No. 13-632

In the Supreme Court of the United States

RICHARD JAMES AND RONALD MALLAY, PETITIONERS

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONERS

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This case presents an unusually deep conflict on a vitally important question of constitutional law: whether forensic pathology reports are testimonial for purposes of the Confrontation Clause. Since the petition in this case was filed last November, the conflict has only deepened, with another court holding that forensic pathology reports are testimonial. See *State* v. *Lui*, 315 P.3d 493, 510-511 (Wash. 2014). Additional courts have recognized the conflict—and, in so doing, have specifically cited the decision below. See *Smith* v. *Ryan*, Civ. No. 12-318, 2014 WL 1247828, at *31 n.15 (D. Ariz. Mar. 24, 2014); *Bae Hyuk Shin* v. *Sullivan*, Civ. No. 12-1322, 2014 WL 683766, at *7 (C.D. Cal. Feb. 14, 2014). And remarkably, more than a dozen other petitions for certiorari are now

pending that present various permutations of the question presented here. See p. 10, *infra*.

In the face of all of that, one might think that only a member of the Flat Earth Society could deny the existence of a conflict that warrants the Court's immediate review. Yet that is precisely what the government has done in its brief in opposition. And in a transparent effort to postpone the day of reckoning on this issue, the government identifies a series of flimsy vehicle problems that posed no impediment to the court of appeals' consideration of the question presented and should pose no impediment for this Court either. Because the conflict on the question presented cries out for the Court's review, and because this case is an optimal vehicle in which to resolve that conflict, the petition for certiorari should be granted.

1. The government contends (Br. in Opp. 21-28) that "[n]o * * * conflict exists" on the question whether forensic pathology reports are testimonial for purposes of the Confrontation Clause because "[t]he decisions * * * merely reflect that forensic reports are generated in numerous factual contexts." That contention is simply incredible—and requires the government to ignore what the conflicting cases actually say.

To begin with, the government contends that *State* v. *Locklear*, 681 S.E.2d 293 (N.C. 2009), "reflect[s] th[e] premise" that forensic pathology reports are testimonial only when they are "created to support an active criminal investigation." Br. in Opp. 24. But the North Carolina Supreme Court could not have been clearer in unconditionally holding that "forensic analyses qualify as 'testimonial' statements, and forensic analysts are 'witnesses' to which the Confrontation Clause applies." 681 S.E.2d at 304-305 (citation omitted). The court did not even specify whether an investigation was ongoing at the

time the autopsy at issue was conducted, much less did it place any weight on that fact in its analysis.

So too with *State* v. *Kennedy*, 735 S.E.2d 905 (W. Va. 2012). The government contends that *Kennedy* stands for the proposition that autopsy reports are testimonial only where "the autopsy was conducted as part of a criminal investigation." Br. in Opp. 26. As with *Locklear*, however, *Kennedy* cannot be so limited. The West Virginia Supreme Court made clear that, in holding that the autopsy report at issue was testimonial, it was establishing a categorical rule of exclusion for "criminal action[s] where the performing pathologist or analyst does not appear at trial and the State fails to establish that the pathologist or analyst is unavailable and that the accused has had a prior opportunity to cross-examine the witness." 735 S.E.2d at 917. The government further contends that *Kennedy* simply "construed a particular West Virginia statute." Br. in Opp. 25. But the statute in question merely specified that one of the purposes of autopsy reports was use in judicial proceedings. See 735 S.E.2d at 916-917. That is hardly a basis for distinction, because a forensic pathology report may be used in a judicial proceeding regardless of whether a statute expressly so provides—as, indeed, Dr. Mootoo's toxicology report was used here.

The government also relies on state law in attempting to distinguish *United States* v. *Ignasiak*, 667 F.3d 1217 (11th Cir. 2012). See Br. in Opp. 22. Once again, however, the government ignores the test the court actually adopted, under which an autopsy report is testimonial where it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 667 F.3d at 1232 (citation omitted). The Eleventh Circuit nowhere required the existence of an active crim-

inal investigation, and it looked to state law only to inform its determination that the reports at issue would be "available for use at a later trial." *Ibid.*

The government makes no effort to distinguish *United States* v. *Moore*, 651 F.3d 30 (D.C. Cir. 2011) (per curiam), aff'd on other grounds, 133 S. Ct. 714 (2013), on the ground that it involved an active criminal investigation. Instead, it contends (Br. in Opp. 23) that the court discussed the Confrontation Clause only in dicta. That is incorrect. Like the Eleventh Circuit, the D.C. Circuit squarely held that the autopsy reports are testimonial when made under "circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." 651 F.3d at 73 (citation omitted). Applying that standard, the court concluded that "circumstances make the autopsy reports here testimonial." *Ibid.* To be sure, the court did not decide the subsequent question whether the report could be introduced through a "surrogate witness," because the court deemed any error to be harmless. *Id.* at 72, 74. But that in no way undermines the court's holding that forensic pathology reports are testimonial for purposes of the Confrontation Clause.

In addition, the government attempts to distinguish some of the foregoing decisions on the ground that they involved autopsy reports, rather than toxicology reports. See Br. in Opp. 22, 26. But the government never explains why that distinction matters. As the district court explained, the toxicology report at issue here "is an integral part of forensic pathology," Pet. App. 62a, containing statements by a government analyst bearing at least as much formality, and made for the same purpose, as the statements in the autopsy report. Indeed, the government argued below that the toxicology and autopsy reports should stand or fall together for Confrontation

Clause purposes. See, *e.g.*, D. Ct. Opp. to Mot. to Exclude Evidence 3-5 (May 28, 2007). Because the government offers no meaningful basis for its belated effort to distinguish between toxicology and autopsy reports, that distinction should be rejected.

2. The government contends (Br. in Opp. 18-21) that the decision below is "consistent" with this Court's decision in *Williams* v. *Illinois*, 132 S. Ct. 2221 (2012). As a preliminary matter, that contention is impossible to square either with the government's own concession that "no single rationale for the judgment [in *Williams*] can be identified," Br. in Opp. 17, or with the sharply divergent approaches taken by lower courts in the wake of *Williams* to determine whether statements are testimonial, see Pet. 17-19.

Two points warrant specific responses. First, the government suggests that the various opinions in *Williams* agreed that a statement would qualify as testimonial only if it was made "during an ongoing criminal investigation of a known crime with an identified victim." Br. in Opp. 19. But neither Justice Kagan's dissenting opinion nor Justice Thomas's opinion concurring in the judgment embraced that rule. Justice Kagan would have required a showing that the statement was "made for the primary purpose of establishing past events *potentially* relevant to later criminal prosecution." *Williams*, 132 S. Ct. at 2273 (emphasis added; internal quotation marks and citation omitted). And Justice Thomas would simply have required "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 2259 (alteration in original; citation omitted).

Second, the government contends that the toxicology report at issue here would not satisfy Justice Thomas's requirement of a "solemn declaration or affirmation." See Br. in Opp. 20-21. But the toxicologist, Dr. Mootoo,

signed the following statement: "Commissioner [of Police], [t]he results of my examination are [that] [the sample] tested positive for [a]mmonia." Pet. C.A. App. 178. By signing that statement, Dr. Mootoo "certif[ied] the accuracy" of the results of the toxicology analysis that he "purport[ed] to have performed." *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring). In addition, the report was presented on a form entitled "The Guyana Police Force—Articles for Analysis"; bore the seal of the "police forensic laboratory"; and was structured to satisfy the chain of custody required under the evidentiary rules. This Court has characterized a report with similar "formalities" as testimonial and, in so doing, "rejected as untenable any construction of the Confrontation Clause that would render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements perfectly OK." *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705, 2717 (2011) (internal quotation marks and citation omitted).

3. The government contends (Br. in Opp. 28-32) that this case is a poor vehicle for four reasons. Each of those reasons is wholly meritless.

a. The government asserts (Br. in Opp. 29-30) that any error in admitting the toxicology report was harmless beyond a reasonable doubt because there was other evidence suggesting that petitioners had poisoned Sewnanan. But the court of appeals did not hold that any error would have been harmless, and this Court has indicated that it "ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance." *Ring* v. *Arizona*, 536 U.S. 584, 609 n.7 (2002). Notably, the Court has followed that practice in its recent Confrontation Clause cases. See *Bullcoming*, 131 S. Ct. at 2719 n.11; *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 329 n.14 (2009). It can readily do the same here, and leave

any harmless-error inquiry for the lower courts on remand in the event of a reversal.

In any event, there is good reason why the court of appeals did not rely on harmless error in the opinion below, because the government's argument lacks merit. The cause of Sewnanan's death was hotly disputed at trial. See Pet. 6. And the government acknowledged below both that the testimony of the pathologist, Dr. Brijmohan, was "material to [that] critical issue," Gov't C.A. Br. 38, and that Dr. Brijmohan expressly relied on Dr. Mootoo's toxicology report in concluding that ammonia poisoning was the cause of Sewanan's death, Tr. 3283, 3304-3305 (May 29, 2007). Indeed, the toxicology report was the *only* forensic evidence supporting the propositions that the contents of Sewnanan's stomach contained ammonia and that Sewnanan was murdered by ammonia poisoning—propositions that were essential to connect petitioners to Sewnanan's murder. See Pet. 20; Pet. C.A. Br. 59. As a result of Dr. Mootoo's unavailability, moreover, petitioners were unable to cross-examine him to confirm one of their principal defenses: *i.e.*, that any ammonia found in Sewnanan's stomach was the naturally occurring result of decomposition after death. Under those circumstances, any error cannot be said to be harmless beyond a reasonable doubt.

b. In a related vein, the government asserts (Br. in Opp. 28-29) that petitioners forfeited any objection to certain portions of Dr. Brijmohan's testimony. At the same time, however, the government concedes that petitioners preserved their objection to the admissibility of the toxicology report; that petitioners filed a written motion to exclude not only the toxicology report, but Dr. Brijmohan's "conclusions based thereon" (which the district court later denied); and that counsel for petitioners

also made contemporaneous oral objections to "certain aspects" of Dr. Brijmohan's testimony. *Id.* at 7, 29.

In light of those concessions, the government's argument is seriously odd. The court of appeals itself recognized that petitioners "vigorously objected to Dr. Vivikand Brijmohan's testimony as to a toxicology test relating to the death of Hardeo Sewnanan, which was based on forensic testing conducted by Dr. Leslie Mootoo." Pet. App. 33a. And the government does not dispute that the court of appeals squarely addressed petitioners' Confrontation Clause challenge—which is all that is required to preserve the issue for this Court's review. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). At most, the government's assertion that petitioners inadequately preserved objections to certain aspects of Dr. Brijmohan's testimony would go to the harmlessness of any error arising from the admission of the evidence to which petitioners concededly *did* object—an issue, as noted above, that poses no obstacle to this Court's review.

c. The government argues (Br. in Opp. 30-32) that obtaining reversal of the convictions based on Sewnanan's murder would not alter petitioners' sentences of life imprisonment, because petitioners were also convicted on other counts. This Court should reject out of hand the government's ambitious suggestion that it should effectively deem an error to be harmless as long as vacating the conviction would have no effect on the defendant's custodial status. Cf. *Ball* v. *United States*, 470 U.S. 856, 864-865 (1985) (concluding that a double jeopardy violation cannot be harmless, even where the violation would have no effect on the defendant's ultimate sentence, because "[t]he separate *conviction* * * * has potential adverse collateral consequences that may not be ignored").

In any event, the premise of the government's argument is incorrect. If this Court were to vacate petitioners' convictions based on Sewnanan's murder, petitioners would ask the lower courts to vacate their convictions based on Basdeo Somaipersaud's murder as well, because this Court's decision would render plain a similar error in the admission of an autopsy report as to those convictions. See *Henderson* v. *United States*, 133 S. Ct. 1121, 1124-1125 (2013). And because all of the counts were so closely intertwined, petitioners would also ask the lower courts to vacate their remaining convictions, on the ground that spillover prejudice from the Sewnanan convictions infected the verdicts on the other counts. See, *e.g.*, *United States* v. *Murphy*, 323 F.3d 102, 108-112 (3d Cir. 2003). Again, those issues would be left to be worked out by the lower courts on remand in the event of a reversal, and thus pose no impediment to this Court's review.

d. The government argues (Br. in Opp. 28) that, even if this case is otherwise a suitable vehicle, the Court should await a case that was tried after *Williams*, so as to permit "prosecutors, defense lawyers, and lower courts" to "absorb the lessons of the Court's recent Confrontation Clause decisions and to reframe their actions in light of them." With all due respect, that is a preposterous argument. The whole point of this petition is that the lower courts are desperate for guidance precisely because this Court's decision in *Williams* was so badly fragmented. In fact, just about the only point on which the lower courts can agree is that the problem of discerning a governing standard from *Williams* is "intractable." Pet. App. 24a. Even the government has conceded that "no single rationale for the judgment [in *Williams*] can be identified." Br. in Opp. 17. And the conflict on the

question presented, which actually predated the Court's decision in *Williams*, has only deepened since.

Given that 19 courts of appeals and state courts of last resort have now taken conclusive positions on the question presented, there is no material benefit to awaiting further percolation before granting review. As this Court is well aware, it bears the responsibility of ensuring "*uniformity*, as well as correctness in expounding the constitution and laws of the United States." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (Marshall, C.J.). And that responsibility is particularly acute, we respectfully submit, where the lack of uniformity stems from confusion concerning this Court's precedent.

4. As noted above, there are at least thirteen other currently pending petitions for certiorari that present various questions concerning the application of the Confrontation Clause to forensic pathology reports. See *Turner* v. *United States*, No. 13-127; *Brewington* v. *North Carolina*, No. 13-504; *Ortiz-Zape* v. *North Carolina*, No. 13-633; *Derr* v. *Maryland*, No. 13-637; *Cooper* v. *Maryland*, No. 13-644; *Galloway* v. *Mississippi*, No. 13-761; *Yohe* v. *Pennsylvania*, No. 13-885; *Bolus* v. *Pennsylvania*, No. 13-1078; *Alger* v. *California*, No. 13-1102; *Maxwell* v. *United States*, No. 13-7394; *Edwards* v. *California*, No. 13-8618; *Johnson* v. *California*, No. 13-8705; *Walker* v. *Wisconsin*, No. 13-8743.

Should the Court wish to resolve the question presented, it should grant this petition. Alone among the currently pending cases of which we are aware, this case possesses three characteristics that would facilitate the Court's review. First, this case poses the clean question whether forensic pathology reports are testimonial for purposes of the Confrontation Clause. That question is sufficiently broad to allow the Court to offer clarity in this area of the law, where it is sorely needed, while af-

fording the Court the flexibility to decide the case more narrowly if it so chooses. Second, as noted above, petitioners in this case indisputably preserved a Confrontation Clause objection below, and the lower court squarely addressed that objection without resting in the alternative on case-specific harmless-error analysis. And third, there is no doubt in this case that out-of-court statements by a nontestifying analyst were directly introduced at trial. The toxicology report signed by Dr. Mootoo was admitted into evidence, and Dr. Brijmohan, the testifying witness, did not participate in or review the toxicology analysis; did not form an independent opinion based on the nontestifying analyst's out-of-court data; and did not sign the contested report. Those characteristics combine to make this case an ideal vehicle for the Court's review.

The sheer number of pending petitions underscores the dire need for this Court's intervention. Rarely will the Court see as deep and entrenched a conflict on a question as the one presented here. And there is no valid reason for the Court to postpone resolving such a recurring and important question of constitutional law. The Court should grant review in this case, hold the other currently pending petitions, and resolve once and for all the testimonial status of forensic pathology reports.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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