

APPENDIX B

COPY

15-3831

United States Court of Appeals
for the Second Circuit

KENNETH WASHINGTON,

Petitioner-Appellant,

- against -

THOMAS GRIFFIN,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

LYNN W.L. FAHEY
Attorney for Petitioner-
Appellant

APPELLATE ADVOCATES
111 John Street, 9th Floor
New York, N.Y. 10038
(212) 693-0085 ext. 211

Dated: April 21, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE	2
STATEMENT OF THE CASE	
A. <u>Procedural History</u>	2
B. <u>Statement of Facts</u>	3
<u>Introduction</u>	3
<u>The Trial</u>	4
<u>The Whitaker Burglary</u>	4
<u>The Gonzalez Burglary</u>	5
<u>The Brown Burglary</u>	5
<u>Evidence Sent for DNA Testing and Matching of DNA Profiles</u> .	6
<u>The OCME Buccal Swab DNA Testing File</u> <u>(People’s Exhibit 39)</u>	10
<u>The Prosecutor’s Summation</u>	11
<u>Charge, Deliberations, Verdict and Sentence</u>	12
<u>The Appeal to the Appellate Division, Second Department</u>	12
<u>The Application for Leave to Appeal to the New York State</u> <u>Court of Appeals</u>	13

<u>Proceedings in the District Court</u>	14
<u>The District Court’s Decision Denying the Petition</u>	17
SUMMARY OF THE ARGUMENT	19
ARGUMENT	
THE STATE TRIAL COURT VIOLATED APPELLANT’S SIXTH AMENDMENT RIGHTS UNDER <u>CRAWFORD</u> v. <u>WASHINGTON</u> , 541 U.S. 36 (2004), WHEN IT ADMITTED INTO EVIDENCE A DNA REPORT THAT INCLUDED STATEMENTS MADE BY ANALYSTS WHO DID NOT TESTIFY AT TRIAL	24
A. <u>The United States Supreme Court Has Clearly Established that Statements Made By Forensic Analysts for the Primary Purpose of Establishing a Fact to Be Used in a Criminal Proceeding Against a Targeted Suspect are Testimonial and Subject to Cross-Examination</u> ..	26
B. <u>The Plurality Decision in <i>Williams v. Illinois</i>, 126 S. Ct. 2221 (2012), Did Not Alter the Clearly-Established Primary Purpose Rule of the Cases That Preceded It or Affect Its Applicability to DNA Testing Statements</u>	33
C. <u>The Statements Contained in the DNA Report Admitted Into Evidence at Mr. Washington’s Trial Through the State’s Expert Witness Were Testimonial</u>	37
D. <u>The Appellate Division’s Holding that the Statements Made By Non- Testifying Analyst Who Tested Mr. Washington’s Buccal Swab Were Not Testimonial Was Contrary to, and Involved an Unreasonable Application of, Federal Constitutional Law as Clearly Established By the Supreme Court of the United States</u>	43
CONCLUSION	52
ADDENDUM	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bullcoming v. New Mexico</u> , 131 S.Ct. 2705 (2011)	<u>passim</u>
<u>Carrington v. District of Columbia</u> , 77 A.3d 999, 1005 (D.C. 2013)	37
<u>Crawford v. Washington</u> , 541 U.S. 36 (2004)	37
<u>Davidson v. State</u> , Number 58459, 2013 WL 1458654 (Nev. Apr. 9, 2013)	37
<u>Davis v. Washington</u> , 547 U.S. 813 (2006)	14, 19, 24, 26, 32
<u>Francis S. v. Stone</u> , 221 F.3d 100 (2d Cir. 2000)	48
<u>Harrington v. Richter</u> , 562 U.S. 86 (2011)	48, 49, 52
<u>Henry v. Poole</u> , 409 F.3d 48 (2d Cir. 2005)	44
<u>Hittson v. Chatman</u> , 135 S.Ct. 2126 (2015)	44
<u>Hoi Man Yung v. Walker</u> , 468 F.3d 169 (2d Cir. 2006)	48
<u>Howard v. Walker</u> , 406 F.3d 114, 122 (2d Cir. 2005)	48
<u>Jean v. Green</u> , 523 Fed. Appx. 744 (2d Cir. 2013)	46
<u>Lockyer v. Andrade</u> , 538 U.S. 63 (2003)	26, 44, 51
<u>Lyndh v. Murphy</u> , 521 U.S. 320	48
<u>Martin v. State</u> , 60 A.3d 1100 (Del. 2013)	36
<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. 305 (2009)	<u>passim</u>
<u>Michigan v. Bryant</u> , 562 U.S. 344 (2011)	38, 39
<u>Ohio v. Clark</u> , 135 S.Ct. 2173 (2015)	39

<u>Ohio v. Roberts</u> , 448 U.S. 56 (1980)	27
<u>People v. Dail</u> , 69 A.D.3d 873 (2d Dept. 2010)	13, 23, 45, 49
<u>People v. Pealer</u> , 20 N.Y.3d 447 (2013)	45, 51
<u>People v. Rawlins</u> , 10 N.Y.3d 136 (2008)	45, 50
<u>Porter v. McCollum</u> , 538 U.S. 30 (2009)	44
<u>Renico v. Lett</u> , 559 U.S. 766 (2010)	49
<u>State v. Frazier</u> , 735 S.E.2d 727 (W. Va. 2012)	37
<u>State v. Navarette</u> , 294 P.3d 435 (N.M. 2013)	37
<u>United States v. James</u> , 712 F.3d 79 (2013)	17, 21, 36, 37
<u>White v. Woodall</u> , 134 S.Ct. 1697 (2014)	44, 51, 52
<u>Williams v. Illinois</u> , 132 S.Ct. 2221 (2012)	<u>passim</u>
<u>Williams v. Taylor</u> , 529 U.S. 362 (2000)	25, 26, 44, 45, 46, 48
<u>Woods v. Donald</u> , 135 S.Ct. 1372 (2015)	49
<u>Yarborough v. Alvarado</u> , 541 U.S. 652 (2004)	48, 49
<u>Young v. United States</u> , 63 A. 3d 1033 (D.C. 2013)	36

CONSTITUTIONS

U.S. Const., Amends. VI, XIV	25
------------------------------------	----

STATUTES

28 U.S.C. § 2254	26, 44, 45, 46, 48, 49
New York Civ. Proc. Law & Rues § 4518	10, 42

PRELIMINARY STATEMENT

This appeal is from the memorandum and order of United States District Judge Frederic Block of the Eastern District of New York, entered November 5, 2015, denying petitioner-appellant's petition for a writ of habeas corpus. The district court granted a certificate of appealability on the question "whether the Second Department's decision denying Washington's Confrontation Clause claim was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States" (A 6).

JURISDICTIONAL STATEMENT

The basis for subject matter jurisdiction in the district court was 28 U.S.C. §§ 2241 and 2254, which authorize the federal courts to entertain an application by a person in state custody pursuant to the judgment of a state court for a writ of habeas corpus. Appellant raised a Confrontation Clause claim under the Sixth Amendment.

This court has appellate jurisdiction pursuant to 28 U.S.C. §§ 2253 and 2254. This is an appeal from a final order, entered November 5, 2015, that disposed of all claims with respect to all parties. The district court granted a Certificate of Appealability in its decision denying relief and appellant filed a timely Notice of Appeal on November 30, 2015.

STATEMENT OF THE ISSUE

The issue on appeal is whether the state trial court violated appellant's Sixth Amendment right to confront witnesses against him by admitting into evidence a certified report by the Office of the Chief Medical Examiner of the City of New York concerning the DNA testing of appellant's cheek swab that contained statements made by analysts whom the State did not call to the stand and, therefore, were not subject to cross-examination by the defense. See Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

STATEMENT OF THE CASE

A. Procedural History

Appellant Kenneth Washington was convicted on January 19, 2011, after a jury trial, of first- and second-degree burglary, first- and second-degree assault, first-degree criminal sexual act and first-degree sexual abuse (12 counts in all, charged in a single indictment) involving three complainants. (Lasak, J., at trial and sentencing). He was sentenced to an aggregate 90 years in prison with 25 years of post-release supervision.

Mr. Washington perfected his appeal in the Appellate Division, Second Department on April 9, 2012, arguing three issues: (1) that the court improperly denied for-cause challenges against two prospective jurors, (2) that the court violated Mr. Washington's right to present a defense by precluding defense counsel from challenging the statistical

significance of DNA evidence, and (3) that the court violated Mr. Washington's rights under the Confrontation Clause by permitting the introduction of testimonial statements made by DNA analysts who were not subject to cross-examination at trial. The Appellate Division affirmed Mr. Washington's conviction on July 3, 2013 (A 20). He sought leave to appeal to the Court of Appeals on the same claim, but leave to appeal was denied on January 31, 2014.

Mr. Washington timely filed his petition for a writ of habeas corpus on February 6, 2015 (A 151). United States District Judge Frederic Block denied the petition on November 5, 2015, but issued a Certificate of Appealability (A 17-18).

B. Statement of Facts

Introduction

Petitioner was charged with three separate burglaries in which his identity was established solely by DNA evidence. A DNA profile from a cheek swab taken from Mr. Washington after his arrest for these charges was admitted in evidence, together with the underlying lab reports and DNA profiles developed from evidence found at each crime scene. The only expert witness to testify with regard to DNA testing and profiles admitted that she had not examined or tested the cheek swab at all and had done very little of the DNA testing on the crime scene evidence. Defense counsel argued, inter alia, that admission of the DNA report from the cheek swab violated Petitioner's federal

constitutional right to confront the witnesses against him, but the court overruled his objection. As a result, the expert was permitted to give her opinion that DNA profiles from the crime scenes matched Mr. Washington's cheek swab DNA profile.

The Trial

The Whitaker Burglary

Around 2:00 a.m. on August 17, 2006, New York City Police Detective Cassandra Whitaker awoke to see a man, whose face was covered and who wore a white T-shirt and socks on his hands, searching the jewelry box in her bedroom in her house at [REDACTED] Street in Queens County, New York (478-479, 489, 502-504, 545-547, 569). She tried to take her loaded gun from the night stand drawer without making noise, but the man grabbed her hand and, after repeatedly hitting her in the face, took the gun from her, hit her with it, and pushed her into the bathroom. Whitaker was bleeding profusely from her head and forehead and from around her eyes (490-497, 532-539, 568-569). He left the room, but when she tried to get up, he returned, hit her head with the gun, and stomped on her face. He turned her pocketbook upside down to empty it and searched her wallet, then left the room and closed the door (496-499, 540-541). Whitaker was taken to the hospital because of her injuries. When she returned home from the hospital a few days later, she found that jewelry, a MetroCard, and her gun and police shield, were missing (Whitaker: 505-509; Sandra Torres, M.D.: 576-583).

The Gonzalez Burglary

On December 5, 2006, when Luisa Gonzalez and her family returned to her apartment at [REDACTED] Street in Queens County, New York, they observed signs of an intrusion and noticed that all of her son's video games, several video game systems, a pair of sneakers, and two watches had been taken. They pointed out to the police two gloves that did not belong to them. Neither Gonzalez nor her son, Luis Alonzo, knew Mr. Washington (Gonzalez: 677-682, 685, 689-693; Alonzo: 886-891).

The Brown Burglary

On July 15, 2007, Stacy Brown was alone in her apartment at [REDACTED] Road. In the early morning hours she was awakened by a "loud thump." She noticed that some things had been moved but returned to bed (699-708, 754-755). When the telephone rang at about 1:00 p.m., she awoke to find a man wearing her white robe and with his face covered by a white towel or T-shirt. He forced her face down onto her pillow and held her down while he fondled her "butt" and his penis touched the outside of her anus (708-714). He punched and choked her, demanded money and jewelry, and tied a T-shirt around her face so she could only see downward, but could not see his face (713-716, 766-767). He wore socks on his hands during part of the incident (735, 762-763).

The man dragged Brown to the kitchen, where she saw the bottom of the refrigerator door open and heard him gulping, after which an iced tea container dropped to the floor (716-718, 767-769, 772). He brought her to another bedroom and beat and

choked her further, and again pressed his penis against her anus, until at some point, he left the bathroom. She then closed and locked the door, opened a window that was 8 feet off the ground, and climbed out head first (728-730, 734). She later learned that jewelry, money, and eyeglasses had been taken from the house (736-737).

Evidence Sent for DNA Testing and Matching of DNA Profiles

Later during the day of the Whitaker burglary, the police recovered a bloody white T-shirt, a bloody white sock, and a black stocking cap near the house. Whitaker said that those items looked like the ones worn by the burglar (516-517). The shirt was sent for DNA testing (Detective Patrick Curran: 398-407, 453-454; Detective Daniel Boggiano: 619-622, 635). Also sent for testing were the gloves found in Gonzalez's apartment and the iced tea container from Brown's residence (Detective Shamika Meadows: 640-652; Melvin Shaw: 782-784; Police Officer Yuan Ye: 796-801; Detective William Porter: 845-848).

The parties stipulated that Mr. Washington was not an identical twin and that, had witnesses been called from the New York State Police Forensic Biology Laboratory in Albany, they would have offered testimony and documentary evidence to establish that DNA profiles developed by the New York City Chief Medical Examiner's Office from a white T-shirt found near Whitaker's residence, a glove found in Gonzalez's apartment, and the iced tea container found in Brown's residence were "uploaded into the New York State DNA Index" and compared to DNA profiles in that index. Petitioner's "DNA profile is on file in that" Index and the three profiles from the crime scene evidence "matched

[Petitioner's] DNA profile contained in [that] Index on October 10, 2007.” New York State DNA Index personnel “then notified the New York City Police Department” about the matches (A 23-24). The court instructed the jury that “there are a variety of ways that an individual’s DNA profile may come to be included in the New York State DNA Index. How [Petitioner’s] DNA profile came to be included . . . is not a subject of this trial and is irrelevant to the proceedings. You must not speculate about or consider it in any way . . .” (A 24-25).

Detectives Curran and Rich Santangelo received a “notification” from New York State regarding Mr. Washington’s DNA database profile. After Santangelo arrested Mr. Washington on October 11, 2007, Curran took a buccal swab from Mr. Washington’s cheek and sent it to OCME for DNA testing (Curran: 424-427; Santangelo: 871-872).

Natalyn Yanoff, a DNA analyst at the Office of the Chief Medical Examiner (OCME), was deemed an expert in DNA analysis and forensic biology. She explained that a DNA profile consists of a string of numbers representing specific alleles, two of which may be found at each of up to 15 tested locations, or loci, on a person’s DNA, which actually has many more alleles at loci that are not tested. At the time of the testing in this case, OCME tested only 13 loci. Yanoff also said that sometimes an identification of alleles cannot be made at every loci tested (A 25-27, A 30-35, A 55-56, A 91-92).

OCME conducted testing on the crime scene evidence submitted to it from the Whitaker, Brown and Gonzalez crime scenes (A 36). The OCME files from those cases,

which contained “the evidence examination” and the “notes on all the DNA testing results,” were submitted as People’s Exhibits 33, 34, and 35 to be introduced into evidence (A 36-37). Yanoff admitted that she did not do all of the underlying testing and document preparation on which those reports were based (A 38-41). Although she scraped the T-shirt collar from the Whitaker burglary for DNA skin cells, she submitted the scrapings to others for testing (A 51-52), and she never personally examined the gloves from the Gonzalez burglary or the iced tea container from the Brown burglary prior to trial (A 75-76).

Defense counsel objected to the admission of those files on Confrontation Clause grounds, arguing that they were based on the work of non-testifying witnesses (A 41). When the prosecutor argued that Yanoff had written the DNA reports contained in the files and that the files were business records, counsel countered by arguing that the confrontation clause trumps the business record exception and that Yanoff had “relied upon data that was generated by other people and it was the development of that data that the defense has the right to challenge in open court” (A 43). Yanoff testified that she had, in fact, relied upon data generated by others in each case (A 44). The court overruled the objection and admitted People’s Exhibits 33, 34 and 35 into evidence (A 45). It also admitted into evidence, without objection, charts of the DNA profile that was developed from evidence recovered from the three crime scenes (A 55, A 64, A 72).

With respect to the T-shirt recovered from the Whitaker crime scene, Yanoff testified that allele readings could not be obtained at one of the 13 loci tested, and only one of the two alleles necessary for determining a DNA profile were obtained at three other loci, resulting in “inconclusive” results at those loci (A 58-59, A 117-23). And with respect to the gloves recovered from the Gonzalez crime scene, the scrapings had to be tested twice because there was not enough DNA recovered to rely on a single test (A 73). The testing of both shirt and gloves indicated the presence of DNA from another individual in addition to the “major donor” (A 58, A 73-74). These irregularities notwithstanding, Yanoff testified that the DNA profile associated with the crime scene evidence from each burglary was the same (A 65, A 75). She was also able to determine that the chances of that DNA profile recurring in more than one person were over one in one trillion (A 77).

The prosecutor then sought to introduce into evidence People’s Exhibit 39, the OCME file relating to testing done on Mr. Washington’s cheek swab (A 79, A 81). After defense counsel elicited that the testing done on the cheek swab sample had been done by other analysts, not by Yanoff (A 80-82), counsel made “the same objection I have had” (A 81). The court overruled the objection and admitted Exhibit 39 into evidence (A 81).

Yanoff then testified that, after reviewing the file, she compared the DNA profile developed from Mr. Washington’s cheek swab with the profiles developed from the crime scene evidence from the three burglaries and determined that “[t]hose profiles were the same” (A 83). She admitted, however, that if any of the inconclusive alleles from the T-

shirt testing were different from the alleles identified at those loci for Mr. Washington's profile, the DNA on the T-shirt could not have been his (A 122).

Nevertheless, according to Yanoff, the probability of a particular DNA profile being identified is calculated by multiplying the likelihood of the readings at a particular loci occurring by the likelihood of the readings for all the other loci in the profile occurring (A 142-43). Yanoff claimed that, based on the 13 loci with two readings in each location, the likelihood of Mr. Washington's profile appearing in the profiles from each burglary was one in more than one trillion (A 77-78, A 85). In fact, she claimed that results from only 10 loci would create a probability of less than one in a trillion that the particular profile would occur (A 88-91).

The OCME Buccal Swab DNA Testing File (People's Exhibit 39)

The first page of the cheek swab DNA testing exhibit that was admitted into evidence was a Certification as a Business Record under Rule 4518 of the New York Civil Procedure Law & Rules that the file was compiled by a governmental office "in the regular course of business" (A 381). In addition to various print-outs of testing results, the file contained a "Forensic Biology - Report Route Sheet" stating that Kenneth Washington was the suspect and listing three complaint numbers and three complainants, two of whose names were redacted and the third, Whitaker's, was referred to by the number UC 7615 (A 382; A 36). The report also included evidence tracking worksheets with statements concerning who handled the "DNA Buccal Swab Collection Kit," and in what order

analysts received the kit from another analyst and passed it on to the next analyst (A 391); a “Schedule of Analysis” indicating that four specific tests were to be conducted, out of approximately 13 tests that could have been conducted, and that they were conducted in a particular order: Process Exemplar; Extraction and Quantitation; DNA Typing; Compare to Submitted Exemplars — after which a report was to be written (A 392); a DNA/Serology Submission Tracking and Productivity Form indicating that a total of one item was examined, but 2 samples were submitted for DNA extraction, 2 samples were submitted for quantitation, 2 samples were amplified and interpreted at a total of 32 loci (A 393); a “Control Review Worksheet” indicating that control types Allelic Ladder, Positive Control, Amplification Negative, and two types of Extraction Negative 1, each “Pass[ed]” (A 404); and an “Exemplar Evidence Packaging and Exam Worksheet” indicating (1) that the cheek swab was contained in a white 7½" x 5" envelope labeled with voucher number R361863 and the name Kenneth Washington, which was inside a white 9" x 6" envelope sealed with tape labeled with the same voucher number, and (2) that two “cuttings” of the swab were made on April 22, 2010 (A. 417).

The Prosecutor’s Summation

The prosecutor argued that Petitioner’s guilt was proved by the DNA evidence, which is “the most reliable form of evidence on earth today” and “the gold standard in identification evidence” (1078). She contended that the “DNA testing was amazing, competent and certainly not bungled” (1104).

The prosecutor asserted that the DNA evidence proved Petitioner was the perpetrator, pointing to the specific matching allele numbers contained in the DNA profiles from the crime scenes and the cheek swab. She mentioned the stipulation that the crime scene DNA profiles matched Petitioner's New York State database profile only to state that it brought Petitioner to the attention of the police, who then took his cheek swab and sent it for DNA testing (1100-1101, 1103).

Charge, Deliberations, Verdict, and Sentence

The court submitted to the jury first-degree burglary (two counts), second-degree burglary, first-degree assault, and second-degree assault with regard to Whitaker; second-degree burglary with regard to Gonzalez; and first-degree burglary, second-degree burglary, first-degree assault, second-degree assault, first-degree criminal sexual act, and first-degree sexual abuse with regard to Brown (1123-1141). The jury convicted Mr. Washington on all counts (1157-1162).

The Appeal to the Appellate Division, Second Department

Mr. Washington argued in the Appellate Division, in pertinent part, that the trial court violated his Sixth Amendment Confrontation Clause rights, as set forth in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), when it admitted analyst statements about DNA testing performed on his cheek swab through an expert witness who had not performed the testing, thereby depriving him

of his right to confront the witnesses who had made the statements in the report. (A 224-26).

The State contended that the DNA profiles developed from the crime scene evidence were admissible under the then-recently-issued decision in Williams v. Illinois, 132 S.Ct. 2221 (2012), because those profiles “did not have the primary purpose of establishing the guilt of a targeted individual” (A 290). The State did not address the cheek swab evidence or discuss or cite Melendez-Diaz or Bullcoming.

Finding Mr. Washington’s Confrontation Clause claim to be “without merit,” the Appellate Division affirmed Mr. Washington’s conviction. Specifically, the court held that the trial court properly admitted the crime scene DNA reports because those were prepared prior to Mr. Washington’s arrest and, therefore, ““did not, standing alone, link [him] to the crime”” (A 21) (quoting People v. Dail, 69 A.D.3d 873, 875 [2d Dept. 2010]). The court went on to conclude that “the DNA profile generated from the swab of the defendant’s cheek, standing alone, shed no light on the issue of the defendant’s guilt in the absence of the expert’s testimony that it matched the profiles derived from the crime scene evidence” (A 21).

The Application for Leave to Appeal to the New York State Court of Appeals

In his August 8, 2013 application for leave to appeal to the Court of Appeals, Mr. Washington focused primarily on the Confrontation Clause claim (A 315-19). Specifically,

he argued that Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006), established that when statements are made for the “primary purpose” of establishing a fact that will be used in a later criminal prosecution, such statements are testimonial, triggering the protections of the Confrontation Clause (A 316-17). He also argued that, under Bullcoming v. New Mexico and Melendez-Diaz v. Massachusetts, statements based on testing of an arrested suspect’s DNA, resulting in a DNA profile that is matched against crime scene evidence, are testimonial because they were made in anticipation of their use in the criminal prosecution of that suspect (A 317). Leave to appeal was denied on January 31, 2014 (A 326).

Proceedings in the District Court

Mr. Washington based his petition for a writ of habeas corpus on United States Supreme Court precedent establishing that the Confrontation Clause protects a defendant against “testimonial” evidence untested by cross-examination. Crawford v. Washington, 541 U.S. 36, 49-55, 68 (2004). Specifically, he relied on Melendez-Diaz v. Massachusetts, 557 U.S. 305(2009), and Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), in which the Supreme Court established that reports of forensic testing may be, and was in those cases, testimonial (A 168-69; A 426-27). He also argued that the four-justice plurality decision in Williams v. Illinois, 132 S.Ct. 2221 (2012), was not to the contrary because in that case the reports concerned the DNA testing of crime scene evidence before the defendant was

identified, whereas in his case, the testing in question was of the defendant's own buccal swab after his arrest (A 168; A 429). The Williams plurality decision concluding that the crime scene testing reports were not testimonial was irrelevant because, unlike in Melendez-Diaz and Bullcoming, the reports in Williams did not have the primary purpose of accusing a targeted individual of engaging in criminal conduct (A 167; A 429).

Counsel pointed out that the DNA report in question was not merely a collection of charts and graphs printed out by machines during the testing process. The report also included statements that the buccal swab sample was sealed when delivered to OCME, that specific tests were done, that there was no contamination of the sample, that the sample packaging was properly labeled — statements that echoed those found to be testimonial by the Supreme Court in Bullcoming (A 431).

Finally, Mr. Washington argued that since the analysts who tested his post-arrest buccal swab had made statements that were meant to be used in the criminal case against him, those statements were testimonial under all of the applicable United States Supreme Court precedent (A 168; A 427). Since the State failed to call as witnesses at Mr. Washington's trial the laboratory employees who developed the DNA profiles from his cheek swab, the Appellate Division, Second Department's affirmance of his conviction on his direct appeal was contrary to, and an unreasonable application of, clearly established Supreme Court law (A 165, 168).

The State argued that the admission of the OCME reports did not violate the Confrontation Clause “as it has been defined by either the plurality or the concurring opinion in Williams” (A 366). First, the State argued that under the Williams plurality’s second rationale — that testimony about the reports did not violate the Confrontation Clause because the reports themselves were not introduced into evidence — Yanoff’s testimony did not violate the Sixth Amendment because the reports were not introduced for their truth, but only to explain her reasoning (A 366). It made that argument despite there having been no restriction on the use of the reports admitted into evidence at Mr. Washington’s trial.

Second, the State argued that “the primary purpose was to prepare the biological samples for processing in a machine” and that “no technician at the OCME’s office could have known if the profile she created would actually incriminate anyone” (367).¹ Claiming that Yanoff’s supervision of the process and analysis of the results distinguished this case from Bullcoming, the State also argued that the only statements not subject to cross-examination were machine-generated information that was not testimonial in nature (A 369).

¹ The State’s additional argument, that the statements in the DNA reports were not testimonial under Williams because they “did not have the primary purpose of establishing the guilt of a targeted individual” related only to the three crime scene evidence reports, which were not at issue because Mr. Washington had not challenged the admission of those reports in his petition (A 366).

Finally, they argued that because Williams was a plurality decision, its precedent was limited to Justice Thomas's concurrence, which required more formality than the mere certification as a business record. Since the DNA reports in this case were not sworn affidavits, they were not testimonial under Williams (A 372; A 322, 326).

The District Court's Decision Denying the Petition

In its written decision, the district court acknowledged that Mr. Washington had "objected to the admission of Yanoff's reports and testimony because it relied on the DNA profiles generated by testing that Yanoff did not personally perform" (A 8), and found that the Appellate Division, Second Department had rejected Mr. Washington's Confrontation Clause challenge because "the DNA profile generated from the swab of the defendant's cheek, standing alone, shed no light on the issue of the defendant's guilt in the absence of the expert's testimony that it matched the profiles derived from the crime scene evidence" (A 9; see A 21).

After reviewing the applicable United States Supreme Court precedent, the district court concluded that "[a]fter Williams, . . . the Supreme Court's Confrontation Clause jurisprudence is hardly a model of clarity" (A 13). The court relied heavily on Justice Kagan's frustration, voiced in her dissenting opinion, that the Melendez-Diaz and Bullcoming decisions "apparently no longer mean all that they say" (Williams, 132 S.Ct. at 2277 (Kagan, J., dissenting)), and on this Court's observation in United States v. James, 712

F.3d 79, 95 (2013), that “Williams does not, as far as we can determine . . . yield a single, useful holding relevant to the case before us” (A 13, 14), in determining that it could not conclude that the state courts had unreasonably applied clearly established Supreme Court law (A 13-14, 17). Its decision was also based on other considerations discussed in the Williams plurality decision, such as whether individual technicians could anticipate the consequences of their actions or know whether what they do and say will be incriminating, and whether, when work is divided among multiple analysts, their conclusions somehow become less testimonial (A 15). The district court concluded from that discussion that “whether the plurality would hold that the primary purpose of those preparing Washington’s DNA profile implicated the Confrontation Clause is, at the very least, debatable” (A 16). Finally, the court noted that the DNA report in this case “was no more ‘formal’ or ‘solemn’ than the report in Williams,” and so, there was no reason to believe that Justice Thomas would have joined the Williams dissenters in voting to find a Confrontation Clause violation (A 16-17). Accordingly, the court denied Mr. Washington’s petition but issued a Certificate of Appealability to this Court.

SUMMARY OF THE ARGUMENT

The Supreme Court announced a new jurisprudential approach to the Confrontation Clause when it decided Crawford v. Washington, 541 U.S. 36 (2004). The Court held that “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine,” but left “for another day any effort to spell out a comprehensive definition of ‘testimonial.’” 541 U.S. at 59, 68. That process began in earnest in Davis v. Washington, 547 U.S. 813 (2006), in which, finding one unsworn statement to the police testimonial and another not, the Court explained that statements

are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822 (emphasis supplied).

The Supreme Court applied what has come to be known as the “primary purpose” test to forensic evidence in a pair of cases involving the admission into evidence of written reports documenting the results of scientific tests. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307-308, 329 (2009), involved laboratory reports that identified substances seized from the defendant as cocaine. The Court concluded that those reports were testimonial because, quoting Crawford, 541 U.S. at 51-52, statements “made under circumstances

which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” were testimonial. 557 U.S. 310.

Similarly, in Bullcoming v. New Mexico, 131 S.Ct. 2705, 2717 (2011), the Court held that laboratory test results determining the defendant’s blood alcohol concentration were testimonial because “[a] document created solely for an ‘evidentiary purpose’ . . . made in aid of a police investigation, ranks as testimonial.” In Bullcoming, Justice Thomas joined the majority decision because the certification of the report for admission into evidence satisfied the additional factor of formality he believed was required before Confrontation Clause protections are implicated. See Melendez-Diaz, 557 U.S. at 329.

The Court had occasion to revisit the question in a case that involved a DNA report, but under circumstances very different from those in this case. In Williams v. Illinois, 132 S.Ct. 2221 (2012), the state courts permitted a DNA expert to testify at a bench trial that the DNA profile developed by an outside laboratory from a rape kit matched the DNA profile developed by the State laboratory from the defendant’s blood sample. Id. at 2227. The analyst who did the DNA testing of the rape kit did not testify, but the State introduced the results of the rape kit testing through a different analyst at the defendant’s bench trial. Id. The four Justices who had dissented in Melendez-Diaz and Bullcoming wrote a plurality opinion concluding that the statements in the rape kit report were not testimonial because they were made for the purpose of identifying a dangerous rapist, rather than “for the purpose of proving the guilt of a particular criminal defendant at trial.”

132 S.Ct. at 2243. The plurality recognized that Melendez-Diaz and Bullcoming had established that Crawford applied to statements made by forensic analysts but articulated the rule of those cases more narrowly than any formulation of it that had appeared in either of them: “formalized statements” of forensic analysts “having the primary purpose of accusing a targeted individual of engaging in criminal conduct” are testimonial. Id. at 2242.

In United States v. James, 712 F.3d at 96 (2d Cir. 2013), this Court found that the plurality opinion had not altered the constitutional principle of Melendez-Diaz and Bullcoming. That principle is that when the primary purpose of forensic testing is the development of evidence to be used in a criminal trial, formal statements made by the analysts who conduct the testing are testimonial. Id. at 96.

Because the testing of the buccal swab in this case was done after Mr. Washington was arrested and for the purpose of confirming that his DNA profile matched that developed from the crime scene evidence, the analysts’ statements were made both “for use at a later criminal trial,” see James, 712 F.3d at 96, and “for the purpose of accusing a targeted individual of engaging in criminal conduct.” See Williams, 132 S.Ct. at 2242. The testing process resulted in a report that contained statements that were certified for introduction into evidence at a trial just as the statements contained in the Bullcoming report were. As a result, regardless of whether the constitutional principle of Melendez-Diaz and Bullcoming is rendered as this Court did in James, or more narrowly as the

plurality justices did in Williams, there can be no doubt that the DNA report regarding the testing of Mr. Washington's buccal swab contained testimonial statements.

Nevertheless, the Appellate Division, Second Department, held that the analyst statements made during the buccal swab testing and introduced into evidence against Mr. Washington were not testimonial at the time they were made because no one had yet matched the crime scene profile to Mr. Washington's buccal swab profile such that there was a link between Mr. Washington's DNA profile and criminal conduct (A 21). That holding was an application of a rule that was contrary to even the most narrow articulation of governing principle of Bullcoming and Melendez-Diaz, namely, that statements made for the purpose of establishing evidence to be used against a targeted suspect are testimonial. Whether the statement, on its face, shed light on the defendant's guilt was irrelevant. As the Supreme Court said in Bullcoming, that a statement recounts the observations of a neutral party that are not adversarial does not except them from being subjected to confrontation. 131 S.Ct. at 2717. So long as they are made for the purpose of proving a fact to be used in a criminal proceeding, the statement is testimonial even it becomes "inculpatory only when taken together with the other evidence linking" the defendant to criminality. Melendez-Diaz, 557 U.S. at 313. Because the Appellate Division, therefore, applied a rule that conflicts with the governing principle clearly established in Bullcoming and Melendez-Diaz, its decision was "contrary to" "clearly established federal law as determined by the United States Supreme Court," 28 U.S. § 2254(d)(1), and the

district court's decision denying Mr. Washington's petition must be reversed. And since the facts of Bullcoming were materially indistinguishable from those of this case, the Appellate Division's decision reaching a result that is the opposite of the one reached by the Supreme Court in that case, its decision was "contrary to" clearly established Supreme Court precedent for that reason as well.

Even if the rule that the Appellate Division applied was not contrary to Supreme Court precedent, it certainly was an unreasonable application of it. The Appellate Division relied on a previous case, People v. Dail, 69 A.D.3d 873 (2d Dept. 2010), that found no Confrontation Clause violation with respect to the introduction into evidence of a DNA report because, "standing alone, [it] shed no light on the issue of the defendant's guilt in the absence of expert testimony that all of the profiles matched" (A 21). As was just explained, the Supreme Court has rejected the Dail reasoning. The Appellate Division's decision adopting that same argument in Mr. Washington's case, while ignoring the intervening Supreme Court law that expressly rejected it, was therefore unreasonable.

Because the Appellate Division's decision was both contrary to, and an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, the district court's decision denying Mr. Washington's petition for a writ of habeas corpus must be reversed.

ARGUMENT

THE STATE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHTS UNDER CRAWFORD v. WASHINGTON, 541 U.S. 36 (2004), WHEN IT ADMITTED INTO EVIDENCE A DNA REPORT THAT INCLUDED STATEMENTS MADE BY ANALYSTS WHO DID NOT TESTIFY AT TRIAL.

The Confrontation Clause protects a defendant against “testimonial” evidence untested by cross-examination. Crawford 541 U.S. at 49-55, 68 (2004). The Supreme Court has explained that statements are testimonial when they are “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 52. The Court later clarified that, in order for a statement to be testimonial, its “primary purpose” must have been to establish a fact for use in a criminal proceeding. Davis v. Washington, 547 U.S. 813, 822 (2006). In Bullcoming v. New Mexico, 131 S. Ct. 2705, 2716 (2011), and Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009), the Supreme Court held that statements of forensic analysts are subject to the same test for determining whether they are testimonial as any other statement.

In this case, at the behest of the District Attorney’s Office, non-testifying analysts at OCME developed a DNA profile from a buccal swab taken from Mr. Washington after his arrest on burglary charges. Although defense counsel objected to the admission of the buccal swab DNA evidence through an analyst who did not personally perform, supervise,

or even observe, any aspect of the DNA testing, the state trial court admitted a report containing this information into evidence and permitted the prosecutor to elicit facts contained in, and based on, the DNA report.

Under the Supreme Court's application of the primary purpose test in Melendez-Diaz and Bullcoming, the statements made by non-testifying OCME analysts who conducted DNA testing of Mr. Washington's buccal swab taken after his arrest were testimonial because they were certified and made for the primary purpose of establishing his DNA profile for use against him in a criminal prosecution. The state trial court's admission of those statements into evidence through an OCME expert who did not conduct that testing therefore violated Mr. Washington's Sixth Amendment right to confront witnesses against him, and the Appellate Division, Second Department's holding that there was no such violation was both contrary to, and involved an unreasonable application of clearly-established federal law as determined by the Supreme Court in Bullcoming and Melendez-Diaz. Because that Court's more recent case Williams v. Illinois, 132 S.Ct. 2221 (2012), did not alter the rule of Bullcoming and Melendez-Diaz with respect to the facts of Mr. Washington's case, the district court's decision denying his petition for a writ of habeas corpus must be reversed and the petition granted. U.S. Const., Amend. VI, XIV; N.Y. Const. Art. 1, § 6; Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); Crawford v. Washington, 541 U.S. 36 (2004); Williams v. Taylor, 529 U.S. 362 (2000).

A. The United States Supreme Court Has Clearly Established that Statements Made By Forensic Analysts for the Primary Purpose of Establishing a Fact to Be Used in a Criminal Proceeding Against a Targeted Suspect are Testimonial and Subject to Cross-Examination.

The United States Supreme Court has defined “clearly established Federal Law, as determined by the Supreme Court” under 28 U.S.C. § 2254(d)(1), to be “the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” Lockyer v. Andrade, 538 U.S. 63, 71 (2003). So long as the Supreme Court has “broken sufficient legal ground to establish an asked-for constitutional principle,” there is clearly established federal law on which the habeas corpus petitioner can rely. Williams v. Taylor, 529 U.S. 362, 381 (2000).

The governing constitutional principle on which Mr. Washington relies derives from the Supreme Court’s first formulation of the post-Crawford test for determining whether a statement is testimonial in Davis v. Washington, 547 U.S. 813 (2006), a case involving police interrogation. The Davis Court explained that out-of-court statements

are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822.

The question with which the Supreme Court was presented in Melendez-Diaz was whether a different rule should govern cases involving statements made by forensic analysts when they conducted scientific tests relating to a criminal charge. In that case, the

defendant was arrested under circumstances indicating he was in possession of a controlled substance. 557 U.S. at 308. The police sent the substance recovered during his arrest to a state laboratory for chemical analysis to determine whether it was, in fact, a controlled substance. Id. The Court unequivocally held that because that testing was to be used in a criminal proceeding against the defendant, statements made by forensic analysts who conducted it were testimonial. Id. at 511. The Court noted that the forensic analysts' statements fell within the core class of testimonial statements described in Crawford, and specifically rejected the notion that the "resul[t] of neutral, scientific testing" should be treated differently because of its presumed reliability, and derided that argument as an "invitation to return to [the] overruled decision" of Ohio v. Roberts, 448 U.S. 56, 66 (1980).

The Melendez-Diaz Court also specifically rejected two other arguments for admitting the results of scientific testing without affording the defendant the opportunity to cross-examine their authors. First, it held that whether the statements of forensic analysts directly accuse the defendant of wrongdoing and, therefore, are "accusatory," is irrelevant. 577 U.S. at 312. The argument that such statements are not testimonial because they become inculpatory only "when taken together with other evidence linking petitioner to the contraband" "finds no support in the text of the Sixth Amendment or in our case law." Id. at 313. Instead, the Court held that formal statements made during forensic testing are inadmissible absent an opportunity to cross-examine those who made them. Id. at 311, 328.

The Court also rejected the notion that the reports of forensic analysts are admissible without confrontation as “business records admissible at common law.” Melendez-Diaz, 577 U.S. at 321-22. Thus, even if the reports in that case qualified as business records, “their authors would be subject to confrontation nonetheless.” Id. at 321. As the Court explained,

[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. In contrast, the affidavits written by the analysts who concluded that the substance possessed by the defendant in Melendez-Diaz was cocaine were made for the express purpose of establishing a fact that would be available for use in a criminal proceeding against them. Id. at 324. Accordingly, the analysts’ affidavits were “testimonial statements” and the analysts witnesses such that their statements were inadmissible unless the analysts were subject to cross-examination at trial. Id.

Justice Thomas expressly joined the Melendez-Diaz majority opinion, and thereby adopted its reasoning. He wrote separately to voice his belief that there is an additional requirement beyond those announced by the majority, namely, that the statements be “formalized” in the way that sworn testimony and affidavits are. Melendez-Diaz, 577 U.S. at 329-30. No other Justice on the Court has adopted that view.

The Supreme Court revisited the issue two years later, in Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), a case involving the admissibility of a blood-alcohol analysis report. Bullcoming was arrested when, following an automobile accident, responding police officers smelled alcohol on his breath and administered a field sobriety test, which Bullcoming failed. Id. at 2710. When he then refused to take a breathalyzer test, the police obtained a warrant authorizing a blood alcohol test, obtained a blood sample from him, and sent it to a state laboratory for analysis. Id. The laboratory compiled a report concluding that Bullcoming's blood-alcohol content was .21 grams per hundred milliliters, "an inordinately high level." Id.

The laboratory report in question contained analyst statements both about the ultimate result of the testing, namely the alcohol content of Bullcoming's blood, and about the testing protocol itself. Id. at 2710-11. The report was admitted into evidence, not through the testimony of the analyst who wrote the report and made those statements, but through a different analyst who, while familiar with testing protocol, had neither conducted, nor witnessed, the testing of Bullcoming's blood sample. Id. at 2711.

The New Mexico Supreme Court found that, under Melendez-Diaz, the blood-alcohol report was testimonial because it was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." State v. Bullcoming, 147 N.M. 487, 226 P.3d at 8 (2010). That court nevertheless concluded that the report was admissible through a surrogate witness because the original certifying

witness was “a mere scrivener” who “simply transcribed the results generated by the gas chromatograph machine” and because the proffered witness was an expert with respect to the “established laboratory procedures” applicable to the testing the certifying analyst had conducted. Id. at 9, 10.

The United States Supreme Court, however, rejected that conclusion, explaining that even though “the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment, . . . the comparative reliability of an analyst’s testimonial report does not overcome the Sixth Amendment bar.” Bullcoming, 131 S.Ct. at 2715. The Court reaffirmed what it had stated in Melendez-Diaz, that the presumed reliability of a scientific testing process “does not dispense with the Confrontation Clause”:

the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess “the scientific acumen of Mme. Curie and the veracity of Mother Teresa.”

Id. at 2715 (quoting Melendez-Diaz, 577 U.S. at 319 n. 6). As the Court stated in Crawford, the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing [that evidence] in the crucible of cross-examination.” 541 U.S. at 61.

The Bullcoming Court also found that the blood-alcohol report was not merely a scrivener’s record of a machine-generated number. Rather, the certifying analyst had stated

that the seal on the sample had been unbroken, that he had checked the sample number against the report number, and that he had performed a particular test according to a precise protocol. Bullcoming, 131 S.Ct. at 2714. That analyst had also conveyed, by leaving the “remarks” section blank, that nothing had interfered with “the integrity of the sample or . . . the validity of the analysis.” Id. These representations, the Court stated, which related to “past events and human actions not revealed in raw machine-produced data, are meet for cross-examination.” Id.

In an attempt to alter the Supreme Court’s view about the testimonial nature of scientific evidence, the State repeated an argument the Court had already rejected in Melendez-Diaz, that the affirmations made by the certifying analyst that were used in the prosecution of Bullcoming were not testimonial because they were “simply the observations of an ‘independent scientis[t]’ made ‘according to a non-adversarial public duty.’” Bullcoming, 131 S.Ct. at 2717 (quoting Brief for Respondent). Once again, the Supreme Court made clear that a statement that is “created solely for an ‘evidentiary purpose’” and “made in aid of a police investigation, ranks as testimonial.” Id. (quoting Melendez-Diaz, 129 S.Ct. at 2532). That the statement was made by a laboratory technician was irrelevant.

The Court also specifically rejected any argument that the protections of the Confrontation Clause are available only when the statements in question were made under oath. Bullcoming, 131 S.Ct. at 2717. Harkening back to Crawford, the Court pointed out

that permitting the introduction of testimonial statements merely because they were not sworn “would make the right to confrontation easily erasable.” Id. (citing Crawford, 541 U.S. at 52-53 n. 3; Davis, 547 U.S. at 830-31 n. 5).

Notwithstanding his belief that statements must have the solemnity of sworn statements in order to be testimonial, see Melendez-Diaz, 577 U.S. at 329-30, a belief shared by no other justice, Justice Thomas voted with the majority in Bullcoming to find the forensic analysts statements testimonial. The analyst who conducted the testing of a blood sample taken from the defendant to determine his blood-alcohol content prepared and signed a certificate concerning the results of his analysis. 131 S.Ct. at 2717. That document, which headed the report, “contains a legend referring to the municipal and magistrate courts’ rules that provide for the admission of certified blood-alcohol analyses.” Id. Justice Thomas, along with the rest of the majority, found this to be the functional equivalent of the affidavits that constituted testimonial statements in Melendez-Diaz. Id. The Bullcoming Court reiterated that the constitutional requirement of confrontation “‘may not [be] disregard[ed] . . . at our convenience,’” id. at 2718 (quoting Melendez-Diaz, 129 S.Ct. at 2540), and noted that any burden on the state was easily mitigated by notice-and-demand statutes or by having a second analyst retest the sample and testify about the results of the retest rather than those of a test he did not conduct or observe. Id.

In sum, just as it had in the targeted suspect case of Melendez-Diaz, the Supreme Court in Bullcoming, another targeted suspect case, again held that the certified statements

made by an analyst who conducted a scientific test to establish evidence for use in a criminal proceeding against him were testimonial, regardless of whether those statements were made under oath, appeared to be objectively reliable, or were accusatory on their face. Accordingly, the State's admission of those statements into evidence through a surrogate witness without providing the defense an opportunity to cross-examine the analysts who performed the testing, violated the Confrontation Clause.

B. The Plurality Decision in *Williams v. Illinois*, 126 S. Ct. 2221 (2012), Did Not Alter the Clearly-Established Primary Purpose Rule of the Cases That Preceded It or Affect Its Applicability to DNA Testing Statements.

in Williams v. Illinois, 132 S.Ct. 2221 (2012), the Supreme Court addressed the applicability of Crawford to DNA evidence under circumstances markedly different from those in Melendez-Diaz and Bullcoming. In Williams, the prosecution introduced into evidence at the defendant's bench trial the DNA profile developed from a rape kit before any suspect had been identified, as well as the defendant's DNA profile, developed from a blood sample taken from him after his arrest. The analyst who processed Williams's blood sample testified about the tests she used to develop his DNA profile, but no analyst testified concerning the DNA testing of the rape kit. Id. at 2229. Another analyst, who had played no role in any of the DNA testing, testified that the rape kit DNA profile matched Williams's DNA profile. Id. at 2227, 2230. The prosecution did not introduce into evidence the underlying DNA reports and the analyst who testified to the match did not vouch for the accuracy of the rape kit profile. Id. The question for the Supreme Court

was whether the rape kit evidence, which was tested before Williams was arrested, contained testimonial statements such that admitting the DNA results, without affording the defense the opportunity to cross-examine the analysts who tested it, violated the Confrontation Clause.

The four Justices who had dissented in Melendez-Diaz and Bullcoming issued a plurality opinion in favor of upholding the Illinois Supreme Court's decision that there was no Confrontation Clause violation regarding the rape kit DNA report on two grounds. First, the plurality concluded that the rape kit results had not been introduced into evidence for their truth, but merely as an explanation for the expert's opinion. Id. at 2228. Justice Kagan had anticipated that factual scenario in her concurrence in Bullcoming, see 131 S.Ct. at 2722, and it was the Court's main focus in Williams. Since the buccal swab DNA report was offered into evidence against Mr. Washington at his trial before a jury, and the statements in it were offered for their truth (see Part C at 38-39, post), that aspect of Williams has no bearing on this appeal.

Second, the Williams plurality reasoned that even if the rape kit DNA report had been offered into evidence for the truth contained therein at a jury trial, there would have been no Confrontation Clause violation because that report "was produced before any suspect was identified" and, thus, was intended "for the purpose of finding a rapist who was on the loose," rather than "for the purpose of obtaining evidence to be used against the petitioner." Id. at 2228. Critical to the plurality's opinion was the difference it

highlighted between the facts of Williams and those of Melendez-Diaz and Bullcoming, in which the forensic reports were testimonial because they were “made for the purpose of proving the guilt of a particular criminal defendant at trial.” 132 S.Ct. at 2243.

The plurality specifically articulated the rule to be derived from Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and its prior cases, as follows:

The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.

132 S.Ct. at 2242 (emphasis supplied). Thus, despite their disagreement that the primary purpose test extends to the testing of rape-kit evidence before a suspect has been identified, the four judges who had dissented in Melendez-Diaz and Bullcoming, and then comprised the Williams plurality recognized that, under those cases, statements made during the testing of a known suspect’s own buccal swab after his arrest and for the purpose of prosecuting him are testimonial. Thus, at most, the confusion to which Justice Kagan referred in her dissent, see Williams, 132 S.Ct. at 2277 (the plurality justices “left significant confusion in their wake”), and on which the district court relied heavily in finding the state court decision not to be unreasonable, involves just how far beyond the targeted suspect scenario the primary purpose test reaches. There was no confusion regarding the

application of the primary purpose test to the targeted suspect facts of Mr. Washington's case. Further, but for Justice Thomas's view of the formality aspect of testimoniality, a view not shared by any other justice, he agreed with the Williams dissent, as well as the Melendez-Diaz and Bullcoming majorities, that the primary purpose test is necessarily met when a targeted suspect's DNA is tested. Williams, 132 S.Ct. at 2255.

In United States v. James, 712 F.3d 89 95-96 (2d Cir. 2013), this Court questioned the reasoning of the Williams plurality limiting the coverage of Crawford to targeted suspects. But whatever its reservations about the Williams plurality opinion, the Court, recognizing that, at a minimum, the Confrontation Clause continued to apply as forcefully as it had in Bullcoming to statements "made with the primary purpose of creating a record for use at a later criminal trial." Id. at 96. That formulation of the rule clearly encompasses forensic testing for the purpose of developing evidence against a targeted suspect.

The post-Williams weight of authority in other jurisdictions finding Confrontation Clause violations when statements of non-testifying forensic analysts were admitted shows that Williams did not alter the constitutional principle established in Melendez-Diaz and Bullcoming. See Young v. United States, 63 A. 3d 1033, 1047-1048 (D.C. 2013) (testimony based on review of subordinates' work product in a lab is insufficient under the Confrontation Clause); Martin v. State, 60 A.3d 1100, 1108-1109 (Del. 2013) (testimony by "note-taking laboratory supervisor" "instead of having the testing analyst [] available for cross-examination" was the "kind of evasion" not tolerated by the Confrontation Clause);

Davidson v. State, No. 58459, 2013 WL 1458654, at *1-2 (Nev. Apr. 9, 2013) (unpublished decision finding that results of DNA testing performed by another analyst who could anticipate its use at a later trial was testimonial); Carrington v. District of Columbia, 77 A.3d 999, 1005 (D.C. 2013) (admission of urinalysis prepared to prove defendant was under the influence of drugs violated Confrontation Clause, which was not cured by ability to confront a witness who did not conduct the forensic tests); State v. Navarette, 294 P.3d 435, 436-37 (N.M. 2013) (cert. denied, 187 L. Ed. 2d 254 (2013) (expert testimony on whether the nontestifying medical examiner “followed the standard procedure” was impermissible under the Confrontation Clause); State v. Frazier, 735 S.E.2d 727, 731-732 (W. Va. 2012) (surrogate pathologist not permitted to relay conclusions of nontestifying pathologist). Thus, even after Williams, the rule remains that when the primary purpose of forensic testing is the development of evidence to be used in a criminal trial, formal statements made by the analysts who conduct the testing are testimonial, particularly if the testing relates to the DNA sample of a targeted suspect.

C. The Statements Contained in the DNA Report Admitted Into Evidence at Mr. Washington’s Trial Through the State’s Expert Witness Were Testimonial.

Under both the clearly-established primary purpose test as set forth in Melendez-Diaz and Bullcoming, which this Court recognized in James, and the even the more restrictive rendering of it articulated by the Bullcoming dissenters in the Williams plurality decision, the DNA report from the testing of Mr. Washington’s buccal swab contained

testimonial statements. Mr. Washington was already the targeted suspect when the testing was done and the report was sufficiently formal in both purpose and effect to approximate the kind of “out of court substitutes for trial testimony” the Supreme Court has found to be testimonial. Michigan v. Bryant, 562 U.S. 344, 358-59 (2011).

It is beyond dispute that the purpose of the testing of Mr. Washington’s buccal swab was to develop evidence to be used against him in a criminal prosecution. Not only had Mr. Washington already been arrested when his buccal swab was taken, the prosecution had already matched his New York State database DNA profile to the crime scene evidence in all three charged cases. Since the State had decided, for whatever reason, not to rely on that match to prove Mr. Washington’s guilt, it embarked on testing of his buccal swab to create evidence that would be introduced at trial, eliminating all doubt as to the purpose of the testing.² As the Supreme Court has recently held, in determining whether a statement

² The parties’ stipulation that the crime scene DNA profiles matched Mr. Washington’s profile in the New York State database did not constitute an admission that the profiles used for the comparisons were properly developed from the evidence or certified for use at trial. In order to use the comparison with the New York State database as evidence in chief, the State would have had to prove that the profile listed there for Mr. Washington had been derived properly from a sample taken from him, a fact that was not part of the stipulation. It was apparent that the State had no intention of proving that the database profile was, in fact, taken from him or that appropriate laboratory procedures were used in creating the profile. Rather, the stipulation was reached for the limited purpose of explaining to the jury why Mr. Washington was arrested and the court instructed the jury not to consider it as proof of guilt (A 25). Therefore, the only proven connection between the DNA profiles from the crime scenes and Mr. Washington was the evidence derived from the testing of his cheek swab, and that was the sole evidence of his guilt of the charged crimes.

passes the primary purpose test a court must consider “all of the relevant circumstances,” including whether some other purpose, such as responding to an emergency, could be found. Michigan v. Bryant, 562 U.S. 344, 369 (2011); see Ohio v. Clark, 135 S.Ct. 2173, 2180 (2015). Here, the only possible purpose of the report that was submitted to the District Attorney was that it would be used as evidence in Mr. Washington’s trial.

Nevertheless, in the district court, the State claimed that the analysts who developed the DNA profile from petitioner’s cheek swab did not have the primary purpose of creating evidence against petitioner because they had merely performed discrete steps in a scientific process (Response at 39). But the Supreme Court already dispensed with any such argument in Melendez-Diaz and Bullcoming, both of which were scientific testing cases that involved analysts performing discrete steps in a testing process. Insofar as the State was suggesting that the right of confrontation does not apply to scientific witnesses, the Melendez-Diaz Court emphasized that cross-examination of forensic experts is critically important because “[s]erious deficiencies have been found in the forensic evidence used in criminal trials.” Id. at 319. The Court continued,

[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency. . . . [and they] may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution.

Id. at 318. The Court explained that “[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.” 557 U.S. at 318-319.

Besides, the forensic analysts in this case made statements both about the results of their testing and about the attendant circumstances and procedures. The report indicated that Kenneth Washington was the suspect and listed three complainants, two whose names were redacted but a third, referred to by the number UC 7615, was known to the jury as Whitaker (A 382; A 36). The report also established the chain of custody of analysts who handled the “DNA Buccal Swab Collection Kit” (A 391), and indicated that four specific tests were to be conducted, out of approximately 13 tests that could have been performed, and that they were conducted in a particular order, after which a report was to be written (A 392). There were also statements indicating that two samples were cut from the one that had been submitted for testing and that both were subjected to extraction, quantitation, and amplification procedures, and were interpreted at a total of 32 loci (A 393). A Control Review Worksheet indicated that control types Allelic Ladder, Positive Control, Amplification Negative, and two types of Extraction Negative 1, were performed and each “Pass[ed]” (A 404). Finally, the report also indicated that the cheek swab was contained in a white 7½" x 5" envelope labeled with voucher number R361863 and the name Kenneth Washington, which was inside a white 9" x 6" envelope sealed with tape labeled with the same voucher number when received by OCME (A 417).

These statements mirrored the analyst statements the Supreme Court identified as being testimonial in Bullcoming:

Caylor certified that he received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number "correspond[ed]," and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol. . . . He further represented, by leaving the "[r]emarks" section of the report blank, that no "circumstance or condition affect[ed] the integrity of the sample or . . . the validity of the analysis."

131 S.Ct. at 2714 (internal citations omitted). The Court characterized those representations as "relating to past events and human actions not revealed in raw machine-produced data," and found them "meet for cross-examination." Id. That same conclusion is incontrovertible in this case.

As for the DNA report's formality, there can be no question that it contained statements akin to "prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations," a non-exhaustive list the Supreme Court has identified are governed by the Confrontation clause. Crawford v. Washington, 541 U.S. 36, 68 (2004). The report in this case had exactly the same indicia of formality the Supreme Court, Justice Thomas included, found was sufficient to trigger Confrontation Clause protections in Bullcoming. A certifying agent of OCME signed a "Certification as a Business Record" cover page to which the DNA report was attached attesting to the fact that the within records had been prepared in the regular course of OCME business (A 381).

The certifying agent also attested that she was certifying those records “according to Rule 4518 of the New York Civil Practice Law and Rules,” under which those records were “admissible in evidence under this rule and [was] prima facie evidence of the facts contained therein” “without the need for foundation testimony or further proof of authenticity or accuracy” unless objections to the record are made. C.P.L.R. §§ 4518(d) & (e). Thus, like the certificate in Bullcoming, the certificate in this case was a signed document that referred to statutory rules “that provide for the admission of” forensic evidence. 131 S.Ct. at 2717. By operation of statute, the DNA report in this case was as fully-certified as the one in Bullcoming was. 131 S.Ct. at 2717.

The State’s argument in the district court that the portion of the DNA report written by non-testifying analysts was not testimonial because it was not accompanied by a sworn affidavit (A 369), fails because the exhibit the State admitted into evidence was a single report certified as an official business record of the OCME, not a series of separate reports. Because the certification of that exhibit is signed by a designated OCME agent attesting, under C.P.L.R. § 4518, that it is “a true and accurate copy” of the original records maintained by OCME, the exhibit as a whole met the formality requirements outlined by the Supreme Court. Bullcoming, 131 S.Ct. at 2717; Melendez-Diaz, 557 U.S. at 310 (“Certificates of Analysis”).

Finally, the State argued in the district court that statements by DNA analysts in New York are not testimonial because they “had [no] purpose other than performing some

discrete step in the testing process” (A 367). Apart from the State’s failure to identify authority for that proposition, the argument collapses under its own weight. A state cannot evade the reach of the Confrontation Clause by assigning parts of an investigatory process, scientific or otherwise, to multiple participants. Police investigations typically involve several or many officers each conducting a discrete part of an investigation: securing the crime scene, evidence recovery, vouchering of evidence, submission of evidence for analysis, canvassing for witnesses, interviewing witnesses, searching for a defendant once he is identified, etc. When separate officers conduct separate parts of an investigation, no individual officer’s contribution to the investigation can be placed before a jury unless that officer testifies and is subject to cross-examination. To hold otherwise in the forensic analysis context would wreak havoc with respect to settled Confrontation Clause principles.

D. The Appellate Division’s Holding that the Statements Made By Non-Testifying Analyst Who Tested Mr. Washington’s Buccal Swab Were Not Testimonial Was Contrary to, and Involved an Unreasonable Application of, Federal Constitutional Law as Clearly Established By the Supreme Court of the United States.

Under the governing legal principle established in Melendez-Diaz and Bullcoming, unchanged in Williams, the statements made by the forensic analysts who tested Mr. Washington’s buccal swab after his arrest, and for the specific purpose of proving his guilt, were testimonial. The Appellate Division’s determination that Mr. Washington’s profile did not become inculpatory until the testifying expert matched it to crime scene evidence, and therefore that the certified report documenting the testing resulting in that profile

contained no testimonial statements, was both contrary to, and an unreasonable application of, clearly established law as determined by the Supreme Court.

(A)

Mr. Washington was entitled to have his petition for a writ of habeas corpus on petitioner's Sixth Amendment claims granted because the Appellate Division's decision affirming his conviction on the ground his rights under the Confrontation Clause were not violated was "contrary to" "clearly established federal law, as announced by the United States Supreme Court." 28 U.S.C. § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412-13 (2000); see White v. Woodall, 134 S.Ct. 1697, 1702 (2014). Since the Appellate Division explained its decision on Mr. Washington's Confrontation Clause claim, "a federal habeas court simply evaluates deferentially the specific reasons set out by the state court." Hittson v. Chatman, 135 S.Ct. 2126, 2127 (2015) (Ginsburg, J, concurring in the denial of certiorari); see Porter v. McCollum, 538 U.S. 30, 39-44 (2009).

A state court decision is "contrary to" clearly established Supreme Court precedent when "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or "if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Taylor, 529 U.S. at 413. Stated another way, a state court decision is contrary to federal law "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court cases. Id. at 405-06, quoted in Lockyer v. Andrade, 538 U.S. 63, 74 (2003); see Henry v. Poole, 409 F.3d 48, 68 (2d Cir.

2005) (“A state-court decision is ‘contrary’ to established federal law within the meaning of § 2254(d)(1) if it is ‘diametrically different’ from, ‘opposite in character or nature’ to, or ‘mutually opposed’ to the relevant Supreme Court precedent.” (quoting Taylor, 529 U.S. at 405)).

First, the Appellate Division’s decision was contrary to Supreme Court precedent because it “arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law.” Taylor, 529 U.S. at 413. The Appellate division’s explanation of its holding in this case was given in two parts. First, with respect to the crime scene DNA evidence, the court determined that statements made by non-testifying analysts were not testimonial because they were “prepared prior to the defendant’s arrest and ‘did not, standing alone, link [him] to the crime’” (A 21; quoting People v. Dail, 69 A.D.3d 873, 875 (2010)). Second, with respect to the buccal swab DNA evidence, the court held that

the DNA profile generated from the swab of the defendant’s cheek, standing alone, shed no light on the issue of the defendant’s guilt in the absence of the expert’s testimony that it matched the profiles derived from the crime scene evidence (id.; citing People v. Pealer, 20 N.Y.3d 447, 452-56 (2013); People v. Rawlins, 10 N.Y.3d 136, 159 (2008); Williams v. Illinois, 132 S.Ct. 2221, 2224 (2012).

While only the analyst statements made during the development of the buccal swab DNA profile are in question before this Court, the Appellate Division’s preliminary explanation concerning the crime scene DNA reports is illuminating in that it informs its decision on the buccal swab report. The Appellate Division clearly held that the analyst statements for

neither the crime scene nor buccal swab tests were testimonial at the time they were made because no one had yet matched the two such that there was a link between the profiles and Mr. Washington's criminal conduct. That holding ignored the fact that Mr. Washington was already a targeted suspect at the time his buccal swab was tested.

As described above, the rule on which Mr. Washington relies was clearly established in Bullcoming, 131 S.Ct. 2705, and Melendez-Diaz, 129 S.Ct. 2527 (see Part A, ante). Concisely stated, that rule is that formalized out-of-court statements made by forensic analysts that have the primary purpose of building a case against a targeted individual accused of engaging in criminal conduct are testimonial. See Williams, 132 S. Ct. 2242. The Appellate Division's explanation applied a rule that forensic statements made during testing done for the primary purpose of accusing a targeted individual are not testimonial unless they expressly accused the defendant of criminality. This was an additional restriction the Supreme Court had already rejected in Bullcoming, 131 S.Ct. at 2717, and Melendez-Diaz, 557 U.S. at 313. Accordingly, the Appellate Division's decision was "contrary to clearly established federal law as determined by the United States Supreme Court." 28 U.S.C. § 2254; Williams v. Taylor, 529 U.S. 362 (2000) (state court mischaracterized the ineffective assistance of counsel prejudice rule of Strickland); cf. Jean v. Green, 523 Fed. Appx. 744 (2d Cir. 2013) (finding state court decision not contrary to federal law because the state court had not applied harmless error standard that conflicted with Supreme Court precedent).

The Appellate Division's decision was also contrary to Supreme Court precedent because, although the facts in this case are materially indistinguishable from those in Bullcoming, the decision in this case was different from the Supreme Court's decision in that one. In both cases, after the defendant was arrested, the State caused a bodily sample to be extracted from the defendant and sent for forensic testing. In both cases that testing was requested by the State for the purpose of establishing a scientific fact to be used as evidence against the defendant. In both cases the analysts made statements not just about the substantive results of the testing, but also the protocol that was followed, including chain of custody, integrity of the sample's packaging, and what controls were performed. Id. at 14. In both cases the resulting report was accompanied by a signed certification that the records were official records admissible into evidence under cited statutory authority. Id. at 2717. And in both cases statements made by the forensic analysts were introduced into evidence at the defendant's trial through the testimony of a surrogate. See Bullcoming, 131 S.Ct. at 2712.

That the forensic testing done in this case involved DNA rather than blood-alcohol content is irrelevant for purposes of determining whether those statements were testimonial. Since the Appellate Division's decision that the forensic analyst statements in this case were not testimonial is the opposite of the Supreme Court's decision in Bullcoming on materially identical facts, it was "contrary to . . . clearly established federal

law as determined by the United States Supreme Court.” 28 U.S.C. § 2254(d)(1); Taylor, 529 U.S. at 413.

(B)

Mr. Washington is also entitled to relief under 28 U.S.C. § 2254(d)(1) because the Appellate Division’s decision “involved an unreasonable application of federal law as determined by the Supreme Court of the United States.” A state court makes an unreasonable application of federal law when it “‘correctly identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case,’ or refuses to extend a legal principle that the Supreme Court has clearly established to a new situation in which it should govern.” Hoi Man Yung v. Walker, 468 F.3d 169, 176 (2d Cir. 2006) (quoting Williams, 529 U.S. at 413).

The question is not whether all reasonable jurists would agree that there was error, but rather that there was “some increment of incorrectness beyond” mere error, Howard v. Walker, 406 F.3d 114, 122 (2d Cir. 2005) (quoting Williams, 529 U.S. at 411), that “need not be great.” Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000). Thus, under § 2254(d)(1), habeas relief should be granted when fairminded jurists cannot disagree about the correctness of a state court’s determination that a federal claim lacks merit. Yarborough v. Alvarado, 541 U.S. 652, 664 (2004), see Harrington v. Richter, 562 U.S. 86, 101 (2011). While the statute necessarily anticipates substantial deference to state court rulings, see Lyndh v. Murphy, 521 U.S. 320, 333 n. 7, the more specific the federal

constitutional principle in question is, the less leeway state courts will have in reaching outcomes that diverge from it. Renico v. Lett, 559 U.S. 766, 776 (2010).

In this case, the narrow Confrontation Clause rule at issue is substantially more specific than the more general rules regarding ineffective assistance of counsel, *see* Woods v. Donald, 135 S.Ct. 1372 (2015), and Harrington, 562 S.Ct. at 103, or custodial interrogation, *see* Yarborough 541 U.S. at 664, that have been at the forefront of recent § 2254(d)(1) cases. Given the more narrow rule at issue in this case, even assuming that the Appellate Division identified and applied the correct constitutional principle when it held that Mr. Washington's Confrontation Clause rights had not been violated by the introduction of the buccal swab DNA report through an analyst who did not prepare it, that decision was an unreasonable application of the governing legal principle established in Bullcoming and Melendez-Diaz.

First, that the Appellate Division relied primarily on People v. Dail, 69 A.D.3d 873 (2d Dept. 2010), in support of its holding that the crime scene DNA was not testimonial because it was not "linked" to Mr. Washington is telling since the Supreme Court had already specifically rejected that argument a year before Dail was decided. *See* Melendez-Diaz 129 S. Ct. at 2533 (finding no support for the proposition that analyst statements are not subject to cross-examination unless they link the defendant to a crime). The court's related (identical?) holding that the buccal swab DNA report was not testimonial because it shed no light on Mr. Washington's guilt until his profile was matched to the crime scene

was similarly rejected in Melendez-Diaz, 557 U.S. at 2534. Again, the Supreme Court specifically rejected the notion that statements need be “accusatory” in order to be subject to confrontation. Instead, the Court held that it is statements of witnesses against the defendant that are subject to cross-examination regardless of whether those statements are facially inculpatory. Melendez-Diaz, 129 U.S. at 2534.

Second, the Appellate Division’s citation to People v. Rawlins, 10 N.Y.3d 136, 139 (2008), was similarly revealing in that the Supreme Court had already rejected that reasoning as well. The Rawlins discussion to which the Appellate Division referred was, essentially, that statements made pursuant to scientific testing are unlike those that are typically the subject of Confrontation Clause protections, and thus fall outside the ambit of Sixth Amendment concern. In Melendez-Diaz, however, the Supreme Court held that forensic analysts who make statements pursuant to scientific testing for the purpose of establishing facts to be used in a criminal prosecution are testimonial regardless of their substance or reliability. 129 S.Ct. at 2532, 2533. The Court specifically reaffirmed that holding in Bullcoming, 131 S.Ct at 2717 (rejecting state arguments that analyst statements were merely the “inquisitorial” observations of “independent” scientists according to a “non-adversarial public duty”). Indeed, the Appellate Division’s citation to Rawlins for the scientific evidence exception proposition is ironic given that in another part of Rawlins, the Court of Appeals held that statements made by a fingerprint expert who analyzed the defendant’s

fingerprints were testimonial because they were offered to prove the defendant's identity as the perpetrator, 10 N.Y.3d at 157, just as was the case here.

Although it relied primarily on cases that were decided before Melendez-Diaz and Bullcoming changed the lay of the land, the Appellate Division also cited People v. Pealer, 20 N.Y.3d 447 (2013), a Vehicle and Traffic Law breathalyzer test case, and Williams. In Pealer, the statements in question all related to the working order and calibration of the breathalyzer machine that was used by the police to test the defendant's blood alcohol content. The New York State Court of Appeals held that the statements made pursuant to the testing of the breathalyzer machine were not testimonial because the purpose of the testing was to determine whether the machine could produce accurate results, an inquiry having nothing to do with whether results generated by the machine would be used in a criminal trial. And Williams, of course, involved crime scene testing in a cold case, not testing of a charged defendant's own DNA when he was a targeted suspect, as was the case here.

In sum, the Appellate Division adopted reasoning that had been rejected by the Supreme Court in both Melendez-Diaz and Bullcoming, and ignored those cases in favor of citation to contrary authority that pre-dated those controlling cases and to inapposite authority that did not bear on the issue before the court. Because the Appellate Division's decision was, therefore, "objectively unreasonable," see Lockyer v. Andrade, 538 U.S. 63, 75 (2003); see White, 134 S.Ct. at 1702, and "so lacking in justification that there was an

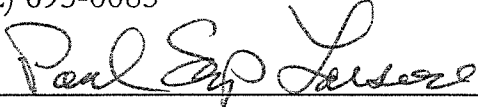
error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” Harrington v. Richter, 131 S.Ct. 770, 786-87 (2011); see White, 134 S.Ct. at 1702, the district court’s decision denying the writ should be reversed and this Court should grant Mr. Washington’s petition.

CONCLUSION

BECAUSE THE APPELLATE DIVISION’S HOLDING THAT THE ADMISSION INTO EVIDENCE OF A DNA REPORT THAT INCLUDED STATEMENTS MADE BY NON-TESTIFYING ANALYSTS WHO TESTED HIS BUCCAL SWAB AFTER HIS ARREST DID NOT VIOLATE HIS CONFRONTATION CLAUSE RIGHTS WAS CONTRARY TO, AND AN UNREASONABLE APPLICATION OF, FEDERAL LAW AS DETERMINED BY THE SUPREME COURT IN MELENDEZ-DIAZ v. MASSACHUSETTS AND BULLCOMING v. NEW MEXICO, THE DISTRICT COURT’S DENIAL OF HIS PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE REVERSED AND THE WRIT GRANTED.

Respectfully Submitted,

LYNN W. L. FAHEY
Appellate Advocates
111 John Street, 9th Floor
New York, NY 10036
(212) 693-0085


By: Paul Skip Laisure
Of Counsel
April 21, 2016

ADDENDUM

U.S. Const. Amend. VI

28 U.S.C. § 2254

N.Y. Crim. Proc. Law & Rules § 4518

Memorandum and Order of November 4, 2015 (Block, J.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
KENNETH WASHINGTON,

Petitioner,

-against-

THOMAS GRIFFIN, Superintendent,
Green Haven Correctional Facility,

Respondent.
-----X

MEMORANDUM AND ORDER

15-CV-603 (FB)

Appearances:

For the Petitioner:

JONATHAN M. KRATTER
Appellate Advocates
2 Rector Street
New York, NY 10006

For the Respondent

RICHARD A. BROWN
JOHN M. CASTELLANO
JOHNNETTE TRAILL
WILLIAM H. BRANIGAN
Queens County District Attorney's
Office
125-01 Queens Boulevard
Kew Gardens, New York 11415

BLOCK, Senior District Judge:

Kenneth Washington ("Washington"), currently serving a ninety-year sentence, petitions the court for a writ of habeas corpus. Washington asserts that the admission of a DNA profile during his trial violated his Sixth Amendment right to confrontation because he was not afforded the opportunity to cross-examine the lab technicians who generated it. For the following reasons, Washington's petition is denied.

I

On August 17, 2006, Cassandra Whitaker ("Whitaker") awoke to see a man

searching through her jewelry box. The man wore a white t-shirt, his face was covered, and he had socks on his hands. Whitaker reached for her loaded gun in her nightstand drawer, but the intruder grabbed her hand, took the gun, and repeatedly hit her in the face, causing her to bleed. After searching the contents of Whitaker's pocketbook and wallet, the man left the room. The police recovered a bloody white t-shirt near Whitaker's house, which was sent to the Office of Chief Medical Examiner ("OCME") for DNA analysis.

On December 5, 2006, Luisa Gonzalez ("Gonzalez") and her family returned to her apartment to find it had been burglarized. They identified for the police two gloves they found in the apartment that did not belong to them. The gloves were sent to OCME for DNA analysis.

On July 15, 2007, Stacy Brown ("Brown") awoke to find a man in her apartment wearing her white robe, with his face covered by a white shirt or towel. He forced her head down on the pillow, fondled her buttocks, and touched his penis to the outside of her anus. The man then beat Brown, demanded money and jewelry, and dragged her into the kitchen. Brown saw the bottom of the refrigerator door open, and could hear the man drinking; she then saw a container of iced tea drop to the floor. The intruder dragged Brown into the bathroom, continued to beat her, and then left the room. Brown locked the bathroom door and escaped through the window headfirst. As part of the subsequent police investigation, the iced-tea container was sent to OCME for DNA analysis.

OCME generated DNA profiles from human cells gathered from the evidence sent to it for analysis. A DNA profile is a string of numbers that represent the presence of specific variations in an individual's DNA sequence. *See* Tr. Trans. at 905.

It was determined that the DNA profile generated from the bloody white t-shirt, the gloves, and the iced-tea container each matched Washington's DNA profile on the New York State DNA Databank. He was arrested the next day. A police officer took a swab of Washington's cheek and sent it to OCME for DNA analysis. With respect to all three incidents, Washington was charged with numerous counts of burglary, assault, criminal sexual act, and sexual abuse.

During Washington's trial in New York State Supreme Court, Queens County, the State called Natalyn Yanoff, a DNA analyst from OCME, as an expert witness in DNA analysis and forensic biology. Although Yanoff did not personally conduct the laboratory testing to generate the DNA profiles, she prepared reports comparing the profiles derived from cells found on the bloody white shirt, the gloves, the iced-tea container, and Washington's cheek. She testified that each DNA profile matched. Yanoff further testified that the probability of this DNA profile appearing in a specific individual was one in greater than one trillion.

Washington objected to the admission of Yanoff's reports and testimony because it relied on the DNA profiles generated by testing that Yanoff did not personally perform.

The trial court overruled the objection, and the jury convicted Washington on all counts.

Washington was sentenced to serve ninety years in prison.

On appeal to the Second Department, Washington argued, among other things, that his Sixth Amendment right to confrontation was violated because he was not afforded the opportunity to cross-examine the lab technician that generated the DNA profile from his cheek swab. The Second Department rejected Washington's contention because "the DNA profile generated from the swab of the defendant's cheek, standing alone, shed no light on the issue of the defendant's guilt in the absence of the expert's testimony that it matched the profiles derived from the crime scene evidence." *People v. Washington*, 968 N.Y.S.2d 184, 187 (2d Dep't 2013) (citing, among others, *Williams v. Illinois*, 132 S. Ct. 2221, 2224 (2012) (plurality opinion)). The Court of Appeals denied leave to appeal. *See People v. Washington*, 22 N.Y.3d 1091 (2014).

Washington now petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the sole ground that the admission of the DNA profile generated from his cheek swab without an opportunity to cross-examine the lab technician that conducted the testing denied him his Sixth Amendment right of confrontation.

II

Washington's Confrontation Clause claim was adjudicated on the merits in state court. Accordingly, this Court may grant his petition only if the state court's adjudication of the claim "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). This is a very difficult standard to meet. Washington must show that the state court’s ruling on his Confrontation Clause claim “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

III

A. The Confrontation Clause

The Sixth Amendment guarantees a criminal defendant the right “to be confronted with the witnesses against him.” U.S. CONST. amend VI. For years, a defendant’s confrontation right was determined by whether the challenged evidence fell “within a firmly rooted hearsay exception.” *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). However, in *Crawford v. Washington*, the Supreme Court altered the legal landscape by holding that “testimonial” out-of-court statements may not be admitted without confrontation. 541 U.S. 36, 68 (2004) (“Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”). The Court left “for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.*

The Court began to shape the bounds of the meaning of “testimonial” in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). In *Melendez-Diaz*, the defendant was charged with distributing and trafficking cocaine. *Id.* at 308. The trial court admitted “certificates

of analysis” that stated the forensic results of testing performed on substances seized by the police. *Id.* The certificates, sworn to before a notary public by the laboratory analysts, affirmed the substances were cocaine. *Id.* The Supreme Court held that the certificates were testimonial and thus inadmissible unless the defendant was afforded an opportunity to cross-examine the laboratory analysts. *Id.* at 311. The Court explained that “[t]he documents at issue here, while denominated by Massachusetts law ‘certificates,’ are quite plainly affidavits: ‘declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.’” *Id.* at 310 (second alteration in original) (quoting BLACK’S LAW DICTIONARY 62 (8th ed. 2004)).

Subsequently, in *Bullcoming v. New Mexico*, a defendant charged with driving while intoxicated challenged the admission of a forensic laboratory report regarding the alcohol content in his blood. 131 S. Ct. 2705, 2710 (2011). The analyst also certified in the report the steps he engaged in to conduct the forensic testing. *Id.* at 2714. Despite not being sworn to before a notary, the Supreme Court noted why the report was sufficiently “formal” to be considered testimonial:

Here, as in *Melendez-Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations. Like the analysts in *Melendez-Diaz*, [the analyst] tested the evidence and prepared a certificate concerning the result of his analysis. Like the *Melendez-Diaz* certificates, [the analyst’s] certificate is “formalized” in a single document, headed a “report.” Noteworthy as well, the [report] form contains a legend referring to municipal and magistrate courts’ rules that provide for the admission of certified blood-alcohol analyses. *Id.* at 2717 (citations omitted).

Because “the formalities attending the ‘report of blood alcohol analysis’ [were] more than adequate to qualify [the analyst’s] assertions as testimonial,” *id.* at 2717, the report was inadmissible unless the defendant had an opportunity to cross-examine the analyst who prepared it.

Most recently, however, in *Williams v. Illinois*, a highly fractured Supreme Court held that a defendant’s right to confrontation was not violated when the prosecution’s expert witness’s testimony relied on a DNA profile that the expert did not personally prepare. 132 S. Ct. 2221, 2227, 2244 (2012) (plurality opinion). Writing for a four-justice plurality, Justice Alito opined that the confrontation clause was not triggered because (1) the DNA profile was an out-of-court statement that was not offered “to prove the truth of the matter asserted,” and (2) the primary purpose of the DNA report “was not to accuse petitioner or to create evidence for use at trial.” *Id.* at 2228, 2243 (plurality opinion). These two rationales were explicitly rejected by five justices, thus “in all except its disposition, [Justice Alito’s] opinion is a dissent.” *Id.* at 2265 (Kagan, J. dissenting).

Justice Thomas, concurring alone, provided a fifth vote for allowing the admission of the DNA profile because the DNA report “lacked the requisite ‘formality and solemnity’ to be considered “‘testimonial’” for purposes of the Confrontation Clause.” *Id.* at 2255 (Thomas, J. concurring) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J. concurring)). Justice Thomas distinguished the testimonial certificates in *Melendez-Diaz* and *Bullcoming* by noting that the DNA profile was not sworn to before a

notary, did not contain a “Certificate of Analyst” signed by the scientist who performed the testing, nor an affirmation regarding the procedures used when creating the DNA profile.

Id. (Thomas, J. concurring).

Lastly, writing for four dissenting justices, Justice Kagan would have held that under *Melendez-Diaz* and *Bullcoming*, the defendant had a Sixth Amendment right to cross-examine the technician that prepared the DNA profile. *Id.* at 2277 (Kagan, J. dissenting).

B. Washington’s Habeas Corpus Petition

As noted above, to obtain habeas corpus relief Washington must show that the state court’s judgment was an unreasonable application of “clearly established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1). After *Williams*, however, the Supreme Court’s Confrontation Clause jurisprudence is hardly a model of clarity. To the extent the Supreme Court announced a clear rule in *Melendez-Diaz* and *Bullcoming*, “that clear rule is clear no longer.” *Williams*, 132 S. Ct. at 2277 (Kagan, J. dissenting). As Justice Kagan explained dissenting in *Williams*:

The five Justices who control the outcome of today’s case agree on very little. Among them, though, they can boast of two accomplishments. First, they have approved the introduction of testimony at Williams’s trial that the Confrontation Clause, rightly understood, clearly prohibits. Second, they have left significant confusion in their wake. What comes out of four Justices’ desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice’s one-justice view of those holdings, is—to be frank—who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority. *Id.* (Kagan, J. dissenting).

The Second Circuit has opined that the fractured nature of *Williams* confines it to its facts such that *Melendez-Diaz* and *Bullcoming* remain controlling. *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 case before us. It is therefore for our purposes confined to the particular set of facts presented in that case.”); *see also Williams*, 132 S. Ct. at 2277 (Kagan, J. dissenting) (“[U]ntil a majority of this Court reverses or confines those decisions, I would understand them as continuing to govern, in every particular, the admission of forensic evidence.”). But even confining *Williams* to its facts does not clarify the law applicable to Washington’s claim because he challenges the admissibility of a DNA profile, the same type of evidence at issue in *Williams*. Moreover, the Second Circuit in *James* was not constrained—as the Court is here—by § 2254; it owed no deference to a state court decision, nor was it limited to applying “clearly established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254; *see generally James*, 712 F.3d at 87 (addressing the issues before the court on direct appeal).

Washington attempts to distinguish *Williams* by arguing that the plurality opinion would rule differently in his case because he was in custody when the DNA profile in question was generated. Indeed, the *Williams* plurality explained that the confrontation clause was not implicated in that case because the “primary purpose” of generating the DNA profile “was not to accuse petitioner or to create evidence for use at trial” when the petitioner “was neither in custody nor under suspicion” at the time the profile was

generated. *Id.* at 2243 (plurality opinion). Here, however, Washington was under arrest when the DNA profile was generated from his cheek swab. He asserts that because he was a “targeted individual[],” the *Williams* plurality would clearly find the profile to be inadmissible under the Confrontation Clause. Pet. at 27.

But whether the defendant was in custody was not the plurality’s only consideration for determining the primary purpose of the DNA profile; it also considered that “[w]hen lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. . . . The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.” *Williams*, 132 S. Ct. at 2244 (plurality opinion). And “in many labs, numerous technicians work on each DNA profile,” such that “[w]hen the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.” *Id.* (plurality opinion). Here, Yanoff testified that in the laboratory that generated Washington’s DNA profile, multiple analysts perform each test much like an “assembly line making a car.” Tr. Trans. 910. Moreover, the plurality explained that a DNA profile is “not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today.” *Williams*, 132 S. Ct. at 2228 (plurality opinion). In that vein, the Second Department specifically noted that “the DNA profile generated from the swab of the defendant’s cheek, standing alone, shed no light on the issue of the

defendant's guilt in the absence of the expert's testimony that it matched the profiles derived from the crime scene evidence." *Washington*, 968 N.Y.S.2d at 187 (citing, among others, *Williams*, 132 S. Ct. at 2224 (plurality opinion)). Accordingly, whether the plurality would hold that the primary purpose of those preparing Washington's DNA profile implicated the Confrontation Clause is, at the very least, debatable. *See Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) ("It is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents.'" (quoting *Harrington*, 562 U.S. at 102)).¹

Finally, the DNA profile prepared in this case was no more "formal" or "solemn" than the report in *Williams* such that the Court has any indication Justice Thomas would join the four *Williams* dissenters in voting to find a right to confrontation. Like the evidence at issue in *Williams*, Washington's DNA profile "is neither a sworn nor a certified

¹At oral argument, Washington's counsel raised the argument that the *Williams* plurality would hold differently in this case because *Williams* was convicted in a bench trial while Washington was tried before a jury. To be sure, the plurality emphasized the importance of such a distinction when holding that the DNA profiles were admissible because they were not admitted for their truth. *Williams* 132 S. Ct. at 2234-35 (plurality opinion) ("When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose."). But the plurality determined that "[e]ven if the Cellmark report had been introduced for its truth, [it] would nevertheless conclude that there was no Confrontation Clause violation" under an independent rationale because the DNA profile was not "prepared for the primary purpose of accusing a targeted individual." *Id.* at 2242, 2243 (plurality opinion).

declaration of fact;” “[n]owhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained;” although the report was “approved,” the approving individual “neither purport[s] to have performed the DNA testing nor certif[ies] the accuracy of those who did;” and “although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.” *Williams*, 132 S. Ct. at 2260 (Thomas, J. concurring).²

Considering the lack of clarity in the Supreme Court’s Confrontation Clause jurisprudence, and in light of the factual similarities between *Williams* and the present case, this Court cannot hold that the state court’s judgment—which mirrored the disposition in *Williams*—was an unreasonable application of clearly established Supreme Court precedent.

IV

For the foregoing reasons, Washington’s petition is DENIED. However, because Washington has made a substantial showing of the denial of a constitutional right, a certificate of appealability will issue. *See* 28 U.S.C. § 2253. The issue certified for appeal is whether the Second Department’s decision denying Washington’s Confrontation Clause

² That the admitted copy of the report bore OCME’s seal certifying the exhibit was “a true and accurate copy” does not bear on the formality or solemnity of the exhibit itself. The seal certified only the accuracy of the copy of the report as it relates to the original; it in no way attested to the accuracy of the information contained in the exhibit.

claim was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

SO ORDERED.

/S/ Frederic Block
FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
November 4, 2015

United States Code Annotated Constitution of the United States Annotated Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury trials, USCA CONST Amend. VI-Jury trials

Current through P.L. 114-115 approved 12-28-2015

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 45. Evidence (Refs & Annos)

McKinney's CPLR Rule 4518

Rule 4518. Business records

Effective: August 15, 2007
Currentness

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(b) Hospital bills. A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, provided it bears a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. This subdivision shall not apply to any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital, except that in a proceeding pursuant to section one hundred eighty-nine of the lien law to determine the validity and extent of the lien of a hospital, such certified hospital bills are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients.

(c) Other records. All records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician. Where a hospital record is in the custody of a warehouse, or "warehouseman" as that term is defined by paragraph (h) of subdivision one of section 7-102 of the uniform commercial code, pursuant to a plan approved in writing by the state commissioner of health, admissibility under this subdivision may be established by a certification made by the manager of the warehouse that sets forth (i) the authority by which the record is held, including but not limited to a court order, order of the commissioner, or order or resolution of the governing body or official of the hospital, and (ii) that the record has been in the exclusive custody of such warehouse or warehousemen since its receipt from the hospital or, if another has had access to it, the name and address of such person and the date on which and the circumstances under which such access was had. Any warehouseman providing a certification as required by this subdivision shall have no liability for acts or omissions relating thereto, except for intentional misconduct, and the warehouseman is authorized to assess and collect a reasonable charge for providing the certification described by this subdivision.

(d) Any records or reports relating to the administration and analysis of a genetic marker or DNA test, including records or reports of the costs of such tests, administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law are admissible in evidence under this rule and are prima facie evidence of the facts contained therein provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee delegated for that purpose, or by a qualified physician. If such record or report relating to the administration and analysis of a genetic marker test or DNA test or tests administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law indicates at least a ninety-five percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and shall, if unrebutted, establish the paternity of and liability for the support of a child pursuant to articles four and five of the family court act.

(e) Notwithstanding any other provision of law, a record or report relating to the administration and analysis of a genetic marker test or DNA test certified in accordance with subdivision (d) of this rule and administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law is admissible in evidence under this rule without the need for foundation testimony or further proof of authenticity or accuracy unless objections to the record or report are made in writing no later than twenty days before a hearing at which the record or report may be introduced into evidence or thirty days after receipt of the test results, whichever is earlier.

(f) Notwithstanding any other provision of law, records or reports of support payments and disbursements maintained pursuant to title six-A of article three of the social services law by the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions are admissible in evidence under this rule, provided that they bear a certification by an official of a social services district attesting to the accuracy of the content of the record or report of support payments and that in attesting to the accuracy of the record or report such official has received confirmation from the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions pursuant to section one hundred eleven-h of the social services law that the record or report of support payments reflects the processing of all support payments in the possession of the office or the fiscal agent as of a specified date, and that the document is a record or report of support payments maintained pursuant to title six-A of article three of the social services law. If so certified, such record or report shall be admitted into evidence under this rule without the need for additional foundation testimony. Such records shall be the basis for a permissive inference of the facts contained therein unless the trier of fact finds good cause not to draw such inference.

(g) Pregnancy and childbirth costs. Any hospital bills or records relating to the costs of pregnancy or birth of a child for whom proceedings to establish paternity, pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law have been or are being undertaken, are admissible in evidence under this rule and are prima facie evidence of the facts contained therein, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee designated for that purpose, or by a qualified physician.

Credits

(L.1962, c. 308. Amended Jud.Conf.1970 Proposal No. 2; L.1982, c. 695, § 3; L.1983, c. 311, § 1; L.1984, c. 792, § 3; L.1992, c. 381, § 1; L.1994, c. 170, § 350; L.1995, c. 81, § 236; L.1997, c. 398, §§ 87 to 89, eff. Nov. 11, 1997; L.2002, c. 136, § 1, eff. July 23, 2002; L.2005, c. 741, § 1, eff. Oct. 18, 2005; L.2007, c. 601, § 10, eff. Aug. 15, 2007.)

McKinney's CPLR Rule 4518, NY CPLR Rule 4518

Current through L.2016, chapters 1 to 32, 50 to 53, 55, 56.

United States Code Annotated Title 28. Judiciary and Judicial Procedure (Refs & Annos) Part VI. Particular Proceedings Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

Effective: April 24, 1996

Currentness

<Notes of Decisions for 28 USCA § 2254 are displayed in three separate documents. Notes of Decisions for subdivisions I to XIV are contained in this document. For Notes of Decisions for subdivisions XIV to end, see documents for 28 USCA § 2254, post.>

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

§ 2254. State custody; remedies in Federal courts, 28 USCA § 2254

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 104, 110 Stat. 1218.)

28 U.S.C.A. § 2254, 28 USCA § 2254

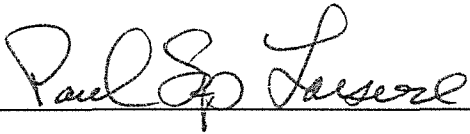
Current through P.L. 114-115 approved 12-28-2015

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation set forth in FRAP 32(A)(7). This Brief is in 14-point Garamond, a proportionate space typeface. The total number of words in the brief, excluding the cover, but including tables and Addendum, is 13, 878.

A handwritten signature in cursive script, reading "Paul Skip Laisure", written over a horizontal line.

Paul Skip Laisure

