

APPENDIX C

15-3831

To be argued by
WILLIAM H. BRANIGAN

United States Court of Appeals

For the Second Circuit

KENNETH WASHINGTON,

Petitioner-Appellant,

against

THOMAS GRIFFIN, Superintendent,
Sullivan Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
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THOMAS GRIFFIN, Superintendent,	:
Sullivan Correctional Facility,	:
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Respondent-Appellee.	:
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BRIEF FOR RESPONDENTS-APPELLEES

PRELIMINARY STATEMENT

Appellant Kenneth Washington (hereinafter “petitioner”) appeals from a November 5, 2015 judgment of the United States District Court for the Eastern District of New York (Block, J.) that denied his motion to issue a writ of *habeas corpus*. In that decision, the District Court granted petitioner a certificate of appealability on petitioner’s Confrontation Clause issue.

Petitioner is incarcerated pursuant to a January 19, 2011 judgment of conviction for three counts of Burglary in the First Degree (New York Penal Law § 140.30[2] and [3]); three counts of Burglary in the Second Degree (New York Penal Law § 140.25[2]); two counts of Assault in the First Degree (New York Penal Law § 120.10[4]); two counts of Assault in the Second Degree (New York Penal Law § 120.05[6]); Criminal Sexual Act in the First Degree (New York Penal Law § 130.50[1]); and Sexual Abuse in the First Degree (New York Penal Law § 130.65[1]) (Queens County Indictment Number 145/08).

In total, petitioner was sentenced to a state prison term of ninety years, plus twenty-five years of post-release supervision. Petitioner is currently incarcerated pursuant to this judgment of conviction.

SUMMARY OF ARGUMENT

The District Court properly denied petitioner's application for a writ of *habeas corpus*. The State court's rejection of petitioner's claim – that the testimony of the Medical Examiner about DNA reports prepared, in part, by other analysts violated his right to confrontation under *Williams v. Illinois*, 132 S.Ct. 2221 (2012) – was not contrary to, or an unreasonable application of clearly established Supreme Court precedent – a condition precedent to *habeas* relief. Indeed, the Supreme Court has never held that the introduction of uncertified laboratory reports, consisting of notes and computer-generated graphs, violated the Confrontation Clause. And, in *Williams*, the case most similar to this one, a five-member majority permitted the introduction of similar uncertified documents from a DNA laboratory. As the District Court held, “[c]onsidering 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 . . . the state court’s judgment – which mirrored the disposition in *Williams* – was [not] an unreasonable application of clearly established Supreme Court precedent.” *Washington v. Griffin*, 142 F. Supp. 3d 291, *15 (E.D.N.Y. 2015).

Petitioner, however, argues that *Williams* is distinguished from this case because, here, the DNA swab from petitioner's mouth was tested post-arrest, and argues that this case is controlled by *Melendez-Diaz* and *Bullcoming*. But *Williams*

is the relevant precedent here. Like this case – and unlike *Melendez-Diaz* and *Bullcoming* – *Williams* concerned uncertified DNA reports relied on by a testifying expert at trial to conclude that a defendant’s DNA matched recovered DNA. While, here, the reports were admitted into evidence, the *Williams* plurality specifically held that its decision would be the same if the reports were admitted. And, concerning the primary purpose, the *Williams* plurality held that when a lab employs a division of labor like that used to test the DNA sample here, “it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.” *Williams v. Illinois*, 132 S. Ct. at 2244.

Moreover, the Supreme Court simply never has held that the introduction of non-formalized notes and machine-produced charts at trial violates the Sixth Amendment. Both *Melendez-Diaz* and *Bullcoming* concerned formalized certificates of laboratory analysis created for the sole purpose of being introduced for evidence at trial. And both of those decisions depended on the concurrence of Justice Thomas, who joined the majority in *Williams*, because the documents at issue there were not solemnized. Here, the documents at issue are not solemnized analyst reports created to prove a fact at trial; they are uncertified notes and computer graphs. Indeed, despite petitioner’s claims, the only “certification” attached to the records solely attests to their status as business records and does not attest to the truth of their contents. Thus, there is simply no clearly established Supreme Court precedent that would exclude the documents at issue here from evidence.

STATEMENT OF FACTS

On August 17, 2006, Cassandra Whitaker woke up and Kenneth Washington was standing in her bedroom. Whitaker, who was then an off-duty police detective, reached into her night stand to grab her loaded gun. Petitioner, however, grabbed Detective Whitaker's hand with one of his hands, and repeatedly hit her in the face with his other hand until blood dripped into her eyes and mouth. Petitioner took the gun from Detective Whitaker, repeatedly hit her in the head with it, pushed her into the bathroom and into her bathtub, continued to hit her with the gun, and stomped on her face while she was lying in the bathtub. Petitioner took some of Detective Whitaker's property, including jewelry, her gun, and her police badge, and left her bleeding in the bathtub. Detective Whitaker was treated at the hospital for her injuries, which included lacerations and serious bruising. She received stitches to her face and staples in her head to treat her wounds.

On December 5, 2006, petitioner entered Luisa Gonzalez's apartment and removed some of her and her son's property, including a video gaming system, video games, sneakers, and jewelry. Ms. Gonzalez and her family were not at home at the time of the burglary.

On July 15, 2007, petitioner broke the house of Stacy Brown, who was six months pregnant. Petitioner forced her face down onto a pillow on her bed, and fondled her buttocks and touched his penis to them. Petitioner punched and choked Ms. Brown, demanded money from her, and tied a T-shirt around her face. He dragged Ms. Brown to the kitchen, opened her refrigerator, and drank from her iced

tea container. Petitioner spit the iced tea at Ms. Brown, brought her to another bedroom, and choked her until she was about to pass out. Ms. Brown defecated on herself. Petitioner threw her in the shower, told her to wash off, touched his erect penis to her buttocks again, and choked her until she defecated again. Then petitioner put Ms. Brown on the toilet and he left the bathroom. Ms. Brown locked the bathroom door and jumped, head first, out of her bathroom window, which was eight feet above the ground. Petitioner stole some of Ms. Brown's property, including jewelry, money, and sunglasses.

Detective Whitaker, Ms. Gonzalez, and Ms. Brown did not know petitioner. The police arrested him for these crimes because DNA recovered from the different crime scenes matched his DNA, which was stored in a database. Before his trial, petitioner's cheek was swabbed and the results of that DNA analysis was compared to the recovered DNA, confirming the known match. The Office of the Chief Medical Examiner (OCME) prepared files for each DNA sample, and, at trial, those files were introduced into evidence along with the testimony of an OCME criminalist.

Petitioner was charged with three counts of Burglary in the First Degree (New York Penal Law § 140.30[2], [3]); three counts of Burglary in the Second Degree (New York Penal Law § 140.25[2]); two counts of Assault in the First Degree (New York Penal Law § 120.10[4]); two counts of Assault in the Second Degree (New York Penal Law § 120.05[6]); Criminal Sexual Act in the First Degree

(New York Penal Law § 130.50[1]); and Sexual Abuse in the First Degree (New York Penal Law § 130.65[1]).

The Trial

On August 17, 2006, at approximately 2:00 a.m., at 114-31 225th Street, off-duty detective *CASSANDRA WHITAKER* woke up and saw a man standing in her bedroom, searching through her jewelry box (Whitaker: 489). The man's face was covered with a black stocking cap with a knot on top of it, and his hands were covered in socks.¹

Detective Whitaker reached into her night stand drawer and tried quietly to remove her gun from its holster. While Detective Whitaker had her hand on the gun, petitioner came over to her, grabbed her hand, and tried to wrestle the gun from her. As they struggled for the gun, petitioner beat Detective Whitaker with his free hand (Whitaker: 490-93). Detective Whitaker tasted salt and began to have trouble seeing because blood was pouring from her face and head (Whitaker: 493).

Ultimately, petitioner took the gun from Detective Whitaker, and hit her in the head with it repeatedly. Then, he pushed her into the bathroom, ordered her to get into the bathtub, and pushed her into the tub after she refused. Petitioner called her a "stupid fat bitch," and he claimed that he had been watching her and knew she was a "police type bitch" (Whitaker: 494-95). He demanded money, asked where the safe was located, and threatened to kill her. When he left the bathroom, Detective Whitaker tried to get up and escape, but she slipped on her blood, which was covering

¹The State's citations are to the original trial record, except for citations labeled "A" which refer to the Joint Appendix.

her bathtub. Petitioner returned and continued to hit her in the head with the gun. He pushed her down into the bathtub and stomped on her face with his feet (Whitaker: 496-98).

Petitioner took Detective Whitaker's purse, turned it upside down, emptied it, searched her wallet, left the bathroom, and closed the door. She grabbed her cell phone, which had fallen into the bathtub when petitioner emptied her purse, and called 911 (Whitaker: 497-99).

Detective *PATRICK CURRAN*, who knew Detective Whitaker from work at the police department, responded to her house after he received a radio run for a burglary in progress, which was updated to a run for a police officer needing assistance (Curran: 382). Detective Curran rang Detective Whitaker's doorbell and she answered the door. She was distraught. She was covered in blood from her head to her waist, and blood was flowing from an open wound in her forehead that Detective Curran initially mistook for a gunshot wound. Her nightgown was covered in blood and her face looked like she was wearing a Halloween mask. Her floors, walls, and bathroom were all covered in her blood (Curran: 384).

Detective Whitaker told Detective Curran that she believed the intruder was still in her home, and she told him that the man had her gun. Detective Whitaker described the intruder as a black man, wearing a white T-shirt, three-quarter denim jean shorts, braids or cornrows, and a mask (Whitaker: 385).

After the sun came up, Detective Curran did a daylight search of the area surrounding Detective Whitaker's house to make sure nothing was missed in the dark.

He found a bloody white T-shirt, a bloody white sock, and a black stocking cap with a knot on top of it in front of the neighbors' homes (Curran: 398-419). Detective *DANIEL BOGGIANO* of the Crime Scene Unit took photographs of these items and gave them to Detective Curran, who vouchered them (Boggiano: 619-22, 635). Each of these items looked like the clothing worn by the intruder. Each item was later tested by *NATALYN YANOFF*, an expert in DNA analysis at New York City's Office of the Chief Medical Examiner (OCME), forensic biology, and statistical studies, and a DNA profile report was created from cells removed from the neckline of the white T-shirt (Yanoff: 922-923).

Meanwhile, Doctor *SANDRA TORRES* treated Detective Whitaker at North Shore Hospital for cuts and severe bruises (Torres: 576-82). The wounds on her face were stitched by a plastic surgeon and Dr. Torres stapled the wounds on her head shut. Detective Whitaker, after being treated overnight in the emergency room, stayed with her grandmother for over one week. She returned home a few days after she was hospitalized and she discovered that some of her property, including jewelry, her gun, and her badge, were missing from her house. She did not return to work for several months. Detective Whitaker did not know petitioner and had not given him permission to be in her house (Whitaker: 504-511).

In the meantime, the police continued to investigate the case. Detective Curran took an elimination DNA swab from Detective Whitaker. Detective Whitaker viewed hundreds of photographs in an attempt to find suspects. Detective Curran

visited pawn shops. None of these investigative efforts led to an arrest (Curran: 419-422).

On December 5, 2006, *LUISA GONZALEZ* went to work. She returned to her apartment, which was located at 88-49 241st Street, and she noticed that somebody had broken into her apartment (Gonzalez: 677). She called the police and she and her son, *LUIS ALONZO*, pointed out two gloves that did not belong to anyone in their family (Alonzo: 886). Ms. Gonzalez and Mr. Alonzo noticed that some of their property, including jewelry, a new pair of sneakers, a video game system, and video games were missing from their apartment. Ms. Gonzalez and Mr. Alonzo did not know petitioner. Petitioner did not have permission to enter into their apartment (Gonzalez: 677-82; 689-93; Alonzo: 886-91).

Detective *SHAMICKA MEADOWS* dusted Ms. Gonzalez's apartment for fingerprints (Meadows: 656). She recovered the gloves from Ms. Gonzalez's apartment, and sent them to be tested (Meadows: 658). *MELVIN SHAW*, a criminalist with the New York City Police Department, tested the gloves for trace evidence, attempting to collect hairs and fibers from the gloves (Shaw: 781-82). OCME later created a DNA profile report from cells removed from the gloves (Yanoff: 906).

On July 15, 2007, *STACY BROWN*, who was then six months pregnant, was sleeping in her house, which was located at 194-54 114th Road. Early that morning, she heard a thump, woke up, noticed that her sister's luggage had been moved, and returned to sleep (Brown: 699-708, 754-55).

At 1:00 p.m., Ms. Brown's telephone rang and she got up to answer it. Petitioner appeared in her bedroom. He was wearing her white robe, had socks on his

hands, and had a white towel or T-shirt covering his face. She was wearing boy shorts, a bra, and a camisole shirt. Petitioner forced Ms. Brown down on to her bed, and he held her face against her pillow. Ms. Brown was not able to breathe. Petitioner fondled her buttocks and he touched his erect penis to the outside of her anus (Brown: 708-14, 735). Ms. Brown thought petitioner was going to rape her (Brown: 712). He asked her, “Where’s the money, bitch?” (Brown: 715).

Petitioner punched and choked Ms. Brown while she held her stomach and tried to shield her unborn baby from the attack. The man also demanded money and jewelry. He tied a T-shirt around Ms. Brown’s face. She could see only down, under the shirt, and could not see her attacker’s face (Brown: 713-16, 766-67).

Petitioner dragged Ms. Brown into the kitchen, opened her refrigerator, gulped from a container, spit iced tea on Ms. Brown and on the floor, and dropped her iced tea container on the ground. He forced Ms. Brown into another bedroom. Petitioner told Ms. Brown that he was going to put her to sleep and he choked her until she was about to pass out. She defecated on herself, and petitioner called her a “nasty bitch” in an angry tone of voice (Brown: 716-18, 767-69, 772).

Petitioner dragged Ms. Brown to the bathroom, threw her in the shower, and told her to wash off. Ms. Brown tried to take the T-shirt off of her face, but petitioner punched her in the face and prevented her from doing so (Brown: 718-21).

Petitioner grabbed Ms. Brown out of the shower, dragged her back to a bedroom, and put her on the lower end of the bed. Petitioner told Ms. Brown that he wanted to “lick her pussy” (Brown: 721-22). He touched his erect penis to the

outside of her anus, and choked her until she could not breathe. Ms. Brown defecated again, and petitioner put her on the toilet and left the bathroom. Ms. Brown kicked the bathroom door shut and locked it. She opened a window that was in her bathtub, hoisted herself up, and dove, head first, out of the window. The window was eight feet above the ground. Ms. Brown landed on the ground, on her back (Brown: 718-730). She crawled to the front of her house, pulled herself up by grabbing her fence, and ran, covered in blood and feces, to the house of her neighbor, *SOPHIA MCINTOSH* (McIntosh: 807).

Ms. McIntosh opened her door, and saw Ms. Brown covered in blood and feces. Ms. Brown was screaming that someone had attacked her in her home. Petitioner had ripped off Ms. Brown's camisole top and, at this point, she was only wearing her bra and underwear. Ms. Brown fell into Ms. McIntosh's foyer, grabbed her stomach, and screamed at Ms. McIntosh to call 911. Ms. McIntosh called the police, and noticed a man in a white robe scaling the fence behind Ms. Brown's house (McIntosh: 806-10).

Ms. Brown was taken to the Jamaica Hospital trauma center and was treated by Doctor *LAWRENCE KRAMER*, the attending physician for Obstetrics and Gynecology (Kramer: 817-19). Ms. Brown had bruising and abrasions and she was kept at the hospital for three days so that she and the unborn baby could be monitored (Kramer: 824). Ms. Brown never gave petitioner permission to be in her house (Brown: 751).

Detective *WILLIAM PORTER* recovered the iced tea container from Ms. Brown's apartment and dusted the house for fingerprints (Porter: 845-48). Police Officer *YUAN YE* vouchered the iced tea container (Ye: 796-801). It was sent to the laboratory for analysis, and a DNA profile report was created from saliva recovered from the iced tea container (Porter: 849).

WILLIAM UMSTEAD, an expert in the field of fingerprint analysis, examined the fingerprints that had been lifted in this case. The prints were either of no value or did not match Kenneth Washington's fingerprints (Umstead: 600-614).

On October 10, 2007, petitioner's DNA profile was found in the New York State database. Petitioner's DNA profile matched the DNA profiles created from the genetic material on the T-shirt recovered from Detective Whitaker's house, the gloves recovered from Ms. Gonzalez's apartment, and the iced tea container recovered from Ms. Brown's house (Stipulation: 894-95).² On October 11, 2007, Detective *RICHARD SANTANGELO* arrested petitioner (Santangelo: 871-72). Detective Curran subsequently took a DNA swab from petitioner's cheek and sent it for DNA testing (Curran: 425-27).

At trial, Natalyn Yanoff, a Criminalist Level Three in the Department of Forensic Biology at the Office of the Chief Medical Examiner, and an expert in Forensic Biology, DNA analysis, and the statistical significance of DNA profiles, testified about the science of DNA and DNA analysis, and the results of the laboratory tests that had been performed in this case (Yanoff: 896). Ms. Yanoff

²The parties also stipulated that petitioner was not an identical twin.

explained that, at the time the evidence in this case was tested, OCME used thirteen standardized areas of DNA, or "loci," for analysis (Yanoff: 902-06, 926-27, 962-63). The thirteen loci contained twenty-six alleles (Yanoff: 958).

Ms. Yanoff explained that her colleagues created a DNA profile for petitioner and Ms. Whitaker. Ms. Yanoff also examined cells that were scraped from the neckline of the T-shirt that had been recovered from Ms. Whitaker's apartment. Her colleagues examined cells that had been scraped from the gloves recovered from Ms. Gonzalez's apartment, and the saliva that had been recovered from the iced tea container that had been recovered from Ms. Brown's apartment (Yanoff: 906-11).

Ms. Yanoff determined that a mixture of DNA was found on the T-shirt. Ms. Whitaker's DNA was present in the sample, and male DNA was also present in the sample. Ms. Yanoff was able to create a male DNA profile from the T-shirt. One locus tested inconclusive, and results at three loci were available for only one allele, which provided full results for nine loci, and partial results at one allele at three locus points (Yanoff: 922-25, 930).

A mixture of DNA was found on the gloves recovered from Ms. Gonzalez's apartment, and a male DNA profile was created for the major donor (Yanoff: 940-45). A male DNA profile was also created from the swab that was taken from the iced tea container that had been recovered from Ms. Brown's apartment (Yanoff: 932-35).

Ms. Yanoff testified that the male DNA profile that had been generated from the T-shirt, the gloves, and the iced tea container was found in one in more than

one trillion people. She concluded with a reasonable degree of scientific certainty that the DNA profiles from the T-shirt, the gloves, and the iced tea containers all came from the same person. In addition, she compared each of the recovered DNA profiles to the profile found on the swab that was taken from defendant's mouth. She concluded that the profiles were the same (Yanoff: 945-54).

Petitioner presented the testimony of *JAMES MEMISHA*, who was a New York City Police Department detective in 2006. He brought Ernst Pope to North Shore Hospital, showed him to Detective Whitaker, and had him speak for her. Detective Whitaker told Detective Memisha that she was not sure if Mr. Pope was the person who had broken into her room and attacked her, but Detective Memisha indicated on his paperwork that Detective Whitaker had identified Mr. Pope. The notation in Detective Memisha's paperwork was a mistake, and Detective Whitaker had never identified Mr. Pope as the perpetrator of the crimes against her (Memisha: 1023-27).

At the conclusion of the trial, petitioner was convicted of three counts of Burglary in the First Degree (New York Penal Law §§ 140.30[2], [3]); three counts of Burglary in the Second Degree (New York Penal Law § 140.25[2]); two counts of Assault in the First Degree (New York Penal Law § 120.10[4]); two counts of Assault in the Second Degree (New York Penal Law § 120.05[6]); Criminal Sexual Act in the First Degree (New York Penal Law § 130.50[1]); and Sexual Abuse in the First Degree (New York Penal Law § 130.65[1]). On January 19, 2011, petitioner was sentenced as noted above.

The Direct Appeal

In April of 2012, petitioner, through counsel, filed an appeal in the New York State Appellate Division, Second Department, raising three claims. As relevant here, petitioner claimed that the introduction of DNA evidence violated his right to confrontation because the DNA test results were introduced through an expert who did not test each piece of evidence.

On August 13, 2012, the State filed a brief in response to petitioner's main brief, arguing that some of petitioner's claims were unpreserved in the trial court and that they were all meritless. As to the Confrontation Clause claim, the State argued – under both *Williams v. Illinois*, 132 S.Ct. 2221 (2012), and under relevant New York State Court of Appeals decisions – that the trial court properly admitted the DNA evidence through the testimony of the OCME criminalist, who performed the DNA testing on the recovered T-shirt in Ms. Whitaker's case and who interpreted the results generated by other OCME employees in Ms. Gonzalez's and Ms. Brown's cases.

On July 3, 2013, the New York State Appellate Division affirmed petitioner's conviction. The Appellate Division, citing *Williams* and relevant New York Court of Appeals cases, held that the DNA documents were properly admitted because, standing alone, they did not link petitioner to the crime, and because the critical analysis was performed by the testifying witness. *Id.* at 577-78.

On January 14, 2014, the New York State Court of Appeals denied petitioner's application for leave. *People v. Washington*, 22 N.Y.3d 1091 (2014).

The Habeas Corpus Petition

In February of 2015, petitioner filed his petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of New York. Petitioner claimed that he was denied his right to confrontation because the DNA reports of the swab taken from his cheek after he was arrested was introduced into evidence without the testimony of all of the people who prepared the reports. He claimed that, because he was already arrested when the DNA from his cheek was taken, the documents would be considered testimonial under *Williams*.

On May 13, 2015, the State opposed the petition. The State argued that a plurality of the Supreme Court found that similar DNA evidence was admissible to support the conclusions of a testifying expert in *Williams v. Illinois*, 132 S.Ct. at 2221. And a fifth justice found that the same evidence did not offend the Confrontation Clause because – like the evidence in this case – it was not sworn-to or otherwise certified.

On November 4, 2015, the District Court Judge denied the petition. *Washington v. Griffin*, 142 F. Supp. 3d 291 (E.D.N.Y. 2015). First, the court held that the state court decided this issue on the merits and, therefore, that decision was entitled to deference under 28 U.S.C. § 2254(d)(1). *Id.* at *5. Then, the court held that, after *Williams*, the rules on what evidence can be admitted under the Confrontation Clause had become confused. *Id.* at *9-10. And, comparing the facts of this case to the analysis of the four-member plurality in *Williams*, the court held 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.” *Id.* at *13. Moreover, the court held that the documents at issue here were not formalized in any way that would have led Justice Thomas to bar them from evidence. *Id.* *14-15. Thus, “[c]onsidering 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,” the court held “that the state court’s judgment – which mirrored the disposition in *Williams* – was [not] an unreasonable application of clearly established Supreme Court precedent.” *Id.* at *15.

ARGUMENT

THE STATE COURT’S DECISION TO REJECT PETITIONER’S SIXTH AMENDMENT CLAIM WAS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED SUPREME COURT PRECEDENT.

The state court did not contravene or unreasonably apply the relevant Supreme Court precedent when it affirmed petitioner’s conviction. Indeed, the Supreme Court has never held that the introduction of uncertified laboratory notes violates the Confrontation Clause. To the contrary, in *Williams v. Illinois*, 132 S.Ct. 2221 (2012), a plurality of the Supreme Court found that DNA reports similar to those at issue here were admissible both because they could be admitted to support a testifying expert’s conclusions and because the primary purpose of the statements was not to accuse a particular defendant. And a fifth justice found that this evidence

did not offend the Confrontation Clause because – like the evidence in this case – it was not sworn-to or otherwise certified.

Petitioner, however, claims that the state court’s decision was an unreasonable application of *Williams*, because the State introduced DNA reports of a buccal swab taken from his mouth after his arrest, and, therefore, the primary purpose of the laboratory technicians who prepared the reports was to accuse him of a crime. Ignoring key parts of the holding in *Williams*, petitioner argues that the “clearly established” Supreme Court precedent compelling this result consists of that Court’s decisions in *Melendez-Diaz* and *Bullcoming*, which dealt with drug and blood alcohol content tests, and that *Williams* does not apply because petitioner was under arrest when his DNA was swabbed and tested. In addition to petitioner’s arguments, Amicus claims that compelling the testimony from the assembly line of lab technicians who worked on the DNA sample is necessary to prevent mistakes.

Petitioner and Amicus are wrong. As noted by the *Williams* plurality, the primary purpose of the uncalled laboratory analysts at the OCME is to perform a discreet task in the testing process; each analyst could not understand how her particular task might implicate or exculpate petitioner. Thus, their testimony is not accusatory in a manner sufficient to make it testimonial. *Williams v. Illinois*, 132 S. Ct. at 2244 . And here, as in *Williams*, the analyst who concluded that a match existed, and who thus made the “accusatory” allegations, testified at the trial, subject to cross-examination. Moreover, the single report at issue was unsworn and, contrary to petitioner’s contention, the business record certification did not attest to the

accuracy of the contents of the report, but only that the report was made in the course of the lab's business.

Similarly, Amicus's claims regarding the utility of testimony from the lab workers, assuming those are relevant assertions on habeas review at all, would lead, as Amicus acknowledges, to the conclusion that regardless of when a report is prepared, every analyst providing any link in the chain of analysis resulting in the report must be called at trial. This conclusion was flatly rejected in *Williams*, and certainly is not "clearly established" in petitioner's favor.

Nor was it contrary to, or an unreasonable application of, clearly established Supreme Court precedent for the state court to rely on *Williams* instead of the Court's prior holdings in *Melendez-Diaz* and *Bullcoming*, upon which petitioner and Amicus so heavily rely. This is particularly true since *Williams* was decided after those cases and dealt directly with the need to call subsidiary analysts who assisted in creating DNA profiles. As the District Court held, the law with regard to reports of DNA profiles is far from "clearly established" and the state court did not contravene or unreasonably apply *Williams* in arriving at a similar result with similar reasoning.

Under 28 U.S.C. § 2254(d), where a state court adjudicates a claim on the merits, a federal court may not grant a writ of habeas corpus unless the petitioner establishes that the state court decision is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. The statute thus imposes a bar to relief unless the petitioner can satisfy this

“substantially higher threshold” than the one applicable on *de novo* review. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

When the state court is determined to have adjudicated the claim on the merits, a petitioner’s claim fails unless he can show that the State Court’s decision rejecting his claim on appeal was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S.362 (2000). In analyzing this issue, “[t]he threshold question is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court convictions became final.” *Williams v. Taylor*, 529 U.S. at 390. This means that a petitioner must “identify a clearly established Supreme Court precedent that bears on his claim.” *Lolisco v. Goord*, 263 F.3d 178, 191 (2d Cir. 2001). In this regard, a petitioner cannot succeed by showing that the State court misapplied circuit court precedent. *See Yung v. Walker*, 311 F.3d 104 (2d Cir. 2002). If petitioner has failed to identify clearly established Supreme Court precedent, the District Court need go no further. *Sellan v. Kuhlman*, 261 F.3d 303, 309 (2d Cir. 2001).

If the petitioner satisfies this hurdle, he must then establish that the decision is either “contrary to” or an “unreasonable application” of the precedent identified. A state court decision is “contrary” to Supreme Court precedent if it applied the incorrect legal standard or rule to the case, or if it addressed a set of facts “materially indistinguishable” from a relevant Supreme Court case and arrived at a result opposite to that reached by the Court. *Williams v. Taylor*, 529 U.S. at 404-406.

In determining whether a state court has “unreasonably applied” Supreme Court precedent, “a habeas court must determine what arguments or theories supported or . . . could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of [the Supreme] Court.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Under this highly deferential standard, “even a strong case for relief does not mean that the state court’s contrary conclusion was unreasonable,” *Id.*, because AEDPA “imposes a ‘highly deferential standard for evaluating state-court rulings,’ *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), and ‘demands that state-court decisions be given the benefit of the doubt,’ *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).” *Renico v. Lett*, 559 U.S. 766, 773 (2010).

Thus, before “obtaining *habeas corpus* from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court 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. at 103 (emphasis added). Indeed, “federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong.” *Woods v. Donald*, ___ U.S. ___, 135 S.Ct. 1372, 1376 (2015).

Here, because the Appellate Division adjudicated the merits of petitioner’s Confrontation Clause claim, its decision is entitled to deference in this Court. And because petitioner cannot show that the state court’s decision was

contrary to, or an unreasonable application of, established Supreme Court precedent, this Court should conclude that the District Court properly denied the petition.

Initially, the Appellate Division's decision rejecting petitioner's claim constitutes an adjudication on the merits. The court specifically held that petitioner's right to confrontation had not been violated by the admission of the DNA documents at issue, and, in addition to New York State cases, cited to the Supreme Court decision of *Williams v. Illinois*, 132 S.Ct. at 2221. Thus, this Court is now required to apply section 2254's deference to that ruling. *Sellan v. Kuhlmann*, 261 F.3d 303 (2d Cir. 2001).

Second, applying that deferential standard of review to this case, the state court's determination cannot be said to have resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Supreme Court law. First, there is no clearly established Supreme Court precedent holding that the State must present the testimony of every analyst involved in the production of reports consisting of laboratory notes and machine-generated graphs. Indeed, *Williams v. Illinois*, 132 S.Ct. at 2221, the closest precedent, holds that the admission of DNA reports almost identical to the evidence at issue here did not violate the Confrontation Clause. For this reason alone, petitioner cannot succeed in his Confrontation Clause claim on *habeas* review.

Williams v. Illinois is the last in a series of three cases applying the Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004) – which interpreted the Confrontation Clause through a historical analysis of the right of

confrontation as understood by the framers of the constitution – to forensics reports. The right to confrontation developed, according to the *Crawford* Court, as a response to abuses of the civil law, which “condone[d] examination in private by judicial officers” and which had been incorporated in part into English criminal practice. *Id.* at 43. The framers understood the right of confrontation to prohibit out-of-court statements similar to the pre-trial examinations by justices of the peace. *Id.* at 68.

The Court held that these “testimonial” statements were inadmissible unless the witness was unavailable and the accused had a prior opportunity to cross-examine the witness. *Id.* at 53-4. The Supreme Court, however, declined to define the term “testimonial” with any specificity, leaving that task to “another day.” *Id.* at 68. The Court concluded that, at a minimum, this new rule would apply “to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations” because “[t]hese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” *Id.* at 51-52.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Supreme Court, applying the holding of *Crawford*, held that certificates of the results of scientific testing of controlled substances recovered from the defendant could not be admitted at trial under the confrontation clause. At trial, the state had “submitted three ‘certificates of analysis’ showing the results of the forensics analysis performed on the seized substances,” reporting the weight of those substances, and concluding that they contained cocaine. *Id.* at 308. “The certificates were sworn to before a

notary public by analysts” at the state laboratory, and were subsequently admitted at trial over the defendant’s objections. *Id.* at 308-09.

A five-member majority, relying upon two distinct rationales, held that the certificates were improperly admitted. First, the Court concluded that the certificates were affidavits, squarely within the “core class” of testimonial statements that the framers intended to exclude under the confrontation clause. The Court noted that its prior descriptions of “core testimonial statements” in *Crawford v. Washington*, 541 U.S. 36 (2004), twice included the term “affidavits,” and the Court observed that the certificates in *Melendez-Diaz* were, in fact, sworn, notarized affidavits admitted to prove a fact in dispute. The Court therefore concluded that the “analysts’ affidavits” were clearly testimonial in nature and were inadmissible, in the absence of prior confrontation and a showing that the witness was unavailable.

Second, the opinion noted that the documents were not only made with the knowledge that they might be used at trial, but that the sole purpose of the documents under Massachusetts law was to provide *prima facie* evidence of the nature and weight of the substance that the defendant was charged with possessing. The analysts were undoubtedly aware of this fact, as it was printed on the certificates themselves. *Id.* at 311. These facts provided further proof that the statements were testimonial in nature and therefore inadmissible, absent testimony from the analysts.

The twin rationales behind the Court’s holding, however, are limited by the concurring opinion written by Justice Thomas, who provided the fifth vote for the Court’s majority. In his concurrence, Justice Thomas adopted only the Court’s first

rationale, that the certificates were affidavits and thus clearly within the ambit of formalized testimonial materials that the framers intended to preclude. He concurred separately to explain that he continued to adhere to his view that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *Id.* at 329 (Thomas, J., concurring), quoting, *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). Thus, Justice Thomas joined “the Court’s opinion . . . because the documents at issue” were “quite plainly affidavits” and fell “within the core class of testimonial statements governed by the Confrontation Clause.” *Id.* at 330 (internal quotation marks omitted).³

³Indeed, as explained in the series of opinions that he cited in his concurrence, Justice Thomas has consistently held a far narrower view of the confrontation clause than that expressed by the other members of the majority. In his concurring opinion in *White v. Illinois*, Justice Thomas first expressed his view that the confrontation clause should be narrowly construed to implicate only a “discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process.” 502 U.S. 346, 365 (1992) (Thomas, J., concurring). These included only formalized testimonial materials, such as “affidavits, depositions, prior testimony, or confessions.” *Id.* Later, in *Crawford v. Washington*, 541 U.S. at 51-2, the Court expressly acknowledged Justice Thomas’s narrow definition of testimonial statements in *White*, quoting it as one of the possible formulations for this term, but found it unnecessary to adopt one definition over others for the purposes of that case.

In *Davis v. Washington*, 547 U.S. 813, 836-37 (2006), Justice Thomas wrote separately, again expressing his view that “testimonial” statements required “some degree of solemnity,” as found in formalized statements such as affidavits, depositions, prior testimony, or confessions. Applying this limitation to the facts in *Davis*, Justice Thomas observed that none of the statements at issue in that case – which included a victim’s crime-scene statements to police officers that the majority held were inadmissible – constituted formalized testimonial materials within the ambit of the confrontation clause. *Id.* at 840. Under Justice Thomas’s view, these statements did not constitute a “formalized dialogue” similar to the “Marian examinations” held before magistrates and “there was no suggestion that the prosecution attempted to introduce the [statements] at trial in order to evade confrontation.” *Id.*; see also *Giles v. California*, 554 U.S. 353, 377-78 (2008) (reiterating view that statements made to police are not testimonial absent “formalized dialogue” similar to Marian bail examinations before magistrates).

And, because Justice Thomas's vote was necessary for the majority in *Melendez-Diaz* and because it was decided on narrower grounds than stated in the main opinion, that decision has precedential effect only under the rationale stated in Justice Thomas's concurrence. As the Supreme Court explained in *Marks v. United States*, 430 U.S. 188 (1977), "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds....'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 [1976]). In *Melendez-Diaz*, the narrowest grounds were provided by the necessary concurrence of Justice Thomas. Thus, the holding of *Melendez-Diaz* only precluded from trial only sworn statements of fact made out of court for the purpose of introduction as evidence at trial.

Following *Melendez-Diaz*, the Supreme Court decided the case of *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). In *Bullcoming*, the Court held that a certified laboratory report, containing the results of a blood-alcohol test, could not be introduced into evidence through a second analyst who did not perform or observe that test. *Id.* at 657-58. In that case – citing its decision in *Melendez-Diaz* – the Court held that "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial,' and therefore within the compass of the Confrontation Clause." *Id.* at 658-59.

Finally, in *Williams v. Illinois*, 132 S. Ct. at 2221, the Supreme Court held that the admission of uncertified laboratory reports containing DNA data at a

trial of a defendant for rape did not violate the Confrontation Clause. First, a four-justice plurality held that this evidence, which was ^{not} admitted to support a testifying expert's conclusion, did not constitute hearsay and, therefore, did not violate the Confrontation Clause. *Id.* at 2228. In addition, the plurality provided a "second, independent basis" for its decision, holding that the report would not have violated the Confrontation Clause even if it had been admitted into evidence. The plurality held that the report at issue was "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach." *Id.* The plurality found that the lab produced the report not to introduce as evidence against a known defendant, but "for the purpose of finding a rapist who was on the loose." *Id.* at 2243.

The plurality further explained that a DNA profile "tends to exculpate all but one of the more than 7 billion people in the world today," and that the Confrontation Clause never intended, by compelling the testimony of all the technicians who worked on a report, to "encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable." *Id.* at 2228. And it noted that a defendant who wished "to probe the reliability of the DNA testing done in a particular case . . . may always" subpoena the technicians. *Id.*

In *Williams*, swabs were taken from a rape victim, sent by a detective to the Illinois State Police lab, and sent to Cellmark Diagnostics Laboratory for testing.

Id. at 2229. The Cellmark lab then produced a report of a male DNA profile, which was later matched to the defendant. *Id.* At trial, three forensic analysts testified, including a DNA analyst who testified that the defendant's DNA matched the DNA recovered from the victim. *Id.* at 2230. That expert based her opinion on a series of reports from Cellmark, which were not admitted into evidence, and she was cross-examined about her knowledge of Cellmark's practices. *Id.* at 2230-31.

Addressing the defendant's Confrontation Clause claim, the four-member plurality of the Court first noted that the Clause excluded from evidence only statements that were offered to prove the truth of the matter asserted. *Id.* 2235. And it found that the DNA expert testified to the truth only for matters about which she had personal knowledge. *Id.* While the expert testified to a conclusion based upon the premise that semen was recovered from vaginal swabs taken from the victim, the Court found that there was no evidence that the fact-finder – in that case the trial court – took the answer based upon this premise as substantive fact. *Id.* at 2236. To the extent that this "basis" evidence was admitted, reasoned the plurality, it was for the nonhearsay purpose of showing the logic of the expert's reasoning. *Id.* at 2240.

The *Williams* Court also distinguished *Melendez-Diaz* and *Bullcoming*, finding that the certified forensics reports in those cases were admitted for the purpose of proving the truth of the matter. *Id.* In *Williams*, the report was not admitted to establish that it contained the defendant's DNA profile, but only for the limited purpose of determining whether there was a match between the profile of the DNA taken from the defendant's blood and the report from Cellmark. *Id.* at 2240.

Second, after determining that the report was not admitted for its truth, the plurality held that there still would be no Confrontation Clause violation even if the report had been admitted for its truth. *Id.* at 2242. The Court noted that its recent cases addressing the Confrontation Clause had found two rationales for finding an abuse – the statements were made for the primary purpose of accusing someone of criminal conduct or were formalized statements “such as affidavits, depositions, prior testimony, or confessions.” *Id.* In *Melendez-Diaz* and *Bullcoming*, the excluded documents were the equivalent of affidavits created for the purpose of proving guilt at trial, and “the technicians who prepared the reports must have realized that their contents . . . would be incriminating.” *Id.* at 2243.

Under this primary purpose analysis, the plurality held that the reports at issue in *Williams* were created to catch a rapist, and that the technicians could not have known that the generated reports would implicate the defendant. *Id.* at 2243-44. Indeed, the Court noted that DNA lab technicians generally do not know whether their work “will turn out to be incriminating or exonerating – or both.” *Id.* at 2244. Thus, “the use at trial of a DNA report prepared by a modern, accredited laboratory ‘bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.’” *Id.* (quoting *Michigan v. Bryant*, 562 U.S. 344 [2011] [Thomas, J., concurring]).

The plurality was joined by two concurrences. The first, by Justice Breyer, joined the plurality opinion in full. *Id.* at 2252. The second, by Justice Thomas, joined only in the result and disagreed with the plurality’s holding that the

statements were not hearsay. *Id.* at 2255-56. Instead, Justice Thomas – following his own jurisprudence discussed above – found that the report was testimonial because, unlike the affidavits in *Melendez-Diaz* and *Bullcoming*, it was “neither a sworn nor a certified declaration of fact.” *Id.* at 2260. While the “report [was] signed by two ‘reviewers,’” they did not “purport to have performed the DNA testing [or] certify the accuracy of those who did.” *Id.* at 2260.

Here, under similar facts to those in *Williams*, the District Court properly denied the petition because there is no clear Supreme Court precedent holding that uncertified DNA profile reports are inadmissible at trial under the Confrontation Clause, as defendant claims. At trial, the State sought to introduce into evidence three files that were generated by the OCME laboratory as business records (A: 36-8). Ms. Yanoff testified that each of the three cases on trial had a team of DNA analysts working on it, and each case was assigned an interpreting analyst, whose job was to review all of the paperwork in the case file and to make conclusions on the findings (A: 39). Ms. Yanoff testified that she did not prepare every document that was contained in each case file, but that she did personally examine the evidence related to case number FB06-1479 (Cassandra Whitaker’s case), and she personally prepared the reports on all three cases (A: 38-41). Defense counsel objected to the admission of the files on the ground that their admission violated the New York State and Federal constitutions because the file contained paperwork that was prepared based on work done by other people whom the defense would not have an opportunity to

confront (A: 41-2). The court overruled petitioner's objection, and admitted the three files into evidence (A: 43-5).

The State then introduced the DNA records of the testing of the swab taken directly from petitioner's mouth. Again, over the objection of petitioner, the trial court admitted the documents (A: 79-81).⁴ Ms. Yanoff then compared the DNA recovered from petitioner to the DNA recovered in the three crimes, and she concluded that it was the same (A: 82-6).

Here, the state court's decision admitting the OCME reports was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. First, there is no clear Supreme Court precedent that would compel all of the analysts involved in producing the uncertified OCME reports to testify. The closest precedent is the disjointed holding of *Williams*, to which the Appellate Division cited in affirming petitioner's conviction. Indeed, the admission of the OCME reports did not violate the Confrontation Clause as it has been defined by either the plurality or concurring opinion in *Williams*. Under the plurality's rationale, the reports were admissible both because they were admitted to explain the reasoning of the testifying expert – and not for their truth – and because they were not made with the primary purpose of establishing petitioner's guilt. First, as discussed above, *Williams* held that an expert witness may testify to an opinion based upon facts of which she has no personal knowledge. *Williams v. Illinois*, 132 S. Ct. at 2233. And because these underlying facts are introduced solely to demonstrate the basis of the

⁴The files were admitted as People's Exhibits 33, 34, 35, and 39.

expert's reasoning – and are not considered for their truth – there is no Confrontation Clause violation. *Id.* at 2235. For this reason alone, the documents were admissible under the plurality's rationale.

Second, the files in this case were not testimonial because they did not have the primary purpose of establishing the guilt of a targeted individual. *See Williams v. Illinois*, 132 S.Ct. at 2243-44; *People v. Brown*, 13 N.Y.3d 332, 340 (2009). The OCME technicians who prepared the DNA reports of the biological material recovered in the three cases could not have had the “primary purpose” of creating evidence for use in petitioner's case because he was not a known suspect at the time they tested the material.

Moreover, none of the technicians preparing the DNA reports – including those who tested the swab taken from petitioner – had any purpose other than performing some discrete step in the testing process. Indeed, the OCME is not a law-enforcement entity and no technician at the OCME's office could have known if the profile she created would actually incriminate anyone. “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 v. Illinois*, 132 S. Ct. at 2221. As the *Williams* plurality held, “the use at trial of a DNA report prepared by a modern, accredited laboratory ‘bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.’” *Id.* at 2244 (quoting *Michigan v. Bryant*, 562 U.S. 344 [2011] [Thomas, J., concurring]). And Ms. Yanoff explained at trial, the samples were prepared by an assembly line of analysts (A: 39-40, 114-16). Their

primary purpose was to prepare the biological samples for processing in a machine, and they could not have replicated petitioner's DNA, had they intended to, with a computer-generated series of graphs.

Indeed, examining the admitted documents, the key information interpreted by the testifying analyst was a series of computer-generated graphs (A: 110-13). The lab technicians did nothing other than prepare the samples for this final process, and a machine produced a profile that was ultimately interpreted at trial. *See People v. Brown*, 13 N.Y.3d 332, 340 (2009) (admitted DNA report not testimonial "because it consisted of merely machine-generated graphs, charts and numerical data").

Because each of the individual, non-testifying lab technicians performed a limited part of the lab protocols without the knowledge or the ability necessary to alter the results to render them inculpatory, their testimony was unnecessary under the plurality opinion in *Williams*. Indeed, the plurality in *Williams* specifically relied on the technician's limited roles in evaluating their primary purpose and upholding admission of the testimony about the DNA profile: "it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures." *Id.* at 2244. The Court emphasized that none of the technicians in the assembly line "could have possibly have known that the profile that it produced would turn out to inculcate" petitioner. *Williams*, 132 S. Ct. at 2243-44. Thus, here, as in *Williams*, each lab technician's "primary purpose" was to perform her specific

duty in processing biological materials, not to create a statement for the introduction as evidence at petitioner's trial.

Moreover, here, as in *Williams*, the analyst who actually reviewed and interpreted the data and concluded that there was a match, thus offering a statement intended to be admitted at trial as an accusation, testified at trial and was subject to cross-examination. The only OCME employee who interpreted the data and concluded that a match existed between the crime scene samples and the buccal swab from petitioner was Ms. Yanoff, who testified at trial and whom petitioner had ample opportunity to cross-examine. As the analyst who read the computer generated data and testified to the result, she was, therefore, the one analyst whose testimony was necessary in court. Indeed, unlike the surrogate analyst who testified in *Bullcoming* – who offered testimony that “could not convey what [the technician who performed the test and certified the results] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed,” *Bullcoming v. New Mexico*, 131 S. Ct. at 2715 – the analyst here reviewed the process and analyzed the results. And unlike the testifying analyst in that case, she did not have to rely on a witness's certification of the machine-generated results because she had the printout made by the machine (A: 113). Thus, the one analyst who made a statement for the purpose of establishing a fact at trial made her statements under oath at that trial.

In addition, applying the holding of Justice Thomas, who provided the fifth vote for the majority in *Williams*, the DNA reports at issue and Ms. Yanoff's testimony about them were admissible. In this case, the certification on People's

Exhibits 33, 34, 35, and 38 merely attested to the fact that file was a business record, and that the copy of the records provided to the parties was a true and correct copy of the original records. Nowhere in the records is there any certification as to the accuracy of the results contained in the records. Exhibits 33, 34, 35, and 38 contain mostly charts, graphs, and numerical data, and the signatures that appear within the records do not certify the accuracy of the results. These alone could not, and did not in *Williams*, constitute formal attestations of guilt; they were at most working documents useful in the process, themselves subject to review by the testifying analyst. As such, the records at issue in this case are no more formal than those in *Williams*, and so they were properly admitted in this case.

Nevertheless, despite the similar nature of the facts of this case and *Williams*, petitioner claims that the District Court should have held that the Appellate Division unreasonably interpreted that case by finding that the admission of the DNA reports did not violate the Confrontation Clause.

First, petitioner appears to ignore the holding in *Williams* altogether and, instead, focuses on the prior holding of the Supreme Court in *Melendez-Diaz* and *Bullcoming*. But those cases do not control this one because they addressed the admission of certified laboratory reports produced for their admission into evidence against a defendant. As discussed above, *Williams* must be followed because the documents at issue there – uncertified DNA reports produced by an assembly line of analysts – closely resemble the reports here. And no five-member majority of the

Supreme Court has ever precluded uncertified laboratory analyst reports from evidence.

Moreover, petitioner misreads the Court's holding in *Melendez-Diaz* to the extent that he claims Justice Thomas joined its "primary purpose" holding (Petitioner's Brief: 28). As discussed above, Justice Thomas concurred in that case explicitly because a sworn affidavit had been admitted into evidence. And despite petitioner's arguments to the contrary (Brief: 31-33), only the formalized nature of the statements at issue in *Bullcoming* ultimately led to their preclusion. Indeed, in both of those decisions, solemnized laboratory reports were admitted to prove a fact at trial. In his concurrence in *Melendez-Diaz*, Justice Thomas clarified that he was joining the majority opinion adopted under only one of the Court's rationales – that the certificates were affidavits and thus clearly within the ambit of formalized testimonial materials that the framers intended to preclude. He adhered to his view that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." 557 U.S. at 329 (Thomas, J., concurring), quoting, *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). Notably, Justice Thomas declined to join the *Williams* dissenters because the DNA documents at issue in that case were not certified. Thus, *Bullcoming* and *Melendez-Diaz* preclude only the admission of sworn-to affidavits at trial, and say nothing about the documents at issue here.

In addition, as discussed above, while petitioner attempts to distinguish this case because he was swabbed and tested after his arrest, the plurality in *Williams* and Justice Thomas still would have formed a majority admitting the report (Petitioner's Brief: 35-6, 37-40). First, as discussed above, the *Williams* plurality held that an expert witness may testify to an opinion based upon facts of which she has no personal knowledge. *Williams v. Illinois*, 132 S. Ct. at 2233. And because these underlying facts are introduced solely to demonstrate the basis of the expert's reasoning – and are not considered for their truth – there is no Confrontation Clause violation. *Id.* at 2235.

Second, as discussed above, the primary purpose of the lab technicians was not to accuse petitioner, but to perform individual tasks without possibly knowing what results were intended or whether the testing would implicate or exonerate petitioner. The technicians simply processed the biological material. And while *Williams* noted that the lab's purpose in that case was, in part, to catch a rapist, it also found, as noted above, that, where, as here, a group of technicians works on a sample, "it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures." *Id.* at 2244. Therefore, the plurality would have found no Confrontation Clause violation under the circumstances here.

And, as discussed above, Justice Thomas would not find that petitioner's confrontation rights were violated under the circumstances here because the lab results were not sworn-to by an out-of-court declarant. And, whatever Justice

Thomas said about the primary purpose test (Petitioner's Brief: 36), he rejects that test in favor of his own test discussed above. Indeed, his test carried the majority in both *Bullcoming* and *Melendez-Diaz*. Similarly, in *Williams*, without his concurrence, there was simply no majority to hold that the introduction of unsworn DNA reports violated the Confrontation Clause. And, for the same reasons here, five justices would find this DNA evidence admissible. At the very least, such a conclusion is not beyond fair-minded disagreement.

Moreover, petitioner claims that the introduction of particular statements in the reports violated his right to confrontation (Petitioner's Brief: 40). First, to the extent that petitioner complains that the reports list him as a suspect and refer to the victim Whitaker as "UC 7615," that section was signed by Ms. Yanoff, who testified at trial (A: 382-85). Likewise, Natalyn Yanoff's initials – "NY" – appear by "analyst" on the page listing the different tests to be performed, and her initials appear on the following page which lists the tests performed on the two samples (A: 392). For the reports prepared by Ms. Yanoff, there can be no violation because she testified at trial.

In any event, for the reasons discussed above, none of these unsworn statements, relating primarily to the chain of custody, violated the Confrontation Clause. The papers cited by petitioner merely list various steps in the testing process; the purpose of the declarants could only have been to complete their particular tasks.

Moreover, as discussed above, *Bullcoming* held that the admission of a certification of test results violates the Confrontation Clause, and petitioner simply

cannot claim that, in light of the *Williams* decision, it bars the documents at issue here based on any similarities to those in that case (Petitioner's Brief: 41). First, as discussed above, the only rule that has garnered five members of the Court is that certified documents may not be admitted to prove a defendant's guilt. Indeed, as petitioner quotes *Williams* in his brief: "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" (Petitioner's Brief: 35, quoting *Williams v. Illinois*, 132 S. Ct. at 2242).

And, as discussed above, the lab technicians here, like those in *Williams*, did not have any accusatory purpose beyond performing a discreet task in the testing process. *Id.* at 2244. This is certainly evident in the "statements" of which petitioner complains – a summary signed by the reviewing analyst, who testified at trial (A: 382-85); names signed into a chain of custody log (A: 391); a list of tests performed (A: 392-93); a Control Review Worksheet (A: 404); and a packaging worksheet (A: 417). Nobody filling in these sheets could have understood in any way that they were accusing petitioner – especially trained laboratory personnel who prepared the sample in this case as part of an assembly line. Much less were these formal, sworn to, or certified documents with an accusatory primary purpose. Thus, as the plurality held, "the use at trial of a DNA report prepared by a modern, accredited laboratory bears little if any resemblance to the historical practices that the Confrontation Clause

aimed to eliminate.” *Williams v. Illinois*, 132 S. Ct. at 2244 (internal citations omitted).

In addition, the business records certification simply affirmed that the documents here were admissible as proper business records, and is not comparable to the certificate at issue in *Bullcoming* (Petitioner’s Brief: 41-2). In *Bullcoming*, the analyst “tested the evidence and prepared a certificate concerning the result of his analysis.” *Bullcoming v. New Mexico*, 131 S. Ct. at 2717. In that case, the witness affirmed the results of the test and the state offered his sworn, ultimate conclusions into evidence; here, the custodian of records affirmed that the copies of OCME documents were in fact business records – not that they contained true statements. Moreover, the content of the reports were informal at best – worksheets, notes, and computer-generated graphs produced by lab technicians at various stages of the process. These were not formalized documents – much less ones arriving at a conclusatory conclusion as in *Bullcoming* and *Melendez-Diaz*.

Furthermore, the state’s argument that the primary purpose of the OCME personnel was to perform “some discreet step in the testing process” was based on the plurality holding in *Williams* (Petitioner’s Brief: 43; A: 367).

The plurality found it “significant that in many labs, numerous technicians work on each DNA profile. When 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.” *Williams v. Illinois*, 132 S. Ct. at 2244. Thus, the plurality found that this division of labor affected the primary purpose of the

workers – and a fifth justice found that the documents were not testimonial because they were not formalized.

Moreover, the decision of the Second Department is not contrary to clearly established federal precedent because it is consistent with *Williams*, and a faithful attempt to interpret what is at best a difficult-to-parse set of opinions in that case (Petitioner’s Brief: 45-8). The decision is consistent with the holding of *Williams* that the primary purpose of the analysts at issue in the DNA documents was to perform some discrete task and not to accuse petitioner, as the expert did at trial. The state court held that the individual OCME technicians contributions to the report were not accusatory, and that only Ms. Yanoff’s testimony was, as her testimony “established that she conducted the critical analysis at issue by comparing the DNA profiles derived from the crime scene evidence to the defendant’s DNA profile and concluding that all of the profiles matched. Moreover, 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*, 108 A.D.3d 576, 577-78 (2d Dept. 2013). Therefore, this decision holding that only the testifying expert accused petitioner was not “contrary to, or an unreasonable application of” clearly established federal law.

Furthermore, while Amicus argues that the Second Department’s holding was inconsistent with *Melendez-Diaz* and *Bullcoming* (Amicus Brief: 21, 25-6), *Williams* controls this case. And, as discussed above, those cases are distinguished

from this one and *Williams* because they both involved the introduction of certificates of analysis.

In addition, the Amicus seems to embrace a fallacy that, because Justice Thomas disagreed with the rationale of the plurality, the Supreme Court somehow established a rule that would permit the DNA evidence in that case while prohibiting it in this and future cases (Amicus Brief: 22-4). Again, five Justices would clearly permit the testimony at issue in this case and the rationale of the Second Department was consistent with the view of the plurality opinion. At the very least, petitioner has failed to satisfy the required showing, based on *Williams*, that the testimony was inadmissible under the Confrontation Clause. Nor can Amicus rely on the *Williams* dissent to argue what rule the state court should have applied (Amicus: 24-5).

Moreover, to the extent that petitioner attacks the state court's rationale as inconsistent with the primary purpose analysis of *Melendez-Diaz* or *Bullcoming*, the *Williams* plurality was clear that the exact statements of which petitioner now complains do not have the primary purpose of accusing a defendant (Petitioner's Brief: 46-51). *Williams v. Illinois*, 132 S. Ct. at 2244. Indeed, that petitioner finds statements in *Melendez-Diaz* and *Bullcoming* at variance with those in *Williams* reflects the confused nature of the Supreme Court decisions resulting from Justice Thomas's unique jurisprudence. And his main complaint seems to be that the Appellate Division followed *Williams* – which involved uncertified DNA reports akin to those here – instead of *Melendez-Diaz* and *Bullcoming* – which involved a certified

drug test and a certified blood alcohol test. Any confusion created by these decisions should lead to more deference – not less – to the state courts.

Furthermore, Amicus claims that the writ should be granted in this case because cross-examining more laboratory personnel would ensure more accurate findings of guilt (Amicus Brief: 3-16). Amicus, however, misapprehends the nature of the inquiry before this Court: What is the clearly established Supreme Court law and whether the state court reasonably applied that law – not what rule the defense believes would foster a better result.

Moreover, while Amicus cites instances where laboratories made mistakes, those cases are not relevant here because there is no conceivable possibility that petitioner is innocent. DNA recovered from three separate crimes matched DNA stored in a national database (Stipulation: 894-95). Then, OCME compared a swab taken from petitioner's cheek to the recovered DNA and found that it matched that DNA. While the state did not admit the original DNA sample taken from petitioner, its additional swabbing of petitioner – and the testing of that swab by a modern accredited laboratory – guaranteed that the three separate DNA hits were accurate.

In addition, subjecting the entire chain of analysts to court appearance and cross-examination could ultimately lead to *less* reliable verdicts rather than more. New York's OCME, along with virtually every other accredited DNA laboratory, would be compelled to shift from its current assembly line method to another that would require only one analyst, grinding to a near halt the ability to analyze this type of evidence and produce the results for use in a criminal prosecution, whether

favorable to the prosecution or the defense. Far more often than not, the state simply could not rely on DNA evidence, because the burden of producing so many analysts for trial would be too high, especially with the passage of time. This could readily produce less reliable verdicts because, unlike other types of forensics science that has been criticized in recent years, DNA is particularly reliable and helpful to a jury. As the plurality in *Williams* held, the Confrontation Clause never intended, by compelling the testimony of all the technicians who worked on a report, to “encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable.” *Williams v. Illinois*, 132 S.Ct. at 2228.

Notably, the National Academy of Sciences has singled out DNA for its reliability: “In the case of DNA analysis, studies have evaluated the precision, reliability, and uncertainties of the methods. This knowledge has been used to define standard procedures that, when followed, lead to reliable evidence.” National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, p. 114 (The National Academies Press 2009). These methods, developed by science, should guide DNA analysis if reliability of trial outcomes is the test. And this same study supporting the reliability of DNA evidence was cited in *Melendez-Diaz* as support for the unreliability of the drug testing there. *Melendez-Diaz v. Massachusetts*, 557 U.S. at 318.

Moreover, compelling additional witnesses would have little benefit in preventing the kind of mistakes cited by Amicus (Amicus Brief: 5-8). An analyst

who oversaw a discreet stage in a DNA test simply would not remember whether she misplaced or mishandled one of countless samples. And even *Melendez-Diaz* rejected any argument that the state had to prove every link in the chain of custody: “[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.” *Melendez-Diaz v. Massachusetts*, 557 U.S. at 311.

Moreover, Amicus discusses issues with the analysis of samples of DNA from crime scenes or DNA derived from mixtures (Amicus Brief: 8-16). But those examples are not relevant here because only the sample swabbed directly from petitioner’s mouth is at issue (Petitioner’s Brief: 24-5). Therefore, there was no need either to extract that DNA from a crime scene or to analyze it in a mixture. There is simply no question that it was petitioner’s DNA that was compared to that at the crime scene.

Nor do this Court’s decision in *United States v. James*, 712 F.3d 79 (2d Cir. 2013), and the recent holding of the New York State Court of Appeals in *People v. John*, 27 N.Y.3d 294 (2016), affect the decision here. As threshold matter, neither case is relevant to the issue of whether the state court’s interpretation of clearly established Supreme Court precedent was reasonable at the time it was made.

Furthermore, this Court’s holding in *United States v. James*, 712 F.3d at 79, addressing the admissibility of autopsy reports on *de novo* review, cannot affect this Court’s decision in this case where AEDPA deference is owed the state court’s

holding permitting the admission of uncertified DNA reports (Petitioner’s Brief: 36; Amicus Brief: 25-6). In *James*, this Court held that the autopsy reports were admissible because the “primary purpose” behind their creation was not to prove a fact at the defendant’s trial. *United States v. James*, 712 F.3d at 88. But this Court also discussed the evolution of the Supreme Court’s jurisprudence in the area of forensics reports, and held that it would apply pre-*Williams* law because of the confused nature of the Supreme Court’s holding in that case. *Id.* at 95-6.

First, *James* should not affect this case because whatever rule derives from that case is circuit precedent, not Supreme Court precedent. State courts are, of course, bound only by Supreme Court precedent under the deferential review of 2254(d). That this Court may have, on direct, de novo review chosen a particular path of interpretation of Supreme Court precedent does not preclude a state court from choosing a different one. Second, the rule in *James* is directed to autopsy reports, rather than DNA profiles, as to which *Williams* is the best precedent on point. The decision here is at least a reasonable interpretation of that difficult case. Third, in *James*, this Court effectively acknowledged that there is no clearly established Supreme Court precedent in this area. While the *Williams*’s failure to “yield a single, useful holding” led this Court to fashion a new rule for autopsies in *James*, here such a failure can only result in deference to the state court, especially in a DNA context. *United States v. James*, 712 F.3d at 95. Fourth, to the extent that this Court suggested that the decision in *Williams* either could or should be ignored, as petitioner also suggests, the state court cannot be faulted for reading, considering, and attempting

to faithfully interpret what is by far the closest Supreme Court case to the issue the state court was considering.

Nor should the holding by the New York Court of Appeals in *People v. John*, 27 N.Y.3d at 294, affect this case. Again, only the precedent of the Supreme Court is relevant here, and *John* simply offers another reasonable interpretation of that precedent. In that case, the Court of Appeals held that the introduction of DNA reports into evidence violated the Confrontation Clause. There, the police recovered DNA from a gun that petitioner was accused of using, and that DNA was subsequently matched to DNA recovered from petitioner. *Id.* at 298-99. At trial, the state introduced reports on the DNA recovered from the gun swabs and from petitioner over the defendant's objections. *Id.* at 299-300. Regarding the results of editing done to the DNA charts in the file, the testifying OCME analyst, "who did not engage in the editing process, claimed that she 'did review [the results of the editing to] make sure that [she] agreed that that edit . . . should have been taken out.'" *Id.* at 302.

The court held that the introduction of these reports violated the defendant's right to confrontation. It found that the expert's trial testimony was "nothing more than surrogate testimony to prove a required fact – that defendant's DNA was found on the loaded gun for which he stood charged." *Id.* at 309. It distinguished its holding from its prior decision in *People v. Brown*, 13 N.Y.3d 332, 340 (2009), finding that the expert in *Brown* "testified that any conclusions or opinions she reached from the raw data supplied by the outside

laboratory were her own and were not contained in any reports,” while the expert in *John*, who “made no such claim” and “was not an OCME supervisor, reviewed the reports of the other OCME analysts, including the numerical DNA profiles generated after an editing process, saw that the ‘necessary people’ had signed off and agreed with their conclusions.” *Id.* at 310.

The court found that “[h]er conclusory testimony in this regard was based solely on the reports of the nontestifying analysts that were admitted into evidence for their truth and not based on a separate, independent and unbiased analysis of the raw data.” *Id.* at 310-311. Ultimately, the Court concluded “that an analyst who witnessed, performed or supervised the generation of defendant’s DNA profile, or who used his or her independent analysis on the raw data, as opposed to a testifying analyst functioning as a conduit for the conclusions of others, must be available to testify.” *Id.* at 315.

The New York Court of Appeals would not have reversed this case for the same reason it did not reverse *Brown*. Here, Ms. Yanoff testified that she personally reviewed and compared the profile recovered from petitioner to the existing profiles recovered from the three different crime scenes (Yanoff: 953-54). And her conclusion that there was a match was made independently without reference to the conclusions contained in any reports (Yanoff: 957). Moreover, where *John* condemned the failure to produce the analyst who edited the DNA charts, the analyst here read the computer produced graphs herself and determined what alleles to assign to the various peaks (Yanoff: 984). Thus, in this case, Ms. Yanoff used “her

independent analysis on the raw data, as opposed to a testifying analyst functioning as a conduit for the conclusions of others.” *Id.* at 315.

Finally, as the District Court properly held, in the *habeas* posture of this case, petitioner simply cannot claim that any clear Supreme Court precedent exists that would compel the granting of his petition. The Supreme Court, quite clearly, is fractured and cannot muster a majority on this issue. In her dissent, Justice Kagan notably complained about the confusion generated by the plurality and concurrence: “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.” *Williams v. Illinois*, 132 S. Ct. at 2277.⁵

Under these circumstances, the decision of the New York State Appellate Division that the admitted DNA profiles – which did not contain any sworn-to statements and which had to be interpreted by an expert who testified live at trial – did not violate petitioner’s right to confrontation was “eminently reasonable and entirely consistent with relevant Supreme Court precedent.” *Thompson v. Besio*, ___ F. Supp. ___, 2014 U.S. Dist. LEXIS 52144, *22 (E.D.N.Y. 2014). Indeed, no majority of the Court ever has held that the admission of unsworn DNA documents

⁵The Court has barred the admission of certified results of laboratory tests at trial and nothing more. The majorities in both *Melendez-Diaz* and *Bullcoming* depended on “one Justice’s one-justice view of those holdings.” In that sense, the reach of the Supreme Court’s decisions in this area is quite clear.

violated the Confrontation Clause. “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.” *Washington v. Griffin*, 142 F. Supp. 3d at 296. Thus, “[c]onsidering 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,” the District Court properly declined to “hold that the state court’s judgment – which mirrored the disposition in *Williams* – was an unreasonable application of clearly established Supreme Court precedent.” *Washington v. Griffin*, 142 F. Supp. 3d at 297.

In sum, the state court properly admitted the DNA documents at trial and the admission of those documents did not violate petitioner’s right to confront the witnesses against him. Because petitioner has failed to show that the state courts contravened or unreasonably applied Supreme Court precedent in rejecting his contention, petitioner’s claim was properly denied.

CONCLUSION

For the reasons set forth above, this Court should uphold the decision of the District Court denying the petition for a writ of *habeas corpus*.

Respectfully submitted,

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July 26, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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KENNETH WASHINGTON, :
 :
 Petitioner-Appellant, :
 :
 -against- : Dkt. No. 15-3831
 :
 THOMAS GRIFFIN, Superintendent, :
 Sullivan Correctional Facility, :
 :
 Respondent-Appellee. :
-----X

CERTIFICATE OF COMPLIANCE

WILLIAM H. BRANIGAN, pursuant to Title 28, United States Code,
Section 1746, hereby declares under penalty of perjury:

I am the attorney for appellee in the above-captioned matter, and,
pursuant to Rule 32(a)(7)(C), I certify that appellee's brief complies with
type-volume limitations of Rule 32(a)(7)(B)(i), and that the word-count function on
my word processor indicates that the brief contains 13,502 words.

WILLIAM H. BRANIGAN