review standard, the Court does not conclusively determine whether the introduction of the Autopsy Report through surrogate testimony constituted harmless error.

IV. CONCLUSION

For the foregoing reasons, the Court respectfully recommends that Garlick's petition be DENIED. Because, however, Garlick has made a substantial showing of the denial of a constitutional right, the Court also recommends that, if the District Court adopts this Report and Recommendation and denies the Petition, a certificate of appealability issue on the questions (1) whether the Supreme Court's Confrontation Clause precedent clearly established that an autopsy report was testimonial and, (2) if so, whether the First Department's decision denying Garlick's Confrontation Clause claim was contrary to, or involved an unreasonable application of, that precedent. *See* 28 U.S.C. § 2253.

Appendix C

Dated: New York, New York
April 27, 2020

/s/ Sarah L. Cave
SARAH L. CAVE
United States Magistrate Judge

APPENDIX D — OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, DATED NOVEMBER 29, 2016

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

November 29, 2016, Decided;
November 29, 2016, Entered

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

JAMES GARLICK,

Appellant.

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered November 1,2013, convicting defendant, after a jury trial, of manslaughter in the first degree, andsentencing him, as a second felony offender, to a term of 20 years, unanimously affirmed.

The court properly denied defendant's midtrial request for a protective order pursuant to CPL 240.50 (1) as to a surveillance videotape of the incident. That provision was inapplicable, because discovery had already concluded. In any event, the risk that jurors might view media coverage of the case, in violation of the court's thorough admonitions against doing so, did not present

circumstances sufficiently compelling to rebut the presumption of the public's right to access a trial exhibit pursuant to the common law (*see Application of Natl. Broadcasting Co., Inc.*, 635 F2d 945, 952-953 [2d Cir 1980]) and the First Amendment (*see Mosallem v Berenson*, 76 AD3d 345, 349, 905 NYS2d 575 [1st Dept 2010]). The prosecutor did not make the videotape available to the news media until after it had been received in evidence and played for the jury in open court. We have considered and rejected arguments concerning preservation and the scope of our review.

The court properly exercised its discretion in declining to conduct individual inquiries of two jurors as to whether they had violated the court's repeated instructions against viewing news coverage of the case, following the revelation that a local TV news station had aired part of the video with inflammatory commentary. The court asked the entire jury panel if anyone had seen any media coverage, and it dismissed the only juror who admitted to having done so, after the court conducted an individual inquiry of that juror and then asked the entire panel about this matter a second time, before the jurors were able to see that the one juror was dismissed. Defense counsel's statement that the facial expressions of the two jurors at issue, which the court had not perceived, suggested they might have violated the instructions did not compel individual inquiries under the circumstances (*see People v Joaquin*, 138 AD3d 422, 422, 27 NYS3d 860 [1st Dept 2016], *lv denied* 28 NY3d 931, 40 NYS3d 359, 63 NE3d 79 [2016]; *see also People v Mejias*, 21 NY3d 73, 79-80, 989 NE2d 26, 966 NYS2d 764 [2013]).

Appendix D

"Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" (*People v Acevedo*, 112 AD3d 454, 455, 976 NYS2d 82 [1st Dept 2013], *lv denied* 23 NY3d 1017, 992 NYS2d 800, 16 NE3d 1280 [2014]), since the report, which "[did] not link the commission of the crime to a particular person," was not testimonial (*People v John*, 27 NY3d 294, 315, 33 NYS3d 88, 52 NE3d 1114 [2016]). Defendant's contention that *People v Freycinet* (11 NY3d 38, 892 NE2d 843, 862 NYS2d 450 [2008]) has been undermined by subsequent decisions of the United States Supreme Court is unavailing (*see Acevedo*, 112 AD3d at 455).

We perceive no basis for reducing the sentence. Concur—Friedman, J.P., Sweeny, Saxe, Kapnick and Gesmer, JJ.

APPENDIX E — COURT TRANSCRIPT EXCERPT IN THE SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY, DATED SEPTEMBER 23, 2013

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM: PART H94

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JAMES DARNELL GARLICK,

Defendant.

BEFORE: HONORABLE DENIS J. BOYLE
Justice of the Supreme Court

[page 636] single question. So basically in the written statement there was no interrogation because nobody was in the room with the defendant. And for the video statement, which is a different modality conducted by a different person, Detective DeGrazia didn't ask a single question. So you couldn't really say DeGrazia interrogated the defendant on the written statement because nothing was asked of the defendant or on the video statement because Detective DeGrazia never says a word and merely appears in the video in the beginning of it when they pan across to show everybody in the room. We're going to introduce two complete statements of the defendant.

THE COURT: I well remember the video and I well remember the evidence at the hearing, and I don't mean to

cut you off, but I'm satisfied that the rule of completeness doesn't obtain here. It was not a continuous interrogation, and so, the defense application is denied.

MR. SCHEPPS: Can I just -- well, I mean, I know we don't note exceptions these days, but the Falcon decision, I think, is more directly on point here and I would argue that --

THE COURT: It was not a continuous interrogation. My conclusion is that it was not a continuous interrogation.

MR. SCHEPPS: Okay.

THE COURT: Did you have another application?

[page 637] MR. SCHEPPS: I do, and that regards the medical examiner testimony. It's come to our attention that the doctor who did the autopsy, Dr. Maloney, is, for whatever reason, I don't know, I believe the People don't know where she is.

MR. KAREN: She's left the medical examiner's office.

MR. SCHEPPS: Well, okay. So she will not be testifying. And I believe there was another doctor who was present in the performance of the autopsy who will also not be testifying as well.

MR. KAREN: Dr. Gill as left the ME's office to become the chief medical examiner, I believe in Stamford, Connecticut. We will be calling Deputy Medical Examiner,

Dr. Ely, who, I believe, is the chief in the Bronx. She's coming in to testify.

MR. SCHEPPS: All right. I'm going to request that Dr. Ely not be permitted to testify basically under the rule of Crawford and its progeny. Just hear me out, I know there's been a lot of case law.

I think that under the Supreme Courts most recent pronouncements, which are Melendez Diaz versus Massachusetts -- do you want the cites of these or?

THE COURT: I'm familiar with Melendez Diaz. If you rely on cases I'm not familiar with, I'll ask you for [page 638] the cite.

MR. SCHEPPS: Most recently Williams v Illinois.

THE COURT: I'm not sure I'm familiar with that.

MR. SCHEPPS: I can give you the cite on that.

THE COURT: Does it have to do with autopsies?

MR. SCHEPPS: Not directly, but they have to do with whether anything is testimonial or not.

THE COURT: Okay.

MR. SCHEPPS: All right. I know the Court is familiar with the rules of the Melendez Diaz, but to just summarize briefly, I'll backtrack a little bit to Court of Appeals case

that was decided prior to Melendez Diaz and Bullcomings, People versus Freycinet, which I don't know if the Court's familiar with that case. That cite is 11 NY3d 238, a 2008 decision.

In that case a different medicar examiner than the one who did the autopsy was permitted to testify, specifically because the autopsy report had been redacted from all opinion information, so that the medical examiner who did testify was testifying basically from what the Court characterized as findings of fact rather than opinion.

THE COURT: For example, stab wounds as to distinct from homicide?

MR. SCHEPPS: Well, I don't know exactly how clearly that was laid out in that case in my recollection. [page 639] I mean, I think I would argue that there are instances where even the characterization of a wound is, a stab wound would be opinion evidence rather than, you know, a puncture or a laceration or something like that. The problem is that Melendez Diaz analysis, in that case it was just a certification that was put into evidence that there were, that something that had been taken from a car. It was cocaine, in fact. Under the analysis of Melendez Diaz, the analysis by the Court of Appeals, again prior to the Melendez Diaz analysis, I think, is completely called into question, and I think that the decision that the Court of Appeals announced in Freycinet really needs to be revisited.

Appendix E

The controlling law from the United States Supreme Court in Melendez Diaz and in Bullcomings, I think, makes it, in my opinion, pretty clear that an autopsy report, under these circumstances, is testimonial. It's prepared under circumstances that would lead an objective witness reasonably to believe that the statement or the report would be available for use later at trial. That's quoting from Melendez Diaz at page 2532. That's probably the Supreme Court cite rather than the official reporter cite.

Furthermore, we have in Bullcomings, which was a blood test, blood analysis in a DWI case, and the Court announced there that the confrontation clause does not tolerate dispensing with confrontation simply because the [page 640] Court believes that questioning one witness about another's testimonial statements provide a fair enough opportunity for cross-examination.

Another characterization of what would constitute testimonial evidence is in the more recent case, Williams versus Illinois. And the cite of that case is -- it's only the unofficial cite, 132 Supreme Court 2221. I think it's a 2012 decision. And it's a plurality decision, so it was Justice Thomas' concurrence that my reading of the case announces the Court's holding on what constitutes testimoniality(sic).

In that case, in fact it was ruled that what was being introduced was not testimonial in nature, but the way Justice Thomas characterized it was that the document or the report had to be sufficiently formalized. It had to be sworn or certified, and it needed to have the solemnity

of an affidavit or deposition. Clearly, an autopsy report does satisfy that requirement, it's certified, and all of the requirements that the Court would have made in that case was satisfied.

Now, I know that there could be an argument made perhaps that it's a business record, but that's really, I think there are two elements that have to be addressed. It's whether it's a business record simply addresses certain hearsay requirements, but not whether it has been prepared [page 641] in anticipation of litigation would be one way of characterizing it.

Now an autopsy report, and certainly the one in this case, was prepared basically at the request of the police. There's a man found lying on the floor with blood all over the place -- withdrawn, with blood underneath him in the lobby of a building. The police are the first ones called there and an ambulance comes and he's brought to the hospital and he died. He dies. The autopsy is then done at the request of the police and of the hospital. It isn't necessary that it be a law enforcement agency see in order for the sought document to be characterized as testimonial. In fact, in Melendez Diaz and in Bullcomings that is, that's -- there is language to that effect in both of those cases, interesting language also from Melendez Diaz is the following: Witnesses are either witnesses for the defendant or against him. There is no special category for witnesses that are helpful to the prosecution, yet not against the defendant.

By mentioning this I'm addressing the argument often made by prosecutors and that I have read in cases as well that because the office of medical examiner has been held by the Court of Appeals as not be a law enforcement agency, it doesn't fall within any of these requirements. And I think that the reasoning and rulings of the court, of [page 642] the Supreme Court in Melendez Diaz and Bullcomings, I think makes it clear that it doesn't matter whether it's a law enforcement agency or not.

The agency that did the analysis in Melendez Diaz was not a law enforcement agency, and the agency that did the analysis of the blood in Bullcomings was just a hospital, so it clearly is not relevant whether the, whether the agency is considered law enforcement agency or not. It's the purpose for which the report is prepared, number one, and the way in which it's prepared. Again, to refer to Justice Thomas's analysis in the William versus Illinois case it's certified, the solemnity of an oath and it is available for use at a later time at trial. An autopsy report clearly fits all of these requirements.

Now again, to return to Freycinet finally, the Court of Appeals case, again the ruling in that case was that the report was admissible in that case. The Court I don't think made an analysis of whether it was testimonial or not in a way that would satisfy Melendez Diaz or Bullcomings, but the court said that it was admissible because it had been redacted of all opinion evidence. I don't know whether that has been done in this case or not. I don't know whether the proposed doctor has seen it, but this is, this isn't what I'm concerned about. What I'm concerned about is the

Appendix E

Supreme Court's analysis --

[page 643] THE COURT: And what is your application?

MR. SCHEPPS: My application is that this doctor not be permitted to testify, that the autopsy report not be permitted to be put in through this doctor.

THE COURT: As far as opening statements are concerned, I'm not going to foreclose the People from stating to the jury what it is they intend to prove by way of the content of the autopsy. If there are specific objections at the time the doctor testifies, I'll take them up with you. I'm not going to prospectively preclude Dr. Ely's testimony.

Do you need a few minutes before openings?

MR. KAREN: Three minutes. I take it we can put off my argument until.

THE COURT: Yes. It's ten to four so I don't think we'll get to the autopsy today.

MR. KAREN: No, Dr. Ely's here tomorrow.

THE COURT: Okay.

MR. KAREN: Yes.

THE COURT: Yes, the answer is this, yes, I would like to have openings anyway.

MR. KAREN: Absolutely, I just need three minutes.

THE COURT: Now let's bring the jurors in who are going to be sworn, and then I'll have a brief recess.

MR. KAREN: Very good. Can I let the officer go

[page 7] Avenue. Johanna Rivera, not related to Lisa Rivera, lived in the next building, and she will tell you that she knew Lisa Rivera and Garlick for several years from the neighorhood. Apparently, the witnesses did not know and the defendant in his statement did not know Gabriel Sherwood, who also lived in the area.

Johanna Rivera will tell you she first saw Gabriel Sherwood the morning of November 1, 2011 when she took her son to school. She'll tell you he was acting strange. He was shadowboxing by himself in the street. That was in the morning. The homicide actually began at around 5:50, 5:55 p.m.

You'll learn from the autopsy report that the deceased, Gabriel Sherwood, was drunk. His alcohol level was above the level for legal intoxification had he been driving, which he wasn't, but he was drunk when this happened. As Johanna Rivera walked by, and this is in the late afternoon on the way to a store, and separately as Lisa Rivera walked by, Gabriel Sherwood makes some statements to them. He said words to the effect, and this is a quote, "spic bitches, suck my dick." This is what he said to these two women while he was drunk and out on the street. Lisa Rivera then phoned her boyfriend, James Darnell Garlick, sitting over

there, and said some guy was hassling her and so Garlick rode over on his bicycle. There was a

[page 17] ready to call their first witness?

MR. KAREN: And their second. We have Dr. Ely here who should be the first witness. Johanna Rivera is here and her lawyer is here, she'll be the second witness. There were two other people who were supposed to be here who are not, but I figured with the medical examiner and with Johanna Rivera, an eyewitness, it should be a reasonably full day.

APPENDIX F — COURT TRANSCRIPT EXCERPT IN THE SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY, DATED SEPTEMBER 10, 2013

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL TERM: PART H94

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JAMES DARNELL GARLICK,

Defendant.

BEFORE: HONORABLE DENIS J. BOYLE
Justice of the Supreme Court

THE COURT: Okay. Mr. Schepps, Mr. Beatrice, were there additional arguments to be made before the first witness?

MR. SCHEPPS: Do you have any further, anything further to address? Maybe I misunderstood you. I thought you were gonna be addressing my application regarding the medical examiner further.

MR. KAREN: Do you want her to step out for the argument?

MR. SCHEPPS: I don't know what we're doing.

MR. BEATRICE: Judge, there are --

THE COURT: I thought you wanted to be heard further. I had said in substance I'd take up any objections to her testimony when they were made, but I wasn't going to prospectively preclude her. If you think that you're anticipating an objection that can better be heard before the jury's in the box, I'll take it up with you this way, [page 18] and I'll ask the witness to step out for that purpose.

MR. SCHEPPS: It won't take long.

THE COURT: Okay. If the witness could please step out.

MR. BEATRICE: Judge, I would also ask that any other potential witnesses not be in the courtroom for the proceedings also, or the application.

MR. KAREN: This is Scott Turner who represents Johanna and the other is an intern.

THE COURT: Mr. Schepps?

MR. SCHEPPS: One thing that I wanted to add incase the Court has come across it, I am aware of a Second Circuit case, Feliz versus United States, which did hold that autopsy reports are not testimonial; however, that case was also decided prior to Melendez Diaz, Bullcomings and Williams, so I think that that analysis needs to be called into question as well.

As far as the autopsy report is concerned, I mean, it's fine if we deal with it turn by turn and moment by moment. It's riddled with mentions of stab wounds and knife, and inclusion it was a homicide. But, you know, the issue of redactions shouldn't be something for me to decide, it should be something for the People to decide.

THE COURT: And you've reviewed the autopsy report?

[page 19] THE COURT: Are there parts of it that you maintain should be redacted that haven't been redacted?

MR. SCHEPPS: Nothing's been redacted.

MR. KAREN: Your Honor?

THE COURT: Yes.

MR. KAREN: I have a suggestion. Obviously, defense has had this case for a couple of years and has made no application. What I could do, one option is to introduce the certified copies as a business record and then have the doctor testify. There is a way to avoid any possible hearsay. And I think the better practice is to establish that she has the certified record, that it's a business record, but not offer it and simply have her testify. That way, you don't run the risk of putting a document into evidence where something in there might be objectionable. That's what I would propose.

THE COURT: So if I understand what you're saying, Mr. Karen, you're proposing to introduce testimony from the witness, but not to introduce the document?

MR. KAREN: Right. And then if anybody wants to put in part of the document later they can, but the risk of putting in, and I think Mr. Schepps is correct, putting in the full document, something could end up in there that could be objectionable. This is a cleaner way of doing it.

[page 20] MR. SCHEPPS: Well, that would be fine if we had Dr. Maloney here who could testify as to her actual -- all right, you heard me.

THE COURT: I'm not cutting you off.

MR. SCHEPPS: No, I'm reading you.

THE COURT: Sometimes I'm easier to read than others probably. Your research was on all fours. I've read Freycinet, I've read the cases or at least scanned them that you referred me to last night.

MR. SCHEPPS: A one-second approach?

THE COURT: Yes.

(Whereupon, a discussion was held at the bench off the record among the Court and counsel.)

THE COURT: I don't draw the same conclusion, Mr. Schepps, as you do from Freycinet. ·The principles, at least

in broad strokes, I think, are clear to everybody. There's a very distinct and significant difference between testimony regarding as discussed in Freycinet whether wounds or stab wounds or any kind of wound as compared to whether in the doctor's opinion the wounds were a product of a homicide, so certain conclusions are opinions that are not inadmissible. And arguably, as you point out in Freycinet, certain conclusions and opinions such as the nature of the wounds, the wound's trajectory, opinions based upon observations of the body are not inadmissible conclusions, if you want to [page 21] describe them as conclusions, and I'm going to be alert to the difference.

MR. SCHEPPS: Okay.

THE COURT: And that's why I said I'll take up your objections as they're made, but I'm not prospectively precluding her testimony.

MR. SCHEPPS: All right, but I would not agree to Mr. Karen's suggestion that the document not be put into evidence. Dr. Ely is it?

MR. KAREN: Ely, she's the Chief Medical Examiner of the Bronx.

MR. SCHEPPS: Right, but she has no participation in this autopsy at all, and I don't see how it would be possible without Dr. Maloney being here to have an effective cross-examination without the document being placed into evidence, so.

MR. KAREN: And I'll be happy to offer it.

THE COURT: And if either side offers it and if there are redactions to be made, I'll take them up with you.

MR. SCHEPPS: Okay.

THE COURT: But you know, and again, you've read Freycinet, in Freycinet one of the key issues was whether a witness could testify based upon an opinion drawn from reviewing the autopsy --

MR. SCHEPPS: Right.

[page 22] THE COURT: -- report --

MR. SCHEPPS: Right.

THE COURT: -- where the witness did not themself participate in the autopsy.

MR. SCHEPPS: That's the crux of their analysis, sure.

THE COURT: For whatever it's worth, more recently in People against Hall in the First Department at 84 83rd page 79, similar issues were before the court and it was held that it was proper to allow a witness to testify to the contents of an autopsy report, even though the witness had not participated in the autopsy.

MR. SCHEPPS: I'll have a look at that.

THE COURT: Perhaps significantly, in addition to leave being denied in the Court of Appeals, cert. was denied at 133 Supreme Court page 193. And anyway, to be continued.

MR. SCHEPPS: Okay.

THE COURT: If both sides are ready, given what we've discussed so far I'll bring the jury in, we'll proceed.

MR. KAREN: We're ready.

COURT OFFICER: Jury entering.

(Whereupon, the jury entered the courtroom.)

THE CLERK: This is case on trial continued. All parties are present. The jury is also present.

[page 23] THE COURT: Members of the jury, good morning. Mr. Karen?

MR. KAREN: Thank you, Judge.

At this time the People call Dr. Susan Ely to the stand.

(Whereupon, the witness entered the courtroom and took the witness stand.)

SUSAN ELY, a witness called by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

COURT OFFICER: You may have a seat. In a loud and clear voice, say and spell your first and last name.

THE WITNESS: Dr. Susan Ely, S-U-S-A-N, E-L-Y.

COURT OFFICER: Title and affiliation.

THE WITNESS: Deputy Chief Medical Examiner for the Office of Chief Medical Examiner for the City of New York.

THE COURT: Mr. Karen?

MR. KAREN: Thank you, Judge.

DIRECT EXAMINATION

BY MR. KAREN:

Q Dr. Ely, what are the duties and functions of the Office of Chief Medical Examiner of the City of New York?

A The primary responsibilities for the medical examiner's office, and there's, you know, a physical office in each borough,

APPENDIX G — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 30, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 20-1796

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of July, two thousand twenty-one.

JAMES GARLICK,

Petitioner-Appellee,

v.

SUPERINTENDENT WILLIAM LEE,
EASTERN CORRECTIONAL FACILITY,

Respondent-Appellant.

ORDER

Appellant, William Lee, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix G

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/_____