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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether forensic test results on which a medical examiner who performed an autopsy partially relied in forming his expert judgment on cause of death were testimonial for purposes of the Confrontation Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 712 F.3d 79. The order of the district court (Pet. App. 59a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2013. A petition for rehearing was denied on July 16, 2013 (Pet. App. 58a). On October 4, 2013, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 14, 2013. On October 28, 2013, Justice Ginsburg further extended the time to December 13, 2013, and the petition was filed on November 22, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners Mallay and James were convicted of racketeering, in violation of 18 U.S.C. 1962(c); racketeering conspiracy, in violation of 18 U.S.C. 1962(d); murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); conspiracies to commit murders in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); and conspiracies to commit mail fraud and money laundering, in violation of 18 U.S.C. 371 and 1956(h), respectively. Mallay was also convicted of three murders for hire and conspiracies to commit those murders, in violation of 18 U.S.C. 1958; and mail fraud, in violation of 18 U.S.C. 1341. James was additionally convicted of solicitation of murder in aid of racketeering, in violation of 18 U.S.C. 373, 1959(a)(1), and attempted murder for hire, in violation of 18 U.S.C. 1958. The district court sentenced Mallay to nine concurrent life sentences for counts of conviction reflecting four murders; James to three concurrent life sentences for counts reflecting at least two murders; and both to concurrent terms of imprisonment on other counts. Pet. C.A. App. 118-120, 124-126; Pet. App. 3a. The court of appeals affirmed. Pet. App. 1a-57a.

1. a. Between 1991 and 2002, Mallay and James conducted and participated in the conduct of a criminal enterprise that, *inter alia*, secured life-insurance policies on individuals and murdered those individuals to collect insurance proceeds. Gov't C.A. Br. 4-18. James worked as an insurance broker for the Metropolitan Life Insurance Company (MetLife) and used his job to secure insurance contracts on the lives of unwitting victims. See, *e.g.*, *id.* at 7-9, 12, 14. MetLife

eventually discovered that James's clients had more than three times the normal mortality rate and that many of them suffered violent or accidental deaths. Presentence Investigation Report (James) ¶ 26. Shortly before his arrest, James admitted in a recorded conversation with a government informant—who James was then soliciting to murder John Narinesingh (an insured) with poison—that James was carrying $15 million in life insurance on "25 bums" and that he killed such "bums" "for a living" to collect the insurance proceeds. Gov't C.A. Br. 15.

Before petitioners' insurance-and-murder scheme was uncovered, it resulted in the murders of (at least) four individuals: Vernon Peter (the husband of Mallay's sister), Alfred Gobin (the father of Mallay's long-term girlfriend), Basdeo Somaipersaud, and Hardeo "Rawan" Sewnanan (Mallay's nephew). Gov't C.A. Br. 6-18; see Pet. App. 3a-7a. The certiorari petition presents a Confrontation Clause challenge to certain trial evidence relevant to the murder of one of those victims, Sewnanan. See Pet. 2-6. Sewnanan's murder formed the basis for two of Mallay's nine concurrent life sentences (Counts 6-7) and for Mallay's and James's ten-year prison sentences for conspiring to murder Sewnanan in aid of racketeering (Count 5). See Pet. C.A. App. 120, 126 (judgments); 3d Superseding Indictment 14-16 (Doc. 430-2).[1]

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[1] The numbering of the counts of conviction in the district court's judgments corresponds to that in the Third Superseding Indictment, see Pet. C.A. App. 118, 124, but is different from the numbering in the jury's verdict form, which instead corresponds to the numbering in a redacted indictment (*id.* at. 93-113). See Jury Verdict 1-6 (Doc. 541). The Third Superseding Indictment charged murder conspiracies (Counts 3, 6, 8, 10) immediately

b. In October 1996, petitioner James arranged for two insurance policies for $500,000 in base coverage on the life of petitioner Mallay's nephew, Sewnanan, who lived in Port Mourant in the Republic of Guyana. Pet. App. 6a; Gov't C.A. Br. 12; cf. 3d Superseding Indictment 10 (Sewnanan was "known as 'Rawan'"); Trial Tr. (Tr.) 1703-1705. In 1999, Mallay traveled to Guyana, where he met with Derick Hassan and paid Hassan to murder Sewnanan. Tr. 1678-1679, 1685-1686, 1854. The men traveled by car to Port Mourant, where Sewnanan was identified to Hassan. Tr. 1700-1702. Hassan observed Sewnanan closely to ensure that he would know who to kill, and Mallay instructed Hassan to kill Sewnanan by mixing "poison with [his] rum." Tr. 1702, 1706. After Hassan later reneged on his agreement to commit the murder, Mallay told Hassan that he had hired others in Guyana to murder Sewnanan. Pet. App. 6a-7a; Gov't C.A. Br. 13.

On June 8, 1999, Sewnanan died in Guyana at the age of 35. Pet. C.A. App. 173. Sewnanan's body generally appeared healthy and showed no external signs of recent injuries. Tr. 3256. In Guyana, an autopsy is performed when it appears that a decedent may have had an "unnatural death[]" rather than a death from natural causes. Tr. 3266. On June 11, 1999, Dr. Vivikanand Brijmohan, an employee of the Guyanese Ministry of Health who served as one of Guyana's two forensic pathologists, conducted Sewnanan's autopsy

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before each corresponding murder charge (Counts 4, 7, 9, 11), whereas the redacted version of the indictment reverses the order of each conspiracy-and-murder-count pairing. This brief uses the numbering reflected in the Third Superseding Indictment and the district court's judgments.

at the Port Mourant Hospital. Tr. 3234-3235, 3237, 3254, 3275, 3297.

Dr. Brijmohan recognized that Sewnanan was of East Indian descent and knew that the East Indian population in Guyana had a high rate of suicide by poison. Tr. 3253, 3256, 3376-3377. The doctor explained that, as a result, he sees "a lot of poisoning cases" and encounters poisons in his position "on an almost daily basis." Tr. 3253. Dr. Brijmohan also observed during the autopsy that Sewnanan's liver showed severe cirrhosis reflecting "chronic abuse of alcohol." Tr. 3262, 3369-3370. The doctor knew that alcoholism was a problem in Guyana's male East Indian population and was a major contributing factor to that population's high rate of suicide by poison. Tr. 3377. Finally, Dr. Brijmohan found extensive submucosal petechial hemorrhaging in Sewnanan's stomach. Tr. 3262, 3264-3265. That bleeding suggested to the doctor that Sewnanan might have ingested a poison, but it could have also signaled chronic gastritis, chronic alcoholism, excessive doses of medications such as aspirin, or other causes. Tr. 3265-3266, 3368-3369. Dr. Brijmohan emptied the stomach contents into a container and requested a toxicological examination to "confirm whether [his] surmise" about poisoning was correct. Tr. 3262, 3266.

Dr. Brijmohan gave the container to a police officer who witnessed the autopsy and whose "duty [was] to transport [any autopsy specimens] as a courier to the relevant authority" for testing. Tr. 3266; Pet. C.A. App. 173 (Officer McAllister). The Guyana Police Force utilizes a two-sided printed form labeled "Articles for Analysis" for couriering such items. See Pet. C.A. App. 177-178 (form) (capitalization altered).

The front side of the Articles-for-Analysis form includes an area to state the requested analysis and document directions for delivering articles to a "[g]overnment [a]nalyst." Pet. C.A. App. 177. The form for Dr. Brijmohan's toxicology request states that "stomach contents" were forwarded to determine "if there is the presence of any poisonous liquid and if so, what kind?" *Ibid.* The back side of the form includes three areas separated by dividing lines: the first for a government analyst to report "[t]he results of [his] examination"; the second for a police official to record a message to an analyst; and a third for an analyst to complete if the analyst attaches a type of "[c]ertificate." See *id.* at 178. The first area was completed and states that the stomach contents "tested positive for Ammonia." *Ibid.* That statement is followed by a typed signature block and the signature of Dr. L. Mootoo, Guyana's other forensic pathologist at the Ministry of Health. *Ibid.*; see Tr. 3237, 3275. The second and third areas on the back were not completed and no certificate appears to have been attached. See Pet. C.A. App. 178; cf. *id.* at 176 (third area on back of second form that is blank except for preprinted text and writing that bleeds through from the form's front side).

By June 25, 1999, Dr. Brijmohan completed his two-page autopsy report (Pet. C.A. App. 173-174). Tr. 3304. The report summarizes the findings of the doctor's autopsy examination of Sewnanan; states that "[a]nalysis for stomach contents tested positive for ammonia"; concludes that Sewnanan died "from unnatural causes"; and lists Sewnanan's cause of death as "[a]cute poisoning (ammonia)." Pet. C.A. App. 173-174. The doctor attached to his report two two-page Articles-for-Analysis forms (*id.* at 175-178), including

the form stating the test results for Sewnanan's stomach contents (*id*. at 177-178). See Tr. 3273-3274.

Later in 1999, during a conversation with Hassan's brother, petitioner Mallay explained how he and his co-conspirators killed Sewnanan. Tr. 6588-6589. Mallay stated that they "poison[ed]" him with "acid and ammonia." Tr. 6589.

Several years later, in 2002, petitioner James discussed Sewnanan's murder in a recorded conversation with Hassan, who by then was cooperating as an informant. Gov't C.A. Br. 16; Tr. 1853. James expressed his dissatisfaction with Mallay's timing of Sewnanan's murder and explained that Mallay had let an insurance policy on Sewnanan's life temporarily lapse, thereby undermining efforts to collect in full within two years of its reinstatement. Tr. 1854-1855. Mallay and MetLife ultimately settled the disputed insurance claim for $400,000. Tr. 2847.

2. At trial, the evidence established that petitioners' criminal enterprise, *inter alia*, caused the murders of (at least) the four individuals noted above: Peter, Gobin, Somaipersaud, and Sewnanan. Gov't C.A. Br. 6-14. Dr. Brijmohan testified about the autopsy he conducted on Sewnanan. Tr. 3234-3385.

a. The day before Dr. Brijmohan's testimony, petitioners moved to exclude Dr. "Mootoo's toxicology report" and Dr. "Brijmohan's conclusions based thereon." 5/28/2007 Pet. Letter Mot. 1 (Doc. 467). The government opposed the motion, arguing that, *inter alia*, Federal Rule of Evidence 703 permits expert witnesses like Dr. Brijmohan to base their opinions on evidence that itself could be inadmissible. 5/28/2007 Gov't Letter Opp. 7 (Doc. 468). The district court did not immediately rule on petitioners' motion.

During Dr. Brijmohan's testimony, petitioners clarified that their Confrontation Clause objection did not extend to Dr. Brijmohan's two-page autopsy report, which states, *inter alia*, that Sewnanan's "stomach contents tested positive for ammonia" and that the cause of Sewnanan's death was "[a]cute poisoning (ammonia)," Pet. C.A. App. 174. See Tr. 3282-3283, 3291. Petitioners instead stated that their objection applied only to the four pages of attached Articles-for-Analysis forms (Pet. C.A. App. 175-178) that indicate the results of toxicological testing. Tr. 3282-3283, 3291. Petitioners' counsel made clear that "I am saying the first two pages [of the six-page exhibit] can come in" even though that "two-page report" itself identifies "acute poisoning" as the cause of death. Tr. 3282-3283. Counsel explained that he "agree[d] with [the government] that under Rule 703, if [Dr. Brijmohan] relied on [information in a toxicology report]," that information "could come in" as "part of his opinion regardless of whether * * * the scientific report itself comes in[to] evidence." Tr. 3283; see Tr. 3282. Petitioners' counsel thus confirmed that he "agree[d]" that "under [Rule] 703 the first two pages and [Dr. Brijmohan's] conclusion, if he wants to testify about * * * what his conclusion was, it comes in. But the rest of it does not." Tr. 3291. Counsel argued that the four pages of attached "scientific report[s]" signed by Dr. Mootoo were "different" and "should not come in." Tr. 3283, 3291; see Tr. 3285-3286.

In light of petitioners' agreement that Dr. Brijmohan's two-page autopsy report was properly admissible, the district court admitted "th[os]e first two pages" into evidence but "reserve[d] [decision] on the other" four pages with the toxicology results signed

by Dr. Mootoo. Tr. 3292, 3294. To avoid "running afield of the court's rulings and reservations," government counsel asked whether Dr. Brijmohan could testify about "what it is that he relied on, which would be the positive toxicology report[,] in making his findings." Tr. 3294. The court confirmed, without objection, that such testimony was permitted. *Ibid.*

Thereafter, Dr. Brijmohan repeatedly testified—without objection—that he had "conclu[ded] to a reasonable degree of scientific certainty" that the cause of Sewnanan's death was "poisoning with an ammoniacal compound" resulting from "ingestion of a toxic substance" and that his conclusion was based in part on the toxicology-testing results and in part on his own autopsy observations. Tr. 3295, 3299, 3304-3305. Dr. Brijmohan further testified without objection that "the toxicology report" on which he based his opinion "indicate[d]" that Sewnanan's "death was due to ammonia." Tr. 3305. The doctor also testified without objection that he concluded that Sewnanan died from ingesting a commercially produced ammonia-based compound based on his observation of the stomach; the laboratory results "brought to [his] attention"; and his knowledge that the body's post-mortem production of ammoniacal compounds is "very insignificant" and would not produce ammonia in meaningful amounts, let alone amounts that would fill the stomach of one who died of natural causes. Tr. 3382-3384; see Tr. 3361. Petitioners' counsel elicited similar testimony on cross-examination and did not object to Dr. Brijmohan's answers. See, *e.g.*, Tr. 3363-3366 (Dr. Brijmohan concluded that the ammonia in Sewnanan's stomach was commercially produced "[b]ecause of the laboratory report" and the doctor's own observations).

After Dr. Brijmohan testified (without objection) that he recognized Dr. Mootoo's signature on the toxicology report, Tr. 3297, petitioners unsuccessfully objected when government counsel asked Dr. Brijmohan if he had an "understanding" of who did the toxicology analysis, Tr. 3298. The doctor answered, "Dr. Mootoo." *Ibid.*; cf. Tr. 3356-3359 (cross-examination). Six lines of transcript after Dr. Brijmohan testified (without objection) that the toxicology report "indicate[d]" that Sewnanan's "death was due to ammonia," petitioners unsuccessfully objected when government counsel asked whether the doctor recalled what that report "said." Tr. 3305. Dr. Brijmohan answered, "[p]oisoning from ammonia." *Ibid.* The district court sustained other objections by petitioners to questions about the toxicology reports. *E.g.*, Tr. 3306-3307.[2]

b. Three weeks later, but before the government rested its case, the district court denied petitioners' still-pending request to exclude "Dr. Mootoo's toxicology report" from evidence, Pet. App. 63a. *Id.* at 59a-63a (order). The court held that the report did not implicate the Confrontation Clause because it was not "testimonial" under *United States* v. *Feliz*, 467 F.3d 227, 230 (2d Cir. 2006), cert. denied, 549 U.S. 1238 (2007), which concluded that autopsy reports were not "testimonial." Pet. App. 61a-63a.

The district court also explained that Dr. Mootoo's report was unlike a "'chemist's' report created by 'law enforcement.'" Pet. App. 61a. The court found that Dr. Mootoo (who died before trial, Tr. 3239) had been employed by the Guyanese Ministry of Health. Pet.

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[2] Petitioners also objected to the "form" of other questions without posing a substantive objection to the evidence. See, *e.g.*, Tr. 3304-3305, 3307.

App. 61a-62a. The court noted the close "physical proximity" between the Guyanese medical examiner's office and Guyanese police facilities and "cooperation" between the two agencies, but the court found "no indication" that Dr. Mootoo was employed by a law-enforcement agency or had law-enforcement responsibilities. *Ibid.* The court further found that the record showed that Dr. Brijmohan and Dr. Mootoo's role was simply to investigate "'unnatural deaths'" or "'suspicious deaths'" just like "any medical examiner in New York." *Id.* at 62a (quoting Tr. 3235).

Two Articles-for-Analysis forms with toxicology results signed by Dr. Mootoo (Pet. C.A. App. 175-178) were accordingly admitted in evidence. Those reports include only three relevant lines of text that briefly indicate testing results. One report states that a liquid sample "tested negative for Ammonia" and that a second sample "tested positive for Ammonia." *Id.* at 176.[3] The other report states that stomach contents "tested positive for Ammonia." *Id.* at 178. The reports provide no further explanation of the testing.

c. The jury found Mallay and James guilty of racketeering, in violation of 18 U.S.C. 1962(c) (Count 1); racketeering conspiracy, in violation of 18 U.S.C. 1962(d) (Count 2); the murder of Somaipersaud in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) (Count 9); conspiracies to murder Sewnanan and Somaipersaud in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5) (Counts 5 and 8); and conspiracies to commit mail fraud (Count 14) and money laundering

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[3] Dr. Brijmohan stated that he received the results from this first report about samples in two bottles, but the "record does not conclusively reveal whether the contents of the bottles" were taken from Sewnanan's body. Pet. App. 35a n.12.

(Count 16). The jury also found Mallay guilty of conspiracies to commit murder for hire and the murders for hire of Gobin (Counts 3-4), Sewnanan (Counts 6-7), and Somaipersaud (Counts 10-11), in violation of 18 U.S.C. 1958; and mail fraud (Count 15). The jury further found James guilty of soliciting Narinesingh's murder in aid of racketeering (Count 12) and Narinesingh's attempted murder for hire (Count 13). Pet. C.A. App. 118-119, 124-125; 3d Superseding Indictment 4-25; see also Jury Verdict 1-6 (Doc. 541); Pet. C.A. App. 93-113 (redacted indictment).

The district court sentenced each petitioner to one mandatory life sentence under 18 U.S.C. 1959(a)(1) for the murder of Somaipersaud in aid of racketeering (Count 9), and two other life sentences for racketeering (Count 1) and racketeering conspiracy (Count 2). Pet. C.A. App. 120, 126. The court sentenced Mallay to six more mandatory life sentences for conspiracies to commit murder for hire and the murders for hire of Gobin (Counts 3-4), Sewnanan (Counts 6-7), and Somaipersaud (Counts 10-11). *Id.* at 126.

3. The court of appeals affirmed. Pet. App. 1a-57a. As relevant here, the court concluded that admitting the toxicology results signed by Dr. Mootoo into evidence did not violate the Confrontation Clause. *Id.* at 33a-38a. The court noted that any error must be reviewed for harmlessness, *id.* at 33a-34a, but did not address the government's harmless-error arguments (Gov't C.A. Br. 31-39) because it concluded that the toxicology results were not "testimonial" and thus did not implicate confrontation rights. Pet. App. 37a-38a.

a. The court of appeals surveyed this Court's recent Confrontation Clause decisions, Pet. App. 8a-26a, and concluded that *Melendez-Diaz* v. *Massachusetts*,

557 U.S. 305 (2009), and *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705 (2011), reflect that "a laboratory analysis is testimonial," "if the circumstances under which the analysis was prepared, viewed objectively, establish that the primary purpose of a reasonable analyst in the declarant's position would have been to create a record for use at a later criminal trial." Pet. App. 23a; see *id.* at 12a-16a. The court also concluded that the Court's 4-1-4 decision in *Williams* v. *Illinois*, 132 S. Ct. 2221 (2012), did not alter the analysis. Pet. App. 24a; see *id.* at 16a-22a. The court noted that the *Williams* plurality applied a "primary purpose" test focused on the purpose of obtaining trial evidence against a "targeted" individual and that this standard, if adopted, appeared inconsistent with the primary-purpose analysis in *Melendez-Diaz*. *Id.* at 24a-25a. But the court of appeals concluded no narrowest ground for the *Williams* judgment could be identified under *Marks* v. *United States*, 430 U.S. 188 (1977), because no single rationale supporting that judgment reflected the views of a majority of this Court. Pet. App. 24a. The court of appeals thus explained that, "for [present] purposes," *Williams* could not be extended beyond its facts to alter the "primary purpose" inquiry reflected in this Court's earlier decisions. *Id.* at 25a.

In light of those Confrontation Clause decisions, the court of appeals concluded that its 2006 opinion in *Feliz*, which "categorical[ly] designat[ed] * * * certain forensic reports as admissible in all cases" and which the district court here followed, was of "questionable validity." Pet. App. 9a, 22a, 37a. The court of appeals explained, however, that the district court's ultimate holding remained "sound" because the par-

ticular toxicology results signed by Dr. Mootoo were not testimonial because they were not created for the primary purpose of establishing or proving facts at a criminal trial. *Id.* at 9a, 37a-38a; see *id.* at 25a.

Consistent with its recitation of the district court's findings (Pet. App. 36a), the court of appeals found "no indication" that a "criminal investigation" was contemplated during the 1999 inquiry into Sewnanan's death or that "the toxicology report was completed primarily to generate evidence for use at a subsequent criminal trial." *Id.* at 37a-38a. Dr. Brijmohan, the court explained, requested testing because he "suspect[ed] poisoning in general—not murder in particular"—given the high rate of suicides by poison among Guyana's male East Indian population, his autopsy observations that were consistent with poisoning, and the "other potential 'natural' causes" of those observations. *Id.* at 37a-38a & n.14. The court further explained that the role of the Guyanese police in the autopsy process (which included "transporting forensic samples for testing") appears to reflect a "routine procedure employed by the Guyanese medical examiner in investigating all unnatural deaths" and, thus, did "not indicate that a criminal investigation was contemplated." *Id.* at 37a n.13.

b. Judge Eaton concurred. Pet. App. 50a-57a. Judge Eaton did not dispute the majority's holding about the toxicology results signed by Dr. Mootoo. He instead stated that he disagreed with the majority's conclusion (*id.* at 26a-33a) that a different autopsy report about Somaipersaud's death was testimonial. *Id.* at 50a. But like the majority, Judge Eaton concluded that it was not reversible "plain error" to admit that report. *Ibid.*; accord *id.* at 33a (majority opinion).

ARGUMENT

Petitioners contend (Pet. 10-17) that the lower courts are divided over whether forensic pathology reports are testimonial under the Confrontation Clause. They argue (Pet. 17-20) that this case provides an opportunity to clarify the proper analysis after *Williams* v. *Illinois*, 132 S. Ct. 2221 (2012). And they suggest (Pet. 20-23) that this is a "suitable vehicle" to resolve important and recurring questions about forensic reports. The decision of the court of appeals is correct and warrants no further review. The decisions of courts of appeals and state courts of last resort that address forensic reports reflect the differing factual contexts in which such reports are generated, not a division of authority relevant here. Moreover, this case would be a poor vehicle for review because petitioners agreed below that almost all of the evidence that they now challenge was properly admitted. The evidence about Sewnanan's death to which petitioners did object was cumulative and not significant. In any event, review would not materially aid petitioners because they are serving life sentences for murders unrelated to the evidence challenged in this Court.

1. 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. In *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004), this Court held that the government may not offer into evidence a "testimonial" statement of an absent witness at a criminal trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. The court of appeals correctly

held on the facts of this case that the toxicology results prepared in connection with Sewnanan's autopsy were not "testimonial."

This Court has concluded that statements that respond to law-enforcement questioning will be "testimonial" if the "primary purpose" of the questioning is to "establish or prove past events potentially relevant to later criminal prosecution." *Davis* v. *Washington*, 547 U.S. 813, 822 (2006). Such statements thus will be testimonial if their "primary purpose" is to "creat[e] an out-of-court substitute for trial testimony." *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1155 (2011).

In *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009), the Court explained that "public records" are not "testimonial" if they are not created for "the purpose of establishing or proving some fact at trial," *id.* at 324, but that the formal, written statements before the Court were testimonial because they had been "prepared specifically for use at [the defendant's] trial." *Ibid.* *Melendez-Diaz* thus held that formal, sworn statements by state laboratory analysts made in affidavits that reported the results of their forensic drug testing were "testimonial" because they had been created "sole[ly]" as evidence for criminal proceedings. *Id.* at 310-311 (emphasis omitted); see *id.* at 330 (Thomas, J., concurring) (joining the Court's opinion because the documents at issue were "quite plainly affidavits") (quoting *id.* at 310 (opinion of the Court)).

This Court in *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705, 2710, 2715-2716 (2011), applied *Melendez-Diaz*'s rationale to hold that the Confrontation Clause forbids the admission of an analyst's signed, forensic report certifying the results of a blood-alcohol test when the report's statements were offered through

the "surrogate testimony" of another scientist who "did not sign the certification or perform or observe the test" and who had no "independent opinion" about its results. Justice Sotomayor joined the five-Justice majority opinion, *id.* at 2709 n.*, but wrote separately to emphasize that the underlying forensic report was "testimonial" because its "'primary purpose'" was to "'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 2719-2720 (Sotomayor, J., concurring in part) (quoting *Bryant*, 131 S. Ct. at 1155).

In *Williams*, this Court recently concluded that admitting a DNA's expert's opinion testimony, which relied in part on data from the DNA report of a nontestifying analyst, did not violate the Confrontation Clause. No single opinion commanded a majority of the Court, and no single rationale for the judgment can be identified under the approach of *Marks* v. *United States*, 430 U.S. 188, 193 (1977). The four-justice plurality concluded that the expert-opinion evidence was permissible because, as relevant here, the DNA report on which the opinion was based was not "testimonial" because its "primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against" an identified defendant. 132 S. Ct. at 2243; see *id.* at 2242-2244. Justice Thomas concurred in the judgment, finding that the DNA evidence on which the expert relied lacked the requisite "formality and solemnity" to be testimonial because it was "neither a sworn nor a certified declaration of fact" similar to "an affidavit or deposition." *Id.* at 2255, 2260-2261. Justice Kagan's dissent, in turn, rejected the plurality's understanding of the primary-purpose test, *id.* at 2273-2275, and Justice Thomas's solemnity requirement, *id.* at 2275-2277.

Justice Kagan concluded that a certified forensic report will be "testimonial" when it has a "clear 'evidentiary purpose'" because it was made under circumstances in which an objective witness would reasonably believe that the report "would be available for use at a later trial." *Id.* at 2266 (citation omitted). Justice Kagan thus concluded that the DNA report in *Williams* was testimonial because it "was made to establish '[a] fact' in a criminal proceeding," namely, the identity of a specific victim's rapist. *Ibid.* (citation omitted); see *id.* at 2277.

b. The toxicological reports in this case were not produced with the primary purpose of creating evidence for use in a criminal proceeding and are not testimonial. The court of appeals found "nothing to indicate that the toxicology report was completed primarily to generate evidence for use at a subsequent criminal trial" because the report was made when Dr. Brijmohan suspected that Sewnanan committed suicide or perhaps accidentally ingested poison. Pet. App. 37a-38a. And because the record failed to reflect that "a criminal investigation was contemplated during the inquiry into the cause of Sewnanan's death," the court of appeals concluded that the toxicology results were not created for the "primary purpose" of creating a record for use at a later trial and, thus, were not testimonial. *Id.* at 9a, 25a, 37a.

The court of appeals' conclusion based on the primary purpose of the toxicology report is consistent with *Melendez-Diaz* and *Bullcoming*. It is also consistent with *Williams*. Although the members of the Court in *Williams* disagreed about the nature of the primary-purpose test, that disagreement concerned an issue not germane here: whether the primary-

purpose test is satisfied when a forensic report is produced during an ongoing criminal investigation of a known crime with an identified victim if the report is not also made with the "primary purpose of accusing a *targeted* individual" who has already been identified as the perpetrator, *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting) (citation omitted; emphasis added). The plurality would require such targeting; the dissenters (and Justice Thomas) would not. Compare *id.* at 2243 (plurality opinion) with *id.* at 2273 (Kagan, J., dissenting) and *id.* at 2261-2263 (Thomas, J., concurring in the judgment). That disagreement has no application here, however, where the toxicology reports were not made during a criminal investigation.

Petitioners dispute (Pet. 14-15, 20) the factual predicate for the court of appeals' decision, arguing that the toxicology report here was "plainly being used to establish 'some fact in a criminal proceeding'" because the analysis was conducted in light of "suspicion that [Sewnanan's] death had been a homicide." Pet. 15, 20 (citation omitted). But the use of the toxicology report years later in this criminal proceeding hardly establishes that the report was testimonial at the relevant time: when it was made. Moreover, as the courts below concluded, nothing suggests that the testing was conducted because of suspicion that Sewnanan's death resulted from a criminal act. To the extent that petitioners seek to challenge the factual findings of the courts below, that fact-bound challenge merits no further review. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); see *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (This Court's "settled practice" is to "accept[],

absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred.").

Petitioners support their argument by contending (Pet. 14-15) that a police officer couriered samples to Dr. Mootoo; Dr. Mootoo was "closely intertwined with law enforcement"; toxicology testing was done in a police laboratory; and the resulting report was written on police letterhead. But the courts below correctly found that Dr. Mootoo worked for the Ministry of Health, not the police; that he had no law-enforcement responsibilities; and that the physical proximity of and cooperation between the Guyanese health and police agencies was insufficient to show that the toxicology report here was made with the primary purpose of producing evidence for use in a criminal proceeding. Pet. App. 37a-38a & n.13, 61a-62a; see pp. 10-11, 14, *supra*. As the court of appeals explained, although the Guyanese police officials played a role in assisting the medical examiner here, that role appears to reflect nothing more than "the routine procedure employed by the Guyanese medical examiner in investigating *all* unnatural deaths," not just deaths for which "a criminal investigation [i]s contemplated." Pet. App. 37a n.13 (emphasis added). Petitioners' fact-bound disagreement merits no further review.

Petitioners assert (Pet. 22) that "the government does not dispute that the toxicology report was signed and certified" and thus contend (Pet. 15, 19-20) that the report has the requisite "formality and solemnity" to be "testimonial" under Justice Thomas's understanding of that concept. That is incorrect. Petitioners have not previously argued that the toxicology results signed by Dr. Mootoo were "certified" as con-

templated by Justice Thomas; petitioners never established a factual basis for this new assertion at trial; and the record does not reflect that the toxicology results were, in fact, certified, see p. 6, *supra*, much less that any "certification" would have reflected "a sworn [or] a certified declaration of fact" similar to "an affidavit or deposition," *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring in the judgment). See also *Melendez-Diaz*, 557 U.S. at 329-330 (Thomas, J., concurring). Dr. Mootoo's signature on the results is insufficient to show that the underlying statements are tantamount to a *sworn* statement or declaration.[4]

2. Petitioners assert (Pet. 10-17) that the court of appeals' decision conflicts with decisions of other courts of appeals and state courts of last resort. No such conflict exists. The decisions that petitioners cite merely reflect that forensic reports are generated in numerous factual contexts, some of which will render a report testimonial while others will not.

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[4] The two Articles-for-Analysis forms reflecting results from toxicology testing (Pet. C.A. App. 175-178) contain preprinted text indicating that blank areas on the back of the forms could have been used by a police official to write "instructions as to issue of Certificate in usual form, or giving such and such particulars, as for the certificate to await further samples, etc." *Id.* at 176, 178. The forms likewise indicate that an officer would be dispatched to "return for the articles" tested once a "Certificate is received from the Analyst." *Id.* at 175, 177. But the forms do not show that a certificate would always issue or what the referenced certificates might certify (*e.g.*, whether they might simply certify that the analyst had completed his analysis). The forms here also do not reflect that a certificate was, in fact, issued to accompany the toxicology results, see p. 6, *supra*, and petitioners failed to explore the question of certification or otherwise develop a related factual record in district court.

Petitioners contend that *United States* v. *Ignasiak*, 667 F.3d 1217 (11th Cir. 2011), holds that "[f]orensic reports constitute testimonial evidence" and are "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial" even though "not all" such reports "will be used in criminal trials." Pet. 11 (quoting 667 F.3d at 1230, 1232). But *Ignasiak* based its conclusion that the autopsy reports before it were "prepared 'for use at trial'" and thus were testimonial "[i]n light of th[e particular] statutory framework" in Florida and the trial testimony of a medical examiner. 667 F.3d at 1231-1232. The court, for instance, emphasized that the Florida Medical Examiners Commission exists "within the Department of Law Enforcement"; its Commissioners by statute included law-enforcement officials (the state Attorney General, a state attorney, and a sheriff); and each medical examiner was required to report or make available in writing each cause-of-death finding to the state attorney. *Ibid.* Those factors are absent here, where the courts below concluded that Guyana's forensic pathologists were employed by the Ministry of Health and did not have law-enforcement responsibilities. See Pet. App. 33a n.11 (distinguishing *Ignasiak* on that basis). Moreover, whereas *Ignasiak* dealt exclusively with autopsy reports, petitioners agreed at trial that Dr. Brijmohan's autopsy report was properly admitted. See p. 8, *supra*. Petitioners challenged only the toxicology reports on which Dr. Brijmohan partially based his conclusions, see *ibid.*, and *Ignasiak* expressly declined to consider whether such "toxicology results themselves present Confrontation Clause problems." 667 F.3d at 1233 n.20.

United States v. *Moore*, 651 F.3d 30 (D.C. Cir. 2011) (per curiam), aff'd in part on other grounds, 133 S. Ct. 714 (2013), addressed autopsy reports but declined "to decide as a categorical matter whether autopsy reports are testimonial." *Id.* at 73 n.16. *Moore* also had no occasion to decide definitively whether admitting the particular reports in the case violated the Confrontation Clause because the court simply "[a]ssum[ed] error with respect to admission of the autopsy reports" and held that any such error was "harmless beyond a reasonable doubt." *Id.* at 74. *Moore* thus does not have a Confrontation Clause holding that conflicts with the decision below.[5]

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[5] Petitioners also incorrectly contend (Pet. 11-12) that *Moore*'s Confrontation Clause discussion (in dicta) is inconsistent with the decision below. *Moore* observed that documents "created solely for an 'evidentiary purpose' . . . made in aid of a police investigation" are testimonial, 651 F.3d at 72 (quoting *Bullcoming*, 131 S. Ct. at 2717), and stated that the "circumstances" surrounding the creation of the particular autopsy reports at issue indicated that they were testimonial, *id.* at 73. An objective witness, the court observed, would have reasonably believed that statements in the autopsy reports would be available for use at a later criminal trial in light of a combination of "factors," including the fact that the D.C. medical examiner was required to investigate deaths if requested by law-enforcement agency; law-enforcement officials did not merely "observe[] the autopsies" in question, they "participated in the creation of [autopsy] reports" by creating a diagram and written comments included in the reports; and "each autopsy found the manner of death to be a homicide caused by gunshot wounds." *Ibid.* Those observations are consistent with the decision below, which concludes that nothing indicated that a criminal investigation was contemplated when the toxicology reports were made and explained that the role that the Guyanese police play in facilitating the autopsy process appears to reflects a routine process for all apparently unnatural deaths, not just those for which a criminal investigation is contemplated. See p. 14, *supra*.

State v. *Locklear*, 681 S.E.2d 293 (N.C. 2009), in turn, simply reflects the view that autopsy reports created in support of a criminal homicide investigation are "testimonial." The autopsy at issue in *Locklear* was conducted on a female college student who had mysteriously disappeared; whose vehicle was found "burned down to bare metal" at a remote rural location; whose skeletal remains were located months later a few miles away from her vehicle; and whose cause of death was determined (in the autopsy) to be "blunt force injuries to the chest and head." *Id.* at 299, 304. *Locklear* explained that *Melendez-Diaz* had held forensic drug testing of "a substance seized by law enforcement officers" yielded "testimonial" statements by the analysts and applied that reasoning to conclude that autopsy reports will similarly trigger confrontation rights. *Id.* at 304-305. Although *Locklear* does not clearly explain that its conclusion was premised on the understanding that the autopsy materials in question were created to support an active criminal investigation, its factual context and recognition that forensic testing of materials "seized by law enforcement officers" will yield testimonial statements reflect that premise. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") (citation omitted).

Indeed, the North Carolina Supreme Court has since recognized that *Melendez-Diaz* and *Locklear*'s application of *Melendez-Diaz* to autopsy reports show that "forensic analysts *generating* laboratory reports *in criminal investigations*" produce reports that are "testimonial in nature." *State* v. *Ward*, 694 S.E.2d

738, 746-747 (N.C. 2010) (emphases added); accord *State* v. *Poole*, 733 S.E.2d 564, 569 (N.C. Ct. App. 2012) (citing *Locklear* for the proposition that "a forensic analysis prepared for the prosecution of a criminal charge" is "testimonial"). *Locklear* is thus consistent with the decision below, which explains that the toxicology results here were produced before a criminal investigation was contemplated.

State v. *Navarette*, 294 P.3d 435, 440-441 (N.M.), cert. denied, 134 S.Ct. 64 (2013), similarly concludes that an autopsy report is testimonial when the underlying autopsy is "performed as part of a homicide investigation" and it is "clear" to the medical examiner authoring the report that the "autopsy was part of a homicide investigation." In such circumstances, the court explained, a medical examiner should "anticipate criminal litigation to result from his determination that the trauma-related death * * * was the result of homicide." *Id.* at 441 (citation omitted); see *ibid.* (explaining that the autopsy findings themselves addressed "who shot" the decedent). That application of the "primary purpose" test, *id.* at 438, is consistent with the court of appeals' fact-bound application of the same inquiry here.

Petitioners contend (Pet. 13-14) that *State* v. *Kennedy*, 735 S.E.2d 905 (W. Va. 2012), concluded that autopsy reports are testimonial primarily because a statutory purpose of autopsy reports under state law is their use in judicial proceedings. The state court in *Kennedy* construed a particular West Virginia statute as showing that "autopsy reports are under all circumstances testimonial," *id.* at 917, but it did so where the 15-year-old victim in the case had died of a head wound, her blood had been found on Kennedy's vehi-

cle, and Kennedy had been arrested for her murder on the day she died, *id.* at 910, 917. The court explained that officers investigating the murder engaged the medical examiner about the cause of death and provided him details during the autopsy thus suggesting a "collaborative investigative effort" that "transform[ed]" the autopsy process into "an integrally interwoven part of a criminal prosecution." *Id.* at 917 n.10. *Kennedy* does not conflict with the decision below. Not only did *Kennedy* rely on state law that does not apply to the activities in *Guyana* at issue here, but the circumstances in *Kennedy*, unlike those here, demonstrated that the autopsy was conducted as part of a criminal investigation such that the resulting report reasonably would be viewed as being created primarily for the purpose of use in criminal proceedings. Furthermore, *Kennedy* does not address whether forensic test results associated with autopsies—the only records at issue here—are testimonial. *Kennedy* involved only autopsy reports, and petitioners expressly agreed that Dr. Brijmohan's autopsy report was properly admitted.

Finally, petitioners cite (Pet. 14) several decisions that petitioners assert (without explanation) find forensic pathology reports to be testimonial. Each case is distinguishable because they involve reports, unlike the toxicology reports here, that were prepared when criminal proceedings were anticipated.[6] Petitioners

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[6] See *Commonwealth* v. *Reavis*, 992 N.E.2d 304, 309, 312 (Mass. 2013) (victim's children witnessed the defendant stab the victim to death; court states that substitute medical examiner could not testify to facts underlying an autopsy report if the report has not been admitted but does not discuss the test for testimonial statements); *People* v. *Childs*, 810 N.W.2d 563 (Mich. 2012) (one-

thus identify no decision that conflicts with the decision of the court of appeals here.

Petitioners relatedly argue (Pet. 17-20) that review is warranted because of asserted confusion in the wake of *Williams*. Any such confusion, however, would not warrant review in this case. As explained, petitioners identify no decision that conflicts with the court of appeals' analysis of the toxicology results here. If it is desirable to clarify the principles ad-

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paragraph order stating that autopsy was testimonial because it was "prepared in anticipation of litigation"); *Connors* v. *State*, 92 So.3d 676, 680-681, 684 (Miss. 2012) (toxicology report based on testing of defendant's blood sample was performed upon request of the sheriff's office "with the results to be used in the prosecution" when sheriff was actively investigating the murder of shooting victims who were found in the same trailer where the defendant was found by responding officers; court concludes that the report was thus made under circumstances in which a witness would believe the statements would be available for use at a later trial); *Cuesta-Rodriguez* v. *State*, 241 P.3d 214, 222-223, 228 (Okla. Crim. App. 2010) (murder victim's daughter witnessed defendant shoot the victim in the head at her home; responding officers heard the victim's screams before the fatal gunshot and arrested defendant when he exited the home; subsequent autopsy report was testimonial because "the circumstances surrounding [the victim's] death warranted the suspicion that her death was a criminal homicide" and that the report would thus "be used in a criminal prosecution"), cert. denied, 132 S. Ct. 259 (2011); see also *Wood* v. *State*, 299 S.W.3d 200, 202, 209-210 (Tex. Ct. App. 2009) (decision by state intermediate appellate court, not the Texas Court of Criminal Appeals, explaining that all autopsy reports are not "categorically testimonial" but that the particular autopsy report at issue was testimonial because the medical examiner would have reasonably understood that it "would be used prosecutorially" where the police suspected that the victim's death was a homicide based on the crime scene and the condition of the body and thus the lead "homicide detective" on the case and another official attended the autopsy).

dressed in *Williams*, the Court should await a vehicle in which those principles are implicated in a substantive division of authority warranting review.

3. Review is also unwarranted because this case is a poor vehicle to address the Confrontation Clause question petitioners present for at least four reasons.

First, the testimony in this case was elicited in 2007 before this Court's decisions in *Melendez-Diaz*, *Bullcoming*, and *Williams*. Neither the parties nor the trial court had the benefit of those decisions in determining what precise questions to ask and what evidence to admit. This Court would be better served in seeking to provide guidance to prosecutors, defense lawyers, and lower courts if it permitted them to absorb the lessons of the Court's recent Confrontation Clause decisions and to reframe their actions in light of them. A decision here, based on a record that predated the relevant decisions, will be of far less use than a decision considering the impact that those decisions have had on day-to-day practice by courts and parties seeking to implement them.

Second, petitioners expressly agreed below that evidence challenged in their certiorari petition was properly admitted. Petitioners contend in this Court that it was error to admit "any conclusions [of Dr. Brijmohan] based on the toxicology report" that Dr. Mootoo signed, Pet. 4, including Dr. Brijmohan's testimony that the "toxicology report indicated that the contents of Sewnanan's stomach had tested positive for ammonia"; that his "knowledge that the ammonia was commercially produced was based on the conclusions in the toxicology report"; and that he therefore based his cause-of-death determination in part on that

report, Pet. 6. But all that testimony was admitted at trial without objection. See pp. 8-10, *supra*.

Indeed, petitioners informed the district court that Dr. Brijmohan's autopsy report—which itself states that Sewnanan's "stomach contents *tested positive* for ammonia" and that the cause of Sewnanan's death was "[a]cute poisoning (ammonia)," Pet. C.A. App. 174 (emphasis added)—was admissible and that Dr. Brijmohan could also properly testify to his conclusions based on a toxicology report, even if that report is itself inadmissible. See p. 8, *supra* (citing Tr. 3282-3283, 3291). By affirmatively informing the district court that such evidence was admissible, petitioners waived any contrary Confrontation Clause contentions. The admission of such evidence thus was not error in light of petitioners' waiver. *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993) ("Deviation from a legal rule is [not] 'error'" if "the rule has been waived."); see *Melendez-Diaz*, 557 U.S. at 314 n.3 ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence.").

Third, although petitioners preserved the argument that the four pages of toxicological reports (Pet. C.A. App. 175-178) were themselves inadmissible as exhibits and objected to certain aspects of Dr. Brijmohan's testimony, see p. 10, *supra*, the evidence that was ultimately admitted over their objection was cumulative and insignificant in light of the other evidence. The toxicology "reports" were merely unelaborated, one-line conclusions stating that a sample did or did not test positive for ammonia, see p. 11, *supra*, yet other evidence had already established that Sewnanan's stomach contents tested positive for am-

monia and that Dr. Brijmohan based his conclusions on that testing. See pp. 8-9, *supra*. Petitioners' objections to Dr. Brijmohan's testimony likewise implicate no significant additional information beyond the evidence already admitted. See p. 10, *supra*.

The exceedingly limited value of any evidence omitted over petitioners objections, moreover, was harmless in light of the overwhelming trial evidence showing that (a) petitioners surreptitiously obtained insurance on Sewnanan's life, (b) Mallay hired and admitted to hiring individuals to murder Sewnanan with poison, (c) Mallay admitted that Sewnanan was in fact murdered with a poisonous acid-and-ammonia mixture, and (d) James (in a recorded conversion) discussed the difficulties of collecting insurance proceeds in light of Mallay's timing of the murder. See pp. 4, 7, *supra*. Any preserved Confrontation Clause errors were thus harmless beyond a reasonable doubt, such that this Court's review would not ultimately benefit petitioners. See also Gov't C.A. Br. 31-39 (harmless-error arguments).

Fourth, even assuming *arguendo* that petitioners' Confrontation Clause contentions might possibly lead to a reversal of those counts of conviction or sentences based on Sewnanan's murder, the resolution of those contentions in petitioners' favor would not alter petitioners' sentences of life imprisonment. Petitioners were convicted on charges with mandatory life sentences for other murders entirely unrelated to Dr. Brijmohan's testimony about Sewnanan's murder and the associated toxicology reports. Mallay was sentenced to nine concurrent life sentences, including two mandatory life sentences for Gobin's murder (Counts 3-4) and three others for Somaipersaud's murder

(Counts 9-11). See 18 U.S.C. 1958, 1959(a)(1). James, in turn, was sentenced to three concurrent life sentences, including a mandatory life sentence for Somaipersaud's murder (Count 9) under 18 U.S.C. 1959(a)(1). See Pet. C.A. App. 120, 126; 3d Superseding Indictment 13-14, 18-20. Those mandatory life sentences for criminal counts based on the murders of Gobin and Somaipersaud would be unaffected by this Court's review of rulings about evidence addressing Sewnanan's murder.[7]

Petitioners acknowledge (Pet. 9 n.2) that the court of appeals rejected their Confrontation Clause challenge to a different autopsy report relevant to Somaipersaud's murder. The court unanimously held that petitioners, who failed to object to the report at trial, failed to establish plain error, Pet. App. 26a, 33a, 50a, and petitioners notably do not seek this Court's re-

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[7] In addition, both of petitioners' concurrent life sentences for racketeering (Count 1) and racketeering conspiracy (Count 2) likely would be unaffected by this Court's review. Both petitioners' racketeering convictions were based on numerous racketeering acts, including the murders of Somaipersaud and Sewnanan, and Mallay's racketeering conviction was also based on the murders of Peter and Gobin. Jury Verdict 2-3 (Racketeering Acts 5-6, 7-8). Even if petitioners could ultimately succeed in excluding certain evidence about Sewnanan's death based on Dr. Mootoo's toxicology results, their racketeering convictions would stand and would rest on other murders. The district court judge who presided over the guilt and capital-sentencing phases of trial concluded at sentencing that James was "an evil man" and that three concurrent life sentences (including two for racketeering counts) were warranted to "reflect the seriousness of [his] offense[s]" and to "protect the public from future crimes of this defendant." James Sent. Tr. 7-8 (Doc. 687); see also Mallay Sent. Tr. 4-6 (Doc. 688) (explaining that Mallay was "truly an evil person" and that nine concurrent life sentences were warranted).

view of any aspect of that holding. Petitioners merely state (Pet. 9 n.2) in their factual statement that *if* this Court were to grant review and *if* the Court were also to reverse on the basis of the petitioners' arguments about the admissibility of the toxicology-report evidence concerning Sewnanan's murder, then the court of appeals *might* on remand "appropriate[ly]" (re)consider whether petitioners established plain error on their distinct autopsy-report arguments about Somaipersaud's murder. That unelaborated assertion is incorrect and insufficient to show that this Court's review of the petitioners' challenge to toxicology reports relevant to Sewnanan's murder would have any material effect on their mandatory life sentences for Somaipersaud's murder.

Even if petitioners had sought this Court's review of claims pertinent to the autopsy-report (not toxicology-report) evidence of Somaipersaud's murder, each petitioner would have had the burden of proving (1) an error with respect to the admission of that evidence about Somaipersaud's murder that (2) was obvious, (3) affected his substantial rights, and (4) seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *Olano*, 507 U.S. at 734 (burden is on defendant). Petitioners have addressed none of those factors, let alone shown that they have carried their plain-error burden notwithstanding the overwhelming evidence supporting their convictions. Petitioners likewise fail to explain why the court of appeals would likely revisit its plain-error holding. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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