

No. 24-5544

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IN THE

**Supreme Court of the United States**

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EVAN WALD,

PETITIONER,

v.

PEOPLE OF THE STATE OF NEW YORK,

RESPONDENTS.

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

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**BRIEF IN OPPOSITION**

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November 6, 2024

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## INTRODUCTION

Petitioner Evan Wald and his sister Roslyn Pilmar were convicted of murdering Roslyn's husband, Howard Pilmar, after a nine-week trial that featured testimony from nearly fifty witnesses. On appeal, petitioner raised a Confrontation Clause challenge to the trial court's admission of an autopsy report prepared by a medical examiner who did not testify. The New York Appellate Division, First Department, rejected the claim under then-applicable precedent from the New York Court of Appeals that an autopsy report was nontestimonial (A. 2-3). *See People v. Freycinet*, 11 N.Y.3d 38 (2008). Just a few months later, however, the Court of Appeals reversed its prior precedent and held that the type of autopsy report prepared in this case is "testimonial under established Supreme Court precedent." *People v. Ortega*, 40 N.Y.3d 463, 474 (2023).

Petitioner now seeks a writ of certiorari to have this Court confirm what the New York Court of Appeals has already held. Petition for Writ of Certiorari ("Pet.") at i. The petition should be denied. The Court of Appeals' intervening decision in *Ortega* already provides for the legal rule that petitioner presses here: that autopsy reports like the one in his case are testimonial for purposes of the Confrontation Clause. And although the Court of Appeals declined to review petitioner's case, there is good reason to believe that its decision was based on grounds other than petitioner's Confrontation Clause claim: the Court denied leave to appeal after issuing *Ortega*, and there were compelling reasons to think that any error in admitting the autopsy

report was harmless in light of the overwhelming evidence of petitioner's guilt. The petition should thus be denied.

### STATEMENT OF THE CASE

1. On March 21, 1996, Roslyn Pilmar and petitioner ambushed Roslyn's husband, Howard, in his midtown offices and killed him by slicing his neck and stabbing him another 47 times. When the police initially investigated the crime, strong circumstantial evidence pointed to Roslyn and petitioner as the killers. But prosecutors did not pursue charges until the District Attorney's cold-case unit reinvestigated the crime in 2017 and uncovered new evidence further demonstrating that Roslyn and petitioner were guilty. Armed with this new evidence, prosecutors obtained an indictment charging Roslyn and petitioner each with a single count of second-degree murder. The two were tried jointly at a jury trial that began in 2019.

2. The evidence at trial overwhelmingly proved that Roslyn and petitioner were guilty.<sup>1</sup> The location of the murder—in Howard's midtown offices—suggested that he was killed by someone he knew. He was not murdered on the street or the subway; he was killed in the fourth-floor offices of a secure building with security features such as locks and alarms. Strangers would have had to navigate these security systems to enter the building and to exit it after the murder (*see* AD Resp. Br. 4-8 (summarizing testimony about building security and fire alarms)). That was unlikely;

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<sup>1</sup> The following facts were proved at trial. The entire trial record is described more fully in the People's brief in the Appellate Division (Brief for Respondent ("AD Resp. Br.") 4-43). References here are to the consecutively paginated minutes of the trial proceeding ("Tr.").

the more reasonable inference was that the attackers had familiarity with the building and with the office's layout.

The nature of the killing itself suggested that the crime was committed by someone who had an emotional investment in Howard's death—in other words, by someone he knew. For example, at trial, one of the responding detectives described Howard's body as having been “totally ripped apart” (Tr. 347-348). The autopsy photographs admitted without defense objection also visibly confirmed the brutal character of the crime (*see* People's Trial Exhibit (“PTX”) 20A–20V). It was simply implausible that a random stranger would have inflicted such a vicious and sustained attack, only to leave without taking the hundreds of dollars in Howard's pocket and without stealing anything from Howard's offices (*see* Tr. 386, 1106-1107).

Physical evidence pointed to petitioner's involvement. Investigators recovered a single drop of blood from the crime scene, which DNA testing confirmed belonged to petitioner (Tr. 943-958). And on the morning Howard's body was discovered, petitioner arrived to work with a “large bandage” on his left hand covering lacerations significant enough that they remained visible after a week of healing (*e.g.*, Tr. 1956-1957; *see* PTX 40 (photographs of petitioner's injuries)). His explanation for the injuries—that he cut himself picking up broken dishes while catering a luncheon the day before the murder (*e.g.*, Tr. 1630)—was inherently implausible, given the severity of the injuries. And it was refuted by evidence showing that there was no luncheon the day before the murder (Tr. 856-858, 1476-1780, 2261), and that petitioner did not have injuries on his hands in the days before the killing (Tr. 1165-1166, 1507).

There was no dispute that petitioner and Roslyn had been at the scene of the crime shortly before Howard's murder. But evidence also established that it was unusual for them to be there after business hours (*e.g.*, Tr. 224, 239). And their after-hours presence at the office was doubly suspicious since they had recently been asking building staff about the office's security measures (Tr. 1563-64, 1598, 1896-97). The only credible explanation was that they had manufactured a pretext to be in the office and had cased the building's security systems to ensure that they could escape quickly and undetected. Evidence also established that Howard never showed up for a dinner date he had made with a friend that evening (Tr. 568, 574-77), meaning that the murder must have occurred shortly after Howard met with Roslyn and petitioner.

There was also strong proof of motive. Petitioner disliked Howard because he believed that Howard was mistreating his sister; indeed, petitioner had threatened to kill Howard shortly before the murder (Tr. 1278). Petitioner also had a strong motive to come to aid his sister, and Roslyn's motive was undeniable: a former employer had just discovered that Roslyn had stolen nearly \$200,000 from him, and he was demanding payment (*e.g.*, Tr. 88-103); state tax authorities were threatening to seize a business of Howard's that Roslyn had mismanaged (Tr. 873-886); Howard and Roslyn's marriage was in tatters, and Roslyn was afraid that Howard would leave her and take their nine-year-old son (*e.g.*, Tr. 758-62, 786). Roslyn had a strong incentive to kill her husband. And after Howard's murder, she inherited substantial assets, received an insurance payout, and sold Howard's businesses—realizing a

financial windfall just when she most needed it that conveniently resolved all of her financial calamities (*e.g.*, Tr. 532-36, 597-604).

The trial evidence thus added up to one of two possibilities. Either a random person slipped past the building's security systems, killed Howard in an inexplicably frenzied knife attack, and then stole nothing from him or his office—all minutes after Roslyn and petitioner left. Or petitioner and Roslyn were the killers: the people with the strongest motive, whose presence in the office that night was unusual, who were the last people to be with Howard shortly before he died, and who were tied to the crime by petitioner's blood at the scene and his unexplained injuries.

3. As part of the mountain of evidence admitted during the nine-week trial, the People also presented testimony from Dr. Monica Smiddy, a forensic pathologist at the Office of the Chief Medical Examiner ("OCME"), about the nature of Howard's injuries and the manner and cause of his death. Dr. Smiddy based her testimony on an autopsy report (A. 82-93) that had been prepared at the time of the murder by a different medical examiner, Dr. Jordan Greenbaum, who had since moved to Georgia. The autopsy report was admitted over a defense objection (A. 5-6, 8; *see* People's Trial Exhibit ("PTX") 19), and a binder containing 22 of the autopsy photographs was also admitted as a separate exhibit without a defense objection (PTX 20A – 20V).<sup>2</sup>

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<sup>2</sup> In a pretrial proceeding, the People sought to limit prejudice to the defense by introducing only 22 of the 98 photographs taken during the autopsy; those 22 photographs should be admitted, the People argued, because they were "probative of specific injuries" that Dr. Smiddy was going to discuss in her testimony (Tr. 163). The defense asked that fewer photographs be admitted. Counsel for Roslyn argued that the prejudice from admitting so many graphic photographs was unjustified, because "[t]he wounds are the wounds" and there was no "controversy" regarding Dr. Smiddy's testimony "about the wounds" (Tr. 165). Counsel for defendant added that admitting 22 autopsy photographs would be "ridiculous" since "[w]e are all going to concede that he was murdered" (Tr. 166). "[T]here's no reason



The bulk of the autopsy report (A. 84-93) recorded Dr. Greenbaum's anatomical observations of Howard's injuries. For example, Dr. Greenbaum recorded that "[a] gaping incised wound of the neck extends from 2" below the right ear, across the right lateral, anterior and left lateral aspects of the neck to 1/2" behind the left ear, at a level 2-1/4" below the left ear. . . . The incised wound reaches its maximum depth of approximately 2" in the central anterior aspect of the neck where the wound track extends through the sternohyoid and thyrohyoid muscles and perforates the anterior wall of the upper airway, above the thyroid cartilage." (A. 86). In addition to these measurements, the report also included Dr. Greenbaum's conclusions about the cause and manner of Howard's death: the cause of death was "stab and incised wounds to neck and chest with penetrations of lungs, heart and trachea, and perforations of lung and aorta"; and the manner of death was "homicide (stabbed and cut by other(s))" (A. 83).

Dr. Smiddy reviewed Dr. Greenbaum's report and testified in court that, in her independent opinion, the cause of Howard's 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). She then testified about the injuries that Howard had received and offered her opinion about the significance of those injuries (A. 26-53). For example, Dr. Smiddy opined that the grouping of injuries on Howard's back, as well as the "relative lack of acute bleeding or hemorrhage into the soft tissue," indicated that they "occurred post-mortem, after the decedent stopped moving and the heart stopped pumping" (A. 43).

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for the jury to have to see these graphic photos," counsel added, "since we are not contesting how he died" and Howard's cause of death was "not an issue in the case" (Tr. 167).

The prosecutor’s summation—spanning more than seventy transcript pages—painstakingly detailed the mountain of evidence against Roslyn and petitioner. The prosecutor only briefly mentioned the autopsy, and only to argue the inferences that could be drawn from Dr. Smiddy’s testimony. For instance, the prosecutor pointed to the number of wounds, plus Dr. Smiddy’s opinion that some of the wounds had been inflicted after Howard was dead, to argue that the killing was a “crime of passion” committed by someone “who knew him and hated” Howard (Tr. 2902).

4. On appeal to the Appellate Division, petitioner raised a Confrontation Clause challenge to the admission of the autopsy report; he did not object to the admission of the autopsy photographs. The People argued that, under the Court of Appeals’ decision in *Freycinet*, 11 N.Y.3d at 42, an autopsy report was nontestimonial for Confrontation Clause purposes (AD Resp. Br. 71-73). The People also argued that any error in admitting the autopsy report was harmless: the report was cumulative of the permissible in-court testimony from Dr. Smiddy and the autopsy photographs; there was no dispute about the manner and cause of Howard’s death, especially since defense counsel had “concede[d] that [Howard] was murdered” and was “not contesting how he died” (Tr. 166-67); and it was not clear that the jury had even seen the autopsy report (AD Resp. Br. 74-76).<sup>3</sup> Moreover, given the other overwhelming evidence of guilt, there was no reasonable possibility that the autopsy report was responsible for the jury’s verdict.

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<sup>3</sup> The autopsy report and the autopsy photographs were admitted as separate exhibits (PTX 19 and PTX 20), and during deliberations, the jury requested to be provided with the “autopsy photos” but not the autopsy report (see Court Exhibit XXI).

On April 18, 2023, the Appellate Division rejected petitioner's Confrontation Clause argument and affirmed his conviction. *See People v. Wald*, 215 A.D.3d 497, 498 (1st Dep't 2023). Without addressing harmless error, the court cited *Freycinet* to hold that petitioner'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" (A. 2).

On May 10, 2023, petitioner applied for leave to appeal to the Court of Appeals.

4. On November 20, 2023, the Court of Appeals decided *People v. Ortega*, 40 N.Y.3d 463 (2023). That case involved the murder of two children by their nanny; at trial, the court admitted autopsy reports without in-court testimony from the medical examiner who had prepared those reports. *See id.* at 468-69. The Court of Appeals overruled *Freycinet*, concluding that its holding "does not survive" this Court's decisions in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). *Ortega*, 40 N.Y.3d at 473. The court thus concluded that "*Freycinet* should no longer be followed because it is inconsistent with the demands of the Confrontation Clause as articulated more recently by the Supreme Court." *Id.* at 474. And the court further held that the autopsy reports in *Ortega* were "testimonial under established Supreme Court precedent" because they represented a "solemn declaration" made "for the purpose of establishing or proving some fact, namely the homicidal nature of these victims' deaths," and they were made under circumstances "which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Id.* (cleaned up).

After *Ortega*, petitioner renewed his application for leave to appeal, arguing that the admission of the autopsy report in his case clearly violated the Confrontation Clause under *Ortega*, and that “the only issue to be resolved is whether the admittance of that report and the expert witness’s testimony was harmless” (Letter from Jan Hoth, at 1 (Feb. 9, 2024)). The People did not dispute that the autopsy report was admitted in error based on *Ortega*, but argued that further review was unwarranted because any Confrontation Clause error was harmless (Letter from Philip V. Tisne, at 1 (Feb. 21, 2024)).

On May 21, 2024, the Court of Appeals denied petitioner’s application for leave to appeal. *See People v. Wald*, 41 N.Y.3d 1005 (2024).

### **REASONS FOR DENYING THE PETITION**

1. The petition for certiorari should be denied because the New York Court of Appeals has already agreed with the legal argument that petitioner asks this Court to adopt: namely, that certified autopsy reports like the one in his case are testimonial under the Confrontation Clause. Because the Court of Appeals denied petitioner’s application for leave to appeal, this Court’s review of the judgment is limited to the Appellate Division’s decision affirming petitioner’s conviction. *See Robert Stern et al., Supreme Court Practice* § 3.13 (8th ed. 2002). But the parties here agree that the Appellate Division’s determination of the Confrontation Clause issue in this case was error in light of the Court of Appeals’ intervening decision in *Ortega*, which expressly overruled *Freycinet*, the earlier precedent that was the basis of the Appellate Division’s Confrontation Clause ruling. *Wald*, 215 A.D.3d at 498; *see Ortega*, 40

N.Y.3d at 474 (“*Freycinet* should no longer be followed[.]”). The People did not dispute petitioner’s post-*Ortega* argument to the Court of Appeals that the admission of the autopsy report in this case “was clear error under *Ortega*” (Hoth Ltr., *supra*, at 1).

There is thus no dispute that the admission of the autopsy report in this case was error under binding Court of Appeals precedent. This Court’s further review is not needed to confirm what the New York Court of Appeals has already held.

2. To be sure, the Court of Appeals declined to review petitioner’s conviction even after *Ortega*. But there is good reason to believe that the Court of Appeals’ decision was based on harmless error. The parties’ submissions to the court on petitioner’s leave application presented the case as raising solely a question of harmlessness (*see* Hoth Ltr., *supra*, at 1 (arguing that “the only issue to be resolved is whether the admittance of that [autopsy] report . . . was harmless”)). And there was a powerful argument that the autopsy report was immaterial given the other overwhelming evidence pointing directly to petitioner and Roslyn as the murderers, as the People’s brief in the Appellate Division described more fully (AD Resp. Br. 50-58).

Specifically, the viciousness of the murder made clear that it could only have been committed by someone Howard knew, and the location of the killing meant that the murderer could only have been someone familiar with the building’s security systems. These factors pointed directly to petitioner and Roslyn, who were at the murder scene shortly before Howard was killed and had recently been asking questions about the building’s security systems. Petitioner’s blood was also found at the scene, and the next day he had fresh and unexplained lacerations on his left hand.

Roslyn's marriage was falling apart, and she feared that Howard would take her son; she also had an uncommonly powerful financial motive to kill her husband. And without petitioner's assistance, Roslyn would not have been able to overpower Howard in the manner documented by the trial testimony and autopsy photographs.

In light of this mountain of damning evidence, the autopsy report itself was inconsequential. As noted, the autopsy report's conclusions about the cause and manner of death were undisputed at trial, as defense counsel rightly conceded. That left only the objective measurements recorded in the report. But it was unclear whether the jury ever even saw those notations. And in any event, those measurements would have been cumulative of Dr. Smiddy's in-court testimony, which was subject to fulsome cross-examination by defense counsel (A. 54-77).

Petitioner does not suggest that reviewing the harmlessness of the conceded constitutional error here would merit this Court's further review. And for good reason: any dispute about harmless error would turn on the specific facts of this case rather than any broader question of federal law. Because the legal issue that petitioner focuses on instead has already been resolved by the New York Court of Appeals, and because the overwhelming evidence of petitioner's guilt supported the guilty verdict here notwithstanding a conceded Confrontation Clause error, there is no need for this Court to grant review in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alvin L. Bragg", with a large, sweeping flourish at the end.

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