No. _____

IN THE
Supreme Court of the United States

EVAN WALD,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the Appellate Division, Supreme Court of New York, First Judicial Department, is published at 215 A.D.3d 497 and appears in the Appendix at A. 1. The opinion of the New York Court of Appeals denying leave to appeal is published at 41 N.Y.3d 1005 and appears in the Appendix at A. 4. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the Appellate Division was entered on April 18, 2023 (A. 1-3). On April 21, 2024, the New York Court of Appeals denied leave to appeal (A. 4). On August 18, 2024, Justice Sotomayer extended the time for filing a petition for a writ of certiorari to and including September 18, 2024 (see No. 24A172). This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

New York County Law § 677(4) provides: "The . . . medical examiner shall promptly deliver to the district attorney copies of all records pertaining to any death whenever, in his opinion, or in the judgment of the person performing the autopsy,

there is any indication that a crime was committed."

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

STATEMENT OF THE CASE

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

This case presents an important question which has intractably split state courts of last resort and federal courts of appeals: whether the rule of Melendez-Diaz and Bullcoming applies to autopsy reports that are prepared as

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

The Trial Court Proceedings

Early in the morning of March 22, 1996, Howard Pilmar was found stabbed to death in the hallway of King Office Supply ["King"], the company for which he served as president. Howard Pilmar also owned two Philip's coffee shops. One of those cafes was located in King's retail store on the ground floor of the same building where King had its offices—14 East 33rd Street, Manhattan, New York.

Petitioner Evan Wald managed that coffee shop while his sister and co-defendant, Roslyn Pilmar—Howard's wife—worked for Philip's itself. There were no eyewitnesses to the murder and the murder weapon was never found. While almost all of the blood at the crime scene belonged to Howard Pilmar, a single drop of blood on the wall near where his body was found had Evan Wald's DNA profile. Several witnesses saw a bandage on Mr. Wald's hand during the funeral on Sunday, March 24th, and while making shiva calls in the ensuing week. They testified that Mr. Wald had explained that he had cut himself at work while picking up shards of broken dishes.

Following confirmation three years after the murder, in 1999, that the blood drop found at the scene contained Mr. Wald's DNA, the police investigation continued only sporadically over the next 21 years. The FBI refused a request to

retest the blood sample, and the US Attorney's office refused to take over the case. In 2016, the woman who had taken care of the Pilmars' son in 1996 was re-interviewed, and for the first time, provided evidence of Roslyn Plimar's behavior, both before and after the murder, which she characterized as unusual. A second witness—a divorce attorney with whom Howard Pilmar had met several times at the end of 1995 and early 1996—was also located. Despite gathering no new physical evidence and only marginally relevant testimonial evidence against Roslyn Pilmar, in 2017, the District Attorney's Office decided to charge Mr. Wald and Roslyn Pilmar with one count each of second-degree murder.

At trial, the State proffered Dr. Greenbaum's autopsy report. The State, however, refused to produce Dr. Greenbaum for live testimony subject to cross-examination. Instead, the State proffered Dr. Monica Smiddy, who had no involvement in the autopsy whatsoever (A. 24-50; Tr. 657-83).

The State never claimed that Dr. Greenbaum was unavailable. The medical examiner had simply changed offices; Dr. Greenbaum was working in Georgia (A. 16; Tr. 649). Nothing in the record suggests that the witness could not have traveled to New York City for the trial.

Petitioner announced that he wanted to "renew our, raise [an] objection" to the introduction of the autopsy report into evidence as a business record "or otherwise" (A. 5; Tr. 638). Petitioner noted that the autopsy report and factual notations included therein had occurred 23 years earlier. It was, therefore, impossible for the defense to controvert the factual allegations contained in the

report which the doctor had relied upon. Accordingly, introduction of the autopsy report would violate Mr. Wald's "due process constitutional speedy trial rights" (A. 6; Tr. 639).

The State objected that, "[t]he law and the courts have ruled that [the report] [wa]s admissible," regardless of when and by whom it had been prepared. Petitioner responded that it was not clear that Dr. Greenbaum—the doctor who had performed the autopsy—was unavailable. The State's use of Dr. Smiddy was merely a convenience as Dr. Greenbaum no longer worked for the OCME. But, due to Dr. Greenbaum's absence, the defense was unable to challenge any of the "factual specifications" in the report. Petitioner posited that there was a split between "different courts and different circuits" on whether the report was admissible (A. 6-7; Tr. 639-40).

The State responded that, "[T]he autopsy is not testimonial. There is no right of confrontation. The case law makes plain, the autopsy and the testimony of this witness are admissible in this trial" (A. 6-8; Tr. 639-41).

The trial court "agree[d] with the [State]" and denied the motion finding that, "the case law does side squarely in the [State's] favor" (A. 8; Tr. 641).

The State called Dr. Monica Smiddy and introduced the entire OCME file, including the autopsy report, as Exhibit 19 (A. 17-21; Tr. 650-54). The photographs taken before and during the autopsy were admitted as Exhibits 20a - 20v. Exhibits 19A - 19C were diagrams prepared by Dr. Greenbaum, along with his handwritten notes, detailing the locations, size, and type of injuries sustained by the deceased

(A. 95-100). Dr. Smiddy reviewed the autopsy report, and testified that Howard Pilmar had 48 "sharp force injuries," five of which could have been fatal (A. 49; Tr. 682). Reciting the report, the surrogate witness claimed that Howard Pilmar's cause of death was "incised and stab wounds of the neck and of the torso with injuries of the lungs, the heart, and the airway (A. 24; Tr. 657).

The surrogate witness also contrasted "stab wounds" with "incised wounds" (A. 82-82 (autopsy report finding that 14 of the wounds were "stab wounds" while nine of the wounds were "incised" wounds)). Dr. Smiddy explained that a stab wound is a "sharp force injury" and the "incised wound is a cutting wound. It is generally longer on the skin surface than it is deep as compared to a stab wound which is deeper into a body cavity or organ" (A. 28; Tr. 661).

The surrogate witness was unable to determine the order of the wounds, but according to the report, several of the stab wounds were inflicted after Howard Pilmar was deceased (A. 43-44, 53; Tr. 676-77, 686).

Neither Dr. Greenbaum nor the surrogate witness could state a time of death. They also could not determine the type of weapon that had caused these wounds; however, the surrogate witness testified that the shapes and sizes of those wounds were consistent with a flat-edged knife with a four-to-six inch blade (A. 50-52, 63-64; Tr. 683-85, 696-97). The surrogate witness could not determine if there had been more than one assailant, or whether the assailant(s) were right- or left-handed (A.51; Tr. 684).

In summation, the prosecution relied upon the autopsy report:

> Scientifically, the medical examiner couldn't say which was the first injury, but common sense and logic tells you that cutting his throat, slashing his voice box, was among the first. . . . If he were still alive then, the medical examiner said he would have felt like he was drowning.
>
> And then who knows what the order was. A stab wound to his side, penetrating his lung as he raised his arm to protect himself. A separate stab when his right side penetrated his lung and his heart cutting the aorta.
>
> [Howard Pilmar] had so many defensive wounds. [He] fought so hard to protect himself. Nothing he could do could overcome the tremendous and profound hatred that [Mr. Wald] had for him. Without a weapon and caught off guard, Howard Pilmar didn't have a chance. He was dead within minutes.
>
> [Mr. Wald] was stabbing so furiously, he may not even realized at the moment that he cut his hand, his left
> hand because he was left-handed, held the knife. He did the stabbing with his left hand. His cuts to his hands are offensive wounds (Tr. 2843-44) (emphasis supplied).

The jury convicted Mr. Wald of second-degree murder. He was sentenced to the maximum term of 25 years-to-life imprisonment.

On appeal to the Appellate Division, First Judicial Department, Petitioner renewed his contention that the autopsy report was testimonial and thus, inadmissible. Relying on precedent from the New York Court of Appeals, as well as its own prior decisions, the Appellate Division rejected the argument:

> Defendant's right of confrontation was not violated when the autopsy report prepared by a nontestifying medical examiner was introduced through the testimony of another medical examiner. While the Confrontation Clause bars admission of "testimonial statements" of a witness who does not appear at trial

> (see Crawford v. Washington, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 [2004]), this Court has held that the factual statements in an autopsy report are nontestimonial, and their admission at trial without in-court testimony from the person who prepared the report does not violate the Confrontation Clause (see People v. John, 27 N.Y.3d 294, 315, 33 N.Y.S.3d 88, 52 N.E.3d 1114 [2016]; People v. Freycinet, 11 N.Y.3d 38, 42, 862 N.Y.S.2d 450, 892 N.E.2d 843 [2008]; People v. Fuller, 210 A.D.3d 597, 599, 179 N.Y.S.3d 56 [1st Dept. 2022]; People v. Ortega, 202 A.D.3d 489, 491–492, 162 N.Y.S.3d 347 [1st Dept. 2022], lv granted 38 N.Y.3d 1073, 171 N.Y.S.3d 424, 191 N.E.3d 376 [2022]).

(A. 2-3).

Petitioner sought discretionary review of this Confrontation Clause claim before the New York Court of Appeals. While that application was pending, the Court of Appeals, in People v. Ortega, 227 N.E.3d 302 (2023), overruled its decision in People v. Feycinet, 892 N.E.2d 843 (2008) and held that an autopsy report is testimonial where it is likely going to be evidence, e.g., the case is obviously a criminal case and not, say, a suicide or accident. Ortega at 307-09. But, the Court of Appeals further found that "Autopsy photographs and video recordings of a conducted autopsy may properly be relied upon by a testifying witness reaching their own independent conclusions. Further, standard anatomical measurements devoid of the subjective skill and judgment of the performing examiner constitute primary data upon which an expert may rely." Id. at 310-11. Following the parties' supplemental submission, the Court, without comment, denied leave to appeal (A. 4).

REASONS FOR GRANTING THE WRIT

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

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

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

agents' DNA analysis is not testimonial. See Williams v. Illinois, 567 U.S. 50, 81-86 (2012) (plurality opinion); see also id. at 109-19 (Thomas, J., concurring in judgment).

This Court has never considered how Crawford applies to autopsy reports. Lacking "clear guidance on this issue," state and federal courts have become intractably "split over whether an autopsy report is testimonial hearsay." Ackerman v. State, 51 N.E.3d 171, 180 (Ind. 2016), cert. denied, 580 U.S. 989 (2016); accord Commonwealth v. Brown, 139 A.3d 208, 215 (Pa. App. 2016) ("We acknowledge that there is a sharp split in authority on whether autopsy reports are testimonial.").[1]

Six state courts of last resort and two federal courts of appeals have held since Melendez-Diaz that an autopsy report asserting the cause of death to be homicide is testimonial. See State v. Bass, 132 A.3d 1207, 1222-1227 (N.J. 2016); State v. Navarette, 294 P.3d 435, 440-42 (N.M. 2013), cert. denied, 571 U.S. 939 (2013); Miller v. State, 313 P.3d 934, 967-71 (Okla. Crim. App. 2013); Commonwealth v. Carr, 986 N.E.2d 380, 398-400 (Mass. 2013); State v. Frazier, 735 S.E.2d 727, 730-32 (W. Va. 2012); State v. Locklear, 681 S.E.2d 293, 304-05

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

(N.C. 2009); United States v. Ignasiak, 667 F.3d 1217, 1229-35 (11th Cir. 2012); United States v. Moore, 651 F.3d 30, 69-73 (D.C. Cir. 2011). At least two state intermediate courts agree. See Rosario v. State, 175 So.3d 843, 854-58 (Fla. App. 2015); Wood v. State, 299 S.W.3d 200, 208-10 (Tex. App. 2009).

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

On the other side of the split, five state supreme courts since Melendez-Diaz have held that autopsy reports are created as part of criminal investigations are nontestimonial. See State v. Hutchison, 482 S.W.3d 893, 905-14 (Tenn. 2015); State v. Maxwell, 9 N.E.3d 930, 945-52 (Ohio 2014), cert. denied, 574 U.S. 1160 (2015); State v. Medina, 306 P.3d 48, 62-64 (Ariz. 2013), cert. denied, 571 U.S. 1200 (2014); People v. Leach, 980 N.E.2d 570, 582-94 (Ill. 2012); People v. Dungo, 286 P.3d 442, 447-50 (Cal. 2012).

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

Some courts hold that autopsy reports are nontestimonial because medical examiners are "authorized to perform autopsies in a number of situations, only one

of which is when a death is potentially a homicide." Maxwell, 9 N.E.3d at 951. Thus, this reasoning goes, the primary purpose of an autopsy report is never to create evidence for a criminal trial. Id.

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

Still other courts, have ruled that autopsy reports are nontestimonial because they do not "directly link defendant to the crime." An autopsy report is concerned only with how the victim dies, not who was responsible. See Leach, 980 N.E.2d at 592; Hutchison, 482 S.W.3d at 913-14.

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

Three other state high courts, including the New York Court of Appeals, have attempted to steer a middle course, although even these courts disagree over what

the proper rule should be. The Washington Supreme Court has held that statements in autopsy reports are testimonial when they have a directly "inculpatory effect," but not necessarily when they are incriminating only when assessed in combination with other evidence. State v. Lui, 315 P.3d 493, 510-11 (Wash. 2014), cert. denied, 573 U.S. 933 (2014). The California Supreme Court has similarly held that "anatomical and physiological observations" in an autopsy report are not testimonial, while reserving decision on whether "conclusions as to the cause of the victim's death" are testimonial. Dungo, 286 P.3d at 448-50; see also People v. Edwards, 306 P.3d 1049, 1087-90 & n.12 (Cal. 2013), cert. denied, 572 U.S. 1137 (2014). The New York Court of Appeals recently held that an autopsy report is testimonial where it is likely going to be evidence, e.g., where the case is obviously criminal and not, say, a suicide or accident. Ortega, 227 N.E.3d at 307-09. But, the Court also found a "primary data" exception for "objective facts." According to the court, autopsy photographs and "standard anatomical measurements devoid of the subjective skill and judgment of the performing examiner" are not subject to cross. Id.

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

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

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

Confrontation of medical examiners is also essential to prevent wrongful convictions. This Court already has recognized that forensic analysts are sometimes "incompetent" or even "fraudulent." Melendez-Diaz, 557 U.S. at 319. And recent news reports confirm that medical examiners sometimes perform flawed or fraudulent analyses.[2] It is therefore vital that defendants have the opportunity to cross-examine the authors of forensic reports to "expose any lapses or lies." Bullcoming, 564 U.S. at 662.

On a more subtle level, "[a] forensic analyst responding to a request from a

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

law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." Melendez-Diaz, 557 U.S. at 318. As the National Academy of Sciences has explained, medical examiners "serve the criminal justice system as medical detectives by identifying and documenting pathologic findings in suspicious or violent deaths and testifying in courts as expert medical witnesses." National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 244 (2009); see also Homepage, NYC Office of Chief Medical Examiner, available at http://www1.nyc.gov/site/ocme/index.page (declaring that OCME "conducts independent investigations using advanced forensic science in the service of . . . the criminal justice system"). This is particularly true with respect to autopsy reports created during homicide investigations. Police officers typically converse with forensic examiners prior to, or during, such autopsies. And officers usually tell examiners how they think the death occurred.

In addition, forensic pathology involves a significant amount of subjectivity and judgment—far more than that involved in the drug or alcohol testing this Court analyzed in Melendez-Diaz and Bullcoming.[3] Unfortunately though, medical

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

examiners sometimes display anything but the skill necessary for the task. A recent investigation in Mississippi, for example, revealed several wrongful convictions due to autopsies performed by "a forensic analyst with inadequate training" and questionable ethics "who was given far too much deference in the courts." Campbell Robertson, Questions Left for Mississippi Over Doctor's Autopsies, N.Y. Times (Jan. 7, 2013). Elsewhere in the Nation, medical examiner and coroner "systems function at varying levels of expertise, often with deficiencies in facilities, equipment, staff, education, and training." National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 247, 264-65 (2009). In fact, "there are no mandated national qualifications or certifications required for death investigators. Nor is medical expertise always required." Id. The field is so unregulated that even a "17-year-old high school senior" has been "appointed [ ] deputy coroner" in one jurisdiction. Id. at 247.

The sooner this Court clarifies whether autopsy reports prepared for homicide investigations are testimonial, the sooner courts, institutions, and litigants can adapt to this Court's holding. For instance, if autopsy reports are testimonial, states and localities could take steps to ensure that important assertions in autopsy reports are admissible even if a report's author becomes unavailable. Some states require two medical examiners to be present at every

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determine the need for additional dissection and laboratory tests").

autopsy performed as part of a homicide investigation, thus ensuring that if one becomes unavailable, the other can still testify and explain the report. Medical examiners can also take extra photographs or videos, and preserve extra samples to allow retesting if the original examiner becomes unavailable.

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

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

Second, there can be no doubt that the autopsy report was created as part of a criminal investigation. The circumstances surrounding this autopsy are typical of cases involving autopsy reports created during homicide investigations. From the moment the body was delivered to the medical examiner's office, the police and medical examiners believed the death was a homicide. Thus, when the medical examiner found the cause of death to be homicide, she knew her forensic findings would be used in a criminal prosecution.

Finally, the autopsy report is certified, thus rendering it sufficiently formal to satisfy Justice Thomas's test for the testimonial status of forensic reports. Compare Bullcoming, 564 U.S. at 664-65 with Williams v. Illinois, 567 U.S. 50, 109-

12 (2012) (Thomas, J., concurring). Consequently, there is no chance that the Court will splinter as it did in Williams, where the lack of formality prevented a majority from coalescing.

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

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

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

In Bullcoming, this Court reaffirmed that "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial' and therefore within the compass of the Confrontation Clause." 564 U.S. at 664-65. Because state law in that case required the laboratory to assist the police investigation, there was no doubt the blood alcohol report at issue was "'made for the purpose of establishing or proving some fact' in a criminal proceeding." Id. at 664-65 (quoting Melendez-Diaz, 557 U.S. at 310).

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

Furthermore, "the formalities attending" the autopsy report here are "more than adequate to qualify [the report] as testimonial." Bullcoming, 564 U.S. at 664-65. In Bullcoming and Melendez-Diaz, the analysts "prepared a certificate concerning the result of his analysis" and "formalized" the report in a "signed document headed 'a report.'" Bullcoming, 564 U.S. at 664-65; Melendez-Diaz, 557 U.S. at 308. And in Bullcoming, the report "contain[ed] a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses." 564 U.S. at 664-65.

So too here, the autopsy report is headed "REPORT OF AUTOPSY" and bears the official seal of the Office of the Chief Medical Examiner of the City of New York. In the report, Dr. Greenbaum certified that she performed the autopsy and then signed the report. The "formalities attending" this report are thus just like those attending the reports in Bullcoming and Melendez-Diaz.

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

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

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

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

Some state supreme courts have latched on to the theory that autopsy reports are nontestimonial because they do not prove "identity"—they instead prove the cause of death or *mens rea*. Leach, 980 N.E.2d at 59192; Hutchison, 482 S.W.3d at 913. But, as the New York Court of Appeals recently found, in overruling Freycinet, 892 N.E.2d at 843, "Melendez–Diaz made explicit that a statement need not be inherently inculpatory or 'directly accuse' a defendant of wrongdoing to be considered testimonial." Ortega, 227 N.E.3d at 307-08 (citing Melendez–Diaz, 557 U.S. at 313).

Similarly, the California Supreme Court's held that "objective" anatomical and physiological observations in autopsy reports prepared in conjunction with homicide investigations—in contrast to assertions regarding the cause of death—are nontestimonial. People v. Dungo, 286 P.3d at 448-50. The court below adopted that argument holding that "factual statements in an autopsy report are nontestimonial" (A. 2-3). When documents are created with the primary purpose of creating evidence for a criminal investigation, statements are testimonial regardless of how "objective" they might appear. Witnesses' statements regarding

"objective" facts in the physical world—license plate numbers, the color of getaway cars, the time a clock displayed when shots rang out, etc.—are no less testimonial than other statements made to provide evidence for a criminal trial. See Bullcoming, 564 U.S. at 660.

That leaves the concern—first raised by some Members of this Court and later embraced by the Ohio Supreme Court—that applying the Confrontation Clause to autopsy reports would "'effectively' . . . function 'as a statute of limitations for murder[.]'" Williams, 567 U.S. at 97-99 (Breyer, J., concurring) (quoting Melendez–Diaz, 557 U.S. at 335 (Kennedy J., dissenting) (quoting in turn Carolyn Zabrycki, Comment, Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement, 96 Cal. L. Rev. 1093, 1115 (2008)); Maxwell, 9 N.E.3d at 951. If the autopsy provides vital evidence, the reasoning goes, and "[the] medical examiner who conducted an autopsy [is] unavailable or deceased when a trial begins," applying Crawford may imperil the prosecution or require dismissal of the charges. Maxwell, 9 N.E.3d at 951; see also Dungo, 286 P.3d at 457-58 (Chin, J., concurring).

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

Policy arguments cannot justify introducing formalized forensic reports where the defendant has not "had a prior opportunity for cross-examination."

Melendez-Diaz, 557 U.S. at 309 (quoting Crawford, 541 U.S. at 54). When the sole eyewitness to a crime dies before trial, rendering a successful prosecution impossible without his pre-trial testimonial statements, the Confrontation Clause has always held firm. See Crawford, 541 U.S. at 50, 59.

Medical examiners who provide purportedly vital forensic testimony are no different. In Melendez-Diaz, Massachusetts asked this Court to "relax the requirements of the Confrontation Clause to accommodate the necessities of trial and the adversary process." 557 U.S. at 325 (internal quotations omitted). This Court rejected the effort: "It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience." Id.; see also Giles, 554 U.S. at 375 (there is no unavailability exception to the Confrontation Clause, even when the defendant has caused the victim's death, because the Clause is not "subject to whatever exceptions courts from time to time consider 'fair.'"); accord id. at 379 (Souter, J., concurring) (agreeing that declarant's unavailability, due to death, does not justify an exception to the confrontation right).

In any event, the critical role that autopsy reports can play in a homicide prosecution justifies enforcing the Confrontation Clause, not suspending it. As Justice Pfeifer of the Ohio Supreme Court has argued: "If having no autopsy report

available makes a murder conviction impossible, elevating an autopsy to a central role in a murder trial, does that not make it all the more imperative that a defendant have an opportunity to call into doubt the veracity of the report through cross-examination?" Maxwell, 9 N.E.3d at 997 (concurring in part, dissenting in part).

Precedential problems aside, categorically exempting medical examiners from confrontation is the wrong solution to the "statute of limitations" concern. At most, that concern calls for an accommodation in the rare case where, unlike here, the examiner is actually deceased or otherwise unavailable at the time of trial. Indeed, the law review article that first articulated the statute of limitations objection argued that "excluding the autopsy report where" a medical examiner is unavailable—that is, "a medical examiner dies"—would "effectively function[] as a statute of limitations for murder." Zabrycki, supra, at 1115; see also Jennifer L. Mnookin, Expert Evidence and the Confrontation Clause After Crawford v. Washington, 15 Brooklyn J.L. & Pol'y 791, 860-61 (2007) (proposing unavailability exception to rule that medical examiners must be produced for cross-examination).

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

CONCLUSION

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

Respectfully submitted,

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