

No. 17- _____

IN THE
Supreme Court of the United States

JAMES GARLICK,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the Appellate Division, Supreme Court of
New York, First Judicial Department.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Petitioner James Garlick moves for leave to proceed *in forma pauperis*, and to file the enclosed Petition for a Writ of Certiorari to the Appellate Division, Supreme Court of New York, First Judicial Department.

On July 31, 2014, Petitioner was granted, under New York County Law § 722, leave to so proceed in the Supreme Court of the State of New York, Appellate Division, First Judicial Department. A copy of the order granting Petitioner leave to proceed *in forma pauperis*, and Petitioner's declaration in support of his motion for leave to so proceed, is appended hereto.

RESPECTFULLY SUBMITTED this 20th day of July, 2017.

By:



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At a Term of the Appellate Division of the Supreme
Court held in and for the First Judicial Department
in the County of New York on July 31, 2014.

PRESENT - Hon. Angela M. Mazzarelli, Justice Presiding,
David Friedman
Leland G. DeGrasse
Helen E. Freedman
Barbara R. Kapnick, Justices.

-----X
The People of the State of New York,
Respondent,

-against-

M-1316
Ind. No. 3681/11
Case No. 61160C/11

James D. Garlick,
Defendant-Appellant.

-----X

Defendant having renewed his motion for leave to prosecute, as a poor person, the appeal from the judgment of the Supreme Court, Bronx County, rendered on or about November 1, 2013, for leave to have the appeal heard on the original record and upon a reproduced appellant's brief, and for related relief,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted to the extent of permitting the appeal to be heard on the original record, except that a certified copy of the indictment(s) shall be substituted in place of the original indictment(s), and upon a reproduced appellant's brief, on condition that appellant serves one copy of such brief upon the District Attorney of said county and files reproduced copies of such brief, together with the original record, pursuant to Rule 600.11 of the Rules of this Court.

The court reporter shall promptly make and file with the criminal court (CPL §460.70) one transcript of the stenographic minutes of any proceedings pursuant to CPL §210.20, Arts. 710 and 730, and of the plea or trial and sentence. The Clerk shall furnish a copy of such transcripts to appellant's counsel, without charge, the transcripts to be returned to this Court when appellant's brief is filed.

Robert S. Dean, Esq., Center for Appellate Litigation, 74 Trinity Place, 11th Floor, New York, New York 10006, Telephone No. 212-577-2523, is assigned as counsel for defendant-appellant for purposes of the appeal. The time within which appellant shall perfect this appeal is hereby enlarged until 120 days from the date of filing of the record.

ENTER:


CLERK

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, JAMES GARLICK, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>24.80</u>	\$ <u>N/A</u>	\$ <u>24.80</u>	\$ <u>N/A</u>
Self-employment	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Income from real property (such as rental income)	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Interest and dividends	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Gifts	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Alimony	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Child Support	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Disability (such as social security, insurance payments)	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Unemployment payments	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Public-assistance (such as welfare)	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Other (specify): _____	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>	\$ <u>//</u>
Total monthly income:	\$ <u>24.80</u>	\$ <u>Ø</u>	\$ <u>24.80</u>	\$ <u>Ø</u>

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
D.O.C.S	Comstock, NY	6/16 - present	\$24.80
11	Coxsackie, NY	5/15 - 6/16	\$24.80
11	Auburn, NY	1/14 - 5/15	\$24.80

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
/	/	/	\$ /
/	/	/	\$ /
/	/	/	\$ /

4. How much cash do you and your spouse have? \$ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
/	/	\$ /	\$ /
/	/	\$ /	\$ /
/	/	\$ /	\$ /

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value _____

☐ Motor Vehicle #2
Year, make & model N/A
Value _____

☐ Other assets
Description N/A
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money

Amount owed to you

\$ _____
\$ _____
\$ _____

Amount owed to your spouse

\$ _____
\$ _____
\$ _____

7. State the persons who rely on you or your spouse for support.

Name

Relationship

Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

Rent or home-mortgage payment
(include lot rented for mobile home)

Are real estate taxes included? ☐ Yes ☐ No

Is property insurance included? ☐ Yes ☐ No

You

\$ 0

Your spouse

\$ N/A

Utilities (electricity, heating fuel,
water, sewer, and telephone)

\$ 0

\$ N/A

Home maintenance (repairs and upkeep)

\$ 0

\$ N/A

Food

\$ 24.80

\$ 0

Clothing

\$ 0

\$ N/A

Laundry and dry-cleaning

\$ 0

\$ N/A

Medical and dental expenses

\$ 0

\$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>0</u>	\$ <u>N/A</u>
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>0</u>	\$ <u>N/A</u>
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>N/A</u>	\$ <u>N/A</u>
Life	\$ <u>11</u>	\$ <u>11</u>
Health	\$ <u>11</u>	\$ <u>11</u>
Motor Vehicle	\$ <u>11</u>	\$ <u>11</u>
Other: _____	\$ <u>11</u>	\$ <u>11</u>
Taxes (not deducted from wages or included in mortgage payments)		
(specify): <u>N/A</u>	\$ <u>0</u>	\$ <u>N/A</u>
Installment payments		
Motor Vehicle	\$ <u>0</u>	\$ <u>N/A</u>
Credit card(s)	\$ <u>0</u>	\$ <u>11</u>
Department store(s)	\$ <u>0</u>	\$ <u>11</u>
Other: _____	\$ <u>0</u>	\$ <u>11</u>
Alimony, maintenance, and support paid to others	\$ <u>0</u>	\$ <u>11</u>
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>0</u>	\$ <u>NA</u>
Other (specify): _____	\$ <u>0</u>	\$ <u>11</u>
Total monthly expenses:	\$ <u>0</u>	\$ <u>11</u>

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Presently incarcerated and only receive \$0.16 an hour for work detail.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March, 27th, 2017

James Garlick
(Signature)

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a certified autopsy report—created as part of a homicide investigation and asserting that the cause of death was homicide—is “testimonial” under the Confrontation Clause framework established in *Crawford v. Washington*, 541 U.S. 36 (2004)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Garlick respectfully petitions for a writ of certiorari to review the judgment of the Appellate Division, Supreme Court of New York, First Judicial Department.

OPINIONS BELOW

The opinion of the Appellate Division, Supreme Court of New York, First Judicial Department, Pet. App. 1a, is published at 144 A.D.3d 605. The opinion of the New York Court of Appeals denying leave to appeal, Pet. App. 4a, is published at 29 N.Y.3d 948. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the Appellate Division was entered on November 29, 2016. Pet. App. 1a-3a. On March 3, 2017, the New York Court of Appeals denied leave to appeal. Pet. App. 4a. On May 18, 2017, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including July 3, 2017. *See* No. 16A1124. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

New York County Law § 677(4) provides: “The . . . medical examiner shall promptly deliver to the district attorney copies of all records pertaining to any death

whenever, in his opinion, or in the judgment of the person performing the autopsy, there is any indication that a crime was committed.”

New York City Charter § 557 (g) provides: “The chief medical examiner shall keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality. Such records shall not be open to public inspection.”

STATEMENT OF THE CASE

The Confrontation Clause generally prohibits the prosecution from introducing “testimonial” statements from witnesses without putting the witnesses on the stand to face cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic reports fall within the “core class of testimonial statements.” *Id.* at 310 (quoting *Crawford*, 541 U.S. at 51). Two years later, *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), confirmed that there is no “‘forensic evidence’ exception” to the Confrontation Clause. *Id.* at 658-59 (citing *Melendez-Diaz*, 557 U.S. at 317-21). “An analyst’s certification prepared in connection with a criminal investigation or prosecution . . . is ‘testimonial,’ and therefore within the compass of the Confrontation Clause.” *Id.*

This case presents an important question which has intractably split state courts of last resort and federal courts of appeals: whether the rule of *Melendez-Diaz* and

Bullcoming applies to autopsy reports that are prepared as part of a homicide investigation and assert that the cause of death was homicide. This issue is important to the administration of justice and has sufficiently percolated throughout state supreme courts. This Court should resolve the issue now.

1. At 6:20 p.m. on November 1, 2011, the police responded to a report of an assault at an apartment building in The Bronx. Trial Transcript (“Tr.”) 156-57, 169. Inside the building’s lobby, the police found Gabriel Sherwood lying on the ground bleeding. The police secured the “crime scene” and an officer brought Sherwood to the hospital. Tr. 158-59. Within five minutes of his arrival at the hospital, Sherwood was pronounced dead.

That evening, the police launched a homicide investigation. They began by reviewing the apartment building lobby’s surveillance video. The video indicated that a male struggled with the victim on the ground inside the lobby. Then, a female forcefully struck the victim in the skull over a dozen times. The two assailants then left the building.

Around midnight, the investigation’s lead detective (Detective DeGrazia) concluded that Johanna Rivera was the female who had repeatedly struck Sherwood in the head, and the detective arrested her in her home. Rivera informed the detective that petitioner was the male assailant depicted in the surveillance video.

The next morning, the District Attorney’s Office authorized the police to charge Johanna Rivera with intentional murder under the theory that her blows to

Sherwood's head caused Sherwood's death. Tr. 250, 291; Suppression Hearing Tr. 29, 40. The lead detective then notified the New York City Police Department that petitioner was the male suspect depicted on the video by issuing a department-wide notification at 4:45 a.m. to arrest him. Tr. 188-89; Suppression Hearing Tr. 45-47.

Also that morning, Dr. Katherine Maloney of the New York City Office of Chief Medical Examiner ("OCME") performed an autopsy on the victim. Dr. James Gill was present at the autopsy, as were two homicide detectives. Pet. App. 31a; Tr. 243. Before the autopsy, OCME staff conversed with the lead detective (DeGrazia) and prepared a "Notice of Death" form, stating: "Circumstances of death: App. Manner: Homicide."

Later that day, Dr. Maloney drafted an autopsy report in which she declared that the cause of death was a stabbing—not blows to the head. Pet. App. 30a-35a. She then notified the police of her findings. Tr. 277. After receiving this information, the NYPD declined to pursue murder charges against Rivera and instead charged petitioner with murder. Tr. 276-77.¹

2. About a week later, the police arrested petitioner for murder. During an interrogation, petitioner stated that he had arrived at the scene because his girlfriend had frantically told him that Sherwood was sexually harassing and threatening her. Tr. 194-95; Trial Ex. 4 (written statement). When he arrived at the scene, he got into

¹ Rivera was ultimately indicated for assault and pled guilty to assault.

a fist fight with Sherwood outside the apartment building, which then spilled into the building's lobby. During the fight, Sherwood brandished a knife and the two struggled for it. Tr. 194-95; Trial Ex. 4. As petitioner explained: "All I was trying to do was defend myself and my girlfriend. It was a tragedy. This wasn't supposed to happen and I'm sorry for my part in this. I wasn't trying to hurt anybody." Trial Ex. 4.

Shortly thereafter, the State indicted petitioner for intentional murder, voluntary manslaughter (intent to cause serious physical injury), and assault.

More than a month after the indictment was issued, Dr. Maloney completed and signed the final version of her autopsy report. At the beginning of her comprehensive report, Dr. Maloney "certif[ied]" that she performed the victim's autopsy. Pet. App. 31a. She then asserted that the "manner of death" was "homicide" and that a "stab wound of [the] torso with perforation of heart" "cause[d] the death." Pet. App. 30a. Dr. Maloney also claimed that the "depth of penetration" of the purportedly fatal wound to the left chest was "4-1/2 to 5-1/2" inches. Pet. App. 32a. This fatal wound "perforated the heart," collapsed the lung ("the lung is atelectatic"), and led to the loss of 1.5 liters of blood. Pet. App. 32a. Dr. Maloney further noted in her report that the victim had "blunt impact injuries of [the] head," numerous "abrasions" of the head and face, and "contusions of the face." Pet. App. 30a, 33a. She asserted, however, that her "internal examination" of the head indicated no "scalp contusions" or skull "fracture[s]." Pet. App. 33a. "There is no epidural, subdural or subarachnoid hemorrhage. The brain has no contusions." Pet. App. 33a

OCME certified the autopsy report as a business record under New York's statutory business-record rule and "affixed the official seal of the office of the Chief Medical Examiner of the City of New York" to the report. Pet. App. 29a ("Certification as a Business Record"); *see also* N.Y. Civ. Practice Laws and Rules § 4518 (business records are admissible hearsay). As state and local law expressly mandate, OCME delivered the inculpatory report to the District Attorney's Office the very day Dr. Maloney signed it. Pet. App. 28a; N.Y. County Law § 677(4) ("The . . . medical examiner shall promptly deliver to the district attorney copies of all records pertaining to any death whenever, in his opinion, or in the judgment of the person performing the autopsy, there is any indication that a crime was committed."); *accord* N.Y. City Charter § 557(g).

3. At trial, the State proffered Dr. Maloney's autopsy report as its first exhibit. The State, however, refused to produce Dr. Maloney or Dr. Gill (the other medical examiner who was present during the autopsy) for live testimony subject to cross-examination. Instead, as its first witness, the State proffered Dr. Susan Ely, who had no involvement in the autopsy whatsoever. Pet. App. 6a-13a; Tr. 46-47.

The State never claimed that that Dr. Maloney or Dr. Gill was unavailable. The medical examiners had simply changed offices; Dr. Maloney was working in upstate New York while Dr. Gill was working about an hour away in Stamford, Connecticut. Tr. 47-48; Pet. App. 7a. Nothing in the record suggests either witness could not have traveled to New York City for the trial.

Petitioner objected on Confrontation Clause grounds. He argued that the autopsy report was testimonial because it was a certified document and an “objective witness [would] reasonably . . . believe that the . . . report would be available for use later at trial.[.]” Pet. App. 7a-13a (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009)). The trial court overruled petitioner’s objection, holding that the autopsy report was not testimonial. Pet. App. 18a-20a.

The State then called Dr. Ely as its first witness and introduced the autopsy report as Exhibit 1. Tr. 23; Pet. App. 25a-26a. Reciting the report, the surrogate witness claimed that the “actual cause of death” was a “stab wound of torso with perforation of heart” and that head trauma did not cause the death. Tr. 37, 44, 46.

The surrogate witness also contrasted “stab wounds” with “incised wounds.” See also Pet. App. 32a-33a (autopsy report) (finding that two of the wounds were “stab wounds” to the chest while five of the wounds were “incised” wounds). Dr. Ely explained that a stab wound is a deep wound created by the tip of the knife entering the body, while an incised wound is created by the side of the knife laterally cutting the body. Tr. 36-37, 51-53. To distinguish between these wounds, a forensic pathologist must assess “certain characteristics that . . . forensic pathologists . . . are trained to recognize.” Tr. 52. Specifically, the pathologist searches for a “very skinny triangle of a wound” that can only be observed upon a “very careful[.]” examination. Tr. 52.

Defense counsel asked Dr. Ely if Dr. Maloney was certified in forensic pathology when she performed the autopsy. Dr. Ely answered, “I can’t say for sure, I do not believe she was, but I’m not certain of that.” Tr. 54-55. And when asked if the autopsy report “support[ed] the conclusion that the instrument that caused the wounds was being held by two people at the same time”—thus indicating a struggle for the knife—Dr. Ely answered: “The autopsy report wouldn’t tell me that information.” Tr. 48-49.

The State also contended at trial that the surveillance video established cause of death and homicidal intent, that is, intent to kill or cause serious physical injury. But, as the trial court found during the charge conference, “[t]he video itself presents a jury question whether a knife or sharp object is visible on the film.” Tr. 415. Further, the video fails to foreclose the possibility that petitioner inadvertently hurt Mr. Sherwood with the knife during a struggle for it. Trial Ex. 5. Finally, the video does not clearly indicate whether or not Rivera had an object in her hand when she was striking Sherwood in the head. *Id.*

At the close of the evidence, petitioner requested that the court instruct the jury to consider the lesser-included count of intentional assault (intent to cause physical injury). Tr. 380. Petitioner pressed that “intent is an issue in this case, an issue that the People have to prove beyond a reasonable doubt, and it is a questionable jury question based on the evidence that was adduced at trial.” Tr. 382. The State resisted such an instruction, stressing that the autopsy report concluded that “[t]here are seven stab wounds here, . . . a stab to the heart, collapsed lung, one stab caused the

victim to lose one and a half liters, one-third of the blood in his body. The stab designated A [in the autopsy report's body diagram], which is also a stab wound, pierced the diaphragm." Tr. 394-95; Pet. App. 38a.

Finding that a reasonable juror could conclude that petitioner's intent was merely to cause physical injury, the court agreed to submit the intentional assault charge to the jury. Tr. 415-16.

In summation, the prosecution again relied heavily upon the autopsy report:

The victim here had seven knife injuries and also some bruises which didn't contribute to death.

Let's talk about the wound that was the most damaging; a fatal wound, the most deadly wound. It's the wound that is designated as wound C [on the autopsy report's body diagram]. That wound perforated the victim's heart. It went through his heart. There was significant bleeding in his chest cavity. That stab wound alone cost Gabriel Sherwood one and one-half liters of blood. One-third of the blood in his body was lost by that one fatal stab. And that stab also caused him to suffer a collapsed lung. Another stab went through Mr. Sherwood's diaphragm. . . .

Johanna is pounding him, she's punching and kicking him. And we know from the medical examiner none of that contributed in any way to death.
. . .

[I]t was made very clear that when the detective apprehended Johanna [after examining the surveillance video] he didn't know what the cause of death was. He didn't know it was a stab through the heart. And he said he wouldn't have charged Johanna with murder if he knew that.
. . .

And remember, the stab that did the killing, the deepest wound went in a distance of up to five and one-half inches. Five and one-half inches into the body of the victim.

Tr. 452-53, 454, 460, 466; Pet. App. 38a (diagram of the body).

After asking the judge during deliberations to “explain all three charges” again Tr. 527, the jury acquitted petitioner of intentional murder but convicted him of voluntary manslaughter. Tr. 541.

Petitioner was sentenced to 20 years of incarceration in prison.

4. On appeal to the Appellate Division, First Judicial Department, petitioner renewed his contention that the autopsy report was testimonial and thus inadmissible. Relying on precedent from the New York Court of Appeals, the Appellate Division rejected the argument:

“Defendant’s right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner” (quoting *People v. Acevedo*, 112 A.D.3d 454, 455 (N.Y. App. Div. 2013)), since the report, which “did not link the commission of the crime to a particular person,” was not testimonial (quoting *People v. John*, 52 N.E.3d 1114 (N.Y. Ct. App. 2016)). Defendant’s contention that *People v. Freycinet*, 892 N.E.2d 843 (N.Y. 2008), has been undermined by subsequent decisions of the United States Supreme Court is unavailing (citing *Acevedo*, 112 A.D.3d at 455).

Pet. App. 3a.

5. Petitioner sought discretionary review of this Confrontation Clause claim before the New York Court of Appeals. Without comment, the court denied leave to appeal. Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

I. Courts Are Intractably Divided Over Whether Autopsy Reports, Created as Part of a Homicide Investigation and Asserting that the Cause of Death Was Homicide, Are Testimonial.

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const., amend. VI. “Witnesses” are those who give testimony. Accordingly, in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the Confrontation Clause regulates the admissibility of “testimonial” statements. 541 U.S. at 42-62. Under *Crawford*, the prosecution (absent narrow exceptions not pertinent here) cannot introduce testimonial statements unless the witness is unavailable and the defendant had a prior opportunity to cross-examine her. *Id.* at 53-54, 59.

Crawford stopped short of offering a comprehensive definition of “testimonial.” See 541 U.S. at 68 & 68 n. 10. But in *Crawford*’s wake, this Court has held that out-of-court statements are testimonial if their primary purpose is to “establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006). And applying that test, this Court has twice held that certified scientific reports created to assist police investigations—first, a controlled-substance analysis and, second, a blood-alcohol analysis—are testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). On the other hand, this Court has held that an informal report drafted by a

private company to aid law enforcement agents' DNA analysis is not testimonial. See *Williams v. Illinois*, 132 S. Ct. 2221, 2242-44 (2012) (plurality opinion); see also *id.* at 2259-64 (Thomas, J., concurring in the judgment).

This Court has never considered how *Crawford* applies to autopsy reports. Lacking “clear guidance on this issue,” state and federal courts have become intractably “split over whether an autopsy report is testimonial hearsay.” *Ackerman v. State*, 51 N.E.3d 171, 180 (Ind. 2016), *cert. denied* 137 S. Ct. 475 (2016); accord *Commonwealth v. Brown*, 139 A.3d 208, 215 (Pa. App. 2016) (“We acknowledge that there is a sharp split in authority on whether autopsy reports are testimonial.”).²

1. Six state courts of last resort and two federal courts of appeals have held since *Melendez-Diaz* that an autopsy report asserting the cause of death to be homicide is testimonial. See *State v. Bass*, 132 A.3d 1207, 1222-1227 (N.J. 2016); *State v. Navarette*, 294 P.3d 435, 440-42 (N.M. 2013), *cert. denied* 134 S. Ct. 64 (2013); *Miller v. State*, 313 P.3d 934, 967-71 (Okla. Crim. App. 2013); *Commonwealth v. Carr*, 986 N.E.2d 380, 398-400 (Mass. 2013); *State v. Frazier*, 735 S.E.2d 727, 730-32 (W. Va. 2012); *State v. Locklear*, 681 S.E.2d 293, 304-05 (N.C. 2009); *United States v.*

² The scholarly community is divided as well. See Robert Molko, *The Law of Unintended Consequences Strikes Again: Does Murder Have a Statute of Limitations Now? The Sky Will Fall Unless the Supreme Court Changes Its Interpretation of the Right of Confrontation*, 63 Drake L. Rev. 527 (2015); Crystal Vasalech, *Autopsy Reports Are a Victim's Last Statement: The Residual Exception and Surrogate Testimony*, 37 T. Jefferson L. Rev. 473 (2015); Andrew Higley, *Tales of the Dead: Why Autopsy Reports Should Be Classified As Testimonial Statements Under the Confrontation Clause*, 48 New Eng. L. Rev. 171 (2013); Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports—A “Testimonial,”* 74 La. L. Rev. 117 (2013).

Ignasiak, 667 F.3d 1217, 1229-35 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30, 69-73 (D.C. Cir. 2012). At least two state intermediate courts agree. *See Rosario v. State*, 175 So.3d 843, 854-58 (Fla. App. 2015); *Wood v. State*, 299 S.W.3d 200, 208-10 (Tex. App. 2009).

The reasoning of these decisions is straightforward: when the autopsy is conducted during an “active homicide investigation,” its primary purpose is to “establish facts for later use” in prosecution. *Bass*, 132 A.3d at 1225; *see also, e.g., Navarette*, 294 P.3d at 440. This is especially so where, as here, state law mandates that autopsy reports finding homicide be provided to the prosecutor’s office for use in a criminal case. *See Ignasiak*, 667 F.3d at 1231-32; *Frazier*, 735 S.E.2d at 731-32.

2. On the other side of the split, five state supreme courts since *Melendez-Diaz* have held that autopsy reports created as part of criminal investigations are nontestimonial. *See State v. Hutchison*, 482 S.W.3d 893, 905-14 (Tenn. 2015); *State v. Maxwell*, 9 N.E.3d 930, 945-52 (Ohio 2014), *cert. denied* 135 S. Ct. 1400 (2015); *State v. Medina*, 306 P.3d 48, 62-64 (Ariz. 2013), *cert. denied* 134 S. Ct. 1309 (2014); *People v. Leach*, 980 N.E.2d 570, 582-94 (Ill. 2012); *People v. Dungo*, 286 P.3d 442, 447-50 (Cal. 2012). The New York Court of Appeals reached the same conclusion just before *Melendez-Diaz* in *People v. Freycinet*, 892 N.E.2d 843, 845-46 (N.Y. 2008), and has adhered to that position in the wake of *Melendez-Diaz* and *Bullcoming*. *See People v. John*, 52 N.E.3d 1114, 1128 (N.Y. 2016); *People v. Pealer*, 985 N.E.2d 903, 905-08 (N.Y. 2013). Intermediate courts in New York have thus continued, as here, to treat

Freycinet as binding precedent. Pet. App. 3a; *see also People v. Acevedo*, 112 A.D.3d 454, 455 (N.Y. App. Div. 2013).

Like the courts whose views this Court rejected in *Melendez-Diaz*, these courts have advanced “a potpourri” of arguments. *See Melendez-Diaz*, 557 U.S. at 312.

a. Some courts hold that autopsy reports are nontestimonial because medical examiners are “authorized to perform autopsies in a number of situations, only one of which is when a death is potentially a homicide.” *Maxwell*, 9 N.E.3d at 951. Thus, this reasoning goes, the primary purpose of an autopsy report is never to create evidence for a criminal trial. *Id.*

b. Other courts similarly hold that autopsy reports asserting that the cause of death was homicide are nontestimonial because an autopsy does not invariably support a criminal prosecution. *See Leach*, 980 N.E.2d at 591-92. For instance, an autopsy may be performed to rule out suicide or accident, or it might unexpectedly produce exculpatory evidence. *Id.*

c. The apparent “reliability” of autopsy reports has also entered the fray. Medical examiners, the New York Court of Appeals has asserted, are “independent” from police and prosecutors and cannot be “significantly affected by a pro-law-enforcement bias.” *Freycinet*, 892 N.E.2d at 846. Furthermore, autopsy reports contain largely “contemporaneous, objective account[s] of observable facts,” as opposed to debatable “exercise[s] of judgment.” *Id.*

d. Still other courts, like the court here, have ruled autopsy reports nontestimonial because they do not “directly link defendant to the crime. [An autopsy] report is concerned only with *what* happened to the victim, not with *who* killed her.” *Freycinet*, 892 N.E.2d at 846 (emphasis added), *cited in* Pet. App. 39a-42a; *accord Leach*, 980 N.E.2d at 592; *Hutchison*, 482 S.W.3d at 913-14.

e. Finally, courts have held that “policy” reasons justify deeming autopsy reports nontestimonial—thereby categorically exempting medical examiners from the requirements of the Confrontation Clause. Specifically, “[a] medical examiner who conducted an autopsy may be unavailable or deceased when a trial begins” and “a second autopsy may not be possible.” *Maxwell*, 9 N.E.3d at 951. To ensure that a prosecution can proceed under such circumstances, the Ohio Supreme Court has held that autopsy reports are *never* testimonial, even if the medical examiner is perfectly available.

3. Two other state high courts have attempted to steer a middle course, although even these two courts disagree over what the proper rule should be. The Washington Supreme Court has held that statements in autopsy reports are testimonial when they have a directly “inculpatory effect,” but not necessarily when they are incriminating only when assessed in combination with other evidence. *State v. Lui*, 315 P.3d 493, 510-11 (Wash. 2014), *cert. denied*, 134 S. Ct. 2842 (2014). The California Supreme Court has similarly held that “anatomical and physiological observations” in an autopsy report are not testimonial, while reserving decision on whether

“conclusions as to the cause of the victim’s death” are testimonial. *Dungo*, 286 P.3d at 448-50; *see also People v. Edwards*, 306 P.3d 1049, 1087-90 & n. 12 (Cal. 2013), *cert. denied* 134 S. Ct. 2662 (2014).

4. The conflict over the status of autopsy reports created under the circumstances here is now deeply entrenched. Numerous state high courts have weighed in, and courts are no longer usefully contributing to any process of percolation. Only this Court can resolve the conflict over how the Confrontation Clause applies in this context.

II. The Question Presented is Important to the Administration of Justice and Should be Settled Now.

1. The testimonial status of autopsy reports is a recurring issue whose resolution is necessary to the fair administration of justice. Indeed, *Crawford’s* application to autopsy reports is an issue that arises almost exclusively in homicide prosecutions—the most serious criminal cases; the convictions that trigger the longest sentences; and the only ones in state courts that can justify the death penalty. A uniform and proper construction of the Sixth Amendment is especially important in this context.

2. Confrontation of medical examiners is also essential to prevent wrongful convictions. This Court already has recognized that forensic analysts are sometimes “incompetent” or even “fraudulent.” *Melendez-Diaz*, 557 U.S. at 319. And recent news reports confirm that medical examiners sometimes perform flawed or fraudulent

analyses.³ It is therefore vital that defendants have the opportunity to cross-examine the authors of forensic reports to “expose any lapses or lies.” *Bullcoming*, 564 U.S. at 662.

On a more subtle level, “[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.” *Melendez-Diaz*, 557 U.S. at 318. As the National Academy of Sciences has explained, medical examiners “serve the criminal justice system as medical detectives by identifying and documenting pathologic findings in suspicious or violent deaths and testifying in courts as expert medical witnesses.” National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 244 (2009); see also Homepage, NYC Office of Chief Medical Examiner, available at <http://www1.nyc.gov/site/ocme/index.page> (declaring that OCME “conducts independent investigations using advanced forensic science in the service of . . . the criminal justice system”). This is particularly true with respect to autopsy reports created during homicide investigations. As here, police officers

³ See Radley Balko, *The Saga of Shawn Parcells, the Uncredited Forensics ‘Expert’ in the Michael Brown Case*, Wash. Post (Dec. 2, 2014); Campbell Robertson, *Questions Left for Mississippi Over Doctor’s Autopsies*, N.Y. Times (Jan. 7, 2013); Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 Stan. L. & Pol’y Rev. 381, 401-02 (2004) (“The most obvious example of forensic fraud is the reporting of results for tests that were never performed. Ralph Erdmann, a forensic pathologist from Texas who was convicted of faking autopsies, has the distinction of being one of the foremost forensic fabricators. At least twenty death penalty convictions were obtained with the aid of his testimony.”) (footnotes omitted).

typically converse with forensic examiners prior to, or during, such autopsies. And officers usually tell examiners how they think the death occurred.

In addition, forensic pathology involves a significant amount of subjectivity and judgment—far more than that involved in the drug or alcohol testing this Court analyzed in *Melendez-Diaz* and *Bullcoming*.⁴ Unfortunately though, medical examiners sometimes display anything but the skill necessary for the task. A recent investigation in Mississippi, for example, revealed several wrongful convictions due to autopsies performed by “a forensic analyst with inadequate training” and questionable ethics “who was given far too much deference in the courts.” Campbell Robertson, *Questions Left for Mississippi Over Doctor’s Autopsies*, N.Y. Times (Jan. 7, 2013). Elsewhere in the Nation, medical examiner and coroner “systems function at varying levels of expertise, often with deficiencies in facilities, equipment, staff, education, and training.” National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 247, 264-65 (2009). In fact, “there are no mandated national qualifications or certifications required for death investigators. Nor is medical expertise always required.” *Id.* The field is so unregulated that even a

⁴ See George M. Tsiatis, *Putting Melendez-Diaz on Ice: How Autopsy Reports Can Survive the Supreme Court’s Confrontation Clause Jurisprudence*, 85 St. John’s L. Rev. 355, 383 (2011) (“Autopsies are also much more complex than the identification of a narcotic, and are more prone to shades of gray, as their outcome is a diagnosis, not a chemical compound match.”); see also National Association of Medical Examiners, *Forensic Autopsy Performance Standards*, Section B (2006), available at http://www.mtf.org/pdf/name_standards_2006.pdf (describing processes for arriving at “interpretation and opinions,” as well as exercising “the discretion to determine the need for additional dissection and laboratory tests”).

“17-year-old high school senior” has been “appointed [] deputy coroner” in one jurisdiction. *Id.* at 247.

3. The sooner this Court clarifies whether autopsy reports prepared for homicide investigations are testimonial, the sooner courts, institutions, and litigants can adapt to this Court’s holding. For instance, if autopsy reports are testimonial, states and localities could take steps to ensure that important assertions in autopsy reports are admissible even if a report’s author becomes unavailable. Some states require two medical examiners to be present at every autopsy performed as part of a homicide investigation, thus ensuring that if one becomes unavailable, the other can still testify and explain the report. Medical examiners can also take extra photographs or videos, and preserve extra samples to allow retesting if the original examiner becomes unavailable.

III. This Case Is an Ideal Vehicle for Resolving the Issue.

Four aspects of this case make it perfect for resolving the question presented.

1. The case is procedurally clean. The prosecution introduced the autopsy report directly into evidence, thus foreclosing any possible argument that the testifying medical examiner merely rendered an “independent opinion about underlying testimonial reports *that were not themselves admitted into evidence.*” *Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring in part) (emphasis added). And at each level of the New York courts, petitioner challenged the introduction of the autopsy report on Confrontation Clause grounds.

2. There can be no doubt that the autopsy report was created as part of a criminal investigation. At the time of the autopsy itself, petitioner was already a prime suspect. And at the time of the autopsy report's certification, signing, and delivery to the prosecution, petitioner had already been indicted for murder. *Compare United States v. James*, 712 F.3d 79, 99-102 (2d Cir. 2013) (autopsy report was nontestimonial because, at the time it was created, there was no indication of homicide).

The circumstances surrounding this autopsy are typical of cases involving autopsy reports created during homicide investigations. From the moment the body was delivered to the medical examiner's office, the police and medical examiners believed the death was a homicide. Investigating officers also spoke with the medical examiner before she conducted the autopsy, and they remained present while it occurred. Thus, when the medical examiner found the cause of death to be homicide, she knew her forensic findings would be used in a criminal prosecution.

3. The autopsy report is also certified, thus rendering it sufficiently formal to satisfy Justice Thomas's test for the testimonial status of forensic reports. *Compare Bullcoming*, 564 U.S. at 664-65 *with Williams*, 132 S. Ct. at 2259-61 (Thomas, J., concurring). Consequently, there is no chance that the Court will splinter as it did in *Williams*, where the lack of formality prevented a majority from coalescing.

4. Finally, the autopsy report played a critical role in this prosecution, and cross-examination could have revealed flaws in the medical examiner's assertions.

Dr. Maloney's conclusions in her autopsy report caused police and prosecutors to arrest and charge petitioner, as opposed to the woman they initially planned to indict, for the homicide. The State then used the report at trial to pinpoint the cause and manner of death.

The report was also crucial evidence supporting the prosecution's theory of homicidal intent. Petitioner testified that he did not intend to cause serious physical injury to Sherwood. Further, the surveillance footage indicates that petitioner may very well have unintentionally cut Sherwood during a struggle for the knife. But Dr. Maloney declared in her autopsy report that the cause of death was a stab wound with a "depth of penetration" of "4-1/2 to 5-1/2" inches. *See* Pet. App. 32a. Dr. Maloney further asserted that the stabbing pierced the heart and caused the loss of 1.5 liters of blood. Pet. App. 32a. The prosecutor emphasized these findings in summation, painting the picture of an effort to cause serious harm.

In light of the dynamics at issue in this case, the autopsy report played an important role in the jury's assessment of *mens rea*. *See People v. Lopez*, 72 A.D.3d 593, 593 (N.Y. App. Div. 2010) (depth of stab wound confirmed intent to cause serious injury). Yet had petitioner's confrontation rights been honored, he could have challenged the report's reliability by asking the forensic analyst:

- about her qualifications, which were in doubt;
- whether she was overworked at the time of the autopsy;
- whether her conclusions/observations were consistent with an accidental stabbing during a struggle for the knife;
- whether she omitted any information from the report;

- whether she had carefully considered competing cause-of-death hypotheses;
- whether there were any differences between her initial November 2, 2011 draft and her December 30, 2011 final report; and
- why she had left OCME.

The Confrontation Clause required the State to allow petitioner to ask these important questions before incarcerating him for two decades. *See Bullcoming*, 564 U.S. 647; *Melendez-Diaz*, 557 U.S. 305.

IV. The Appellate Division’s Decision Contravenes This Court’s Precedents.

1. An autopsy report created as part of a homicide investigation and concluding that the death was caused by homicide is no different from the forensic statements this Court has previously held testimonial.

In *Melendez-Diaz*, this Court held that formalized forensic reports declaring that a seized substance was an illegal drug fall within the “core class of testimonial statements” covered by the Confrontation Clause. 557 U.S. at 310. Such reports are created “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 311 (quoting *Crawford*, 541 U.S. at 52). Furthermore, such reports are typically transmitted directly to law enforcement personnel and contain “the precise testimony [the witness] would be expected to provide if called at trial.” *Id.* at 310.

In *Bullcoming*, this Court reaffirmed 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.” 564 U.S. at 664-65.

Because state law in that case required the laboratory to assist the police investigation, there was no doubt the blood alcohol report at issue was “‘made for the purpose of establishing or proving some fact’ in a criminal proceeding.” *Id.* at 664-65 (quoting *Melendez-Diaz*, 557 U.S. at 310).

Melendez-Diaz and *Bullcoming* dictate that autopsy reports created as part of a homicide investigation and asserting that the cause of death was homicide are testimonial. As in those cases, medical examiners know that, under such circumstances, their report will serve as crucial evidence in a criminal case. That is particularly true when, as here, investigating police officers are present during the autopsy and local law mandates that the analyst “assist in [state criminal] investigations” by forwarding the autopsy report promptly and directly to prosecuting authorities. See *Bullcoming*, 564 U.S. at 665; N.Y. County Law § 677(4) (requiring all autopsy reports finding homicide to be sent to the District Attorney); accord N.Y. City Charter § 557(g).

Furthermore, “the formalities attending” the autopsy report here are “more than adequate to qualify [the report] as testimonial.” *Bullcoming*, 564 U.S. at 664-65. In *Bullcoming* and *Melendez-Diaz*, the analysts “prepared a certificate concerning the result of his analysis” and “formalized” the report in a “signed document headed ‘a report.’” *Bullcoming*, 564 U.S. at 664-65; *Melendez-Diaz*, 557 U.S. at 308. And in *Bullcoming*, the report “contain[ed] a legend referring to municipal and magistrate

courts' rules that provide for the admission of certified blood-alcohol analyses." 564 U.S. at 664-65.

So too here, the autopsy report is headed "REPORT OF AUTOPSY" and bears the official seal of the Office of the Chief Medical Examiner of the City of New York. In the report, Dr. Maloney certified that she performed the autopsy and then signed the report, indicating a "draft" date and a "final" date. In turn, the Office of the Chief Medical Examiner formally certified the report as a business record for purposes of litigation, expressly citing state law authorizing the report's admission into evidence. The "formalities attending" this report are thus just like those attending the reports in *Bullcoming* and *Melendez-Diaz*.

2. History reinforces this testimonial analysis. As this Court recently recognized, "coroner's reports" were inadmissible under American common law without the opportunity for prior confrontation. *See Melendez-Diaz*, 557 U.S. at 322 (citing *Crawford*, 541 U.S. at 47 n. 2, *Giles v. California*, 554 U.S. 353, 398-401 (2008) (Breyer, J., dissenting), and *Evidence-Official Records-Coroner's Inquest*, 65 U. Pa. L. Rev. 290 (1917)). And long before *Crawford*, this Court explained that an autopsy report could not be admitted without the consent of the accused "because the accused was entitled to meet the witnesses face to face." *Diaz v. United States*, 223 U.S. 442, 450 (1912).

3. In an effort to sidestep this Court's precedents, the New York and other state courts have advanced a flurry of theories. They all fail.

a. It is true, as the Ohio Supreme Court has observed, that medical examiners do not invariably initiate an autopsy with a criminal investigation in mind. *Maxwell*, 9 N.E.3d at 950-51. It is also irrelevant. Here, as in thousands of autopsies performed every year, the medical examiner knew when conducting the autopsy that a homicide investigation was actively underway. And the medical examiner subsequently determined the cause of death to be homicide. Under those circumstances—the only circumstances that matter under the question presented—an autopsy report’s primary purpose is to codify evidence for a criminal prosecution. See, e.g., *Bullcoming*, 564 U.S. at 663-64; *Melendez-Diaz*, 557 U.S. at 310 (quoting *Crawford*, 541 U.S. at 51); see also *Michigan v. Bryant*, 564 U.S. 344, 365 (2011) (the testimonial inquiry hinges on the “context” of the declaration).

b. It is likewise irrelevant that medical examiners sometimes conclude that the cause of death was suicide, an accident, or some other noncriminal occurrence. See *Leach*, 980 N.E.2d at 591-92. When examiners write, sign, and certify a report declaring that the cause of death was *homicide*, and then forward that report directly to the district attorney, the report’s primary purpose is to support a criminal case.

c. Some state supreme courts have latched on to the theory that autopsy reports are nontestimonial because they do not prove “identity”—they instead prove the cause of death or *mens rea*. *Freycinet*, 892 N.E.2d at 846; *Leach*, 980 N.E.2d at 591-92; *Hutchison*, 482 S.W.3d at 913. The court below adopted that argument, holding that even though the report declared that petitioner, and not someone else,

committed the homicide, the report was nontestimonial because it “did not link the commission of the crime to a particular person.” Pet. App. 3a.

This theory contravenes precedent and common sense. In *Melendez-Diaz*, the Commonwealth argued that narcotics “analysts are not subject to confrontation because they are not ‘accusatory’ witnesses, in that they do not directly accuse [defendants] of wrongdoing.” 557 U.S. at 313. Instead, the argument went, the analysts only establish that a substance is “X.” *Id.* This Court had none of it. *Melendez-Diaz* held that limiting the Confrontation Clause to identity evidence “finds no support in the text of the Sixth Amendment or in our case law.” *Id.* at 313-14. Instead, *all* witnesses are subject to confrontation because the Sixth Amendment does not establish a “category of witnesses [who are] helpful to the prosecution [] but somehow immune from confrontation.” *Id.*

Melendez-Diaz further confirmed that an identity limitation “would be contrary to longstanding case law,” as this Court had previously held that the Confrontation Clause applies to non-identity evidence. *Id.* at 314 (explaining that in *Kirby v. United States*, 174 U.S. 47 (1899), this Court held that although the records proved “only that the property was stolen, and not that [defendant] received it . . . admission of the records violated [defendant’s] rights under the Confrontation Clause”); *id.* at 314 (citing *King v. Turner*, 1 Mood. 347, 168 Eng. Rep. 1298 (1832) (confession by one defendant to having stolen certain goods could not be used as evidence against another defendant accused of receiving the stolen property)). Indeed, the vast

majority of forensic reports conducted in criminal cases have nothing to do with identity—they instead bear on the nature of a substance, its weight, or blood content. Nevertheless, this Court has “refused to create a ‘forensic evidence’ exception” to the Sixth Amendment. *Bullcoming*, 564 U.S. at 658-59.⁵

To be sure, a four-Justice plurality in *Williams* suggested that the Clause should apply to forensic reports only when they “accus[e] a targeted individual.” 132 S. Ct. at 2242-43. But the other five Justices rejected this suggestion. As Justice Kagan explained: “Where that test comes from is anyone’s guess. Justice Thomas rightly shows that it derives neither from the text nor from the history of the Confrontation Clause.” *Williams*, 132 S. Ct. at 2273-74 (Kagan, J., dissenting) (citing *id.* at 2262 (Thomas, J., concurring)).

At any rate, this Court need not revisit that debate from *Williams* here, for even the plurality’s “targeted individual” standard would be satisfied here. The *Williams* plurality explained that the Cellmark-DNA report did not “accuse a targeted individual” because—unlike in *Melendez-Diaz* and *Bullcoming*—the police had not yet identified a suspect at the time of the forensic report’s creation. *See Williams*, 132 S. Ct. at 2242-44 (plurality opinion). The plurality’s “targeted individual” standard

⁵ This reasoning from *Melendez-Diaz* similarly disposes of the Washington Supreme Court’s suggestion that autopsy reports might not be testimonial insofar as they have an “inculpatory effect” only in connection with other evidence. *Lui*, 315 P.3d at 510-11. As *Melendez-Diaz* expressly held, reports prepared for evidentiary use that are “inculpatory only when taken together with other evidence” are still testimonial. *Melendez-Diaz*, 557 U.S. at 313.

thus simply requires that the statement serve as evidence against a *known* criminal suspect. Put another way, it's the *stage of the State's investigation* at the time of the report's creation—not the particular *element* established by the report (*i.e.*, “identity”)—that controls.

And here, Dr. Maloney's autopsy report was “prepared for the primary purpose of accusing a targeted individual.” *Williams*, 132 S. Ct. at 2242-44 (plurality opinion). At the time of the report's certification and signing, petitioner had already been indicted for murder. Thus, unlike the private laboratory's DNA report in *Williams*, this autopsy report pointed the finger at a *known* homicide suspect. In doing so, the report ruled out Rivera's blows as the cause of death and instead directly accused petitioner of murder. *Id.*

d. The New York Court of Appeals' suggestion, parroted in part by the Appellate Division here, Pet. App. 3a, that autopsy reports are nontestimonial because they seem reliable fares no better. *Melendez-Diaz* squarely rejected the argument that the “near-contemporaneous” nature of observations and statements in a forensic report render them nontestimonial. 557 U.S. at 315-16. *Melendez-Diaz* likewise dispensed with the notion that the supposedly “neutral” orientation of forensic analysts renders their statements nontestimonial. *Id.* at 317. Ordinary witnesses—Sylvia Crawford, for one—are presumably neutral and free from “pro-law-enforcement bias” too. *Freycinet*, 892 N.E.2d at 846. Yet their statements made to assist with police investigations are testimonial. *See Davis*, 547 U.S. at 822, 826.

e. *Melendez-Diaz* also forecloses the California Supreme Court’s similar holding that “objective” anatomical and physiological observations in autopsy reports prepared in conjunction with homicide investigations—in contrast to assertions regarding the cause of death—are nontestimonial. *People v. Duno*, 286 P.3d at 448-50. Witnesses’ statements regarding “objective” facts in the physical world—license plate numbers, the color of getaway cars, the time a clock displayed when shots rang out, etc.—are no less testimonial than other statements made to provide evidence for a criminal trial. See *Bullcoming*, 564 U.S. at 660.

At any rate, the autopsy report here was introduced in its totality and included far more than anatomical and physiological observations. It included the medical examiner’s opinion that a knife wound, and not the blows to the victim’s head, caused the death. Pet. App. 30a. And that opinion played a vital role in this prosecution.

f. That leaves the concern—first raised by some Members of this Court and later embraced by the Ohio Supreme Court—that applying the Confrontation Clause to autopsy reports would “‘effectively’ . . . function ‘as a statute of limitations for murder[.]’” *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring) (quoting *Melendez-Diaz*, 557 U.S. at 335 (Kennedy J., dissenting) (quoting in turn Carolyn Zabrycki, Comment, *Toward a Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal. L. Rev. 1093, 1115 (2008)); *Maxwell*, 9 N.E.3d at 951. If the autopsy provides vital evidence, the reasoning goes, and “[the] medical examiner who conducted an autopsy [is] unavailable or deceased

when a trial begins,” applying *Crawford* may imperil the prosecution or require dismissal of the charges. *Maxwell*, 9 N.E.3d at 951; *see also Dungo*, 286 P.3d at 457-58 (Chin, J., concurring).

This theory posits that the State can bypass the Confrontation Clause if it has an important “policy” interest in doing so. *Maxwell*, 9 N.E.3d at 951. That theory clashes with precedent, and, alternatively, is irrelevant where, as here, the medical examiner is available.

i. Policy arguments cannot justify introducing formalized forensic reports where the defendant has not “had a prior opportunity for cross-examination.” *Melendez-Diaz*, 557 U.S. at 309 (quoting *Crawford*, 541 U.S. at 54). When the sole eyewitness to a crime dies before trial, rendering a successful prosecution impossible without his pre-trial testimonial statements, the Confrontation Clause has always held firm. *See Crawford*, 541 U.S. at 50, 59.

Medical examiners who provide purportedly vital forensic testimony are no different. In *Melendez-Diaz*, Massachusetts asked this Court to “relax the requirements of the Confrontation Clause to accommodate the necessities of trial and the adversary process.” 557 U.S. at 325 (internal quotations omitted). This Court rejected the effort: “It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional

provisions—is binding, and we may not disregard it at our convenience.” *Id.*; *see also* *Giles*, 554 U.S. at 375 (there is no unavailability exception to the Confrontation Clause, even when the defendant has caused the victim’s death, because the Clause is not “subject to whatever exceptions courts from time to time consider ‘fair.’”); *accord id.* at 379 (Souter, J., concurring) (agreeing that a declarant’s unavailability, due to death, does not justify an exception to the confrontation right).

In any event, the critical role that autopsy reports can play in a homicide prosecution justifies *enforcing* the Confrontation Clause, not suspending it. As Justice Pfeifer of the Ohio Supreme Court has argued: “If having no autopsy report available makes a murder conviction impossible, elevating an autopsy to a central role in a murder trial, does that not make it all the more imperative that a defendant have an opportunity to call into doubt the veracity of the report through cross-examination?” *Maxwell*, 9 N.E.3d at 997 (concurring in part, dissenting in part).

ii. Precedential problems aside, categorically exempting medical examiners from confrontation is the wrong solution to the “statute of limitations” concern. At most, that concern calls for an accommodation in the rare case where, *unlike here*, the examiner is actually deceased or otherwise unavailable at the time of trial. Indeed, the law review article that first articulated the statute of limitations objection argued that “excluding the autopsy report where” a medical examiner is *unavailable*—that is, “a medical examiner dies”—would “effectively function[] as a statute of limitations for murder.” Zabrycki, *supra*, at 1115; *see also* Jennifer L. Mnookin, *Expert Evidence*

and the Confrontation Clause After Crawford v. Washington, 15 Brooklyn J.L. & Pol'y 791, 860-61 (2007) (proposing an unavailability exception to the rule that medical examiners must be produced for cross-examination).

Categorically exempting medical examiners from confrontation to address a statute of limitations concern is akin to “throwing the baby out with the bathwater”—suspending the confrontation right in every homicide trial to address a concern that arises in an exceedingly small number of homicide trials. That makes little sense.

CONCLUSION

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

Respectfully submitted,



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July 20, 2017

APPENDIX

APPENDIX A

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2333 The People of the State of New York, Ind. 3681/11
 Respondent,

-against-

James Garlick,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York
(Matthew Bova of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of
counsel), for respondent.

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

The court properly denied defendant's midtrial request for a
protective order pursuant to CPL 240.50(1) as to a surveillance
videotape of the incident. That provision was inapplicable,
because discovery had already concluded. In any event, the risk
that jurors might view media coverage of the case, in violation
of the court's thorough admonitions against doing so, did not
present circumstances sufficiently compelling to rebut the
presumption of the public's right to access a trial exhibit
pursuant to the common law (see *In re Application of Natl.*

Broadcasting Co. [United States v Myers], 635 F2d 945, 952-953 [2d Cir 1980]) and the First Amendment (see *Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010]). The prosecutor did not make the videotape available to the news media until after it had been received in evidence and played for the jury in open court. We have considered and rejected arguments concerning preservation and the scope of our review.

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

Mejias, 21 NY3d 73, 79-80 [2013]).

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

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 29, 2016


CLERK

APPENDIX B

State of New York
Court of Appeals

BEFORE: HON. SHEILA ABDUS-SALAAM, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

**ORDER
DENYING
LEAVE**

JAMES GARLICK,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: MAR 03 2017



Associate Judge

*Description of Order: Order of the Appellate Division, First Department, entered November 29, 2016, affirming a judgment of Supreme Court, Bronx County, rendered November 1, 2013.

5a

APPENDIX C

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

3 -----x
4 THE PEOPLE OF THE STATE OF NEW YORK

5 -against-

6 JAMES DARNELL GARLICK,

Ind. No.
3681/2011

7 Defendant.
8 -----x

265 East 161 Street
Bronx, New York 10451
SEPTEMBER 23, 2013

9 B E F O R E:

10 THE HONORABLE DENIS J. BOYLE
Justice of the Supreme Court

11 (Appearances same as previously noted.)

12 LAURA ROSEN
13 SENIOR COURT REPORTER

14 * * * * *

15 (Whereupon, the following took place in open court
16 in the presence of the defendant, defense counsel, and the
17 assistant district attorney.)

18 THE CLERK: This is number one on the calendar,
19 case on trial, James Darnell Garlick. All parties are
20 present. The prospective jurors are not present.

21 MR. BEATRICE: Michael Beatrice, 18b counsel for
22 Mr. Garlick. Good morning, Your Honor.

23 THE COURT: Good morning Mr. Beatrice.

24 MR. SCHEPPS: Soloman Schepps appearing with Mr.
25 Beatrice for Mr. Garlick.

THE COURT: Mr. Schepps, good morning.

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

13 THE COURT: I well remember the video and I well
14 remember the evidence at the hearing, and I don't mean to
15 cut you off, but I'm satisfied that the rule of completeness
16 doesn't obtain here. It was not a continuous interrogation,
17 and so, the defense application is denied.

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

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

24 MR. SCHEPPS: Okay.

25 THE COURT: Did you have another application?

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

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

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

12 MR. KAREN: Dr. Gill as left the ME's office to
13 become the chief medical examiner, I believe in Stamford,
14 Connecticut. We will be calling Deputy Medical Examiner,
15 Dr. Ely, who, I believe, is the chief in the Bronx. She's
16 coming in to testify.

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

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

24 THE COURT: I'm familiar with Melendez Diaz. If
25 you rely on cases I'm not familiar with, I'll ask you for

1 the cite.

2 MR. SCHEPPS: Most recently Williams v Illinois.

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

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

5 THE COURT: Does it have to do with autopsies?

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

8 THE COURT: Okay.

9 MR. SCHEPPS: All right. I know the Court is
10 familiar with the rules of the Melendez Diaz, but to just
11 summarize briefly, I'll backtrack a little bit to Court of
12 Appeals case that was decided prior to Melendez Diaz and
13 Bullcomings, People versus Freycinet, which I don't know if
14 the Court's familiar with that case. That cite is 11 NY3d
15 238, a 2008 decision.

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

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

24 MR. SCHEPPS: Well, I don't know exactly how
25 clearly that was laid out in that case in my recollection.

1 I mean, I think I would argue that there are instances where
2 even the characterization of a wound is, a stab wound would
3 be opinion evidence rather than, you know, a puncture or a
4 laceration or something like that. The problem is that
5 Melendez Diaz analysis, in that case it was just a
6 certification that was put into evidence that there were,
7 that something that had been taken from a car. It was
8 cocaine, in fact. Under the analysis of Melendez Diaz, the
9 analysis by the Court of Appeals, again prior to the
10 Melendez Diaz analysis, I think, is completely called into
11 question, and I think that the decision that the Court of
12 Appeals announced in Freycinet really needs to be revisited.

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

22 Furthermore, we have in Bullcomings, which was a
23 blood test, blood analysis in a DWI case, and the Court
24 announced there that the confrontation clause does not
25 tolerate dispensing with confrontation simply because the

1 Court believes that questioning one witness about another's
2 testimonial statements provide a fair enough opportunity for
3 cross-examination.

4 Another characterization of what would constitute
5 testimonial evidence is in the more recent case, Williams
6 versus Illinois. And the cite of that case is -- it's only
7 the unofficial cite, 132 Supreme Court 2221. I think it's a
8 2012 decision. And it's a plurality decision, so it was
9 Justice Thomas' concurrence that my reading of the case
10 announces the Court's holding on what constitutes
11 testimoniality(sic).

12 In that case, in fact it was ruled that what was
13 being introduced was not testimonial in nature, but the way
14 Justice Thomas characterized it was that the document or the
15 report had to be sufficiently formalized. It had to be
16 sworn or certified, and it needed to have the solemnity of
17 an affidavit or deposition. Clearly, an autopsy report does
18 satisfy that requirement, it's certified, and all of the
19 requirements that the Court would have made in that case was
20 satisfied.

21 Now, I know that there could be an argument made
22 perhaps that it's a business record, but that's really, I
23 think there are two elements that have to be addressed.
24 It's whether it's a business record simply addresses certain
25 hearsay requirements, but not whether it has been prepared

1 in anticipation of litigation would be one way of
2 characterizing it.

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

20 By mentioning this I'm addressing the argument
21 often made by prosecutors and that I have read in cases as
22 well that because the office of medical examiner has been
23 held by the Court of Appeals as not be a law enforcement
24 agency, it doesn't fall within any of these requirements.
25 And I think that the reasoning and rulings of the court, of

1 the Supreme Court in Melendez Diaz and Bullcomings, I think
2 makes it clear that it doesn't matter whether it's a law
3 enforcement agency or not.

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

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

1 THE COURT: And what is your application?

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

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

12 Do you need a few minutes before openings?

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

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

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

18 THE COURT: Okay.

19 MR. KAREN: Yes.

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

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

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

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

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

3 -----x
4 THE PEOPLE OF THE STATE OF NEW YORK

5 -against-

6 JAMES DARNELL GARLICK,

Ind. No.
3681-2011

7 Defendant.
8 -----x

265 East 161 Street
Bronx, New York 10451
SEPTEMBER 24, 2013

9 B E F O R E:

10 THE HONORABLE DENIS J. BOYLE
11 Justice of the Supreme Court

(Appearances same as previously noted.)

12 LAURA ROSEN
13 SENIOR COURT REPORTER

14 * * * * *

15 (Whereupon, the following took place in open court
16 in the presence of the defendant, defense counsel, and the
17 assistant district attorney.)

18 THE CLERK: This is case on trial continued. All
19 parties are present. The jurors are not present.

20 THE COURT: Counsel, good morning.

21 MR. SCHEPPS: Good morning.

22 MR. KAREN: Good morning, Judge.

23 MR. BEATRICE: Good morning, Judge.

24 THE COURT: As of a few minutes ago all of our
25 jurors were here. My understanding is that the People are

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1 ready to call their first witness?

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

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

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

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

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

19 MR. BEATRICE: Judge, there are --

20 THE COURT: I thought you wanted to be heard
21 further. I had said in substance I'd take up any objections
22 to her testimony when they were made, but I wasn't going to
23 prospectively preclude her. If you think that you're
24 anticipating an objection that can better be heard before
25 the jury's in the box, I'll take it up with you this way,

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lr-a

1 and I'll ask the witness to step out for that purpose.

2 MR. SCHEPPS: It won't take long.

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

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

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

10 THE COURT: Mr. Schepps?

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

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

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

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lr-a

1 MR. SCHEPPS: Yes, of course.

2 THE COURT: Are there parts of it that you
3 maintain should be redacted that haven't been redacted?

4 MR. SCHEPPS: Nothing's been redacted.

5 MR. KAREN: Your Honor?

6 THE COURT: Yes.

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

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

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

lr-a

18a
Proceedings

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

4 THE COURT: I'm not cutting you off.

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

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

10 MR. SCHEPPS: A one-second approach?

11 THE COURT: Yes.

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

14 THE COURT: I don't draw the same conclusion, Mr.
15 Schepps, as you do from Freycinet. The principles, at least
16 in broad strokes, I think, are clear to everybody. There's
17 a very distinct and significant difference between testimony
18 regarding as discussed in Freycinet whether wounds or stab
19 wounds or any kind of wound as compared to whether in the
20 doctor's opinion the wounds were a product of a homicide, so
21 certain conclusions are opinions that are not inadmissible.
22 And arguably, as you point out in Freycinet, certain
23 conclusions and opinions such as the nature of the wounds,
24 the wound's trajectory, opinions based upon observations of
25 the body are not inadmissible conclusions, if you want to

lr-a

19a
Proceedings

1 describe them as conclusions, and I'm going to be alert to
2 the difference.

3 MR. SCHEPPS: Okay.

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

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

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

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

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

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

20 MR. SCHEPPS: Okay.

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

25 MR. SCHEPPS: Right.

20a
Proceedings

lr-a

1 THE COURT: -- report --

2 MR. SCHEPPS: Right.

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

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

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

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

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

17 MR. SCHEPPS: Okay.

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

21 MR. KAREN: We're ready.

22 COURT OFFICER: Jury entering.

23 (Whereupon, the jury entered the courtroom.)

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

21a

1r-a

Dr. Ely - People - Direct

1 A Doctor Catherine Maloney.

2 Q Is she still working in the Office of Chief Medical
3 Examiner?

4 A No, she's not.

5 Q And was there anybody else present for the autopsy who
6 was also a medical doctor?

7 A Yes.

8 Q And who was that?

9 A That was Dr. James Gill.

10 Q And is he still with the Office of Chief Medical
11 Examiner of New York?

12 A No.

13 Q Do you know where he is?

14 A He's the Chief Medical Examiner of the State of
15 Connecticut.

16 Q Back in November of 2011 was it the duty and
17 responsibility of the Office of Chief Medical Examiner to do
18 autopsies and issue autopsy reports?

19 A Yes.

20 Q And on November 2, 2011, was an autopsy report prepared
21 on that day or shortly thereafter regarding the autopsy of
22 Gabriel Sherwood?

23 A Yes.

24 Q And do you have a certified copy as a business record
25 of that autopsy report on the body of Gabriel Sherwood?

lr-a

Dr. Ely - People - Direct

1 A Yes.

2 MR. BEATRICE: Objection, Judge.

3 THE COURT: Come up, please, briefly.

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

6 THE COURT: Laura, come over, please.

7 (Whereupon, the following took place at the side
8 bar on the record in the presence of the Court and counsel.)

9 THE COURT: Mr. Beatrice, do you want to put your
10 objection on the record?

11 MR. BEATRICE: Well Judge, the basis for my
12 objection was that the question was posed of the witness
13 without any, any document in hand that we can all refer to.
14 It was a question that was just asked: Do you have a copy,
15 a certified copy of the autopsy report? That's presuming
16 that the document is already certified and getting admitted
17 into evidence.

18 THE COURT: I'll allow the question.

19 MR. KAREN: It's a preliminary question to the
20 fact that we're going to introduce it. She has it
21 physically on her person. That's the first question. Then
22 we'll ask her, then it will be introduced.

23 THE COURT: Mr. Schepps, did you want to add to
24 that?

25 MR. SCHEPPS: Yes, I'd like to just reiterate the

1 objection that I made earlier. The difference must be noted
2 between introducing something as a business record and
3 introducing it for the purpose of the opinions and
4 observations contained therein, which make it testimonial in
5 nature, and it would be necessary in that instance for the
6 person who actually did the report to be present under
7 Crawford. And noting the differences with the Freycinet
8 court, but the United States Supreme Court case law, I
9 believe, makes a different result than the, than the New
10 York Court of Appeals had made.

11 The purpose of introducing something as a business
12 record is merely an identification of that it is what it is,
13 but it doesn't go to the contents of the record and
14 questions of, questions of opinion and expertise.

15 THE COURT: All right, I think so far the
16 questions come within Freycinet are permissible.

17 MR. SCHEPPS: Okay.

18 THE COURT: The Hall case, which I cited earlier,
19 specifically admitted an autopsy report as a business
20 record. In either event, I'm prepared to allow the People
21 to establish that it's a document that this witness can use
22 to express an opinion based upon its contents. And I'm not
23 making a broad ruling. I told you I'd give you an
24 opportunity to be heard as we go along.

25 MR. SCHEPPS: Right. And I don't want, you know,

lr-a

24a
Dr. Ely - People - Direct

1 and I don't want to crowd the record with this, but I
2 thought this was an appropriate time to renew that.

3 THE COURT: I understand.

4 MR. SCHEPPS: And again, this is made under the
5 New York State and United States Constitution.

6 MR. KAREN: This is a two-stage offer in this
7 sense. The autopsy report is admissible as a business
8 record. Once it's admissible, I can call any expert
9 witness, whether they're connected with the medical
10 examiner's office or not, so long as they're an expert to
11 interpret it. Now we have the deputy medical director of
12 New York, but the document is admissible. And I could put
13 on an outside doctor if I want. If the doctor is an expert,
14 they can give their expert opinion based on reviewing the
15 doctor's --

16 THE COURT: In any event, I'm permitting the
17 witness on the stand to testify. I'm anticipating I'll
18 allow her to testify to the contents of the report
19 distinguishing between facts as distinct from what I'll call
20 conclusions, for lack of a better word.

21 (Whereupon, the following took place in open court
22 in the presence of the defendant, defense counsel, and the
23 assistant district attorney.)

24 THE COURT: I'm allowing that question to stand.
25 Do you want it read back?

25a
lr-a Dr. Ely - People - Direct

1 MR. KAREN: No, I'll ask it again.

2 Q Doctor, did you have a certified copy of the autopsy
3 that was performed on Gabriel Sherwood on November 2, 2011?

4 A Yes.

5 Q Do you have it in front of you?

6 A Yes.

7 Q Have you reviewed it?

8 A Yes.

9 Q Was it issued in the regular course of medical
10 examiner's business?

11 A Yes.

12 Q And was it the business of the Office of Chief Medical
13 Examiner to issue such report back in November of 2011?

14 A Yes.

15 MR. KAREN: At this time I would offer into
16 evidence as People's 1 the certified autopsy report on the
17 body of Gabriel Sherwood.

18 MR. SCHEPPS: I renew my objection.

19 THE COURT: If you would just step up very
20 briefly, we'll make a record later.

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

23 THE COURT: We'll mark the document as People's 1
24 for identification.

25 (Whereupon, People's Exhibit 1 was marked for

lr-a

Dr. Ely - People - Direct

1 identification.)

2 COURT OFFICER: People's 1 for identification so
3 marked.

4 THE COURT: Please show it to defense counsel.

5 (Whereupon, the referred to item was handed to
6 defense counsel.)

7 THE COURT: You've both had an opportunity to
8 review the document?

9 MR. SCHEPPS: Yes.

10 MR. BEATRICE: We have, Judge.

11 THE COURT: Any voir dire?

12 MR. BEATRICE: No.

13 THE COURT: All right. I'm going to admit
14 People's 1 in evidence, ladies and gentlemen. Counsel,
15 subject to the discussion that we've had previously.

16 (Whereupon, People's Exhibit 1 was received in
17 evidence.)

18 COURT OFFICER: People's 1 in evidence so marked.

19 MR. KAREN: Thank you.

20 (Whereupon, the referred to item was handed to the
21 witness.)

22 MR. KAREN: May I proceed?

23 THE COURT: Yes, you may.

24 Cont'd DIRECT EXAMINATION

25 BY MR. KAREN:

1 Ms. --

2 ADA KAREN: Ms. Rivera.

3 THE COURT: Yes.

4 MR. SCHEPPS: Can I make my final renewal of that
5 objection?

6 THE COURT: Yes.

7 MR. SCHEPPS: The arguments that I made yesterday
8 and renewed today on my objection to permitting Dr. Ely to
9 testify as to the autopsy report and the introduction of
10 the autopsy report are renewed; the arguments that I made
11 under the US Supreme Court standards announced in
12 Melendez-Diaz, Bullcoming versus New Mexico,
13 B U L L C O M I N G, and Williams versus Illinois.

14 I renew my objection to the introduction of that
15 material and in the way that it was introduced as well.

16 THE COURT: The record will reflect that in terms
17 of the document itself, People's 1, consistent with our
18 discussion previously it was admitted subject to certain
19 redactions which will be the subject of further discussion
20 between the parties and myself.

21 MR. SCHEPPS: Well, I made the objections.

22 THE COURT: I am sure you covered your record.

23 MR. SCHEPPS: All right.

24 THE COURT: So you will call your next witness.

25 ADA KAREN: Yes.



DEPARTMENT OF HEALTH
OFFICE OF CHIEF MEDICAL EXAMINER
520 FIRST AVENUE, NEW YORK, N.Y. 10016
CHARLES S. HIRSCH, M.D., Chief Medical Examiner

RECORDS DEPARTMENT

Fax: 212-323-1960

NAME: Gabriel Sherwood

M.E. # B/11/4597

SENT TO DISTRICT ATTORNEY FOR COUNTY OF: BRONX

BY: Yvelisse Matias
(CLERICAL ASSOCIATE III)

DATE SENT: December 30, 2011

	ITEM:		ITEM:
✓	AUTOPSY REPORT		SUPPLEMENTAL REPORT (OTHERS)
✓	TOXICOLOGY REPORT		WOUND CHART
	NEUROPATH. CONSULT REPORT	✓	AUTOPSY NOTES/DIAGRAM
✓	FAMILY IDENTIFICATION	✓	CASE WORKSHEET
✓	ID SURVEY FORM:	✓	MICROSCOPIC REPORT
	POLICE IDENTIFICATION		DENTAL CONSULT REPORT
	ID BY FINGERPRINTS REPORT		MICROBIOLOGY REPORT
	CONFIRMATION OF ID		MOLECULAR GENETIC TESTING REPORT
✓	HOSPITAL REPORT		X-RAY CONSULT REPORT
✓	TEL. NOTICE OF DEATH	✓	POLICE REPORT
✓	SUPPLEMENTAL REPORT (INVESTIGATION)		IDENTIFICATION TAG
	SCENE INVEST. REPORT	✓	IDENTIFICATION PHOTO(S)
	AUDIO DICTATION		

PHOTOGRAPHS, X-RAYS AND AUDIO TAPES ARE NOT AUTOMATICALLY SUPPLIED AND MUST BE SEPERATELY REQUESTED. BACKUP
LABORATORY DATA MUST SPECIFICALLY REQUESTED AFTER A CASE CONFERENCE. MICROSCOPIC SLIDES AND RETAINED TISSUES CAN BE
REVIEWED AT THE OFFICE OF CHIEF MEDICAL EXAMINERS AS LONG AS APPROPRIATE AUTHORIZATION IS OBTAINED.

**OFFICE OF THE CHIEF MEDICAL EXAMINER
OF THE CITY OF NEW YORK**

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) SS.:

CERTIFICATION AS A BUSINESS RECORD

I have been delegated by Charles S. Hirsch, MD, Chief Medical Examiner, to certify and authenticate records of the Office of the Chief Medical Examiner of the City of New York ("OCME") pursuant to Rule 4518 of the New York Civil Practice Law and Rules.

OCME has been ordered to produce certified copies of documents concerning decedent,
Gabriel Sherwood ME #B11-4597.

OCME is a governmental office organized under the New York City Charter § 557 and the New York City Administrative Code §§17-201 – 17-206. All records contained in its Records Department concerning this matter are maintained in OCME's regular course of business. OCME medical examiner files contain autopsy records generated by OCME staff in the regular course of their business, as well as documents received from other sources which are relevant to the particular case.

The copies provided here represent all the documents contained in the above-cited OCME medical examiner case file.

I have examined the original records maintained by OCME's Records Department and I have compared the copies provided here to the originals from which they were photocopied, and I attest that the records bearing this certification and authentication are a true and correct copy of the original records so described and are accurate and genuine.

I have affixed the official seal of the Office of the Chief Medical Examiner of the City of New York to certify these copies as genuine and as business records of the Records Department of the Office of the Chief Medical Examiner.


Print Name: **Yvelisse Matias**
Title: **Clerical Associate III**

Date: **December 30, 2011**



**OFFICE OF CHIEF MEDICAL EXAMINER
CITY OF NEW YORK**



REPORT OF AUTOPSY

Name of Decedent: Gabriel Sherwood

M.E. #: B11-4597

Autopsy Performed by: Katherine Maloney, M.D.

Date of Autopsy: 11/2/2011

FINAL DIAGNOSES

- I. STAB AND INCISED WOUNDS OF TORSO
 - A. PENETRATION OF HEART
 - 1. HEMOPERICARDIUM AND HEMOTHORAX
 - 2. PNEUMOTHORAX
 - B. PENETRATION OF DIAPHRAGM
- II. BLUNT IMPACT INJURIES OF HEAD
 - A. ABRASIONS AND CONTUSIONS OF FACE
- III. INCISED WOUND OF RIGHT THIRD DIGIT
 - A. PERFORATION OF SKIN AND SUBCUTANEOUS TISSUE

CAUSE OF DEATH: STAB WOUND OF TORSO WITH PERFORATION OF
HEART

MANNER OF DEATH: HOMICIDE

THIS IS A TRUE COPY

Office of Chief Medical Examiner
This record cannot be released without
prior consent from the Office of Chief
Medical Examiner, New York City, N.Y.

Yvelisse Matias Y.M.

12/30/2011

**OFFICE OF CHIEF MEDICAL EXAMINER
CITY OF NEW YORK**

REPORT OF AUTOPSY

CASE NO. B11-4597

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

This autopsy was performed in the presence of Dr. James Gill.

EXTERNAL EXAMINATION:

The body is of a well-developed, well-nourished, average-framed, 5', 7", 159 lb Black man (BMI 24.9) whose appearance is consistent with the given age of 35 years. The curled black hair measures up to approximately ¼". The mustache and beard measure up to 1/8". The nose and facial bones are palpably intact. The eyes have brown irides and the conjunctivae are without hemorrhage, petechiae or jaundice. The oral cavity has natural dentition in good repair with braces (see injuries below). The torso and extremities have the injuries described below. The external genitalia are of a normal adult man.

There is a gray fiber on the back of the head (submitted to evidence). There is a 2-1/2" linear scar of the left side of the head above the ear. There is a curvilinear area of no hair growth of the anterior scalp measuring 3". There are two oval scars of the anterior right leg measuring ½" in greatest dimension.

POSTMORTEM CHANGES:

There is moderate symmetrical rigor mortis of the upper and lower extremities, neck and jaw. Lividity is purple, fixed, and posterior. The body is cold.

THERAPEUTIC PROCEDURES:

In place are bandages of the torso and a single lumen intravenous catheter in the left antecubital fossa.

INJURIES:

There are six sharp injuries of the torso, one sharp injury of the right hand, and blunt injuries of the head. The sharp injuries are labeled "A" through "G" for descriptive purposes only; no sequence is implied.

Sharp force injuries of torso and extremity:**A. Stab Wound of Right Chest**

A stab wound of the right chest is centered 19" below the top of the head, ¼" right of midline, and 3-1/2" medial to the right areola. It is obliquely oriented with the right angle superior; there is no discernable blunt edge. It is 5/8" long on the surface of the skin without natural skin tension. After penetrating the skin and muscle, the knife proceeded through the cartilaginous portion of the right 5th rib and the superior aspect of the diaphragm leaving a ¼" penetration. The direction of penetration is from front to back and slightly downward without discernible right or left deviation. The estimated depth of penetration is 1-1/2 to 2-1/2".

B. Incised Wound of Right Chest

A 1" curvilinear, incised wound is of the right chest with vertical orientation, and a depth of approximately 1/8". It is located 20" below the top of the head, midline and 4" medial to the right areola. It did not injure major vessels.

C. Stab Wound of Left Chest

A stab wound of the left chest is centered 21" below the top of the head, 5-1/2" left of midline, and 3-1/2" lateral to the left areola. It is horizontally oriented and a 1/32" blunt edge is directed laterally. It is ½" long on the surface of the skin without natural skin tension. After penetrating the skin and muscle, the knife proceeded between left 5th and 6th ribs, the pericardial sac (¾" defect), and the anterior wall of the right ventricle (½" defect). There is approximately 100 ml of sanguineous fluid in the pericardial sac, and approximately 1-1/2 liters of sanguineous fluid and blood clots in the left pleural cavity. The direction of penetration is from front to back and slightly medial without discernible vertical deviation. The estimated depth of penetration is 4-1/2 to 5-1/2". Review of the postmortem chest x-ray shows that the heart is deviated to the right. Upon opening the left pleural cavity, there is the sound of air release. The left lung is atelectatic. There is no intracardiac air embolism.

D. Incised/Superficial Stab Wound of Left Abdomen

An incised/superficial stab wound of the left abdomen is centered 21-1/2" below the top of the head, 5-1/2" left of midline, and 3-1/2" below the right areola. It is obliquely oriented with the left angle superior; there is no discernable blunt edge. It is 5/16" long on the surface of the skin with natural skin tension. The wound penetrates the skin and subcutaneous tissue. The estimated depth of penetration is ¼".

E. Incised/Superficial Stab Wound of Left Abdomen

An incised/superficial stab wound of the left abdomen is centered 26" below the top of the head, 4" left of midline, and 8" below the right areola. It is horizontally oriented; there is no discernable blunt edge. It is 3/8" long on the surface of the skin with natural skin tension. There are superficial, linear abrasions extending from each edge of the wound,

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GABRIEL SHERWOOD

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measuring 1/2" on the lateral aspect and 1/8" on the medial aspect. The wound penetrates the skin and subcutaneous tissue. The estimated depth of penetration is 1/4".

F. Incised/Superficial Stab Wound of Right Back

An incised/superficial stab wound of the right back is centered 19-1/2" below the top of the head, 6-1/2" right of midline, and 9-1/2" from the top of the shoulder. It is obliquely oriented with the left angle superior; there is no discernable blunt edge. It is 3/8" long on the surface of the skin with natural skin tension. The wound penetrates the skin and subcutaneous tissue. The estimated depth of penetration is 1/4".

G. Incised Wound of Right Third Digit

There is a 1/4" superficial, incised wound of the medial right middle finger over the proximal interphalangeal joint. It did not injure major vessels.

Blunt Impacts to head

There is a 1/2 x 1/2" red abrasion of the left lateral forehead, located 2-1/2" above the left ear and 2" posterior to the glabella. There is a 1/8" red abrasion of the left side of the bridge of the nose. There are red abrasions and pink contusions of the upper lip on the left side measuring 3/4". There are no scalp contusions and the skull is not fractured. There is no epidural, subdural or subarachnoid hemorrhage. The brain has no contusions.

The injuries listed above, having been described once, will not be repeated.

INTERNAL EXAMINATION:

BODY CAVITIES: The organs are in their normal situs. The peritoneal cavity contains normal amounts of serous fluid and is without hemorrhage or adhesion. The abdominal wall pannus is 1/2 inch thick.

HEAD: The scalp has no contusion. The brain weighs 1500 gm and is normal size and shape. The cerebral hemispheres are symmetrical with the usual pattern of sulci and gyri. The leptomeninges are thin and clear. The cerebral vessels are without atherosclerosis or aneurysm. The cranial nerves are normally distributed. The white and gray matter, deep nuclei and ventricles are unremarkable. There are no focal lesions. The brainstem and cerebellum are unremarkable.

NECK: The cervical vertebrae, hyoid bone, tracheal and laryngeal cartilages, and paratracheal soft tissues are without trauma. The upper airway is patent. The tongue is unremarkable.

CARDIOVASCULAR SYSTEM: The heart weighs 350 gm and has a normal distribution of right predominant coronary arteries without atherosclerotic stenosis. There is no

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GABRIEL SHERWOOD

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recent thrombus. The myocardium is homogeneous, dark red and firm without pallor, softening or fibrosis (see injuries section above). The left ventricle wall is 1.4 cm and the right is 0.2 cm thick. The foramen ovale is patent. The endocardial surfaces and four cardiac valves are otherwise unremarkable. The aorta is with fatty streaks. The venae cavae and pulmonary arteries are patent.

RESPIRATORY SYSTEM: The right lung weighs 460 gm and the left weighs 210 gm. The red parenchyma is without masses, consolidation or obstruction (see injuries section above). The bronchi are unremarkable.

LIVER, GALLBLADDER, PANCREAS: The liver weighs 1330 gm and has an intact capsule. The brown parenchyma is without fibrous texture. The gallbladder contains approximately 5 cc of dark green bile without stones. The pancreas is unremarkable in lobulation, color and texture.

HEMIC AND LYMPHATIC SYSTEMS: The spleen weighs 90 gm and has an intact capsule. The color, red and white pulp and consistency are unremarkable. There are no enlarged lymph nodes.

GENITOURINARY SYSTEM: The right kidney weighs 140 gm and the left weighs 150 gm. Each kidney has a smooth red-brown surface with an unremarkable architecture and vasculature. The ureters maintain uniform caliber into an unremarkable bladder containing 10 ml of urine. The prostate is not enlarged. The testes are unremarkable.

ENDOCRINE SYSTEM: The pituitary, thyroid, and adrenal glands are normal color, size and consistency.

DIGESTIVE SYSTEM: The esophagus and gastroesophageal junction are unremarkable. The stomach contains approximately 60 cc of tan fluid and food matter. The gastric mucosa and small intestine are unremarkable. There is focal red discoloration of the adventitial aspect of the posterior rectum (Comment: this may be consistent with lividity). The vermiform appendix is present.

MUSCULOSKELETAL SYSTEM: The vertebrae, clavicles, sternum, and pelvis are without fracture. The musculature is normally distributed and otherwise unremarkable.

HISTOPATHOLOGY:

Sections are submitted for microscopic examination. A separate report will be issued.

TOXICOLOGY:

Specimens are submitted for toxicologic analysis. A separate report will be issued.

FORENSIC BIOLOGY:

B11-4597**GABRIEL SHERWOOD****Page 6**

Fingernail, scalp hair and blood specimens are submitted to Forensic Biology.

POST-MORTEM PHOTOGRAPHY AND RADIOGRAPHY:

Post mortem photographs and radiographs are taken and retained.

EVIDENCE:

The gray fiber identified on the back of the head is submitted to evidence per the usual protocol.



Katherine Maloney, M.D.
City Medical Examiner - I

KFM

DRAFT: 11/2/2011

FINAL: 12/29/2011



Scott
12/29/11

The City of New York
Office of Chief Medical Examiner
520 First Avenue
New York, NY 10016

36a

Forensic Toxicology Laboratory

Deceased: **Gabriel Sherwood**

M.E. Case No.: **BX1104597**

Lab. No.: **4659/11**

Autopsy By: **Dr. Maloney**

Autopsy Date: **11/02/11**

Specimens Received:

Bile, Blood, Brain, Gastric Content, Liver, Urine, Vitreous Humour

Specimens Received in Laboratory By: **Michelle Dumit**

Date Received: **11/03/11**

Equivalents: 1.0 mcg/mL = 1.0 mg/L = 0.1 mg/dL = 1000 ng/mL

1.0 mcg/g = 1.0 mg/kg = 0.1 mg/100g = 1000 ng/g

Results

Blood

Ethanol	0.12 g%	GC
Cannabinoids	Not detected	EI

Urine

Ethanol	0.13 g%	GC
Cannabinoids	Detected	EI*
Benzodiazepines	Not detected	EI
Opiates	Not detected	EI
Benzoyllecgonine	Not detected	EI
Amphetamines	Not detected	EI
Barbiturates	Not detected	EI
Salicylates	Not detected	CT
Acetaminophen	Not detected	CT
Basic drugs	Not detected	GC/MS

Vitreous Humour

Ethanol	0.15 g%	GC
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* Unconfirmed screening result. Confirmation available upon request.

Page 1 of 1

EI = Enzyme Immunoassay	CT = Color Test
GC = Gas Chromatography	TLC = Thin Layer Chromatography
GC/MS = GC/Mass Spectrometry	ISE = Ion Selective Electrode
LC = Liquid Chromatography	SP = Spectrophotometry
LC/MS = LC/Mass Spectrometry	< = Less than

Signed:

Marina Stajic

Dr. Marina Stajic

Date: 12/21/11

GA



The City of New York
Office of Chief Medical Examiner
New York, N.Y. 10016



REPORT OF
MICROSCOPIC EXAMINATION

Name of Decedent: Gabriel Sherwood
Histology Lab #: 1105379-AR

M.E. Case #: B11-4597
Date of Autopsy: 11/2/2011

MICROSCOPIC DESCRIPTIONS:

Tissue or Organ x # of fragments and/or levels (#= slide ID number)

HEART x 1 (2): No pathologic diagnosis.

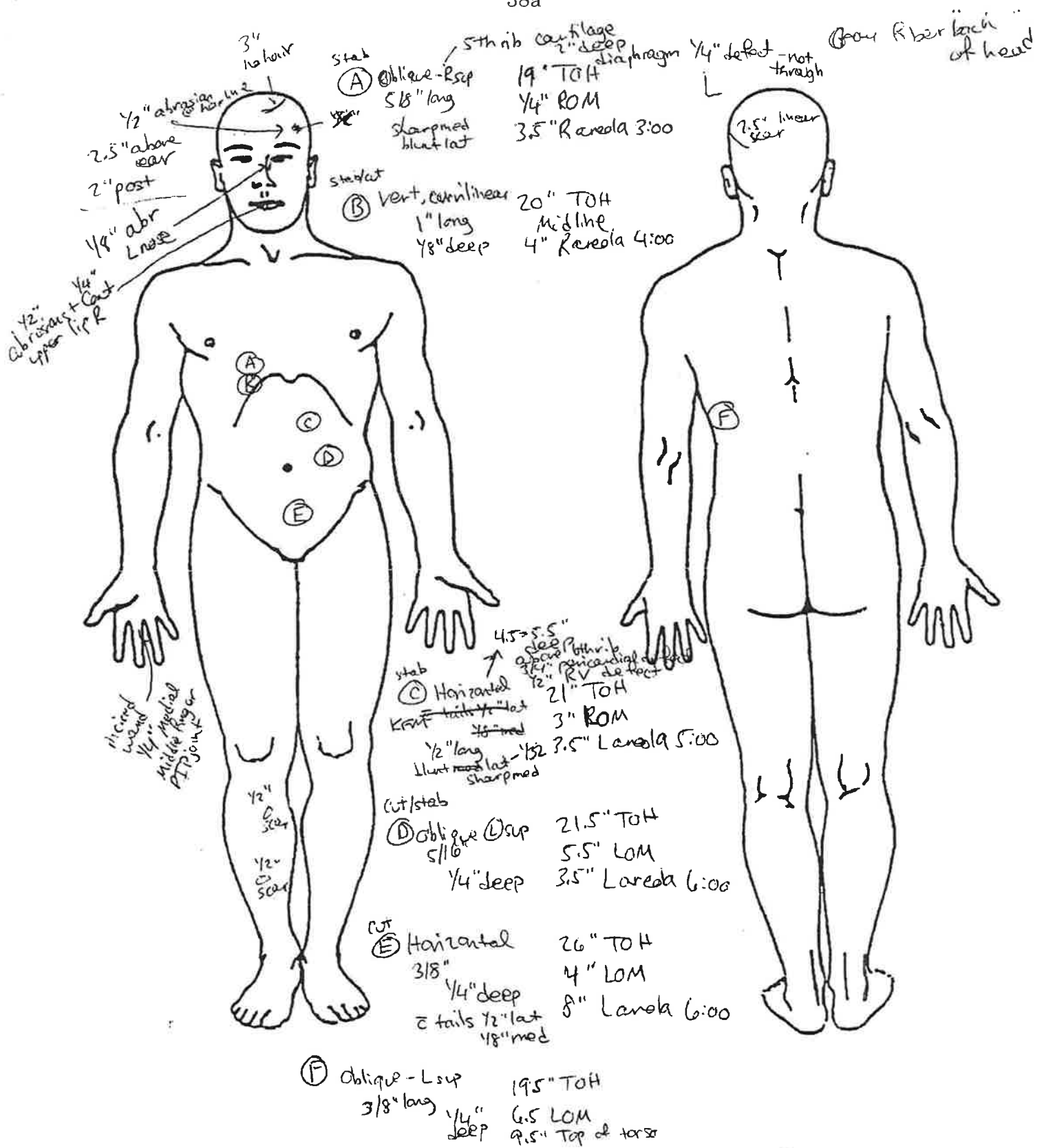
LUNGS x 1 (2): No pathologic diagnosis.

LIVER x 1 (1): No pathologic diagnosis.

KIDNEY x 1 (1): No pathologic diagnosis.

Katherine Maloney, M.D. 12/29/2011
Printed Name/ Date

Katherine Maloney M.D.
Signature/December 29, 2011

NAME OF DECEDENT: Gabriel SherwoodM.E.#: B / 11 / 4597EXAMINED BY: Katherine MaloneyDATE: 11 / 2 / 2011

39a
APPENDIX E

People v Freycinet
2008 NY Slip Op 05776 [11 NY3d 38]
June 26, 2008
Smith, J.
Court of Appeals
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The People of the State of New York, Respondent, v Gary Freycinet, Appellant.
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Argued May 29, 2008; decided June 26, 2008

People v Freycinet, 41 AD3d 731, affirmed.

{**11 NY3d at 39} OPINION OF THE COURT

Smith, J.

In *People v Rawlins* (10 NY3d 136 [2008]), we considered whether fingerprint comparison reports and the report of a DNA technician were "testimonial" evidence under *Crawford v Washington* (541 US 36 [2004]). This case raises a similar question about an [*2]autopsy report. Analyzing the question in the way *Rawlins* requires, we conclude that the redacted report at issue here was not testimonial.

I

Defendant's girlfriend died of a knife wound, and defendant was indicted for murder, manslaughter and other crimes. His{**11 NY3d at 40} defense was that he killed her either justifiably or by accident. He did not testify at trial, but relied on statements he made to police and a prosecutor after his arrest, in which he described the event as occurring when he and the victim were lying next to each other. According to his account, the two had an argument; the victim punched him and reached first for an iron and then for a knife; he reached the knife before she did; she grabbed his wrist; and the knife "just hit her."

Dr. John Lacy, of the New York City Office of Chief Medical Examiner, performed an autopsy on the victim. Dr. Lacy later moved to Seattle, and he did not return for the trial. His report, redacted to eliminate his opinions as to the cause and manner of the victim's death, was received in evidence over defendant's Confrontation Clause objection.

The report said that Dr. Lacy observed "a single perforating stab wound of the face and neck and minor blunt force injury of the face." It said that the stab wound was on the "left face in front of the left ear," and that it was "oriented obliquely with one blunt angle close to the ear and one sharp angle directed toward the chin." The report described the "wound track," as passing "through the subcutaneous tissue and posterior scalp." The report gave the location of the "exit wound" as "just within the hairline of the back of the neck." It also noted a small round abrasion on the left cheek.

Dr. Corinne Ambrosi of the Medical Examiner's office testified as an expert for the People, giving opinions based on the facts in Dr. Lacy's report. She concluded that the cause of the victim's death was bleeding from the stab wound. She also said that the knife, when it entered the victim's neck, was positioned with its blunt edge toward the ear and its sharp edge "facing more toward the front." She said that the wounds were "consistent with a right-handed person as a stabber on top of the person being stabbed" and "with the stabber using force."

In closing argument, the People relied both on Dr. Ambrosi's opinions and Dr. Lacy's report to attack defendant's version of the facts. The prosecutor argued that defendant must have been on top of the victim, not beside her as he said, and that so deep a wound, "from the front of her face to the back of her scalp," could not have been inflicted by accident.

The trial judge, sitting without a jury, acquitted defendant of murder but convicted him, among other things, of manslaughter in the second degree. The Appellate Division affirmed. A judge of this Court granted leave to appeal, and we now affirm. {**11 NY3d at 41}

II

The Confrontation Clause of the United States Constitution says: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against [*3]him" (US Const Amend VI). *Crawford* and *Davis v Washington* (547 US 813 [2006]) establish that this clause does not bar the use of out-of-court statements by declarants who are not "witnesses"; and *Crawford* held that witnesses are "those who 'bear testimony' "

(*Crawford*, 541 US at 51). The Supreme Court has not defined "testimony" in this context, though it has said that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not" (*id.*). The only issue on this appeal is whether the redacted version of Dr. Lacy's autopsy report was "testimony" as that term is used in *Crawford*.

The question of when reports of scientific procedures are and are not testimonial is one we examined at length in *Rawlins*. In that case, we refused to establish an "absolute rule" that documents within the "business records" exception to the hearsay rule are never testimonial, noting that under New York law records of law enforcement agencies may be business records (10 NY3d at 149-150). Instead, we discussed "various indicia of testimoniality" (*id.* at 151). Among them are: the extent to which the entity conducting the procedure is "an 'arm' of law enforcement" (*State v Crager*, 116 Ohio St 3d 369, 379, 879 NE2d 745, 753 [2007], quoted in *Rawlins*, 10 NY3d at 153); whether the contents of the report are a contemporaneous record of objective facts, or reflect the exercise of "fallible human judgment" (10 NY3d at 154); the question—closely related to the previous two—of whether a pro-law-enforcement bias is likely to influence the contents of the report (*id.* at 153); and whether the report's contents are "directly accusatory" in the sense that they explicitly link the defendant to the crime (*id.* at 156). Considering these factors, we held in *Rawlins* that fingerprint comparison reports prepared by a police department analyst, which said that prints found at two crime scenes belonged to the defendant, were testimonial. However, in *People v Meekins* (decided with *Rawlins*), in which the police had sent samples from a rape kit to a private laboratory for testing, we held that a technician's report establishing that a particular DNA profile was obtained from one of the samples was nontestimonial. {**11 NY3d at 42}

Under the *Rawlins* approach, Dr. Lacy's autopsy report was clearly not testimonial. The duties of the Office of Chief Medical Examiner, Dr. Lacy's employer, "are, by law, independent of and not subject to the control of the office of the prosecutor"; the agency "is not a law enforcement agency" (*People v Washington*, 86 NY2d 189, 192 [1995]). Dr. Lacy's report, redacted to eliminate his opinions, was very largely a contemporaneous, objective account of observable facts. The giving of opinions was left to Dr. Ambrosi, who testified at trial. Admittedly, a report of a doctor's findings at an autopsy may reflect more exercise of judgment than the report of a DNA technician; for example, Dr. Lacy no doubt exercised judgment in characterizing the victim's injury as a "stab wound." Nevertheless, the significance of the report to this case derives almost entirely from Dr. Lacy's precise

recording of his observations and measurements as they occurred. It is hard to imagine how this redacted report could have been significantly affected by a pro-law-enforcement bias.
[*4]

Finally, Dr. Lacy's report did not directly link defendant to the crime. The report is concerned only with what happened to the victim, not with who killed her. As *Crawford* explains, the Confrontation Clause derives from the strongly held idea of our country's founders, derived from English common law, that a person accused should have the right to face his or her "accuser." The Clause is in a way an echo of Sir Walter Raleigh's unheeded demand, quoted in *Crawford*: "Call my accuser before my face" (541 US at 44). Dr. Lacy was not defendant's "accuser" in any but the most attenuated sense.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Kaye and Judges Graffeo, Read, Pigott and Jones concur; Judge Ciparick taking no part.

Order affirmed.