No. 21-637

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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The fundamental question before this Court is whether an AEDPA court can ignore a fractured opinion from "the Supreme Court of the United States" to find that "Federal law, as determined by the Supreme Court of the United States" is "clearly established" within the meaning of 28 U.S.C. § 2254(d)(1). Even though this Court has been unable to articulate a test squarely addressing whether or under what circumstances the contents of a forensic report implicate a defendant's right to confrontation, the Second Circuit found that such a test existed and was clearly established. We contend, as do numerous other circuit courts, that this finding was error and we ask this Court for guidance as to the meaning of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

When the Second Circuit set aside Garlick's New York State conviction without regard to this longstanding uncertainty in the state of the law, it acted in excess of the jurisdictional restraints imposed by Congress. Garlick does not now dispute that the Second Circuit is the only circuit in the nation to conclude that this Court has "clearly established" the fact-specific analysis in which the contents of a forensic report are testimonial. Nor does Garlick disagree that the panel deliberately cast aside this Court's decision in *Williams v. Illinois*, 567 U.S. 50 (2012), to do so. The key concern, therefore, is whether an AEDPA court is permitted to blind itself to fair-minded disagreement in this Court's plurality opinions when the statutory language plainly mandates otherwise.

Instead of addressing this core argument, Garlick's brief in opposition conflates AEDPA's threshold inquiry with its second step, evaluating the reasonableness of the state court's application of federal law. *Compare* BIO p. i (Questions Presented), *with* Pet., p. i (Questions Presented). Garlick distracts from the panel's error, and this case's viability as a vehicle in this Court, by relying on an unduly restrictive and hyper-technical reading of the state court's decision.

Whether the Second Circuit's approach was correct requires this Court's immediate review. Certiorari should be granted to consider how AEDPA courts are to evaluate the "clearly established" threshold inquiry when presented with opinions from this Court with no majority holding. 28 U.S.C. § 2254(d)(1). Should this Court ultimately determine that this threshold inquiry was satisfied, the Court should also consider whether the Second Circuit engaged in an unduly narrow unreasonable application analysis. Finally, the Court should weigh in as to the Second Circuit's erroneous application of *Brecht v. Abrahamson*, 507 U.S. 619 (1993) in finding the admission of the report not harmless.

THE SECOND CIRCUIT STANDS ALONE BY CASTING ASIDE *WILLIAMS* TO DETERMINE THAT FEDERAL LAW WAS CLEARLY ESTABLISHED BY THIS COURT'S PRECEDENTS.

Garlick contends that the panel properly discounted this Court's plurality decision in *Williams* to conclude there was clearly established law controlling his claim in state court that the contents of the autopsy report

were testimonial. The only relevant question posed by *Williams*, Garlick asserts, was whether "it changed the law regarding whether a certified document memorializing a forensic analysis is testimonial." BIO, pp. 23. But Garlick misconstrues the appropriate inquiry on habeas review of a state court judgment. He elides the point that whether the law is clearly established is a threshold issue. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). 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 issue. *Wright v. Van Patten*, 552 U.S. 120, 123-25 (2008). While AEDPA certainly 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 Second Circuit and Garlick overlooked the fact that the disparate rationales offered by the five Justices who concurred in the *Williams* result did not produce a governing rule that applied "beyond doubt" to the resolution of Garlick's confrontation claim in 2016. *White v. Woodall*, 572 U.S. 415, 427 (2014), quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666, (2004).

Garlick has mustered no response to the People's argument that the Second Circuit erred by adopting a standard of review from its own precedent that was unconstrained by the deferential standards under AEDPA. Pet., pp. 21, 29-30. Relying upon its prior decision in *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013), as well as this Court's decision in *Marks v. United States*, 430 U.S. 188 (1977), the panel determined that it was unnecessary to consider the impact of *Williams*' fragmented decision — in which five members of the Court concluded that the DNA lab report was not testimonial

but could not coalesce around a single rationale — on the state of the law in 2016. Pet. App. A: 21a. While this Court has held that the *Marks* plurality analysis can be successfully applied "for AEDPA purposes," *Panetti* 551 U.S. at 932, it has never posited that *Marks* permits an AEDPA court to disregard a plurality opinion entirely. An "implicit delegation of authority to those [lower] courts to continue addressing the issue in the manner they did before the Supreme Court intervened" by its very nature cannot constitute a clearly established holding, especially "in a case where the plurality and concurrence pointed to different results." Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 802, 842 (2017).

In essence, the Second Circuit here relied upon its own jurisprudence to determine whether Federal law was clearly established. This was a clear violation of § 2254(d)(1)'s limiting clause that it is this Court's precedents that control. *See Williams v. Taylor*, 529 U.S. 362, 381 (2000). *U.S. v. James* came before the Second Circuit in a distinct procedural posture. There, the Second Circuit was tasked with deciding — on direct appeal from a conviction in federal court and under the less deferential plain error inquiry — whether an autopsy report was testimonial. Citing the fragmented nature of the decision in *Williams*, the Second Circuit in *James* confined its resolution of the issue to the Court's precedents prior to *Williams*. *James*, 712 F.3d at 95-96. By relying on the same analytical framework that guided its review of a federal criminal conviction in *James*, the *Garlick* panel here failed to abide by its congressionally circumscribed power of review over a state court judgment.

In determining that this Court's decision in *Williams* had no place in the AEDPA analysis, the Second Circuit stands alone. The Fifth, Sixth, Ninth, and Eleventh Circuits have each evaluated AEDPA petitions predicated on Confrontation Clause claims involving the States' introduction of forensic reports at defendants' trials. Citing this Court's plurality decision in *Williams,* each of those courts found that the law relating to the application of Confrontation Clause principles to forensic reports was not clearly established. *Mills v. Comm'r, Alabama Dep't of Corr.*, No. 21-11534, 2021 WL 5107477, at *4 (11th Cir. Aug. 12, 2021) (Denying certificate of appealability); *Garrett v. Madden*, 859 F. App'x 156, 158 (9th Cir. 2021) (Denying certificate of appealability); *King v. Brown*, No. 20-2074, 2021 WL 3417921, at *2 (6th Cir. Apr. 20, 2021) (Denying certificate of appealability), *cert. denied,* 142 S. Ct. 294, (2021); *Jenkins v. Hall*, 910 F.3d 828, 835 (5th Cir. 2018).[1]

The Sixth Circuit's decision is especially salient in that it credited the District Court's finding that it was "unclear whether autopsy reports are testimonial" following *Williams*. *King* at *2, quoting *King v. Kowalski*, No. 2:11-CV-12836, 2020 WL 5768897, at *5 (E.D. Mich. Sept. 28, 2020). The Ninth Circuit provides an even more pertinent holding considering the panel's disapproval of the New York Appellate Division's reasoning that the autopsy report here was not testimonial because it did not link Garlick to the crime. Whereas the panel found that this Court "has plainly rejected the reasoning on which

1. When asked to address the issue, the Tenth Circuit "express[ed] no view as to whether the plurality opinion should be treated as controlling." *Jimenez v. Allbaugh*, 702 F. App'x 685, 688 (10th Cir. 2017) (Denying certificate of appealability).

the Appellate Division relied to hold the autopsy report admissible in Garlick's case," by disregarding *Williams* (Pet. App. A: 21a-22a, n.5), the Ninth Circuit cited "the substantial ambiguity in this area" created by *Williams* in concluding that there was no clearly established law addressing the admissibility of out of court statements that did not accuse a specific individual of wrongdoing. *Garrett*, 859 F. App'x at 158.[2] Relying on the plurality in *Williams*, the Ninth Circuit noted that fairminded jurists could disagree about the appropriate test to be applied, *Id.* at 157.[3]

As detailed in the People's main petition, the differing rationales that explain the result in *Williams* may have renewed salience in the context of autopsy reports which are prepared for a variety of reasons unrelated to suspected criminal wrongdoing. Pet., pp. 22-23, 36-39. Given this Court's adherence to a case-by-case approach in defining the meaning of testimonial evidence (*Crawford*, 541 U.S. at 68 ["We leave for another day any effort to spell out a comprehensive definition of 'testimonial."]), the panel should not have disregarded *Williams* in evaluating whether this Court's decisions settled the test and circumstances in which an autopsy report is testimonial.

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2. This undercuts Garlick's arguments that this case is a poor vehicle for certiorari because of his mistaken insistence that the Appellate Division rejected his Confrontation Clause claim solely on this ground. BIO, pp. 18-22.

3. While petitioner recognizes that the state court decisions addressed by the Fifth and Sixth Circuits predate this Court's holding in *Williams*, they are nonetheless suggestive of a widening circuit split. Unlike the panel here, these cases found that the fragmented nature of this Court's decision in *Williams* is wholly relevant to the determination of whether an area of the law is clearly established.

Contrary to Garlick's contentions, the split between the First and Second Circuits militates in favor of granting certiorari. BIO, pp. 14-17. The First Circuit specifically found that Hensley's federal habeas petition claiming the admission of an autopsy report at trial violated his right to confrontation "fail[ed] from its starting presumption" because of the "unsettled nature of the issue at hand." *Hensley v. Roden* 755 F.3d 724, 732-33 (1st Cir. 2014). We maintain that, both at the time of the New York court's decision and now, it is not clearly established how this Court's various iterations of the primary purpose test will apply to "the panoply of crime laboratory reports," including the autopsy report at issue here, and the Second Circuit was incorrect in concluding otherwise. *Williams*, 567 U.S. at 86 (Breyer, J., concurring).

Garlick misapprehends the import of the lower court divide on the issue in the wake of *Williams.* The People have never argued that the mere existence of outlier lower court decisions must foreclose a finding that the law is clearly established under 28 U.S.C. § 2254(d)(1). Rather, the People have highlighted the lower court divide simply to show that the panel should have concluded this Court's decisions have not "clearly established" a governing test. *Carey v. Musladin*, 549 U.S. 70, 76 (2006) ("Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment of defendants' spectator-conduct claims").

THE APPELLATE DIVISION DID NOT CABIN ITS REASONING TO THE ONE RATIONALE ARTICULATED IN ITS OPINION

Garlick insists the panel properly limited its focus to the example specified in the Appellate Division's decision — that the report was not inherently accusatory — to conclude that the state court misapplied clearly established federal law. Relying on *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), Garlick claims that it would have been impermissible for the panel to look beyond the four corners of the decisional language to ascertain the rationales that drove the state court's conclusion that the report was not testimonial. BIO, pp. 20-22. Garlick is incorrect.

In *Wilson*, this Court held that when the highest state court issues an unexplained order affirming a conviction, the federal court should not theorize about the rationales that could have supported the state court's finding, but must "look through" to the last reasoned decision to determine the actual reasons for the higher court decision and presume that the higher court relied exclusively on that reasoning. 138 S. Ct. at 1195-96. At the same time, the Court recognized that the "look through" presumption might "not accurately identify the grounds for the higher court's decision." *Id.* at 1196. For that reason, it reaffirmed that the "look through" presumption was a rebuttable one that could be overcome by evidence showing that it was "obvious from the state-court record" that the higher State court relied on other grounds. *Id.*, citing *Ylst v. Nunnemaker,* 501 U.S. 797 (1991).

Garlick advances a hyper-technical reading of the language in the state court's opinion but offers nothing to

counter the People's argument that the Appellate Division and Court of Appeals undoubtedly relied on additional grounds beyond the one cited in the decision to conclude that his confrontation claim lacked merit.[4] Pet., pp. 24-29. The Appellate Division stated that the autopsy report was properly admitted without the testimony of the former medical examiner "since the report, which '[did] not link the commission of the crime to a particular person,' was not testimonial." Pet. App. D: 129a, quoting *People v. John*, 52 N.E.3d 1114, 1128 (N.Y. 2016). Given the use of the relative clause, properly punctuated by commas at both ends, clearly the court did not rest its holding exclusively on the one factor it cited in this memorandum opinion.

Further, the Appellate Division's quotation of *John*, decided just seven months prior, demonstrates its commitment to dutifully applying this Court's precedents. In *John*, New York's highest court assessed *Crawford*, *Melendez-Diaz*, *Bullcoming*¸ and *Williams* to address John's claim that the lab reports regarding DNA profile evidence were testimonial. The court acknowledged that

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4. This claim is preserved. BIO, pp. 19-20. Lee argued in the District and Circuit Courts that the Appellate Division's decision does not set forth a complete recitation of the New York rule and the other factors underlying it by citing to earlier cases. District Ct. Mem. of Law in Opp'n, pp. 6, 15-17; Appellant Br. 38-40; Reply Br., p. 18. In any event, Garlick seeks to shift the burden onto Lee, who was not required to establish the reasonableness of the state court's holding. Rather, the burden was on Garlick to show the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods v. Donald*, 575 U.S. 312 (2015), quoting *Harrington v. Richter*, 131 S.Ct.,770, 786-787 (2011).

the correct test was the primary purpose test and that the report was testimonial. *Id.* at 1126-27. However, the court also observed that this Court's primary purpose test had not undermined its earlier holding addressing autopsy reports in *People v. Freyincet*, 892 N.E.2d 843, 862 (N.Y. 2008), "given 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." 52 N.E.3d 1114, at 1128 (internal quotations omitted). Thus, the Appellate Division's citations to *John* and *Freycinet* clearly demonstrate that it relied upon the analytical framework of those cases when it rejected Garlick's claim.

While Garlick now argues that the Appellate Division solely relied on the non-accusatory theory to find the autopsy report was non-testimonial, his prior briefing shows that he never understood that to be the sole basis of the court's decision, and his adoption of this view now is a post-hoc rationalization for the Second Circuit's reasoning. In his appellant's brief on direct appeal, Garlick squarely challenged all the factors relied upon in *Freyincet*. Garlick State Appellant Br. pp. 39-55. Garlick similarly challenged the application of these same factors in his application for discretionary review to the New York State Court of Appeals. Garlick Leave Application. pp. 6-16. These courts were undoubtedly familiar with the holdings of their prior decisions, which reflected bona fide efforts to dutifully apply this Court's precedents in a still-evolving area of the law.

Accordingly, this Court should address whether the autopsy report's admission was an "extreme malfunction"

in the criminal justice system" that justified habeas relief (*Harrington v. Richter*, 131 S.Ct. 770, 786-87 [2011]), or whether the panel instead violated the principles of comity that AEDPA demands. *Williams v. Taylor*, 529 U.S. at 381.

THE SECOND CIRCUIT VIOLATED THE CORRECT HARMLESS ERROR STANDARD

This Court should also grant certiorari to address whether a surveillance video showing Garlick repeatedly thrusting an object into the victim's chest and the incriminating statements he made to police upon arrest rendered any such error harmless. *Brecht v. Abrahamson* 507 U.S. 619 (1993). Garlick asserts that the error could not be harmless because the report was admitted "for the truth of the matter asserted." BIO, pp. 29-30. Garlick's argument ignores that the content of the report, including its ultimate conclusion, was introduced as substantive evidence at the behest of his trial counsel after he rejected the prosecutor's proposal that the report only be admitted as a business record to provide a foundation for the testifying expert's independent opinions and conclusions (Pet. App. F: 142a-144a).

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Whether the panel and Garlick are correct that *Melendez-Diaz* and *Bullcoming* "clearly established" the factors an AEDPA court must rely upon to evaluate the testimonial nature of autopsy reports requires an answer that only this Court can provide. This Court should grant certiorari to clarify the state of the law as to the meaning of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.

§ 2254(d)(1) and otherwise correct the Circuit's erroneous decision.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 2022