

No. 24-5544

---

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

---

**REPLY BRIEF FOR PETITIONER**

---

Jan Hoth

*Counsel of Record*

Center for Appellate Litigation

120 Wall Street – 28th Floor

New York, New York 10005

(212) 577-2523 ext 532

[Jhoth@cfal.org](mailto:Jhoth@cfal.org)

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
REPLY BRIEF FOR PETITIONER .....	1
CONCLUSION .....	3

## TABLE OF AUTHORITIES

<u>People v. Ortega</u> , 40 N.Y.3d 463 (2023) .....	1
<u>People v. Wald</u> , 215 A.D.3d 497 (1st Dep’t 2023) .....	1

## REPLY BRIEF FOR PETITIONER

The question presented is “[w]hether a certified autopsy report—created as part of a homicide investigation and asserting that the cause of death was homicide—is ‘testimonial.’” see Petition i. The State does not dispute that this question is extremely important, and one that has left state courts intractably divided. Instead, the State argues that because the New York Court of Appeals held, in People v. Ortega, 40 N.Y.3d 463 (2023), that “certified autopsy reports are testimonial under the Confrontation Clause,” that court has “already agreed with the legal argument Petitioner [is asking] this Court to adopt” (see Br. In Opp. p. 9). The State’s argument is baseless.

Although the New York Court of Appeals has found that the contents of an autopsy report may be testimonial under certain circumstances, Ortega, 40 N.Y.3d at 471-75, it also stuck to the flawed theory that there is an exception to the Sixth Amendment for so-called “primary data” and “objective facts.” Id. According to the New York Court of Appeals, “standard anatomical measurements devoid of the subjective skill and judgment of the performing examiner” are not subject to the Sixth Amendment. Id. And, in denying leave here, the New York Court of Appeals let stand the holding of the appellate division that, “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.” People v. Wald, 215 A.D.3d 497 (1st Dep’t 2023).

Thus, contrary to the State’s argument, the Ortega decision did not agree “with the legal argument Petitioner [is asking] this Court to adopt,” (see Br. In Opp.

p. 9), but left open a deep conflict among the states over whether reports “created as part of a homicide investigation and asserting that the cause of death was homicide” are testimonial, without exception.

The State’s argument that this case is not a proper vehicle for review of this question is also unavailing. According to the State, because it 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,’” “[t]his Court’s further review is not needed to confirm what the New York Court of Appeals has already held” (Br. in Opposition at p. 10). That claim blatantly misstates the record. Quoting Ortega, the People, in objecting to Petitioner’s supplemental leave application, specifically argued:

Contrary to defendant’s claim, however, Ortega does not support a finding of error here, since the medical examiner who testified at trial permissibly based her opinion on an ‘independent analysis [of] the primary data (see Letter from Philip V. Tisne dated February 21, 2024).

The conflict over the status of autopsy reports created under the circumstances here is now deeply entrenched. Numerous state high courts have weighed in, (see Petition at pp. 9-13) 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.

## CONCLUSION

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

Respectfully submitted,

A handwritten signature in cursive script that reads "Jan Hoth".

Jan Hoth  
*Counsel of Record*  
Center for Appellate Litigation  
120 Wall Street, 28th Floor  
New York, NY 10005  
(212) 577-2523, ext. 532  
[jhoth@cfal.org](mailto:jhoth@cfal.org)

December 3, 2024

No. 24-5544

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

**REPLY BRIEF FOR PETITIONER**

---

**CERTIFICATE OF SERVICE**

---

The undersigned certifies that she has, this 3rd day of December 2024, caused one copy of the foregoing reply Brief for Petitioner to be served on the below-named counsel for Respondent by first-class mail, postage prepaid, and by email, and further certifies that all parties required to be served have been served:

Hon. Alvin L. Bragg, Jr.  
District Attorney, New York County  
One Hogan Place  
New York, New York, 10013  
ATTN: ADA Philip Tisne  
[tisnep@dany.nyc.gov](mailto:tisnep@dany.nyc.gov)

  
\_\_\_\_\_  
JAN HOTH  
*Counsel for Petitioner*