

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: October 3, 2011; Final submission: July 16, 2012; *
Decided: March 28, 2013; Errata Filed: May 1, 2013)

Docket Nos. 09-2732-cr, 09-2804-cr

United States,

Appellee,

- v -

Richard James and Ronald Mallay,

Defendants-Appellants.

Before: SACK and RAGGI, Circuit Judges, and EATON, Judge. **

Appeal from judgments of the United States District
Court for the Eastern District of New York (Sterling Johnson,
Judge) convicting defendants on various counts of an indictment
including murder, mail fraud, and murder in aid of racketeering,
and imposing mandatory life sentences. We find no error in the
admission of an autopsy report and a toxicology report without
the presence of the individuals who prepared those reports

* The Court's consideration of this appeal was suspended pending the Supreme Court's decision in Williams v. Illinois, 132 S. Ct. 2221 (2012), and the parties' subsequent supplemental briefing directed to the significance, if any, of that decision here.

** Judge Richard K. Eaton of the United States Court of International Trade, sitting by designation.

1 inasmuch as they were not testimonial statements because they
2 were not made with the primary purpose of creating a record for
3 use at a criminal trial, and therefore did not require that the
4 defendants have the opportunity to confront the authors of the
5 reports. We further conclude that: there was no error in the
6 district court's decision to exclude the prosecutor's rebuttal
7 statement in a prior, related trial; the district court did not
8 abuse its discretion in disallowing as impeachment evidence
9 statements made by a cooperating witness outside of the jury's
10 presence; the district court's denial of defendant Richard
11 James's severance motion did not warrant vacatur of the verdict;
12 there was no Sixth Amendment violation in the admission of
13 surreptitious recordings made by a government informant; it was
14 proper to admit that recording as a co-conspirator statement
15 against defendant Mallay; there was no error in denying a motion
16 for a new trial based upon post-trial allegations of
17 prosecutorial misconduct; and there was no cumulative error
18 warranting reversal.

19 Affirmed. Judge Eaton concurs in a separate opinion.

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29 Mallay.

1 SACK, Circuit Judge:

2 Richard James and Ronald Mallay appeal from judgments
3 of conviction based on their participation in a wide-ranging
4 conspiracy that involved fraudulently obtained life insurance
5 policies for members of their extended families and others in the
6 Guyanese and Guyanese-American community, and, in several
7 instances, murder of the insured in order to collect on those
8 policies.

9 **BACKGROUND**

10 After a jury trial in the United States District Court
11 for the Eastern District of New York (Sterling Johnson, Judge),
12 James and Mallay were each sentenced to mandatory terms of life
13 in prison after they were convicted of racketeering, in violation
14 of 18 U.S.C. § 1962(c); racketeering conspiracy, in violation of
15 18 U.S.C. § 1962(d); murder in aid of racketeering, in violation
16 of 18 U.S.C. § 1959(a)(1); conspiracy to commit murder in aid of
17 racketeering, in violation of 18 U.S.C. § 1959(a)(5); mail fraud,
18 in violation of 18 U.S.C. § 1341; conspiracy to commit mail
19 fraud, in violation of 18 U.S.C. § 371; and conspiracy to commit
20 money laundering, in violation of 18 U.S.C. § 1956(h). In
21 addition, Mallay was convicted of murder for hire and conspiracy
22 to commit murder for hire, in violation of 18 U.S.C. § 1958.
23 James was also convicted of attempted murder for hire, in
24 violation of 18 U.S.C. § 1958, and solicitation of murder in aid
25 of racketeering, in violation of 18 U.S.C. §§ 373 and 1959(a)(1).

1 These charges revolved around the murders of four people: Vernon
2 Peter, Alfred Gobin, Hardeo Sewnanan, and Basdeo Somaipersaud.
3 While Mallay was charged in relation to all four murders, James
4 was charged in connection with only the murders of Sewnanan and
5 Somaipersaud. Mallay was convicted on every count with which he
6 had been charged; James was convicted on all counts with which he
7 had been charged, with the exception of those alleging conspiracy
8 and murder for hire in connection with the deaths of Sewnanan and
9 Somaipersaud. The defendants were eligible for the death
10 penalty, but because the jury was unable to reach a unanimous
11 verdict as to that punishment, a sentence of life imprisonment
12 was imposed.

13 On appeal, the defendants do not contest the
14 sufficiency of the evidence of insurance fraud. The issues on
15 these appeals relate largely to the convictions of the defendants
16 for committing four murders that were allegedly part of this
17 scheme, and particularly the murders of Sewnanan and
18 Somaipersaud, both of whom were poisoned to death. Accordingly,
19 we review only that evidence necessary to explain our decision to
20 affirm all counts of conviction.

21 Vernon Peter

22 In 1991, Mallay was convicted of theft from the postal
23 service, for which he worked as a postal carrier, and sentenced
24 to 15 months' imprisonment. See Memorandum & Order, United
25 States v. James, No. 02 Cr 0778, 2009 WL 763612, at *1, 2009 U.S.
26 Dist. LEXIS 23706, at *3 (E.D.N.Y. Mar. 18, 2009) ("James I").

1 While Mallay was incarcerated, his mother died of a heart attack.
2 Id. Mallay blamed his arrest and conviction on his sister's
3 husband, Vernon Peter, known as "Dilly." Id. He told his
4 sister, Betty Peter, to keep Dilly's life insurance current
5 because he planned to get even. Id., 2009 U.S. Dist. LEXIS
6 23706, at *4. In 1993, after Mallay was released from prison, he
7 asked his nephew Baskinand Motillal if he would kill Dilly for
8 Mallay. Id. at *2, 2009 U.S. Dist. LEXIS 23706, at *4. Motillal
9 declined but introduced Mallay to another person, to whom Mallay
10 paid \$10,000 to commit the crime. He also gave that person \$500
11 with which to purchase a weapon. Id. That person in turn
12 recruited three others to help him carry out the murder. Id. On
13 the morning of July 28, 1993, the four murdered Dilly as he
14 walked out of his home. Id.

15 Betty Peter collected \$400,000 on an insurance policy
16 on Dilly's life. Id., 2009 U.S. Dist. LEXIS 23706, at *5. She
17 then loaned at least \$60,000 of those proceeds to Mallay.¹ Id.,
18 2009 U.S. Dist. LEXIS 23706, at *5.

19 Alfred Gobin

20 In September 1993, Mallay met with James, then an
21 insurance agent with MetLife, and Gulabie Gobin, Mallay's

¹ Betty Peter and Baskinand Motillal's trials were severed from James and Mallay's trial. Peter was convicted of charges including obstructing the investigation into the murder of her husband in aid of racketeering, and sentenced principally to 60 months' imprisonment. United States v. James, 322 F. App'x 32, 32-33 (2d Cir. 2009). Peter cooperated with the government subsequent to her conviction, and testified at the trial leading to the convictions appealed here. Id. at 35.

1 longtime mistress. Id., 2009 U.S. Dist. LEXIS 23706, at *6.
2 James and Mallay persuaded Gobin to take out two insurance
3 policies on her father, Alfred Gobin, who was murdered in Guyana
4 in January 1996. Id. Gulabie and her family received more than
5 \$200,000 from the policies, and lent James and Mallay nearly
6 \$60,000. Id.

7 Basdeo Somaipersaud

8 James encouraged a friend of his, Satyanand Arjun, to
9 purchase an insurance policy on the life of Somaipersaud, a heavy
10 drinker who sometimes lived with Arjun. Id., 2009 U.S. Dist.
11 LEXIS 23706, at *6-*7. In October 1994, James obtained a
12 \$100,000 policy on Somaipersaud's life, with double indemnity if
13 Somaipersaud died accidentally. It named James's sister as a
14 beneficiary. Id.

15 During the fall of 1997, James offered \$10,000 to
16 Kenrick Hassan, a member of James's extended family, to kill
17 Somaipersaud. Id. Although Hassan declined the offer, on
18 January 23, 1998, Somaipersaud was found dead in a park in the
19 Borough of Queens, New York City. The New York City Office of
20 the Chief Medical Examiner ("OCME") determined that Somaipersaud
21 had died of acute alcoholism in combination with a dose of the
22 drug chlorpromazine.² Id. James contacted Arjun to tell him of

² Chlorpromazine [brand name: Thorazine] is used to
"[t]reat[] mental disorders, severe behavior disorders, severe
hiccups, severe nausea and vomiting, and certain types of
porphyria. . . ." See PubMed Health,
<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0009582/?report=details>
(last visited Mar. 22, 2013).

1 Somaipersaud's death, which Arjun found surprising because he was
2 not aware of any connection between James and Somaipersaud and
3 because he had not spoken to James since he had purchased the
4 insurance policy. Id. James's girlfriend and Arjun received
5 insurance payments as a result of Somaipersaud's death. Id.

6 Hardeo Sewnanan

7 In October 1996, James arranged for the purchase of two
8 \$250,000 life insurance policies for Hardeo Sewnanan, who was
9 Mallay's nephew, with Betty Peter, Mallay's wife, and Mallay's
10 mistress's daughter named as beneficiaries. Id., at *3, 2009
11 U.S. Dist. LEXIS 23706, at *8. William Mallay, who shared an
12 address with the defendant Ronald Mallay, paid the premiums on
13 the policy. Id. In 1999, Ronald Mallay asked Kenrick Hassan to
14 kill Sewnanan, who again declined to do so. This time he put
15 Mallay in touch with Kenrick's brother, Derick Hassan. Id.
16 Mallay traveled to Guyana to meet with Derick, paying him \$10,000
17 to kill Sewnanan. But Derick Hasan ultimately decided not to do
18 so. Id. Mallay later told Derick that he had hired others to
19 commit the murder. Id.

20 On January 8, 1999, Sewnanan died in Guyana of what the
21 Guyanese medical examiner determined to be ammonia poisoning.
22 Id.; see also Memorandum & Order, United States v. James, No. 02
23 Cr 0778, 2007 WL 2702449, at *1, 2007 U.S. Dist. LEXIS 67538, at
24 *2 (E.D.N.Y. Sept. 12, 2007) ("James II"). Mallay collected
25 \$400,000 on the policy on Sewnanan's life. James I, 2009 WL
26 763612, at *3, 2009 U.S. Dist. LEXIS 23706, at *8.

1 Appeals

2 The defendants raise eight separate issues on their
3 appeals: First, whether a new trial is required based on the
4 district court's error under the Sixth Amendment's Confrontation
5 Clause in admitting forensic reports relating to the deaths of
6 Sewnanan and Somaipersaud -- specifically, the issues are whether
7 one member of the OCME was properly allowed to testify regarding
8 an autopsy conducted by another member of that office in which
9 the witness had not participated, and whether a medical examiner
10 from Guyana was properly allowed to testify to the results of
11 toxicology tests which he had ordered but did not conduct;
12 second, whether the district court erred in excluding the
13 prosecution's statement in the prior criminal trial of Betty
14 Peter, a cooperating witness in the current trial, suggesting
15 greater culpability on her part for Vernon Peter's murder; third,
16 whether the district court abused its discretion in refusing to
17 permit the defendants to impeach Betty Peter's testimony with
18 prior inconsistent statements; fourth, whether James is entitled
19 to a new trial because the district court's refusal to order
20 severance deprived him of a fair trial; fifth, whether the
21 defendants had been deprived of a fair trial because of the
22 district court's refusal to suppress statements elicited from
23 James by a government informant after James's indictment; sixth,
24 whether the district court erred in admitting, against Mallay as
25 a coconspirator, recorded statements of James made
26 surreptitiously by a third party; seventh, whether the district

1 court erred in denying a new trial based on allegations by a
2 cooperating witness of prosecutorial misconduct and coercion; and
3 eighth, whether there has been cumulative error sufficient to
4 warrant a new trial.

5 DISCUSSION

6 I. The Confrontation Clause

7 The defendants raise two separate Confrontation Clause
8 issues on their appeals. First, they contend that one member of
9 the OCME could not constitutionally have been permitted to
10 testify as to the results of Somaipersaud's autopsy, which was
11 conducted by another member of that office. Second, they urge
12 that allowing the Guyanese medical examiner who conducted
13 Sewnanan's autopsy to testify to the results of forensic tests
14 conducted by a colleague ran afoul of the Confrontation Clause.

15 The Sixth Amendment provides, among other things, that
16 "[i]n all criminal prosecutions, the accused shall enjoy the
17 right . . . to be confronted with the witnesses against him."
18 U.S. Const. amend. VI. The landscape of Confrontation Clause
19 jurisprudence has changed considerably since the Supreme Court's
20 decision in Crawford v. Washington, 541 U.S. 36 (2004). Even
21 after Crawford, however, this court reaffirmed its settled
22 holding that autopsy reports could be admitted as business
23 records without violating the Confrontation Clause. See United
24 States v. Feliz, 467 F.3d 227, 230 (2d Cir. 2006). Defendants
25 urge us to reconsider this precedent in light of Supreme Court

1 decisions since Feliz limning the contours of what constitutes a
2 "testimonial" statement in the context of a laboratory analysis.
3 See Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); Melendez-
4 Diaz v. Massachusetts, 557 U.S. 305 (2009). We conclude that
5 even if these cases cast doubt on any categorical designation of
6 certain forensic reports as admissible in all cases, the autopsy
7 reports in this case are nevertheless not testimonial -- and
8 therefore do not implicate the Confrontation Clause -- because
9 they were not created "for the purpose of establishing or proving
10 some fact at trial." Melendez-Diaz, 557 U.S. at 324; see also
11 Bullcoming, 131 S. Ct. at 2719-20 (Sotomayor, J., concurring)
12 ("When the 'primary purpose' of a statement is 'not to create a
13 record for trial,' 'the admissibility of the statement is the
14 concern of state and federal rules of evidence, not the
15 Confrontation Clause.'" (quoting Bryant, 131 S. Ct. at 1155)).

16 A. Confrontation Clause post-Crawford

17 In Crawford, the Court considered whether a tape-
18 recorded statement to police made by the wife of a man being
19 prosecuted for stabbing another man could be entered into
20 evidence against the alleged perpetrator even though he had no
21 opportunity to cross-examine the witness. She could not be
22 compelled to testify against her husband under the state's
23 marital privilege.

24 The Court's analysis relied heavily on the
25 Confrontation Clause's historical background. The Court
26 explained that the Confrontation Clause was designed to protect

1 against the "principal evil" of using ex parte statements against
2 the accused. Id. at 50. Thus, the proper Confrontation Clause
3 inquiry should focus not on reliability as contemplated by the
4 law of evidence, but on the "witnesses against the accused - in
5 other words, those who bear testimony." See id. at 51. The
6 Crawford Court determined that the statement at issue was
7 "testimonial," having been made against an identified suspect
8 while the witness herself was in police custody, and therefore
9 either confrontation, or unavailability and a prior opportunity
10 for cross-examination, was required. Id. at 65-66. But the
11 Court "le[ft] for another day any effort to spell out a
12 comprehensive definition of 'testimonial,'" to which its rule
13 applied. Id. at 68. In any event, "[w]hatever else the term
14 covers, it applies at a minimum to prior testimony at a
15 preliminary hearing, before a grand jury, or at a former trial;
16 and to police interrogations. These are the modern practices
17 with the closest kinship to the abuses at which the Confrontation
18 Clause was directed."³ Id.

³ Elsewhere in Crawford, the Court offered a more complete definition of "testimonial":

Various formulations of this core class of "testimonial" statements exist: ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits,

1 In Feliz, we concluded, in light of Crawford, that
2 "autopsy reports are not testimonial . . . and, thus, do not come
3 within the ambit of the Confrontation Clause[.]" Feliz, 467 F.3d
4 at 229. We examined a situation raising issues strikingly
5 similar to those raised here -- one member of the OCME testified
6 as to the findings of another member, and the testifying medical
7 examiner had not participated in the autopsy at issue. Id. We
8 remarked upon the sea change that Crawford brought about, but
9 reasoned that it had "declined to 'spell out a comprehensive
10 definition of 'testimonial.'" Feliz, 467 F.3d at 232 (quoting
11 Crawford, 541 U.S. at 68). Crawford, we explained, "indicated
12 that a statement produced through the 'involvement of government
13 officers' and with an 'eye towards trial' is testimonial because
14 it 'presents a unique potential for prosecutorial abuse -- a fact
15 borne out time and again through a history with which the Framers
16 were keenly familiar.'" Feliz, 467 F.3d at 232 (quoting
17 Crawford, 541 U.S. at 56 n.7) (brackets omitted). We observed
18 that among the classes of statements that Crawford concluded

depositions, prior testimony, or confessions;
[and] statements that were made under
circumstances which would lead an objective
witness reasonably to believe that the
statement would be available for use at a
later trial. These formulations all share a
common nucleus and then define the Clause's
coverage at various levels of abstraction
around it. Regardless of the precise
articulation, some statements qualify under
any definition -- for example, ex parte
testimony at a preliminary hearing.

Id. at 51-52 (citations and internal quotation marks omitted).

1 would be testimonial were those "made under circumstances which
2 would lead an objective witness reasonably to believe that the
3 statement would be available for use at a later trial." Id. at
4 233 (quoting Crawford, 467 F.3d at 52).

5 We concluded that autopsy reports would nonetheless be
6 admissible as business records under Federal Rule of Evidence
7 803(6) because "a business record is fundamentally inconsistent
8 with what the Supreme Court has suggested comprise the defining
9 characteristics of testimonial evidence." Feliz, 467 F.3d at
10 233-34. Because the business records exception "requires
11 business records to be kept in the regular course of a business
12 activity, records created in anticipation of litigation do not
13 fall within its definition." Id. at 234.

14 We rejected the argument that "autopsy reports must be
15 testimonial because a medical examiner preparing such a report
16 must have a reasonable expectation the reports may be available
17 for use in a subsequent trial." Id. Because "the Supreme Court
18 did not opt for an expansive definition [of testimonial] that
19 depended on a declarant's expectations," we said, "we are
20 hesitant to do so here." Id. at 236. We concluded that business
21 records fell outside Crawford's definition of testimonial "even
22 where the declarant is aware that it may be available for later
23 use at trial," Feliz, 467 F.3d at 236, and that autopsy reports
24 were business records within the meaning of Rule 803(6), as
25 thousands of autopsies were conducted every year "without regard
26 to the likelihood of their use at trial." Id. We further

1 concluded that autopsy reports would be equally admissible as
2 public, rather than business, records because Rule 803(8)(A)-(B),
3 which defines public records, excludes documents prepared in
4 anticipation of litigation and matters observed by police
5 officers. Id. at 237. "These factors suggest that public
6 records, like business records, 'bear[] little resemblance to the
7 civil-law abuses the Confrontation Clause targeted.'" Id.
8 (quoting Crawford, 541 U.S. at 51).

9 In 2009, however, the Supreme Court cast doubt on our
10 post-Crawford jurisprudence in this area. In Melendez-Diaz v.
11 Massachusetts, 557 U.S. 305 (2009), the Court concluded that
12 "certificates of analysis" identifying a seized substance as an
13 illicit drug should not have been introduced against the
14 defendant absent an opportunity for the defendant to confront the
15 person who prepared the certificate. The Melendez-Diaz Court
16 reached this conclusion in part because the certificates "are
17 quite plainly affidavits: declarations of facts written down and
18 sworn to by the declarant before an officer authorized to
19 administer oaths." Id. at 310 (internal quotation marks
20 omitted). "The 'certificates' are functionally identical to
21 live, in-court testimony, doing 'precisely what a witness does on
22 direct examination.'" Id. at 310-11 (quoting Davis v.
23 Washington, 547 U.S. 813, 830 (2006)). "We can safely assume
24 that the analysts were aware of the affidavits' evidentiary
25 purpose, since that purpose -- as stated in the relevant state-
26 law provision -- was reprinted on the affidavits themselves."

1 Id. at 311. The Court once again declined to spell out a
2 comprehensive definition of testimonial.

3 The Melendez-Diaz Court rejected the government's
4 argument that the evidence should be admitted because it was a
5 business record -- the hearsay exception upon which we relied in
6 Feliz -- because that exception had never applied "if the
7 regularly conducted business activity is the production of
8 evidence for use at trial." Id. at 321. The Court concluded:

9 Business and public records are generally
10 admissible absent confrontation, not because
11 they qualify under an exception to the
12 hearsay rules, but because -- having been
13 created for the administration of an entity's
14 affairs and not for the purpose of
15 establishing or proving some fact at trial --
16 they are not testimonial. Whether or not
17 they qualify as business or official records,
18 the analysts' statements here -- prepared
19 specifically for use at petitioner's trial --
20 were testimony against petitioner, and the
21 analysts were subject to confrontation under
22 the Sixth Amendment.

23 Id. at 324.

24
25 Justice Kennedy, in dissent, criticized the majority
26 for "disregard[ing] a century of jurisprudence" in favor of
27 "formalistic and wooden rules, divorced from precedent, common
28 sense, and the underlying purpose of the Clause." Id. at 330-31
29 (Kennedy, J., dissenting). In explaining why the analyst reports
30 at issue did not implicate the Confrontation Clause, Justice
31 Kennedy asserted:

32 First, a conventional witness recalls events
33 observed in the past, while an analyst's
34 report contains near-contemporaneous
35 observations of the test. . . . Second, an

1 analyst observes neither the crime nor any
2 human action related to it. . . . The
3 analyst's distance from the crime and the
4 defendant, in both space and time, suggests
5 the analyst is not a witness against the
6 defendant in the conventional sense. Third,
7 a conventional witness responds to questions
8 under interrogation. . . . Put differently,
9 out-of-court statements should only "require
10 confrontation if they are produced by, or
11 with the involvement of, adversarial
12 government officials responsible for
13 investigating or prosecuting crime."

14 Id. at 345-46 (quoting Carolyn Zabrycki, Comment, Toward a
15 Definition of "Testimonial": How Autopsy Reports Do Not Embody
16 the Qualities of a Testimonial Statement, 96 Cal. L. Rev. 1093,
17 1118 (2008)).

18 In Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011),
19 the question presented was whether a "certificate of analyst"
20 containing the results of a blood-alcohol test administered
21 pursuant to a DUI arrest required the testimony of the analyst
22 who conducted the gas chromatograph test. Id. at 2710-11. The
23 trial court had admitted the test as a business record, and
24 allowed its introduction through the testimony of "an analyst who
25 did not sign the certification or personally perform or observe
26 the performance of the test reported in the certification." Id.
27 at 2713. The Court rejected the suggestion that the report was
28 nontestimonial:

29 In all material respects, the laboratory
30 report in this case resembles those in
31 Melendez-Diaz. Here, as in Melendez-Diaz, a
32 law-enforcement officer provided seized
33 evidence to a state laboratory required by
34 law to assist in police investigations. Like

1 the analysts in Melendez-Diaz, [the analyst]
2 tested the evidence and prepared a
3 certificate concerning the result of his
4 analysis. Like the Melendez-Diaz
5 certificate, [the certificate here] is
6 "formalized" in a signed document. . . . In
7 sum, the formalities attending the "report of
8 blood alcohol analysis" are more than
9 adequate to qualify [the analyst's]
10 assertions as testimonial.

11 Id. at 2717 (citations omitted).

12 Justice Sotomayor concurred, relying largely on a
13 Confrontation Clause opinion she had written earlier in the term
14 in Michigan v. Bryant, 131 S. Ct. 1143 (2011) (concluding that
15 statements made by a dying man to police could be admitted
16 without requiring confrontation). "To determine if a statement
17 is testimonial, we must decide whether it has 'a primary purpose
18 of creating an out-of-court substitute for trial testimony.'
19 When the 'primary purpose' of a statement is 'not to create a
20 record for trial,' 'the admissibility of the statement is the
21 concern of the state and federal rules of evidence, not the
22 Confrontation Clause.'" Bullcoming, 131 S. Ct. at 2720
23 (Sotomayor, J., concurring) (quoting Bryant, 131 S. Ct. at 1155).
24 Noting that Bullcoming was "not a case in which the State
25 suggested an alternate purpose, much less an alternate primary
26 purpose, for the BAC report," such as to provide for medical
27 treatment, Justice Sotomayor concluded that the primary purpose
28 "is clearly to serve as evidence" and its introduction without
29 confrontation was therefore in error. Id. at 2722-23.

1 Last term, in Williams v. Illinois, 132 S. Ct. 2221
2 (2012), the Court returned to consideration of the Confrontation
3 Clause, this time to determine whether it was a violation to
4 allow an expert to testify in a rape case that "a DNA profile
5 produced by an outside laboratory, Cellmark, matched a profile
6 produced by the state police lab using a sample of petitioner's
7 blood." Id. at 2227. The defendant argued that the expert "went
8 astray when she referred to the DNA profile provided by Cellmark
9 as having been produced from semen found on the victim's vaginal
10 swabs," even though she did not conduct or observe any of the
11 work that Cellmark had done in deducing a male DNA profile. Id.
12 at 2227, 2230. The Court came to no clear consensus as to what
13 constituted a testimonial statement in this context, however,
14 issuing a plurality opinion, two concurrences, and a dissent.

15 The plurality opinion by Justice Alito, joined by Chief
16 Justice Roberts, Justice Kennedy, and Justice Breyer -- the
17 dissenters in Melendez-Diaz and Bullcoming -- concluded that the
18 testimony did not run afoul of the Confrontation Clause using two
19 separate paths. First, it noted that "[i]t has long been
20 accepted that an expert witness may voice an opinion based on
21 facts concerning the events at issue in a particular case even if
22 the expert lacks first-hand knowledge of those facts." Id. at
23 2233. Under the Illinois and federal rules, "an expert may base
24 an opinion on facts that are 'made known to the expert at or
25 before the hearing,'" even if those facts themselves are

1 inadmissible. Id. at 2234 (quoting Ill. R. Evid. 703; Fed. R.
2 Evid. 703).

3 While in a jury trial the expert would be prohibited
4 from disclosing those underlying facts, in a bench trial, such as
5 that in Williams, the judge would be trusted to understand that
6 those facts were not offered for their truth. Id. at 2234-35.
7 The plurality concluded that "it is clear that the putatively
8 offending phrase . . . was not admissible for the purpose of
9 proving the truth of the matter asserted," and "there is no
10 reason to think that the trier of fact took [the testimony] as
11 substantive evidence to establish where the DNA profiles came
12 from." Id. at 2237. Because other evidence also established the
13 origin of the DNA profile, and because the trial judge was
14 presumed not to have considered the evidence for its truth, the
15 plurality concluded that there had been no Confrontation Clause
16 violation. Id. at 2240. The plurality noted that in Bullcoming
17 and Melendez-Diaz, "there is no question" but that the test
18 results were offered for their truth, whereas in Williams, the
19 report was offered "only for the distinctive and limited purpose
20 of seeing whether it matched something else." Id. at 2240
21 (internal quotation marks omitted).

22 The plurality next considered whether, even if the
23 testimony had been offered for its truth, there would have been
24 no Confrontation Clause violation. "The abuses that the Court
25 has identified as prompting the adoption of the Confrontation
26 Clause shared the following two characteristics: (a) they

1 involved out-of-court statements having the primary purpose of
2 accusing a targeted individual of engaging in criminal conduct
3 and (b) they involved formalized statements such as affidavits,
4 depositions, prior testimony, or confessions." Id. at 2242. The
5 plurality asserted that "[t]he Cellmark report is very different
6 from the sort of extrajudicial statements, such as affidavits,
7 depositions, prior testimony, and confessions, that the
8 Confrontation Clause was originally understood to reach. The
9 report was produced before any suspect was identified. The
10 report was sought not for the purpose of obtaining evidence to be
11 used against petitioner, who was not even under suspicion at the
12 time, but for the purpose of finding a rapist who was on the
13 loose." Id. at 2228. The plurality concluded that the admission
14 of the report did not run afoul of the Confrontation Clause
15 because these purposes were not of the same type that the clause
16 had been enacted to protect against. Id.

17 In a concurring opinion, Justice Breyer said that he
18 would have set the case for reargument in order to answer the
19 question of what constitutes a "testimonial statement" with
20 regard to "the panoply of crime laboratory reports and underlying
21 technical statements written by (or otherwise made by) laboratory
22 technicians." Id. at 2244-45 (Breyer, J., concurring). He
23 criticized the Court's evolving Confrontation Clause
24 jurisprudence as offering "no logical stopping place between
25 requiring the prosecution to call as a witness one of the
26 laboratory experts who worked on the matter and requiring the

1 prosecution to call all of the laboratory experts who did so."
2 Id. at 2246 (emphasis in original).

3 Justice Breyer did not himself offer a comprehensive
4 definition of testimonial, but said he would continue to adhere
5 to the dissenting views in Bullcoming and Melendez-Diaz. "[T]he
6 need for cross-examination is considerably diminished when the
7 out-of-court statement was made by an accredited laboratory
8 employee operating at a remove from the investigation in the
9 ordinary course of professional work." Id. at 2249. Justice
10 Breyer asserted that "to bar admission of the out-of-court
11 records at issue here could undermine, not fortify, the accuracy
12 of factfinding at a criminal trial," because it would potentially
13 bar autopsy reports:

14 Autopsies, like the DNA report in this case,
15 are often conducted when it is not yet clear
16 whether there is a particular suspect or
17 whether the facts found in the autopsy will
18 ultimately prove relevant in a criminal
19 trial. Autopsies are typically conducted
20 soon after death. And when, say, a victim's
21 body has decomposed, repetition of the
22 autopsy may not be possible. What is to
23 happen if the medical examiner dies before
24 trial? Is the Confrontation Clause
25 effectively to function as a statute of
26 limitations for murder?

27 Id. at 2251 (citations and internal quotation marks omitted).

28 Justice Breyer proposed as a solution a rebuttable
29 presumption that DNA reports of the type at issue be admissible,
30 with the defendant able to call the technician if he would choose
31 to do so, or to require confrontation upon a showing of a reason
32 to doubt the laboratory's competence or honesty. Id. at 2251-52.

1 Justice Thomas concurred only in the judgment, and,
2 consistent with his prior opinions on the subject, did so because
3 the Cellmark report "lacks the solemnity of an affidavit or
4 deposition, for it is neither a sworn nor a certified declaration
5 of fact. Nowhere does the report attest that its statements
6 accurately reflect the DNA testing processes used or the results
7 obtained." Id. at 2260 (Thomas, J., concurring in the judgment).
8 Further, Justice Thomas explicitly rejected the plurality's
9 requirement that the primary purpose of the statements concern a
10 targeted individual, noting that "[t]here is no textual
11 justification, however, for limiting the confrontation right to
12 statements made after the accused's identity became known." Id.
13 at 2262 (Thomas, J., concurring).

14 In dissent, Justice Kagan, joined by Justices Scalia,
15 Ginsburg, and Sotomayor, characterized Williams as an "open-and-
16 shut case": "The State of Illinois prosecuted Sandy Williams for
17 rape based in part on a DNA profile created in Cellmark's
18 laboratory. Yet the State did not give Williams a chance to
19 question the analyst who produced that evidence." Id. at 2265
20 (Kagan, J., dissenting). Taking note of the fact that the
21 judgment had been affirmed without a majority settling on a
22 "reason why," Justice Kagan averred that "in all except its
23 disposition, [Justice Alito's plurality] opinion is a dissent."
24 Id. Likening the expert's testimony in Williams to the
25 "surrogate testimony" in Bullcoming, Justice Kagan asked, "Have
26 we not already decided this case?" Id. at 2267.

1 Justice Kagan's opinion roundly rejected the idea that
2 the expert's testimony had not been offered for its truth, noting
3 recent scholarship and case law suggesting that the entire
4 concept of "basis evidence" is illusory. "[A]dmission of the
5 out-of-court statement in this context has no purpose separate
6 from its truth; the factfinder can do nothing with it except
7 assess its truth and so the credibility of the conclusion it
8 serves to buttress." Id. at 2269 (emphasis in original).

9 Justice Kagan then turned to the plurality's conclusion
10 that the DNA report was nontestimonial, joining Justice Thomas's
11 criticism of the reformulated primary purpose test as having no
12 basis in constitutional text, history, or the Court's prior
13 precedents. "We have previously asked whether a statement was
14 made for the primary purpose of establishing past events
15 potentially relevant to later criminal prosecution -- in other
16 words, for the purpose of providing evidence. None of our cases
17 has ever suggested that, in addition, the statement must be meant
18 to accuse a previously identified individual." Id. at 2273-74.

19 The dissenters also rejected the plurality's suggestion
20 that the purpose of the DNA testing was "to respond to an ongoing
21 emergency, rather than to create evidence for trial," id. at 2274
22 (internal quotation marks omitted), noting that the expert
23 herself had testified that the DNA report was conducted "'for
24 this criminal investigation . . . and for the purpose of the
25 eventual litigation' -- in other words, for the purpose of

1 producing evidence, not enabling emergency responders." Id.
2 (citation omitted).

3 Summarizing the current state of Confrontation Clause
4 jurisprudence, Justice Kagan noted that the five Justices who
5 agreed on the judgment "agree on very little," and "have left
6 significant confusion in their wake." Id. at 2277.

7 What comes out of four Justices' desire to
8 limit Melendez-Diaz and Bullcoming in
9 whatever way possible, combined with one
10 Justice's one-justice view of those holdings,
11 is -- to be frank -- who knows what. Those
12 decisions apparently no longer mean all that
13 they say. Yet no one can tell in what way or
14 to what extent they are altered because no
15 proposed limitation commands the support of a
16 majority.

17 Id.

18 B. Controlling Law

19 We are confronted in this case with the puzzle Justice
20 Kagan described: Which of the foregoing principles enunciated by
21 various members of the Supreme Court controls here?

22 We begin by looking to our holding in Feliz -- a case
23 decided on facts very similar to these -- to determine how and to
24 what extent the Supreme Court's intervening decisions have
25 altered the rule we established in that case. There, we
26 concluded that autopsy reports were nontestimonial based in large
27 part on their status as business records. Feliz, 467 F.3d at
28 236. But, as we have explained, Melendez-Diaz and Bullcoming,
29 and to a lesser extent Williams, call this categorical conclusion
30 into doubt.

1 In each of these cases, the records were, in some
2 sense, business records -- all were made in the course of the
3 regular business that the laboratory in question conducts:
4 forensic testing. Yet, in Melendez-Diaz and Bullcoming, the
5 Supreme Court concluded that the results of the tests were
6 testimonial because they were completed "for the purpose of
7 establishing or proving some fact at trial," Melendez-Diaz, 557
8 U.S. at 324, or were "affirmations made for the purpose of
9 establishing or proving some fact in a criminal proceeding,"
10 Bullcoming, 131 S. Ct. at 2716 (internal quotation marks
11 omitted).⁴ As the Melendez-Diaz Court explained, "[b]usiness and
12 public records are generally admissible absent confrontation not
13 because they qualify under an exception to the hearsay rules, but
14 because -- having been created for the administration of an
15 entity's affairs and not for the purpose of establishing or
16 proving some fact at trial -- they are not testimonial." 557
17 U.S. at 324. The reports at issue in that case, having been
18 "prepared specifically for use at . . . trial[,] " were
19 testimonial "[w]hether or not they qualif[ied] as business or
20 official records." Id.

⁴ No conclusion was reached in Feliz as to whether the autopsy reports were similarly completed for the purpose of establishing a fact at trial, in part because we did not then think that "the reasonable expectation of the declarant should be what distinguishes testimonial from nontestimonial statements," Feliz, 467 F.3d at 235, rendering that factual inquiry unnecessary.

1 We distill from this pre-Williams case law the
2 principle that a laboratory analysis is testimonial if the
3 circumstances under which the analysis was prepared, viewed
4 objectively, establish that the primary purpose of a reasonable
5 analyst in the declarant's position would have been to create a
6 record for use at a later criminal trial. See Melendez-Diaz, 557
7 U.S. at 324; Bryant, 131 S. Ct. at 1155-56 (explaining
8 application of the primary purpose standard); see also
9 Bullcoming, 131 S. Ct. at 2720 (Sotomayor, J., concurring) ("To
10 determine if a statement is testimonial, we must decide whether
11 it has 'a primary purpose of creating an out-of-court substitute
12 for trial testimony.' When the 'primary purpose' of a statement
13 is 'not to create a record for trial,' 'the admissibility of the
14 statement is the concern of state and federal rules of evidence,
15 not the Confrontation Clause.'" (quoting Bryant, 131 S. Ct. at
16 1155)).

17 The question then becomes whether the Court's later
18 decision in Williams changed that rule. We agree with Justice
19 Kagan that this problem is intractable. No single rationale
20 disposing of the Williams case enjoys the support of a majority
21 of the Justices. Ordinarily, "[w]hen a fragmented Court decides
22 a case and no single rationale explaining the result enjoys the
23 assent of five Justices, the holding of the Court may be viewed
24 as the position taken by those members who concurred in the
25 judgments on the narrowest grounds." Marks v. United States, 430

1 U.S. 188, 193 (1977) (internal quotation marks omitted). But
2 what is the narrowest ground in the disposition in Williams?

3 The Williams plurality's first rationale -- that the
4 laboratory report there was offered as basis evidence, and not
5 for its truth -- was roundly rejected by five Justices.
6 Williams, 132 S. Ct. at 2258-59 (Thomas, J., concurring in the
7 judgment); Id. at 2268-69 (Kagan, J., dissenting). In any event,
8 we are hard-pressed to read this rationale as controlling this
9 case because the facts before us are in significant respects
10 different from those presented in Williams.⁵

11 Nor do we think we can apply the plurality's narrowed
12 definition of testimonial, which would require that the analyst
13 had "the primary purpose of accusing a targeted individual of
14 engaging in criminal conduct[.]" Id. at 2242. Again, five
15 Justices disagreed with this rationale, and it would appear to
16 conflict directly with Melendez-Diaz, which rejected a related

⁵ For example, Corinne Ambrosi, the OCME's deputy chief medical examiner for Queens County, testified in order to establish Somaipersaud's cause of death, which was not at all obvious and was clearly relevant to the charges against the defendants. No other testimony established that Somaipersaud died of poisoning. By contrast, in Williams, other admissible evidence established that the sample tested by Cellmark came from the victim's vaginal swab. See Williams, 132 S. Ct. at 2239.

Also, the plurality in Williams relied at least in part on the fact that Williams was a bench trial, noting that the "[t]he dissent's argument would have force if petitioner had elected to have a jury trial." Williams, 132 S. Ct. at 2236. The case before us was tried to a jury, leaving us less confident that the factfinder would understand the conceptual distinction between basis evidence and evidence offered for its truth.

1 argument. See Williams, 132 S. Ct. at 2274 (Kagan, J.,
2 dissenting). For similar reasons -- lack of support among the
3 Justices and conflict with prior precedents that did command
4 majority support -- we do not think either Justice Thomas's
5 concurrence on the ground that the analysis was not sufficiently
6 "formalized," or Justice Breyer's new approach to application of
7 the Confrontation Clause, is controlling.

8 Williams does not, as far as we can determine, using
9 the Marks analytic approach, yield a single, useful holding
10 relevant to the case before us. It is therefore for our purposes
11 confined to the particular set of facts presented in that case.
12 We think it sufficient to conclude that we must rely on Supreme
13 Court precedent before Williams to the effect that a statement
14 triggers the protections of the Confrontation Clause when it is
15 made with the primary purpose of creating a record for use at a
16 later criminal trial.⁶ See Melendez-Diaz, 557 U.S. at 310-11;
17 Bryant, 131 S. Ct. at 1155; see also Bullcoming, 131 S. Ct. at
18 2716; Davis v. Washington, 547 U.S. 813, 822 (2006); Crawford,
19 541 U.S. at 51-52.

⁶ Although the law is not well developed in the area of testimonial versus nontestimonial statements, a close analogue may be found in cases examining the applicability of the attorney work-product privilege, which applies when documents are created by an attorney "in anticipation of litigation." See, e.g., Matter of Grand Jury Subpoenas Dated Oct. 22, 1991 and Nov. 1, 1991, 959 F.2d 1158, 1166 (2d Cir. 1992).

1 C. Testimony Related to Somaipersaud's Death

2 We address first the defendants' argument that allowing
3 surrogate testimony concerning the autopsy report in
4 Somaipersaud's death was error. This purported error was not
5 objected to at trial. We review challenges on appeal that the
6 defendants did not raise at trial for plain error. A finding of
7 "plain error" requires that

8 (1) there is an error; (2) the error is
9 plain, that is, the error is clear or
10 obvious, rather than subject to reasonable
11 dispute; (3) the error affected the
12 appellant's substantial rights, which in the
13 ordinary case means it affected the outcome
14 of the district court proceedings; and (4)
15 the error seriously affects the fairness,
16 integrity or public reputation of judicial
17 proceedings.

18 United States v. Marcus, 628 F.3d 36, 42 (2d Cir. 2010) (internal
19 quotation marks and bracket omitted).

20 1. Testimony at trial. Corinne Ambrosi, the OCME's
21 deputy chief medical examiner for Queens County, testified at
22 trial regarding Somaipersaud's death. She explained that the
23 OCME generally performs autopsies "where people died in
24 unexpected circumstances, unnatural deaths, unexpected deaths.
25 Those come to the attention of the medical examiner." Trial Tr.
26 4655:18-20. Ambrosi had previously testified as an expert
27 witness on cause and manner of death 106 times. She testified
28 that she did not perform or participate in Somaipersaud's
29 autopsy, which was conducted by Dr. Heda Jindrak, who at the time
30 of trial was no longer employed by the OCME. Ambrosi described

1 at length the results of toxicology tests ordered by Jindrak,
2 which informed the autopsy report. These tests were performed by
3 technicians at the OCME's main office in Manhattan. Ambrosi
4 explained that the tests showed that Somaipersaud had elevated
5 levels of alcohol as well as chlorpromazine, which is sometimes
6 used as an antipsychotic drug. She offered her own opinion that
7 the level of alcohol revealed by the tests would not alone have
8 been enough to have killed Somaipersaud. She testified that the
9 chlorpromazine levels were, however, significant -- more than she
10 would have expected to see from someone regularly taking the drug
11 as medication for a psychiatric illness. Ambrosi further
12 testified that the level of chlorpromazine detected in the
13 victim's body combined with the level of blood alcohol in the
14 body would have been enough to have killed the victim, and that
15 the combination had indeed been determined to be the cause of
16 Somaipersaud's death.

17 The toxicology report was admitted as an exhibit at
18 trial. It indicated .26 blood alcohol content and 1.9 milligrams
19 per kilogram chlorpromazine levels. Ambrosi explained that the
20 chlorpromazine levels appeared to be acute because the level in
21 the liver was 75.7 milligrams per kilogram, whereas in someone
22 who was prescribed the drug therapeutically it would not normally
23 be more than 10 milligrams per kilogram. Ambrosi further
24 explained that she did not recall ever having seen levels of
25 chlorpromazine in a person that high. She also testified as to
26 Jindrak's autopsy determination that the cause of death was

1 "[a]cute intoxication by the ethynel or alcohol and
2 chlorpromazine," and that she agreed with that assessment. Trial
3 Tr. 4678:20-21. "[H]ypertensive and arteriosclerotic
4 cardiovascular disease" were also contributing factors. Trial
5 Tr. 4679:2-3.

6 On cross-examination, Ambrosi confirmed that she had
7 not participated in the autopsy. Her testimony was based on her
8 review of the case file before testifying.

9 2. Analysis. To resolve this case we must determine
10 whether, under the circumstances, the autopsy report (including
11 the toxicology report) was prepared with the primary purpose of
12 creating a record for use at a later criminal trial.⁷ As we

⁷ It is worth noting that courts throughout the country have applied various approaches and reached differing conclusions when considering Confrontation Clause challenges to the introduction of autopsy reports. Compare United States v. Moore, 651 F.3d 30, 73 (D.C. Cir. 2011)(concluding that Chief Medical Examiner's surrogate testimony on autopsy reports prepared by others violated the Confrontation Clause where law enforcement officers observed the autopsies and participated in the creation of the reports -- circumstances that "would have signaled to the medical examiner that the autopsy might bear on a criminal investigation" -- and each autopsy "found the manner of death to be a homicide caused by gunshot wounds"), with State v. Locklear, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009)("Thus, when the State seeks to introduce [autopsy reports], absent a showing that the analysts are unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them such evidence is inadmissible under Crawford."(quotation marks, citation, and brackets omitted)).

There is also academic debate on the subject. Compare Zabrycki, supra, cited by the Supreme Court in both Melendez-Diaz and Williams, in which the author proposed a definition of testimonial similar to that endorsed by the Williams plurality, proposing that "out-of-court statements are testimonial and thus require confrontation if they are produced by, or with the involvement of, adversarial government officials responsible for

1 explained in United States v. Burden, 600 F.3d 204 (2d Cir.
2 2010), the examples of testimonial statements outlined in
3 Crawford, are no "more than a set of guideposts [for] courts [to]
4 work through, case-by-case [N]o court can say whether a
5 particular kind of statement is testimonial until it has
6 considered that kind of statement in an actual case." Id. at
7 224.

8 Key to determining the resolution of the case before us
9 is the particular relationship between the OCME and law
10 enforcement both generally and in this particular case. While
11 the OCME is an independent agency,⁸ the police are required to
12 notify it when someone has died "from criminal violence, by

investigating and prosecuting crime," id. at 1118, but arguing
that medical examiners are "public health officials," rather than
law enforcement officers, and therefore, unless the medical
examiner "writes an autopsy report in response to police
interrogation," the report is non-testimonial, id. at 1128-29,
with Professor Richard Friedman, who argued in a petition for
writ of certiorari from a decision of the Supreme Court of Ohio,
State v. Craig, 110 Ohio St. 3d 306, 853 N.E.2d 621 (2006), cert.
denied, 549 U.S. 1255 (2007), that while "[t]here are, of course,
situations in which coroners write autopsy reports without
anticipation that they will likely be used in forensic
proceedings, and for other purposes . . . ,"
"where, as here, the coroner concludes that the decedent was
clearly a victim of homicide, there can be no genuine doubt that
a reasonable person in the position of the coroner understands
that there will be forensic proceedings and intends that the
report will be used in them," id. at *14, and they are therefore
testimonial.

⁸ See People v. Freycinet, 11 N.Y.3d 38, 42, 862 N.Y.S.2d
450, 453 (2008) (concluding that an autopsy report was not
testimonial, in part because the OCME is "by law, independent of
and not subject to the control of the office of the prosecutor"
and "not a law enforcement agency" (internal quotation marks
omitted)); People v. Hall, 84 A.D.3d 79, 83, 923 N.Y.S.2d 428,
431 (1st Dep't 2011).

1 accident, by suicide, suddenly when in apparent health, when
2 unattended by a physician, in a correctional facility or in any
3 suspicious or unusual manner or where an application is made
4 pursuant to law for a permit to cremate a body of a person."
5 N.Y.C. Charter § 557(a), (f)(1); see also N.Y.C. Admin Code § 17-
6 202. The OCME is required to "take charge of the dead body" in
7 such instances, and must "fully investigate the essential facts
8 concerning the circumstances of the death" and interview
9 witnesses and collect evidence that "may be useful in
10 establishing the cause of death." N.Y.C. Admin. Code § 17-
11 202(a).

12 It is the OCME that determines whether to conduct an
13 autopsy based on whether "it may be concluded with reasonable
14 certainty that death occurred from natural causes or obvious
15 traumatic injury[.]" N.Y.C. Admin Code § 17-203. Whenever an
16 autopsy is deemed necessary, it "shall include toxicologic,
17 histologic, microbiologic and serologic examinations," the
18 results of which must be written down and filed with the OCME,
19 regardless of whether any further investigation results. Id.
20 "Such medical examiner, medical investigator or lay medical
21 investigator shall take possession of any portable objects which,
22 in his or her opinion, may be useful in establishing the cause of
23 death, and except as provided in subdivision c hereof [relating

1 to suicide notes], shall deliver them to the police department."⁹

2 Id. § 202(a).

3 Because the defendants failed to object to the
4 introduction of Ambrosi's testimony during trial, there is scant
5 record of the circumstances under which Jindrak produced her
6 autopsy report. In its written ruling on the defendants'
7 objections to the testimony of Dr. Vivikand Brijmohan -- whose
8 testimony on the cause of death of another victim, Sewnanan, is

⁹ We similarly explained in United States v. Rosa, 11 F.3d 315 (2d Cir. 1993), that

the Medical Examiner's Office is required simply to investigate unnatural deaths; it refers a death bearing any indicium of criminality to the appropriate district attorney and has no responsibility for enforcing any laws. The chief medical examiner and his assistants are required to be physicians and pathologists; there is no requirement in the Charter that they be attorneys or that any employees of the office have any law enforcement training. Even when a matter is referred to the district attorney because of an indication of criminality, the Charter does not give the medical examiner any responsibility for collecting evidence or determining the identity of the perpetrator. Further, though law enforcement activities are typically accusatory and adversarial in nature, a medical examiner's reported observations as to a body's condition are normally made as part of an independent effort to determine a cause of death. Indeed, "a medical examiner, although often called a forensic expert, bears more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case."

Id. at 332 (2d Cir. 1993) (citation omitted) (quoting Manocchio v. Moran, 919 F.2d 770, 777 (1st Cir. 1990) (internal quotation marks omitted)).

1 discussed below -- the district court noted that "Jindrak
2 conducted an internal and external examination as well as a
3 toxicology analysis," and that Ambrosi described these steps as
4 "routine." James II, 2007 WL 2702449, at *2 n.1. The defendants
5 do not argue in either of their briefs, or in the supplemental
6 letter briefs submitted in response to the request by this Court
7 after Williams, that Somaipersaud's autopsy was anything other
8 than routine -- there is no suggestion that Jindrak or anyone
9 else involved in this autopsy process suspected that Somaipersaud
10 had been murdered and that the medical examiner's report would be
11 used at a criminal trial. Ambrosi testified that causes of death
12 are often undetermined in cases like this because it could have
13 been a recreational drug overdose or a suicide. The autopsy
14 report itself refers to the cause of death as "undetermined" and
15 attributes it both to "acute mixed intoxication with alcohol and
16 chlorpromazine" combined with "hypertensive and arteriosclerotic
17 cardiovascular disease."

18 The autopsy was completed on January 24, 1998, and the
19 report was signed June 16, 1998, substantially before any
20 criminal investigation into Somaipersaud's death had begun.
21 During the course of Ambrosi's lengthy trial testimony, neither
22 the government nor defense counsel elicited any information
23 suggesting that law enforcement was ever notified that
24 Somaipersaud's death was suspicious, or that any medical examiner
25 expected a criminal investigation to result from it. Indeed,

1 there is reason to believe that none is pursued in the case of
2 most autopsies.¹⁰

3 In short, the autopsy report was not testimonial
4 because it was not prepared primarily to create a record for use
5 at a criminal trial.¹¹ There was therefore no error, much less
6 plain error, in admitting the autopsy report into evidence, or
7 allowing Ambrosi to testify regarding it, although she did not
8 conduct it herself.

9 D. Testimony Related to Sewnanan's Death

10 In contrast to Ambrosi's testimony relating to
11 Somaipersaud's death, the defendants vigorously objected to Dr.
12 Vivikand Brijmohan's testimony as to a toxicology test relating

¹⁰ The OCME performs an average of 5,500 autopsies each year, and in 2010, for example, 533 New York City residents' causes of death were listed as homicides. See OCME, General Information Booklet, <http://www.nyc.gov/html/ocme/downloads/pdf/General%20Information/OCME%20General%20Information%20Booklet.pdf> (last visited Mar. 22, 2013); Deaths and Death Rates by Selected Causes New York City - 2010, http://www.health.ny.gov/statistics/vital_statistics/2010/table33c.htm (last visited Mar. 22, 2013). This suggests, although the data is of course insufficient to demonstrate conclusively, that something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations. The statistics from Los Angeles tell a similar story: "In 2004, the Los Angeles Medical Examiner's office conducted 4,180 complete autopsies out of 9,465 cases taken by the office. Of the 9,465 total cases, 1,121 died from homicide, 709 from suicide, 3,090 from accidents, and 4,256 from natural causes." Zabrycki, 96 Cal. L. Rev. at 1125.

¹¹ No contrary conclusion is warranted by United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012). Although that case holds that "[f]orensic reports constitute testimonial evidence," id. at 1230, the decision was based in part on the fact that the Florida Medical Examiner's Office "was created and exists within the Department of Law Enforcement," id. at 1231. Here, the OCME is a wholly independent office.

1 to the death of Hardeo Sewnanan, which was based on forensic
2 testing conducted by Dr. Leslie Mootoo. When analyzing error
3 that the defendants did raise at trial, we review for
4 harmlessness, which requires us to ask whether we are satisfied
5 "upon a review of the entire record . . . beyond a reasonable
6 doubt that the error complained of . . . did not contribute to
7 the verdict obtained." United States v. Lee, 549 F.3d 84, 90 (2d
8 Cir. 2008) (internal quotation marks omitted). "In other words,
9 to find the [error] harmless we must be able to conclude that the
10 evidence would have been unimportant in relation to everything
11 else the jury considered on the issue in question, as revealed in
12 the record." Id. (internal quotation marks and citations
13 omitted). We consider "(1) the overall strength of the
14 prosecution's case; (2) the prosecutor's conduct with respect to
15 the improperly admitted evidence; (3) the importance of the
16 wrongly admitted testimony; (4) whether such evidence was
17 cumulative of other properly admitted evidence." Id. (internal
18 quotation marks omitted).

19 1. Testimony at trial. Brijmohan testified regarding
20 Sewnanan's cause of death, in part based on toxicology tests
21 conducted by Mootoo, who had died between his performance of the
22 test and the time of trial. Brijmohan was the chief forensic
23 pathologist for the region of Guyana where Sewnanan's death
24 occurred. Brijmohan testified that he would normally be informed
25 of the need for an autopsy by a coroner affiliated with the
26 police department. Typically, autopsies in Guyana are performed

1 when there are "unnatural deaths," i.e., "accidents, murders,
2 strangulations, drowning, . . . and of course including cases of
3 poisoning." Trial Tr. 3266:12-17. Brijmohan explained that in
4 conducting Sewnanan's internal examination, he discovered
5 "extensive submucosal hemorrhages," which "is not definitely a
6 normal finding. Whenever such a finding occurs, one immediately
7 thinks of extraneous ingestion and one thinks definitely of
8 poisoning." Trial Tr. 3265:13-14, 22-24.

9 Brijmohan then sent the post-mortem contents of
10 Sewnanan's stomach for toxicology testing. He testified that the
11 contents were taken by a police officer to the Guyanese police
12 laboratory, the stamp of which appeared on the resultant
13 toxicology report. Brijmohan further testified that he did not
14 know who actually performed the toxicology test. While Dr.
15 Mootoo may have played some role in the testing, Brijmohan was
16 apparently not sure whether Mootoo had conducted the testing
17 himself.

18 Brijmohan testified, based on "the scientific evidence
19 of my examination and the toxicology report, that the cause of
20 death of Hardeo Sewnanan was the consequence of the ingestion of
21 a toxic substance with ammoniacal compound." Trial Tr. 3299:7-
22 10. Brijmohan said it was probably hydrocyanic acid, or
23 potassium and sodium cyanide, in which case there would have been
24 no symptoms prior to death. Brijmohan further testified that the
25 toxicology report indicated death resulted from ammonia poisoning

1 and, over continued objections, explained that the toxicology
2 report on Sewnanan's stomach indicated ammonia poisoning.¹²

3 On cross-examination, Brijmohan was questioned
4 extensively as to whether the ammonia found in Sewnanan's body
5 could have been naturally occurring, inasmuch as ammonia often
6 occurs naturally in the human body after death. Brijmohan
7 testified that his knowledge that it was commercially produced
8 was based on the laboratory report. His conclusion that Sewnanan
9 died of commercially-produced ammonia "was based essentially on
10 my observation of the stomach, with the hemorrhages, the
11 laboratory reports that was brought to my attention." Trial Tr.
12 3382:23-25.

13 2. The district court's decision. The district court
14 rejected the defendants' argument that allowing introduction of
15 the toxicology report into evidence would violate the
16 Confrontation Clause. See Mem. & Order, United States v. James,
17 2007 WL 2792449, at *1, 2007 U.S. Dist. LEXIS 39585, at *3-*4
18 (E.D.N.Y. May 31, 2007). The district court relied on Feliz in
19 allowing introduction of the report, but its decision preceded
20 the Supreme Court decisions in Bullcoming, Melendez-Diaz, and
21 Williams.

¹² Over repeated objections, Brijmohan testified that test results from two bottles sent to the police lab, one of which tested positive for ammonia, informed his analysis. The record does not conclusively reveal whether the contents of the bottles derived from the victim's body - though that appears the logical inference.

1 The district court did base its decision, however, in
2 large part on its conclusion that the toxicology report was not a
3 "'chemist's' report created by 'law enforcement.'" Id. at *2.
4 While acknowledging that the defendants had described the "close
5 proximity" between the medical examiner's office and the Guyanese
6 police station, and the cooperation between those two agencies,
7 the court concluded that "the critical inquiry is not the
8 physical proximity of two agencies, or their level of
9 cooperation, but rather whether the agency that created the
10 report can be characterized by its duties and purposes as law
11 enforcement." Id. The district court cited Rosa's dictum to the
12 effect that the OCME is not a law enforcement agency, and then,
13 noting that the Guyanese medical examiner operates as part of the
14 Guyanese Ministry of Health and Georgetown Hospital, observed
15 that "[t]here is no indication that Dr. Mootoo was employed by a
16 law enforcement agency or was responsible for enforcing any
17 laws. . . . [I]t appears that the Guyanese Office of Forensic
18 Medicine, for which Drs. Brijmohan and Mootoo worked, is directly
19 analogous to the [OCME]." Id.

20 The court therefore concluded that the forensic records
21 did not fall under the "law enforcement" exception to the
22 business records rule that permits admission of the documentary
23 evidence despite the absence of the document's preparer. Id.
24 Furthermore, the court noted that a toxicology report is "not
25 separate and distinct" from the autopsy report, which bolstered
26 its admissibility as a business record. Id.

1 3. Analysis. First, in light of the foregoing
2 analysis, it is apparent to us that the district court's
3 rationale for allowing the forensic report into evidence is of
4 questionable validity because of the doubt subsequent Supreme
5 Court jurisprudence has cast on Feliz, on which the district
6 court relied. Nevertheless, we think the district court's
7 conclusion sound.

8 There is no indication in Brijmohan's testimony or
9 elsewhere in the record that a criminal investigation was
10 contemplated during the inquiry into the cause of Sewnanan's
11 death.¹³ For example, Brijmohan testified that "the rate of
12 poisons taken is pretty high . . . within the East Indian
13 community," Trial Tr. 3253:15-17, suggesting accidental ingestion
14 or suicide rather than homicide.¹⁴ During the course of the
15 autopsy, Brijmohan observed symptoms consistent with poisoning,
16 including congestion in the lungs and hemorrhaging in the
17 stomach, and ordered toxicology tests on that basis. Brijmohan

¹³ We note, as did the district court, that the police were unquestionably involved in the Guyanese autopsy process, including, for example, transporting forensic samples for testing. As five Justices in Williams made clear, however, the involvement of "adversarial officials" in an investigation is not dispositive as to whether or not a statement is testimonial. In this case, it appears that was simply the routine procedure employed by the Guyanese medical examiner in investigating all unnatural deaths, and does not indicate that a criminal investigation was contemplated.

¹⁴ Brijmohan was interviewed by a publication called "Hinduism Today" regarding the high rate of suicides, particularly among East Indian males, in Guyana, which he attributed to "cultural problem[s]" and alcoholism. Trial Tr. 3375:15-3377:12.

1 further noted that there were other potential "natural" causes of
2 the types of symptoms that led him to suspect poisoning in
3 general -- not murder in particular -- including alcoholism. In
4 short, we see nothing to indicate that the toxicology report was
5 completed primarily to generate evidence for use at a subsequent
6 criminal trial. We conclude that the toxicology report was
7 nontestimonial, and the district court therefore did not err in
8 allowing its introduction without requiring confrontation of the
9 individual who prepared it.

10 As Justice Breyer pointed out in Williams, it is still
11 unsettled under the Court's recent Confrontation Clause
12 jurisprudence whether there is a "logical stopping place between
13 requiring the prosecution to call as a witness one of the
14 laboratory experts who worked on the matter and requiring the
15 prosecution to call all of the laboratory experts who did so."
16 Williams, 132 S. Ct. at 2246 (Breyer, J. concurring). While
17 Brijmohan's testimony implicates that question -- he suggested
18 that someone other than Mootoo may also have participated in the
19 preparation of the toxicology report -- we find it unnecessary to
20 answer it in light of our conclusions as to the nature of the
21 report. To the extent that question implicates the evidentiary
22 rules regarding "basis evidence," we also decline to decide
23 whether the toxicology test was properly offered as such here,
24 where the testifying expert had personal involvement in the
25 autopsy process, and he himself ordered the toxicology tests at
26 issue.

1 **II. Exclusion of the Government's Prior Jury Argument**

2 The defendants contend that the district court abused
3 its discretion in denying their request to introduce an excerpt
4 of the prosecutor's rebuttal summation in the trial of Betty
5 Peter, a cooperating witness, which largely blamed her, and not
6 the defendants in the instant case, for Vernon Peter's murder.
7 "The defense is allowed to introduce a prosecutor's statement
8 from a prior trial when: (1) the prosecution offered an
9 inconsistent assertion of fact at the prior trial; and (2) the
10 prosecution can offer no 'innocent' explanation for the
11 contradiction." United States v. Orena, 32 F.3d 704, 716 (2d
12 Cir. 1994)(citations omitted); see also Fed. R. Evid. 801(d)(2);
13 United States v. McKeon, 738 F.2d 26, 32-33 (2d Cir. 1984).

14 In McKeon, upon which the defendants principally rely,
15 the court's reasoning was based in large part upon the fact that
16 it was the same defendant on trial in a subsequent proceeding.
17 McKeon, 738 F.2d at 31 (noting the relationship to admissions of
18 a party-opponent in civil proceedings). In any event, McKeon
19 requires that, in order to admit such evidence, the district
20 court must "determine by a preponderance of the evidence that the
21 inference the [party] seeks to draw from the inconsistency is a
22 fair one and that an innocent explanation for the inconsistency
23 does not exist. Where the evidence is in equipoise or the
24 preponderance favors an innocent explanation, the . . . statement
25 should be excluded." Id. at 33. Here, the government explained

1 that the change in its view towards Peter resulted from a series
2 of proffer sessions after her conviction on various charges
3 including mail fraud, money laundering, and obstruction of
4 justice. The information gleaned from these sessions and
5 corroborated by other witnesses led the government to a different
6 view as to her culpability for Vernon Peter's murder.

7 We conclude that the district court did not commit
8 clear error in deciding by a preponderance of the evidence that
9 there was an "innocent explanation" for the inconsistency between
10 the government's stated position at the trial of Peter and that
11 in the instant case. The district court therefore did not abuse
12 its discretion in excluding the prior statement. Cf. United
13 States v. GAF Corp., 928 F.2d 1253, 1261 n.3 (2d Cir. 1991)
14 (reversing and finding error in the exclusion of a prior bill of
15 particulars where the "the inconsistency is plain, [and] the
16 inferences are clear," and where the government's only
17 explanation is "that it no longer believes" that the same
18 evidence demonstrates what it had previously argued it did).

19 Finally, the defendants' argument that a post-trial
20 letter from a cooperating witness implicating Betty Peter in her
21 husband's murder somehow affects the propriety of the district
22 court's ruling is misplaced. The letter was not before the
23 district court at the time it made the ruling. It therefore does
24 not suggest either that the district court's factual finding as
25 to the government's explanation was clearly erroneous, or that it

1 abused its discretion in excluding the prosecution's rebuttal
2 statement.

3 **III. Limitation on Cross-Examination**

4 The defendants argue that the district court abused its
5 discretion in curtailing their impeachment of Betty Peter with
6 prior inconsistent statements concerning (1) a conversation she
7 had with a member of Sewnanan's family¹⁵ and (2) her
8 understanding of the term "double indemnity." In particular,
9 Peter testified at trial that she had not spoken to Patricia
10 Sewnanan after Hardeo's death, and that she did not know the
11 meaning of the term "double indemnity."

12 We review for abuse of discretion a district court's
13 decision to preclude evidence offered to impeach a witness. See
14 United States v. Ramirez, 609 F.3d 495, 499 (2d Cir. 2010). A
15 district court "is 'accorded broad discretion in controlling the
16 scope and extent of cross-examination.'" United States v.
17 Caracappa, 614 F.3d 30, 42 (2d Cir. 2010) (quoting United States
18 v. Wilkerson, 361 F.3d 717, 734 (2d Cir.), cert. denied, 543 U.S.
19 908 (2004)); accord, e.g., United States v. Whitten, 610 F.3d
20 168, 182 (2d Cir. 2010). Therefore, a "district court may impose
21 'reasonable limits' on cross-examination to protect against,
22 e.g., harassment, prejudice, confusion, and waste." United
23 States v. Cedeno, 644 F.3d 79, 82 (2d Cir. 2011) (quoting
24 Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). "In the

¹⁵ Precisely what her relationship to Hardeo Sewnanan was
is not reflected in the record.

1 exercise of discretion, a district court should consider the need
2 to 'ascertain [the] truth,' 'avoid needless consumption of time,'
3 and 'protect witnesses from harassment or undue embarrassment.'"
4 Whitten, 610 F.3d at 182-83 (quoting Fed. R. Evid. 611(a)).

5 A district court should afford "wide latitude to a
6 defendant in a criminal case to cross-examine government
7 witnesses," Cedeno, 644 F.3d at 82 (internal quotation marks
8 omitted), because the Confrontation Clause gives a defendant the
9 right not only to cross-examination, but to effective cross-
10 examination, see United States v. Figueroa, 548 F.3d 222, 227 (2d
11 Cir. 2008). But "[i]t does not follow, of course, that the
12 Confrontation Clause prevents a trial judge from imposing any
13 limits on defense counsel's inquiry [in cross-examining] a
14 prosecution witness." Figueroa, 548 F.3d at 227 (quoting Van
15 Arsdall, 475 U.S. at 679) (emphasis added).

16 The defense sought to introduce evidence that the
17 Sewnanan family bribed the medical examiner to change Hardeo
18 Sewnanan's cause of death to poisoning, rather than disease, so
19 that they could collect on the insurance policy's double
20 indemnity clause. The district court excluded evidence
21 supporting this theory, however, which the defendants do not
22 challenge. Peter's denial that she spoke with Patricia Sewnanan,
23 a member of Sewnanan's family, was therefore irrelevant, because
24 the subject of her discussion was not to be introduced in any
25 event. Moreover, because the subject of Peter's discussion with
26 Sewnanan's family member would not have been in front of the

1 jury, her inconsistency on this collateral matter (whether or not
2 she spoke with the family member) was unlikely to influence the
3 jury's assessment of her credibility, because they were already
4 aware that she was a convicted felon who had begun cooperating
5 with the government.

6 For similar reasons, impeachment of Peter concerning
7 her understanding of the term "double indemnity" would have had
8 little probative value. In any event, the cross-examination did
9 indeed elicit testimony from Peter in which she explained that
10 she received \$400,000 on her husband's \$200,000 life insurance
11 policy because "when anybody died accidentally or something, they
12 pay double." Eliciting from Peter that she had been inconsistent
13 in recognizing the term "double indemnity," when it was clear she
14 understood the concept, would therefore also not have affected
15 the jury's assessment of her credibility.

16 **IV. Motion to Sever**

17 Defendant James contends that the district court's
18 denial of his motions for severance of his trial from that of his
19 co-defendant Mallay deprived him of a fair trial. "[T]he court
20 may . . . sever the defendants' trials . . . [if] consolidation
21 for trial appears to prejudice a defendant." Fed. R. Crim. P.
22 14(a). "Considerations of efficiency and consistency militate in
23 favor of trying jointly defendants who were indicted together,
24 [and] [j]oint trials are often particularly appropriate in
25 circumstances where the defendants are charged with participating

1 in the same criminal conspiracy" United States v.
2 Spinelli, 352 F.3d 48, 55 (2d Cir. 2003) (citations omitted).
3 "The decision to sever a joint trial of federal defendants is
4 committed to the sound discretion of the trial judge[, and is
5 c]onsidered virtually unreviewable." United States v. Diaz, 176
6 F.3d 52, 102 (2d Cir. 1999) (internal quotation marks and
7 citations omitted). "[T]o compel reversal, the defendant has the
8 heavy burden to show prejudice so severe that his conviction
9 constituted a miscarriage of justice." United States v.
10 Ferguson, 676 F.3d 260, 286-87 (2d Cir. 2011) (internal quotation
11 marks omitted).

12 James argues that jointly trying him with Mallay, who
13 was also charged with two murders with which James was not
14 charged -- those of Vernon Peter and Alfred Gobin -- caused him
15 prejudice. That evidence, however, was relevant to the
16 racketeering charges against James to prove the formation,
17 existence, and nature of the racketeering enterprise, which
18 involved the murder of individuals to collect on their insurance
19 policies, as well as to show the pattern of racketeering
20 activity. See Diaz, 176 F.3d at 103; United States v. Stewart,
21 590 F.3d 93, 123-24 (2d Cir. 2009) ("[T]he fact that testimony
22 against a codefendant may be harmful is not a ground for
23 severance if that testimony would also be admissible against the
24 moving defendant tried separately." (internal quotation marks
25 omitted)).

1 James's argument that there was an irreconcilable
2 conflict between him and Mallay based on Mallay's initial
3 opposition to the introduction of evidence regarding a plot to
4 bribe the Guyanese medical examiner is also without merit.
5 Mallay later joined James in seeking to introduce that evidence.
6 And in any case, "[t]o obtain a severance on the ground of
7 antagonistic defenses, a defendant must show that the conflict is
8 so irreconcilable that acceptance of one defendant's defense
9 requires that the testimony offered on behalf of a codefendant be
10 disbelieved." United States v. Benitez, 920 F.2d 1080, 1085-86
11 (2d Cir. 1990) (internal quotation marks and citation omitted).
12 That is not the case here.

13 **V. Refusal to Suppress Recorded Statements**

14 The defendants object to the denial of a motion to
15 suppress statements made by James to Derick Hassan, a government
16 informant wearing a recording device, concerning a plot to murder
17 John Narinesingh. The defendants argue that because James was
18 already subject to a sealed indictment at the time those
19 statements were recorded, doing so violated his Sixth Amendment
20 right to counsel.

21 The defendants waived this argument by failing to
22 object to the magistrate judge's recommendation that the motion
23 to suppress be denied, which was adopted by the district court.
24 United States v. James, 415 F. Supp. 2d 132, 137 (E.D.N.Y. 2006).
25 See also Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis,

1 Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir.
2 2010) ("[A] party waives appellate review of a decision in a
3 magistrate judge's Report and Recommendation if the party fails
4 to file timely objections designating the particular issue.").

5 Even so, as Magistrate Judge Pollack explained at
6 length, the Sixth Amendment right is "offense specific," and the
7 statements James made to the informant were not used to support
8 the charge for which he had been indicted at the time he made
9 those statements -- that charge was subsequently dropped. James,
10 415 F. Supp. 2d at 158-61. Therefore, the Sixth Amendment did
11 not bar their introduction into evidence.

12 **VI. Admission of Recorded Statements against Mallay**

13 Defendant Mallay contends that the conversation between
14 James and Hassan, recorded by Hassan -- also referred to in the
15 previous section -- should not have been admitted against him
16 because that conversation indicates Mallay's withdrawal from the
17 conspiracy, and thus is not admissible as a co-conspirator
18 statement. "A statement . . . is not hearsay if . . . [t]he
19 statement is offered against an opposing party and . . . was made
20 by the party's coconspirator during and in furtherance of the
21 conspiracy." Fed. R. Evid. 801(d)(2)(E). "To admit an out-of-
22 court declaration under this rule, the district court must find
23 by a preponderance of the evidence '(a) that there was a
24 conspiracy, (b) that its members included the declarant and the
25 party against whom the statement is offered, and (c) that the

1 statement was made during the course of and in furtherance of the
2 conspiracy.'" United States v. Farhane, 634 F.3d 127, 161 (2d
3 Cir. 2011) (quoting United States v. Al-Moayad, 545 F.3d 139, 173
4 (2d Cir. 2008)). These three factual predicates must be
5 determined by the district court by "a preponderance of the
6 evidence." In re Terrorist Bombings of U.S. Embassies in E.
7 Africa, 552 F.3d 93, 137 (2d Cir. 2008) (citing Fed. R. Evid.
8 104(a)). We review the district court's findings as to each for
9 clear error. See id.

10 First, the conspiracy must be proven by a preponderance
11 of the evidence to involve both the declarant and the defendant.
12 The district court "may properly find the existence of a criminal
13 conspiracy where the evidence is sufficient to establish, by a
14 preponderance of the evidence, that 'the . . . alleged
15 coconspirators entered into a joint enterprise with consciousness
16 of its general nature and extent.'" In re Terrorist Bombings,
17 552 F.3d at 137-38. Although Rule 801(d)(2)(E) "'requires that
18 both the declarant and the party against whom the statement is
19 offered be members of the conspiracy, there is no requirement
20 that the person to whom the statement is made also be a member.'" Id.
21 at 139 (quoting United States v. Beech-Nut Nutrition Corp.,
22 871 F.2d 1181, 1199 (2d Cir. 1989)).

23 Second, to be admissible, the statement must be made
24 "in furtherance of the conspiracy." In general, "'the statements
25 must in some way have been designed to promote or facilitate
26 achievement of the goals of the ongoing conspiracy[.]'" United

1 States v. Diaz, 176 F.3d at 85 (quoting United States v. Tracy,
2 12 F.3d 1186, 1196 (2d Cir. 1993)). The ways in which a
3 statement might "promote or facilitate" the conspiracy include,
4 among others, "seeking to induce a coconspirator's assistance,"
5 id.; "informing coconspirators as to the progress or status of
6 the conspiracy," id.; and prompting a non-coconspirator to
7 respond in some way that "promotes or facilitates the carrying
8 out of a criminal activity," Tracy, 12 F.3d at 1196. See
9 generally, e.g., In re Terrorist Bombings, 552 F.3d at 139; Diaz,
10 176 F.3d at 85; United States v. Gigante, 166 F.3d 75, 82 (2d
11 Cir. 1999). "Because what constitutes a statement that is in
12 furtherance of a conspiracy is essentially a question of fact, we
13 will reverse a decision to admit co-conspirator statements only
14 if it is clearly erroneous." In re Terrorist Bombings, 552 F.3d
15 at 139 (internal quotation marks omitted).

16 Mallay contends that at the time of James and Hassan's
17 conversation regarding the possible murder of Narinesingh he was
18 no longer part of the conspiracy. As proof, James notes the
19 indication on the tape recorded statement that he is no longer
20 talking to Mallay, and that the two have had a falling out. That
21 members of a conspiracy have had a disagreement or a falling out
22 is not, however, sufficient to establish withdrawal from the
23 conspiracy. See, e.g., United States v. Jackson, 335 F.3d 170,
24 182 (2d Cir. 2003) ("To withdraw from a conspiracy, a person must
25 take some affirmative action either by making a clean breast to
26 the authorities or communicating the abandonment in a manner

1 reasonably calculated to reach co-conspirators." (internal
2 quotation marks and citations omitted)); United States v. Spero,
3 331 F.3d 57, 60 (2d Cir. 2003) ("[A conspiracy] is presumed to
4 exist until there has been an affirmative showing that it has
5 been terminated," and its members "continue to be conspirators
6 until there has been an affirmative showing that they have
7 withdrawn." (internal quotation marks omitted)). "An internal
8 dispute among members of a conspiracy can itself be compelling
9 evidence that the conspiracy is ongoing and that the rivals are
10 members of it." United States v. Amato, 15 F.3d 230, 234 (2d
11 Cir. 1994). Hassan testified that the reason Mallay and James
12 were not talking to one another at the time was not that Mallay
13 had withdrawn from the conspiracy, but rather that Mallay had
14 just undergone heart surgery, a fact stipulated to by the
15 parties. Shortly before his surgery, Mallay procured insurance
16 policies on two persons for more than \$2 million, indicating that
17 he continued to participate in the conspiracy at the time of the
18 recorded conversation between Hassan and James. We therefore
19 find no error in the admission of this recording against Mallay.

20 **VII. Denial of New Trial Motion**

21 The defendants argue that a post-trial letter from
22 Camuldeen Allie, a cooperating witness, alleging prosecutorial
23 misconduct required a new trial, or at least an evidentiary
24 hearing, and that the district court erred in not granting their
25 requests for either.

1 We review the denial of a Rule 33 motion for a new
2 trial for abuse of discretion. See United States v. McCourty,
3 562 F.3d 458, 475 (2d Cir. 2009). Federal Rule of Criminal
4 Procedure 33(a) provides that "[u]pon the defendant's motion, the
5 court may vacate any judgment and grant a new trial if the
6 interest of justice so requires." In deciding a Rule 33 motion,
7 "[t]he test is whether it would be a manifest injustice to let
8 the guilty verdict stand." United States v. Lin Guang, 511 F.3d
9 110, 119 (2d Cir. 2007) (internal quotation marks omitted). "For
10 a trial judge to grant a Rule 33 motion, he must harbor a real
11 concern that an innocent person may have been convicted." Id.
12 (internal quotation marks omitted). To merit relief based on a
13 claim of newly discovered evidence, the burden is on the
14 defendant to satisfy five elements: (1) that the evidence is
15 "newly discovered after trial"; (2) that "facts are alleged from
16 which the court can infer due diligence on the part of the movant
17 to obtain the evidence"; (3) that "the evidence is material"; (4)
18 that the evidence "is not merely cumulative or impeaching"; and
19 (5) that "the evidence would likely result in an acquittal."
20 United States v. Owen, 500 F.3d 83, 88 (2d Cir. 2007) (internal
21 citations omitted).

22 The district court concluded that the allegations
23 contained in Allie's letter -- that an Assistant United States
24 Attorney had coerced him into testifying -- were "a fabrication."
25 James I, 2009 WL 763612, at *7, 2009 U.S. Dist. LEXIS 23706, at
26 *21. The court found that the AUSA Allie accused of coercing him

1 had not yet joined the U.S. Attorney's Office at the time when
2 Allie alleges he was coerced, that Allie had testified that no
3 members of the prosecution team in this case were present during
4 the negotiations that led to his cooperation, and that Allie was
5 represented by counsel when he decided to cooperate. Id., 2009
6 U.S. Dist. LEXIS 23706, at *20-*21. Furthermore, in his letter,
7 Allie does not ever disclaim his testimony, or suggest it was
8 anything but truthful. Id. at *8, 2009 U.S. Dist. LEXIS 23706,
9 at *21. Finally, the defendants knew that Allie had a motive to
10 cooperate with the government because it was elicited on cross-
11 examination that the government might let the state parole board
12 know of his cooperation. Id., 2009 U.S. Dist. LEXIS 23706, at
13 *21-*22.

14 While it may be that the contents of the letter provide
15 a reason to doubt Allie's credibility, "a new trial is not
16 required when the suppressed impeachment evidence merely
17 furnishes an additional basis on which to impeach a witness whose
18 credibility has already been shown to be questionable." United
19 States v. Parkes, 497 F.3d 220, 233 (2d Cir. 2007) (internal
20 quotation marks omitted). In any event, there is no "reasonable
21 probability" that the outcome of the defendants' trial would have
22 been different had the contents of Allie's letter been disclosed,
23 even if believed. See In re Terrorist Bombings of U.S. Embassies
24 in E. Africa, 552 F.3d at 146.

1 **VIII. Cumulative Error**

2 Finally, having concluded that there has been no error
3 in the defendants' trial, it follows that we must reject their
4 claim of cumulative error. "[That] doctrine finds no foothold in
5 th[ese] appeal[s]." United States v. Fell, 531 F.3d 197, 233 (2d
6 Cir. 2008) (internal quotation marks omitted).

7 **CONCLUSION**

8 For the foregoing reasons, we affirm the judgments of
9 the district court.

EATON, *Judge*, concurring:

Because of the unsettled state of the law, I agree that the admission into evidence of the autopsy report prepared by Dr. Jindrak did not constitute plain error. *United States v. Gamez*, 577 F.3d 394, 400 (2d Cir. 2009) (“Typically, we will not find plain error ‘where the operative legal question is unsettled.’”) (citations omitted). I respectfully part company with the majority, however, on its conclusion that the autopsy report was “not testimonial” for purposes of the Confrontation Clause.

The majority reads recent Supreme Court cases as holding that “a statement triggers the protections of the Confrontation Clause when it is made with the primary purpose of creating a record for use at a later criminal trial.” This formulation, however, appears to place too much emphasis on future use in a criminal trial being the primary purpose for the creation of a testimonial statement. I would not find that this “primary purpose” is the common thread in the Supreme Court’s jurisprudence.¹ Rather, I would find that a testimonial statement is one having

¹ The Supreme Court’s use of the “criminal trial” language, while not entirely consistent, tends toward the same idea. *Compare Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (quoting *Davis*’ “‘potentially relevant to a later criminal prosecution’” language in the context of a blood-alcohol test requested by the prosecutor), *Michigan v. Bryant*, 131 S. Ct. 1143, 1148 (2011) (employing *Davis*’ “‘potentially relevant to a later criminal prosecution’” language in the context of a police interrogation), and *Davis v. Washington*, 547 U.S. 813, 822 (2006) (articulating the “potentially relevant to a later criminal prosecution” language in the context of a 911 call), with *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (quoting *Crawford*’s “‘available for use at a later trial’” language in the context of a laboratory report requested by the police), and *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004) (listing “available for use at a later trial” among the “[v]arious formulations” of the “core class” of testimonial statements).

an evidentiary purpose, declared in a solemn manner, and made under circumstances that would lead a reasonable declarant to understand that it would be available for use prosecutorially.

The point of departure for this analysis is *Crawford*. As I read that case and those that follow it, there are three key considerations for determining if a statement is testimonial. First, “[t]estimony” is “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”² *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (citation and internal quotation marks omitted). Thus, at the time of its making, the statement must have an “evidentiary purpose.” *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011); *Melendez–Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009). In other words, to be testimonial the declarant must make the statement to “prove past events.” *Davis v. Washington*, 547 U.S. 813, 822 (2006). Statements relating ongoing events made to achieve some other purpose, such as receiving medical or police assistance, and forward-looking statements, such as those made in furtherance of a conspiracy or to elicit inculpatory statements from others, lack the required purpose. *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 (2011) (statement made by a mortally wounded victim in need of medical attention did not have an evidentiary purpose); *Davis*, 547

² Interestingly, not only did “several early American authorities flatly reject[] any special status for coroner statements,” the historical precursors of modern medical examiners’ reports, one of the cases cited in *Crawford* also stands for the proposition that evidence produced by coroners’ investigations requires confrontation, even though the purpose of those investigations was not a purely prosecutorial one. *Crawford*, 541 U.S. at 47 n.2 (citing *State v. Campbell*, 30 S.C.L. 124, 130 (S.C. App. L. 1844) (“The general object, at least, of our Act, would seem to be, to record the whole of the information obtained upon any inquest concerning the sudden or violent death of a man, for the purpose of a prosecution, for satisfaction, or any investigation of the public, or of individuals concerned. So much is due to the living and the dead. Sudden and unnatural deaths shock us all. . . . And let me here observe, that the information and publication of the kind of death, the wound, time and manner, place and circumstances, may often lead to unlooked for charges against unsuspected persons, and even of men abroad. And shall they all be assumed . . . [not to require] cross-examination? Because our Act is general for all inquests, the examination public, and of high respectability? On the contrary, is there not too much of mere formula, if not fiction, in such a notion?”)).

U.S. at 822 (statements about ongoing events during a 911 call did not have an evidentiary purpose); *United States v. Farhane*, 634 F.3d 127, 131–32, 162–63 (2d Cir. 2011) (statements promising future aid in a conspiracy did not have an evidentiary purpose); *United States v. Burden*, 600 F.3d 204, 225 (2d Cir. 2010) (recorded statements of a cooperating witness made to induce a confession did not have an evidentiary purpose); *cf. United States v. Logan*, 419 F.3d 172, 178 (2d Cir. 2005) (finding alibi statements made to police were testimonial).

Second, the statement must have been made in a way that is sufficiently solemn so as to make it more like “‘a formal statement to government officers’” rather than “‘a casual remark [made] to an acquaintance.’” *Bryant*, 131 S. Ct. at 1153 (quoting *Crawford*, 541 U.S. at 51); *Davis*, 547 U.S. at 822 (quoting *Crawford*, 541 U.S. at 51). This does not mean that the statement must be contained in a formal written document, but merely that the circumstances surrounding its utterance must be such that a reasonable declarant would be aware of the serious nature of his or her declaration. *Davis*, 547 U.S. at 826 (citing *Crawford*, 541 U.S. at 51).

Finally, the statement must reasonably be understood as being “available for use at a later trial.” *Melendez–Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 52). That is, the speaker need not expect that the statement will be used in a criminal trial, or even that it is objectively likely that the statement will be used in a criminal trial, only that it is foreseeable that the statement could be used prosecutorially. *Bryant*, 131 S. Ct. at 1169 (Scalia, J. dissenting) (“[H]e must make the statement with the understanding that it may be used to invoke the coercive machinery of the State.”); *see also Melendez–Diaz*, 129 S. Ct. at 2532 (“[T]he affidavits [were] ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” (quoting *Crawford*, 541 U.S. at 52)).

Applying this formulation, it is evident that the admission of Dr. Jindrak's report triggered the Confrontation Clause. First, the autopsy report was, inarguably, created to establish facts regarding the death of Mr. Somaipersaud. The report and its incorporated laboratory analyses contain five final diagnoses, two statements of cause of death, detailed descriptions of various portions of Mr. Somaipersaud's body, and calculated levels of toxins, all of which are factual statements.

Second, the report is sufficiently solemn. All reports generated by the New York City Office of Chief Medical Examiner ("OCME") are required to "be signed by the medical examiner performing the autopsy." N.Y.C. Admin. Code § 17-203 (1998). These reports are made by government officials for use by government officials. *See United States v. Feliz*, 467 F.3d 227, 2337 (2d Cir. 2006) (observing that OCME reports would qualify for the public records hearsay exception, which requires that the statement be made by a public officer or agency). Indeed, even if OCME did not have a long history of cooperation with law enforcement, all autopsy reports would remain statements made directly to law enforcement insofar as they are statutorily required to be available to law enforcement officers and prosecutors. N.Y.C. Admin. Code § 17-205 (1998) ("The appropriate district attorney and the police commissioner of the city may require from [OCME] such further records, and such daily information, as they may deem necessary.") Moreover, like the reports in *Bullcoming* and *Melendez-Diaz*, Dr. Jindrak's report contains a certification.

Third, it could have reasonably been anticipated that the autopsy report would be available for use in a criminal trial. Medical examiners working for OCME are statutorily obligated to make conclusions as to causes of death, to record the reasons for those conclusions, and to preserve those records for future use. N.Y.C. Admin. Code § 17-203 ("A detailed

description of [those] findings . . . shall be written or dictated. . . . The findings of the investigation at the scene of death, the autopsy and any toxicologic, histologic, serologic and microbiologic examinations, and the conclusions drawn therefrom shall be filed in the office of chief medical examiner.”).

Even if it could not have been reasonably foreseen at the outset of the autopsy that the report’s results would be used in a later trial, it seems clear that, at some point during her examination, Dr. Jindrak would reasonably have anticipated that it could be used later in a criminal prosecution. That is, once she certified that the primary cause of death was “acute mixed intoxication with alcohol and chlorpromazine,” i.e., that Mr. Somaipersaud had been poisoned, a reasonable medical examiner would have anticipated that the autopsy report could be used prosecutorially. *See Bryant*, 131 S. Ct. at 1159 (observing that non-testimonial statements may “evolve into testimonial statements” as more information is provided (quoting *Davis*, 547 U.S. at 828 (internal quotation marks omitted))).

When a statement such as Dr. Jindrak’s autopsy report is introduced against a defendant at a criminal trial, that evidence is “functionally identical to live, in-court testimony, because [it does] ‘precisely what a witness does on direct examination,’” rendering its declarant a “witness” and triggering the protections of the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Davis*, 547 U.S. at 830); *see also Bullcoming*, 131 S. Ct. at 2712; *Crawford*, 541 U.S. at 51.

James was both charged with and convicted of murder and conspiracy to commit murder. The prosecution’s theory was that Mr. Somaipersaud had been poisoned. The prosecution offered the autopsy report to establish the very same facts, prejudicial to Mr. James, about which Dr. Jindrak would have been expected to testify at trial. Indeed, on direct examination, Dr.

Ambrosi was asked both to identify Dr. Jindrak's conclusions as to cause of death and to state whether she agreed with those conclusions.

Moreover, I believe that the admission of any medical examiner's report prepared by OCME would trigger the protections of the Confrontation Clause.³ Dr. Jindrak's report was not unique in the sense that the characteristics that made it testimonial are present in all autopsy reports prepared by OCME that are introduced against a defendant at a criminal trial. All such reports are made to establish facts about the cause of death of the decedent; they are made by and to government officials in a formalized recording; they contain statements a medical examiner could reasonably foresee would be used in a criminal prosecution; and if a prosecutor seeks to introduce a report for its truth, it would substitute for live testimony adverse to the defendant.

As noted, I believe that the majority's approach goes astray by suggesting that to trigger the Confrontation Clause the "primary purpose" of an autopsy report must be use "at a later criminal trial." This formulation postulates the existence of a medical examiner who gives adverse testimony but who is not a "witness" for Confrontation Clause purposes because he or she did not prepare the autopsy report primarily for use in criminal proceedings. In doing so, the opinion creates the very "third category of witnesses, helpful to the prosecution, but somehow immune from confrontation" that *Melendez-Diaz* expressly says does not exist. *Melendez-Diaz*, 129 S. Ct. at 2534.

³ At least two other federal circuits and a number of state courts of last resort have reached a similar conclusion regarding particular reports prepared by the equivalent of OCME in their jurisdictions. See, e.g., *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011); *State v. Navarette*, 294 P.3d 435 (N.M. 2013); *State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012); *Connors v. State*, 92 So.3d 676 (Miss. 2012) (noting a pre-*Crawford* decision that held admission of an autopsy report required confrontation); *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009); see also *People v. Lewis*, 806 N.W.2d 295 (Mich. 2011) (vacating lower court's holding that an autopsy report was non-testimonial but holding the error harmless without significant discussion); *Wood v. State*, 299 S.W.3d 200 (Tex. Ct. App. 2009), review denied, 2010 Tex.Crim.App. LEXIS 115 (2010).

Finally, as the Eleventh Circuit points out, “[m]edical examiners are not mere scriveners” and “autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy.” *United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012) (holding autopsy reports to be testimonial and requiring confrontation) (citing *Bullcoming*, 131 S. Ct. at 2714). Both *Bullcoming* and *Melendez–Diaz* hold that a laboratory analyst’s report of sufficient solemnity triggers the protections of the Confrontation Clause. It would be incongruous indeed, if an autopsy report requiring numerous skilled judgments on the part of a medical examiner, did not require the same confrontation.