

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EVAN WALD,

Applicant,

– against –

STATE OF NEW YORK,

Respondent.

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

**APPLICATION FOR EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR WRIT OF CERTIORARI**

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

**APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR WRIT OF CERTIORARI**

TO: Justice Sonia Sotomayor, Circuit Justice for the United States Court of Appeals for the Second Circuit:

Applicant Evan Wald respectfully requests an extension of thirty (30) days in which to file his petition for a writ of certiorari challenging the New York Appellate Division’s decision in *People v. Wald*, 215 A.D.3d 497 (2023), *leave to appeal denied*, 41 N.Y.3d 1005 (May 21, 2024), a copy of which is attached herewith as Appendix A (App. 1a-3a). This Court has jurisdiction to review the federal constitutional question presented under 28 U.S.C. § 1257(a).

In support of this application, Applicant provides the following information:

1. The New York Court of Appeals denied applicant’s timely petition for leave to appeal on May 21, 2024 (App. 4a). Accordingly, the petition for certiorari is currently due on August 19, 2024. Granting this extension would make it due on September 18, 2024.

2. This case is a serious candidate for certiorari review. It raises the important question of whether an autopsy report created in conjunction with a homicide investigation and finding the cause of death to be a homicide is “testimonial” under the Confrontation Clause. *See* U.S. Const. Amend. VI; *Crawford v. Washington*, 541 U.S. 36 (2004).

3. “Due to the lack of clear guidance on this issue,” state and federal courts are deeply “split over whether an autopsy report is testimonial hearsay.” *Ackerman v. State*, 51 N.E.3d 171, 180 (Ind. 2016).

Some courts have held that autopsy reports are categorically nontestimonial. *See State v. Maxwell*, 9 N.E.3d 930, 945-952 (Ohio 2014), *cert. denied*, 134 S. Ct. 1400 (2015); *State v. Medina*, 306 P.3d 48, 62-64 (Ariz. 2013), *cert. denied*, 134 S. Ct. 1309 (2014); *People v. Leach*, 980 N.E.2d 570, 582-593-94 (Ill. 2012).

On the other hand, numerous state high courts, and several federal circuit courts, have held that an autopsy report created “in the case of a violent or suspicious death is indeed testimonial for Sixth Amendment confrontation purposes.” *Miller v. State*, 313 P.3d 934, 969 (Okla. App. 2013) (internal quotation marks and citation omitted); *accord State v. Bass*, 224 N.J. 285, 316-20 (N.J. 2016); *State v. Navarette*, 294 P.3d 435, 440-43 (N.M. 2013), *cert. denied*, 134 S. Ct. 64 (2013); *Commonwealth v. Carr*, 464 Mass. 855, 876 (Mass. 2013); *State v. Kennedy*, 735 S.E.2d 905, 916-17 (W. Va. 2012); *United States v. Ignasiak*, 667 F.3d 1217, 1229-35 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30, 69-74 (D.C. Cir. 2012). Applying this Court’s “primary purpose” test, *see Davis v. Washington*, 547 U.S. 813, 822 (2006), these courts have held that if the medical examiner believes a crime has induced the death, the report’s primary purpose is

to “preserv[e] evidence for criminal litigation.” *Navarette*, 294 P.3d at 440 (quoting *State v. Jaramillo*, 272 P.3d 682, 686 (N.M. Ct. App. 2011)).

Finally, a few state high courts have adopted a middle ground. *See State v. Lui*, 315 P.3d 493, 510-11 (Wash. 2014) (*en banc*) (holding that statements in autopsy reports are testimonial if they have an “inculpatory effect,” but suggesting that such statements might not be testimonial if incriminating only in combination with other evidence); *People v. Dungo*, 286 P.3d 442, 449-50 (Cal. 2012) (holding that “anatomical and physiological observations” in an autopsy report are not testimonial, but suggesting that opinions regarding cause of death might be).

4. Resolution of this three-way conflict is critical to the proper administration of the criminal justice system. Autopsy reports play a central evidentiary role in a large number of homicide trials. And this Court has already recognized that forensic analysts are sometimes “incompetent,” or even “fraudulent.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009). Additionally, “[a] forensic analyst,” “responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.” *Id.* at 318. It is thus vital that defendants have the opportunity to cross-examine the authors of forensic reports, in order to “expose any lapses or lies on the certifying analyst’s part.” *Bullcoming*

v. New Mexico, 564 U.S. 647, 661-62 (2011).

5. This case is an ideal vehicle for resolving the question presented. The State’s trial theory was that Applicant caused the victim’s death by stabbing him multiple times with the intent to kill or cause serious physical injury. To establish the cause of death and the requisite *mens rea*, the State introduced the autopsy report—which concluded that the cause of death was a stabbing and detailed the number and depth of the stab wounds—directly into evidence.

Although the medical examiner who created the autopsy report was not unavailable, the State refused to produce him, instead proffering a surrogate witness who played no role in the autopsy. Applicant comprehensively objected to this procedure on Sixth Amendment grounds. He contended that the autopsy report was testimonial, thus requiring the State to produce the report’s author for live confrontation. The trial court overruled that objection, relying on New York Court of Appeals precedent, *People v. Freycinet*, 11 N.Y.3d 38 (2008), which had found autopsy reports nontestimonial. Applicant thus had no opportunity to cross-examine the medical examiner’s conclusions and observations.

6. This application is not filed for purposes of delay. The undersigned’s current case load justifies this request for a 30-day extension of time. Undersigned counsel, lead appellate counsel at the Center for Appellate Litigation, a

public-defense-appellate firm, has been assigned to numerous appeals of felony convictions and must file briefs and/or post-conviction motions in those matters in the Appellate Division First Department or trial courts.

RESPECTFULLY SUBMITTED this 9th day of August 2024.

By: Jan Hoth
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

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ORDER DENYING LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS
(MAY 21, 2024) 4A

App. 1a
Supreme Court of the State of New York
Appellate Division, First Judicial Department

Webber, J.P., Friedman, Singh, Scarpulla, Rodriguez, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Ind. No. 2399/17
Case No. 2019-03872

-against-

EVAN WALD,
Defendant-Appellant.

Mark W. Zeno, Center for Appellate Litigation, New York (Jan Hoth of counsel), for appellant.

Alvin L. Bragg, Jr., District Attorney, New York (Philip V. Tisne of counsel), for respondent.

Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered July 8, 2019, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Supreme Court properly denied defendant's motion to dismiss the indictment on the ground of preindictment delay (*see People v Singer*, 44 NY2d 241 [1978]; *People v Taranovich*, 37 NY2d 442, 445 [1975]). Preliminarily, we note that the majority of defendant's arguments are similar to arguments this Court previously considered and rejected on the codefendant's appeal (*People v Pilmar*, 193 AD3d 467 [1st Dept 2021], *lv denied* 37 NY3d 967 [2021]). We have considered those arguments that are specific to defendant and find no basis to reach a different result.

Although the 21-year delay was significant, it was not due to bad faith or to gain a tactical advantage. Instead, it was the result of the prosecutor's efforts to acquire

additional evidence to prove defendant's guilt beyond a reasonable doubt. The investigative delays were satisfactorily explained and were permissible exercises of prosecutorial discretion (*see People v Decker*, 13 NY3d 12, 14 [2009]).

The People's delay here is readily distinguishable from the delay recently addressed by the Court of Appeals in *People v Regan*, _NY3d_, 2023 NY Slip Op 01353 [2023]). There, the Court found that the four-year preindictment delay on charges of sexual assault was unreasonable. The Court noted that the People had amassed the majority of the evidence, save for obtaining a DNA sample from the defendant, early in the investigation of the case. The People apparently conceded that their failure to take the necessary steps for 38 months, to secure a DNA sample from the defendant was based in part on their incompetence. In contrast, here, the record demonstrates that the People delayed commencement of the prosecution of this homicide to obtain additional evidence to strengthen their case, which consisted almost entirely of circumstantial evidence. In the ensuing years, the record indicates that reasonable investigative steps were taken to gather evidence for an indictment, including reinterviewing witnesses and conducting additional forensic testing. Once this new information was obtained, including information concerning the whereabouts of the codefendant prior to and after the homicide, as well as a possible motive for the crime, the People sought an indictment.

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 US 36, 53-54 [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 NY3d 294, 315 [2016]; *People v Freycinet*, 11 NY3d 38, 42 [2008]; *People v Fuller*, 210 AD3d 597, 599 [1st Dept 2022]; *People v Ortega*, 202 AD3d 489, 491-492 [1st Dept 2022], *lv granted* 38 NY3d 1073 [2022]).

The verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the jury’s credibility determinations, or its evaluation of the extensive circumstantial evidence establishing defendant’s guilt.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 18, 2023



Susanna Molina Rojas
Clerk of the Court

State of New York Court of Appeals

BEFORE: HON. SHIRLEY TROUTMAN,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

**ORDER
DENYING
LEAVE**

EVAN WALD,

Appellant.


Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: 5/21/2024

at Buffalo, New York


SHIRLEY TROUTMAN
Associate Judge

*Description of Order: Order of the Supreme Court, Appellate Division, First Department, entered April 18, 2023, affirming a judgment of the Supreme Court, New York County, rendered July 8, 2019.

IN THE
SUPREME COURT OF THE UNITED STATES

EVAN WALD,

Applicant,

– against –

STATE OF NEW YORK,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2024, I served a copy of the application for an extension of time within which to file a petition for a writ of certiorari by email and first-class mail on the following: Alvin L. Bragg, Jr., Office of the District Attorney, New York County, Appeals Division, ATTN: Philip V. Tisne, One Hogan Place, New York, NY 10013,

TisneP@dany.nyc.gov

Jan Hoth

Jan Hoth
Counsel to Applicant