25-6755

ORIGINAL

No. 25A496

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT FELDMAN — PETITIONER
(Your Name)

vs.

STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF COLORADO

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Feldman DOC#193950
Sterling correctional facility
P.O Box 6000
Sterling Colorado 80751

QUESTION(S) PRESENTED

In a matter of first impression whether the district attorney may charge a person for causing a death that the coroner declines to find was a homicide, after a forensic pathologist and chief medical examiner concur that there was no foul play and issue a death certificate?

Whether this is in error of the sub-delegation doctrine violating Colo. Const. art. VI §13, Colo. Const. art. XIV, §8 C.R.S 30-10-606, usurping the Coroners authority?

List of parties

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Colorado Denver District Court Case No. 18CR1121

The Colorado Court of appeals Case No. 22CA0792 issued its opinion November 7, 2024 Judgment affirmed The Supreme Court of Colorado No.24SC766 issued its opinion on August 4, 2025 Denied EN BANC.

Pursuant to Supreme Court Rule 29.2, Petitioner Robert Feldman to proceed Pro se Is submitted by and inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746

Certificate of compliance

I hereby certify that this writ complies withal the requirement of USCS Supreme Ct. R 10,11,12,13,14 Rule,29 Rule 33.2 Rule 34 and Rule 39 Including the formatting rule for a pro se, and incarcerated persons .

The brief complies with applicable word limits set forth in USCS Supreme Ct. R 33(g)

It contains 6862 words (petition shall not exceed 9,000 word)

I acknowledge this court may strike my petition if it fails to comply with any of the requirements of USCS Supreme Ct. R 33(g)

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IN THE

SUPREME COURT OF THE

UNITED STATES PETITION FOR

WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinion Below

The Colorado Court of appeals issued its opinion November 7, 2024 Judgment affirmed The Supreme Court of Colorado issued its opinion on August 4, 2025 Denied EN BANC. Absent and extension of time, the petition for writ of certiorari would be due on November 4, 2025.

JURISDICTION

☒ For cases from state courts:

The date on which the highest state court decided my case was August 4, 2025. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date:

_____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____ _____(date) on_(date) in Application No._____A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States Amendment V

Criminal actions—Provisions concerning—Due process of law and just compensation clauses. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States Amendment VI

Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Constitution of the United States Amendment X

Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Constitution of the United States Amendment XIV

Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Paramedics arrived at the Denver home of Robert Feldman and found him hysterically trying to save his 44- year –old wife, Mrs. Stacy Feldman1, from cardiac arrest. TR 4/6/22 (PM) pp84:5-86:17, 161:5-18. His efforts were ultimately unsuccessful, and the official cause of Stacy's Death remains undetermined.

Mr. Feldman told police, investigators, and doctors that Stacy was very ill at the time of her death. TR 4/7/22 pp 158:2-4, 44:14-45:13; TR 4/13/22 (PM)p 117:14-15. He also explained that , that around 9:00 a.m., he took their two children to Hebrew school, came home around lunch, worked out , and then returned to pick up the kids at 1:05 p.m. TR 4/12/22 pp192:6-13, 200:16. Mr. Feldman and his children then attended a Purim Carnival and went to a bike shop, returning home around 3:00 p.m. TR 4/15/22 pp 253:10-256:4. Mr. Feldman then went upstairs and found Stacy collapsed in the bathtub with the shower running. TR4/6/22 (PM) p166:1-4.

Mr. Feldman was frantic.TR 4/6/22 pp 84:5-85:24.he struggled to remove Stacy's 178-pound wet body from the bathtub, slipping and dropping her several times before dragging her from the deep bathtub, over its metal rim and onto the hard bathroom floor:

Mr. Feldman called 911 and attempted resuscitative efforts, but he had no experience performing CPR and injured Stacy's nose and mouth in his efforts to revive her. TR 4/6/22 (PM) pp 142:14-18 (paramedic testifying that individuals without training in CPR usually perform it very poorly); TR 4/7/22 pp246:16-249:11 (inexperienced individuals can injure someone while attempting CPR); TR

4/14/22(PM) pp 114:17-116:11. Paramedics arrived within minutes and dragged Stacy by her wrists and ankles from the bathroom into the adjoin master bedroom. TR4/6/22(PM) pp 85:16-87:15, 110:2. They later remarked that neither the bedroom, nor the bathroom revealed any sign of a struggle, and Mr. Feldman had no injuries to his face, neck, hands, or legs. TR $/7/22 pp 13:5-12, 123:13-25, 127:5-20: TR 4/12/22 pp 220:18-221:23,228:19-14. Paramedics also observed some blood in the bathtub consistent with a hard fall, that a shower caddy had toppled over, that significant water was on the bathroom floor (consistent with pulling Stacy from the tub), and that Stacy was cool to the touch but had a warm core. TR 4/7/22 pp 250:20-241:5, 242:9-17, 245:2-12, 246:2-6. There were no signs of rigor mortis, which typically begins an hour after death, and it thus appeared Stacy had only recently collapsed. TR 2/6/22 (AM) p 118:1-6; TR 4/7/22 p 249:13-22; TR 4/14/22 (PM) p 133:11-24.

After bringing Stacy into the bedroom, paramedics toweled off her body and tried to restart her heart through CPR and intravenous adrenaline shots. TR 4/7/22 pp216:3-232:7, 246:16-18. They also intubated Stacy to manually force oxygen into her lungs, removing about 100cc's of water from her lungs before doing so. TR 4/7/22 pp 251:12-252:1, 254:1-15, 270:24-271:25. Paramedics noted that this was "a lot" of fluid, suggesting Stacy may have drowned after her fall. *Id.*

Unfortunately, paramedics pronounced Stacy deceased after approximately 35 minutes of continuous resuscitative efforts. TR 4/6/22(PM)p 118:7-10.

Mr. Feldman appeared to be in a state of shock but cooperated with multiple

interviews and consented to a unfettered search of his home. TR 4/7/22 pp 5:22, 121:9-122:2; TR 4/12/22 p 124:12-22. He briefly hesitated to authorize an autopsy under Jewish law, but quickly consented to it TR 4/7/22 pp 80:19-81:16.

The next day, an autopsy was performed at the Denver County Medical Examiner's Office by forensic pathologist Dr. Kelly Kobylanski, under the supervision of forensic pathologist Dr. Meredith Frank. TR 4/15/22 pp 138:13-142:7. At the time of Stacy's autopsy, Dr. Kobylanski was not board- certified in forensic pathology; she was board-certified generally, had completed her residency, and was near the end of a year-long fellowship with Dr. Frank. TR 4/15/22 pp 128:15-136:18, 153:16-22. She is now a board-certified forensic pathologist in California. *Id.*
The autopsy showed several clusters of injuries on Stacy's body; a chipped tooth, light bruising on her lips and nose (potentially from CPR, her intubation , or other postmortem trauma), and bruises and small abrasions on both hands, arms, and torso. TR 4/7/22 pp 76:1-78; 20; TR 4/15/22 pp 88:5-91:11. The forensic pathologists agreed Stacy's injuries were superficial and occurred in very close proximity to her death. TR 4/7/22pp 87:11-91:11, 105:17-106:14, 108:2-19; TR 4/15/22pp 150:2-21,171:17-21. They also agreed these injuries were consistent with Stacy collapsing in the shower and, thereafter, Mr. Feldman struggling to pull her form the bathtub in addition to the invasive and prolong resuscitative efforts. TR 4/15/22 pp 113:3-117:1, 207: 21-212:11.

Notably, DR.'s Frank and Kobylanski discovered that Stacy's heart was twice the size of a normal heart – It weighed 420 grams, and the average weight of

a woman's heart is between 170 and 240grams. TR 4/14/22 (PM) pp 143:19-144:7. An enlarged heart can cause fatal cardiac arrhythmia. TR 4/15/22 pp 87:11 88:7, 239:3-17.

In addition, Stacy's Family and friends were aware that she had a variety of chronic health diagnoses; she was obese and had chronic kidney disease, an autoimmune disease, and herniated vertebrae. TR 4/15/22 pp 211:13-212:11. Stacy was also prescribed numerous controlled substances, including narcotics, opiates, and benzodiazepines at the time of her death. TR 4/15/22 pp 211:13-212:11. Specifically, she took Enbrel for rheumatoid arthritis, Ambien for sleep, Zofran for nausea, citalopram hydro bromide for depression, Guaifenesin codeine for a cold, Valium for anxiety, and Oxycodone for pain. TR 4/8/22pp 109:20-113:5. Stacy had also undergone a medical procedure just days before her death and took versed and Fentanyl for her recovery. *Id.* At 121:17-122:19. Even the Feldman's housekeeper testified that Stacy had been bedridden for the month prior to her death. TR 4/13/22 (PM) p 117:14-15. Together, Stacy's conditions further strained her enlarged heart. TR 4/15/22 pp 211:13-212:11,213:6-11.

Of equal importance to what forensic pathologists observed was what they did *not* observe. Specifically, Drs. Frank and Kobylanski did not detect any evidence of strangulation or smothering- such as extensive Petechiae in Stacy's eyes, mouth, or ears, or ligature, compression marks, or bruising on her neck—that would explain her death. TR 4/15/22 pp 78:11-17, 240:20-249:11. Instead, Stacy's injuries were consistent with multiple unsuccessful attempts to pull her from the bathtub

and over its metal railing. *Id.*

For these reasons, Drs. Frank and Kobylanski certified Stacy's Cause and manner of death as "undetermined," an official diagnosis, applying a reasonable degree of medical certainty. TR 4/15/22 pp 76:4-77:8, 192:11-16. They made their diagnosis in consultation with the Chief Medical Examiner, Dr. James Caruso. *Id.*

Based on the autopsy report, no charges were filed against Mr. Feldman. In the following years, however, prosecutors pressured the forensic pathologist to amend their diagnoses to fit a homicidal narrative of Stacy's death. To date, the forensic pathologist have refused to do so. TR 4/15/22 pp99:10-13, 179:10-12.

The primary basis for this persistence was that, on the morning of Stacy's death, Susan McBride contacted Stacy and confessed to recently having a one-night stand with Mr. Feldman. TR3/7/22 p 327:14-23; TR4/8/22 pp311:18-312:1 McBride later claimed that, during their conversation, Stacy was calm, said Mr. Feldman had done this before, and remarked, "I'm done with him." TR 4/8/22 pp 17:2-19:25.

There were three major problems with the prosecution's theory that Mr. Feldman was motivated to kill Stacy based on her discovery of the McBride affair.

First, McBride had ample reason to embellish her account. She admitted she felt scorned by Mr. Feldman. TR 4/8/22 pp 36:12 -37:25. She was also the only person with access to her alleged correspondence with Stacy and the substance of their alleged phone conversation. TR 4/12/22 pp 67:1-67:17. For instance, Google had no record of McBride's alleged emails with Stacy, but had other emails. *Id.*

Second, Stacy already knew Mr. Feldman was unfaithful during their

marriage and had not only forgiven him but had openly laughed about it in mixed company, indicating their marriage was in a good place and infidelity was not a Deal- breaker. TR4/7/22 p 183:5-7; TR 4/12/22 pp 133:3 -136:21, 319:22 322:14. Stacy Never filed for divorce based on past affairs, and when the couple had briefly separated the year before Stacy's death, there was no animosity between them. TR 4/12/22 pp53:16:19; TR 4/8/22 pp 164:12-169:21. In fact, the two continued to amicably live together and worked well as co-parents Nothing to suggest Mr. Feldman would kill Stacy if they divorced TR 4/12/22 pp 99:2-20,133:3-136:21.

Finally, after speaking to McBride, Stacy spoke with several family members and friends and didn't mention anything about the affair or leaving Mr. Feldman, nor did she research or contact divorce lawyers. TR 4/12/22 pp 53:1-54:25, 158:11-159:2. Even Stacy's immediate neighbor, Sarah Olney, didn't hear any commotion, fighting or calls for help from the Feldman house that day. TR 4/8/22 pp 168:6-169:21.

Apart from infidelity, the prosecution theorized that Mr. Feldman killed Stacy for her life insurance policy. Notably, however, Mr. Feldman was the primary breadwinner, was celebrating his most successful year at work, and received his highest monthly earnings on record the day before Stacy's death. TR 4/12/22 pp 249:8-251:3 (Mr. Feldman was on track to make $200,000.00 in 2015); TR 4/13/22 (AM) pp 37:16-28:5. Moreover, Stacy took out an even larger life insurance policy on Mr. Feldman, further undermining this theory. TR 4/13/22 (PM) p 99:18 -22; TR4/12/22 p 80:5; EX62

The prosecution was similarly dissatisfied with Mr. Feldman's explanation for his whereabouts on the day of Stacy's Death. Mr. Feldman said he was working out and completing small chores at home for several hours without seeing Stacy. TR 4/8/22 p 240:12 -20; 3/12/22 p 216:1-10. Meanwhile, the prosecution believed that, during this time, Mr. Feldman killed Stacy and staged her death. It pointed to evidence that when no o9ne picked up the Feldman children from school at noon Staff called Stacy and Mr. Feldman several times but neither answered. TR 4/12/22 pp 25:21-29:12, 195:25-200:16. And, once Mr. Feldman answered his phone, he said he was working out, believed Emily smith was picking up his children, and arrived at the synagogue nearly an hour later. *Id.*

This theory was also weak, however, because school staff admitted many parents forgot their children that day due to the Purim carnival and, in fact, Mr. Feldman had called Stacy after learning no one picked up their children, undermining the prosecution's suggestion he killed Stacy beforehand. TR 4/8/22 pp 309:1-310:24. Also consistent with Mr. Feldman's account was evidence that he was exercising that afternoon; witnesses acknowledged he was active around the neighborhood (cycling and walking his dog), generally trying to improve his fitness, and wearing athletic clothes when he arrived at the synagogue. TR 4/8/22 pp 154:14 -24, 158:2-5,159:13-23; TR 4/12/22 pp 136:12 -21,139:8.

Yet the prosecution persisted. TR 4/13/22 (PM) pp 155:20-158:7. In a highly unusual move, Prosecution paid a Kentucky Doctor, William Smock, to render a separate opinion from the Denver County Medical Examiner's Office regarding

Stacy's cause and manner of death. TR 4/14/22 (PM) p 65:21-22. Smock is not a forensic pathologist, is not board-certified in any medical field, did not participate in Stacy's autopsy, and has not written any substantive scholarship in the field of forensic pathology. TR 4/14/22 (AM) pp 67:10-83:20. In fact, Smock had never performed an autopsy. Due to his lack of qualification, Smock was not bound by the national standards for medical examiners required by Colorado Law. *Id.* Nevertheless, he opined- based on his own notions of science and criminology—on Stacy's cause and manner of death. *Id.*

Principally, Smock deviated from the unified diagnoses of the board- certified, Colorado forensic pathologist and claimed Stacy's death was a homicide by asphyxiation and /or suffocation. TR4/14/22 (AM) p 109:6-13; TR 4/14/22 (PM) p 47:6-10. Smock surmised Stacy was killed by someone sitting on her chest, pinning her arms with his knees, and smothering her mouth. TR 4/14/22 (AM) pp 135:24 - 137:10.

After getting Smock's opinion- nearly three years after Stacy's death – the prosecution charged Mr. Feldman with one count of First- degree murder. CF, p13.

Mr. Feldman pleaded not guilty and, at trial, relied on the testimony from the board-certified, Colorado Forensic pathologists who rejected Smock's Claims. TR4/15/22 pp 108:2-19, 110:1-6, 115:18-116:1, 176:18-178:16, 196:10-197:10,202:8-205:14.

For example, Dr. Leon Kelly, a veteran forensic pathologist and elected Chief Medical Examiner for El Paso County, Colorado, testified that the shape of

the bruises on Stacy's arms were not only Consistent with Mr. Feldman lifting Stacy from the bathtub, but Inconsistent with Smock's theory that Mr. Feldman pinned her to the ground and smothered her. TR 4/15/22pp 183:20-192:3, 200:1-203:20.

Dr. Kelly also agreed with Drs. Frank and Kobylanski that there was no evidence of strangulation or compression of Stacy's neck, testified there was no venous congestion or petechiae indicative of smothering or strangulation, and but - for Stacy's superficial injuries, he would've ruled her death as from natural causes. TR 4/15/22 pp 191:11-212:11. Dr. Kelly suggested that Smock's quest for "answers" clouded his judgment and view of the medical evidence. TR4/15/22 pp213:6-215:22. Dr. Kobylanski similarly rejected Smock's asphyxiation/suffocation theory testifying that- having actually observed and dissected Stacy's body – there were no external or internal injuries to Stacy's neck consistent with strangulation. TR4/15/22 pp 176:18 -179:12. Dr. Kobylanski also testified that she and her colleagues considered every possible explanation for Stacy's death, but ultimately concluded there was "no foul play." TR 4/15/22 pp 146-12-152:9.

Dr. Frank likewise testified that she was an expert in strangulation and there was no evidence to support Smock's theory because there was no bruising to Stacy's Neck, virtually no petechiae, and Stacy's Injuries were superficial, nonfatal, and consistent with a combination of falling, dropping, and protracted resuscitative efforts. TR 4/15/22 pp 68:18-91:11. Dr. Frank testified that she was very careful and that her autopsy report with Dr. Kobylanski was "excellent." TR 4.15.22 pp 75:2-

77:8, 88:5-14, 113:_117:1. Reinforcing Dr. Kelly's admonition on the need to be impartial, Dr. Frank recognized that sudden cardiac arrhythmias do happen and, unfortunately, Stacy's enlarged heart may have caused her death. *Id.*

Perhaps most compelling, each forensic pathologist testified that Mr. Feldman's affair with McBride had no effect on their conclusion on the cause and manner of Stacy's death. TR 4/15/22 pp 99:10-13, 162:1-12, 216:5-216:17. They were unified on the appropriateness of the autopsy procedure and reiterated that Smock never observed Stacy's body in person that he was not a forensic pathologist, and his theories were speculative. TR 4/15/22 pp 178:22-179:12.

Given this evidence, the lead prosecutor recognized how tenuous its case was: "[T]his is a tough case. Own coroner didn't say it was a homicide." Sealed, p 536. Only after hearing from Smock and a parade of character witnesses did the jury convict Mr. Feldman as charged. TR 4/19/22 pp 162:18-21, 176:4-7. He was then sentenced to life in prison without the possibility of parole. *Id.*

REASONS FOR GRANTING THE PETITION

Why this court should Grant Review

1. **When the coroner declines to find that a death was a homicide, the district attorney may not charge a person for causing that death.**

This Court reviews constitutional issues de novo. *People v. Rodriguez*, 112 P. 3d 693, 695 (Colo. 2005). This issue is preserved. Mr. Feldman moved to dismiss the complaint based on the coroner's determination. (Sealed CF _ pp. 1-10) The State

conceded preservation, but the division wrongly said the issue was partly unpreserved, *Feldman*, ¶ 25. Whether the district attorney and coroner are in the same or different branches of government is not what matters.

District attorneys are found under the "Judicial Department," Colo. Const. art VI, §13, but this Court has said "the district attorney is an executive officer," Beacom In&For Seventeenth Jud. Dist., Adams Cty. V. Bd. Of Cty. Comm'rs of Adams Cty., 657 P.2d440, 445 (Colo. 1983), (citing *Tisdel v. Bd. Of Cty. Comm'rs of Bent Cty.,* 621 P.2d 1357 (Colo. 1980), and *People, By & Through VanMeveren v.Dist. Ct. In &For Larimer Cty.,* 527 P2d 50 (Colo 1974)). *Tisdel* merely said, "The District attorney is a state public officer."621 P.2d at1361 *VanMeveren* Said the "district attorney belongs to the executive branch," 527 P.2d at 338, Citing Minnesota authority, even though the Minnesota Constitution does not place district attorneys in the Judicial article, *cf.* Minn. Const. Ar. VI.

Either way, this prosecution proceeded in illegal contravention of the coroner's determination.

A. This is an important issue of first impression.

The published decision in this case allows a person to be prosecuted for murder notwithstanding the coroner's assessment that the cause and manner of the death is "undetermined." *Feldman*, ¶ ¶ 11-26. The division mainly analyzed Smock's testimony, not dismissal. *Id.* This fundamental question about how Colorado's government operates is one this Court should answer.

B. **The prosecution may not charge a person in contravention of the coroner's determination.**

1. **The coroner is a constitutional officer with substantial power.**

The Colorado Constitution mandates each county elect "one coroner." Colo. Const. art. XIV, §8; *see* Colo. Const. art XX §2 (permitting appointment or election in Denver); *see* also Denver Code of Ordinances, Title 1, Subtitle B (Charter) § 2.12.2 (A) (providing for coroner appointment). In 2002, the people allowed the General Assembly to regulate coroner qualifications and training, Colo. Const. art. .XIV, §8.7, and the regulation is now extensive, e.g., C.R.S. §§ 30-10-601.5 through - 601.9.

"The coroners' function is to investigate and determine whether a decedent has died from violent, unexplained causes, or under suspicious circumstances." *People ex rel. Kinsey v. Sumner,* 525 P.2d 512, 514 (colo.app.1974). The coroner may declare an individual dead upon finding she" has sustained irreversible cessation of circulatory and respiratory function." C.R.S. § 30-10-601(2).

When law enforcement discovers a death, they must notify the coroner. C.R.S.§30-10-606(1). When the coroner arrives, law enforcement "shall make all reasonable accommodations" so the coroner can "collect time –sensitive information such as body and scene temperature, "lividity and rigor." *Id.* When a death "may be unnatural," the result of violence, or whenever the coroner determines further inquiry is warranted, the coroner, "in cooperation with law enforcement, shall make all proper inquiry in order to determine the cause and manner of death." C.R.S. §30-

10-606 (1) (a)-(i). The coroner takes legal custody of bodies. C.R.S. §30-10-606 (1.2) (a). Generally, a body may not be removed from the scene without the coroner's approval. C.R.S. §30-10-606 (1.2)(b).

The coroner may summon citizens to make an inquest. §30-10-606 (3); *see*§30-10-606 (6) (a) (empowering coroner to obtain otherwise-privileged records); §30-10-608 (issue subpoenas and punish contempt) *see* also §30-10-612 (accept inquisition verdict). The coroner can order arrests. §30-10-613 through 616.

The coroner performs and can order forensic autopsies. §30-10-606(2); *see.* §30-10-606.5 (1) (a) (requiring autopsies comply with" the most recent version of the 'forensic autopsy performance standards' adopted by the national association of medical examiners"). Generally, a board-certified forensic pathologist must perform the autopsy. §30-10-606.5(2). "A forensic pathologist is a medical doctor who investigates and answers medical questions raised by the law." 3 F. Lee Bailey and Kenneth J. Fishman, Criminal trial Techniques§63:22 (Aug. 2024 update).

> "[T]he certificate of death shall be issued by the coroner," and the certificate must include the coroner's findings on "the manner of death, and if from external causes, the certificate shall state the manner of death." §30-10-606 (4) (a)-(b); *see* §25-2-110(5)(a) ("[T]he coroner shall determine the cause of death.....").

2. The coroner decides in consultation with the district attorney.

The district attorney has significant opportunities to influence the coroner's determination. The coroner oversight board includes a district-attorney member but

is always chaired by a coroner or forensic pathologist. §30-10-601 (1.2)(b).

The district attorney can demand an autopsy and prosecute the coroner for failing to perform one. §30-10-606 (2).

When the coroner uses her power to obtain privileged records, the district attorney is entitled to review certain of those records. §30-10-606(6)(a)-(c).

When "the possibility of criminal activity arises," the coroner "shall immediately consult with the district attorney." §30-10-606 91.2) (f).

3. Requiring the coroner to make a homicide determination before a murder charge is lodged protects people from junk prosecution where the stakes are most serious.

It makes sense that the People would require the government to first determine through a democratically-accountable, medically-informed process that a death was a homicide before putting a person's liberty on the line of or causing the Death. (This case does not implicate situations where the coroner lacks a body she can analyze .)It does not make sense to allow the district attorney to be heard throughout the coroner's process and then disregard the coroner's determination when he does not like the answer. The coroner and district attorney are constitutional officers of equal station. Both serve four-year terms. Colo. Const. art. VI, § 13; Colo. Const. art. XIV, §*. Where, as here, the judicial district is co-extensive with the county, the coroner and district attorney ultimately answer to the same electorate.

The division, however, treated the Coroner's determination as immaterial to

the exercise of the district attorney's "authority to prosecute crimes," i.e., ability to contest "how the victim died." Feldman, ¶21.

But a "homicide" means "the killing of a person by another." §18-3-101(1); *see*§18-3-102(1)(a) (requiring, as elements of first-degree murder, proof that the defendant "caused the death" of another person). The coroner's medical homicide finding opens the way to a constitutional criminal prosecution. Without that protection, prosecutors can turn to junk experts lacking democratic accountability and make allegations that carry lifetime incarcerations. *See U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554,565 (D.C. Cir. 2004) (explaining that delegations of authority to outside parties blur accountability and undermine democratic check on government decision-making).

Private parties, unlike district attorneys, are not government actors legally invited to participate in the coroner's process, so they are not bound by the coroner's determination. *See, e.g. Lockwood v. travelers Ins. Co.*, 498 P.2d 947,950-52 (Colo. 1972)(whether death was suicide or accident was for jury to decide in dispute between life insurer and beneficiary)
Meader v People, 497 P.2d 1010, 1012-13 (Colo.1972) (entertaining criminal defendant's evidentiary challenge to admission of death certificate).

a. This case is the ideal vehicle.

Mr. Feldman should not have been prosecuted for causing Stacy's death when the medical investigation found no homicide. Further, the prosecution's case was circumstantial and its theories weak.

II. The trial court reversibly erred by allowing Smock's testimony.

Abuse-of-discretion review governs. *Venalonzo v. People*, 2017 CO 9, ¶ 15. This issue is preserved. (Sealed CF _pp. 7-8; CF_pp.1743-49, 1823-28; TR_4/14/22(AM) pp.67-84.) The prosecution endorsed Smock – a medical doctor and self-described Kentucky "police surgeon" – as an expert. (CF-pp. 349-66, 1656.) Smock did not participate in Stacy's autopsy; he is not a forensic pathologist: he is not board-certified in anything; he did not comply with the standards of the Nation Association of Medical Examiners in forming his opinions;; his only peer reviewed article touching on pathology concerned motor-vehicle collisions. (TR _4/14/22 (AM) pp. 67-84.) Yet, the trial court allowed him to opine on "emergency medicine, clinical forensic medicine, injury mechanism, and strangulation." (*Id.* P.84:11-12.)

Smock claimed Stacy died of a homicidal assault and was then placed in the bathtub. (*Id.* pp. 109, 135-37; TR_4/14/22(PM) pp.17-18,33-35,45-47,153; CF _pp 1651-53.) He testified this was an easy case: Stacy's injuries were "not CPR related." (TR_4/14/22 (PM) pp. 109-111, 163-63,168-69,176.) He claimed forensic pathologists who don't have his training can gave a hard time diagnosing strangulation. (*Id.* p. 179:7-25.*But see* TR-4/15/22 pp. 106-08,153-55,175-76, 190-91 (on competency of Drs. Frank, Kobylanski, and Kelly to detect strangulation).)

Smock may be qualified to opine on injuries to people he treated, but he could

not speculate on Stacy's death. *See Boerste v. Ellis*, LLC, No. 3:17-CV-00298-BJB-CHL, 2021 WL 6101678, at *11-12(W.D. Ky. Sept. 29,2021) (Finding Smock qualified to opine on injuries of person he physically examined but recommending he be precluded from opining on the "fault of any actor related to this incident"), report and Recommendation adopted, No. 3:17-CV-298-BJB-CHL, 2021 WL 5449003(W.D. Ky. Nov. 22 ,2021); *People v. king,* 161 N.E.3d 143, 154 (ill. 2020) (Trial court "undeniably" erred by allowing crime-scene-analysis expert to opine on forensic pathology).

The division said Dr. Frank "agreed with" Smock that Stacy "more likely died from suffocation and strangulation that from cardiac arrest," *Feldman*, ¶31, but this is deeply misleading. Drs. Frank, Kobylanski and Caruso considered, *inter alia,* suffocation and strangulation, the enlarged heart, and drowning, but Dr. Franks, who ultimately made the determination, had reasons for ruling out strangulation – Stacy's underlying musculature and bones- and she stood by her "undetermined" classification. (TR_4/15/22 pp. 75-77, 91, 99,104, 109-10, 115-17.)

The division also took refuge in defense counsel's closing argument and cross-examination of Smock, *Feldman*, ¶ 31, but this overlooks " the long-settled principle that trial courts have an obligation to serve as gatekeepers regarding the propriety of expert testimony," *Lawrence v. People*, 2021 CO 28 ¶43; *see Harris v. People*, 888 P.2d 259,264 (Colo. 1995) (Jury misled by inadmissible evidence "cannot be considered impartial").

Smock was the prosecution's star witness, and his job was to usurp the jury's

role. The prosecution opened by saying that the evidence would show Stacy died "in the manner that DR. Smock will explain." (TR 4/6/22 (PM) p 49:4-5.) In closing, the prosecution told the jury, "you heard one strangulation expert, one," and he gave "a definitive answer." (TR-4/19/22 p. 66: 2-13; *Id.* pp 82-83 (Stating "Smock told you" that marks was made "during strangulation").) *See king,* 161N.E.3d at 155-56 (stressing that experts should not simply" shore up one party's theory" and that "drawing inference from crime scenes is the *sine qua non* of closing argument, just as it is the essential function of juries in criminal cases" and concluding prosecution had effectively called thirteenth juror to lend expert imprimatur to prosecution's evidentiary characterization). Smock's speculation was not harmless.

III. A mistrial was required when Stacy's aunt claimed Stacy told her that Mr. Feldman would kill Stacy before he'd let her leave.

Abuse-of-discretion review governs. *People v. Goldberry,* 509 P.2d 801,803-84 (Colo.1973). This issue is preserved. The prosecution used Stacy's Aunt, Linda Malman, to put on inadmissible evidence that likely swayed the trial:

> Q. Did [Stacy] ever express any fears about [Mr. Feldman]?
>
> A. yes, she did.
>
> Q. What did she say?
>
> A. She told me that when we had talked about her leaving and the

options of, you know, moving and whatnot, she chuckled and she said to me, He'll kill me before he lets me leave.

(TR_4/8/22 pp.212, 224.) Defense counsel objected under CRE 401,403,404 (b), and the court's prior ruling. (*Id.* p.224:17, *see* TR_8/27/20 pp. 44-75(prior ruling).) The court sustained the objection and told the jury to disregard the answer but denied a mistrial motion. (TR_4/8/22 pp224-26.) Malman "could not testify to this," but the trial court reasoned she "used the word *Chuckled*' so there was no cause for a mistrial. (*Id.* pp.226-27.)

Published authority now accepts the "Chuckle" test, but slipping in that word does not "suggest the victim was not serious." *Feldman,* ¶40. As another witness related with respect to a different Stacy remark, she said it in a "joking manner, but no really, kind of." (TR_4/12/22 p.322:8-9, *Id.* p322:13-14 ("I could tell it was sort of serious.").) Courts should have more emotional sophistication than the lower courts here. *See Courtney v. Oklahoma ex rel., Dep't of Pub. Safety*, 722F.3d 1216, 1224 (10th Cir. 2013) (observing laughter can signal extreme nervousness). The "chuckle" reference did not throw off this jury as to the testimony's importance. The Jury soon asked about the prohibited subjects. (CF_p.1991;TR_4/8/22 pp.268-70.) The division unpersuasively downplayed this as one juror and speculated other testimony may have raised the question. *Feldman,* ¶42.

When the prosecution exposes the jury to inadmissible evidence, relevant mistrial factors include "the nature of the inadmissible evidence, the

weight of admissible evidence of guilt, and the value of a cautionary instruction." *People v. Vigil*, 718 P.2d 496,505 (Colo. 1986). These factors support relief.

First, Malman testified that Mr. Feldman threatened to commit the act he stood trial for.(TR_4/8/22 p.228:6-7 (noting jury essentially heard "a threat to kill in a homicide case"). *See Goldberry*, 509 P.2d at 802 (concluding witness's statement that defendant planned to buy drugs in Texas required mistrial in receipt- of stolen-goods case); *People v. Jackson*, 2018 COA 79, ¶¶6-29 (affirming mistrial granted at prosecutor's request when witness revealed defendant's undisclosed alibi), aff'd on other grounds, 2020 CO 75.

Second, this is a thin, circumstantial case.

Third, the trial court's instruction was not effective. *See People v. Lee,* 630 P.2d 583,591(Colo. 1981) (cautionary instruction could not undo reference to miscarriage). The trial court said it "had to assume the jury will follow its instructions." (TR_4/8/22 p.270:20-23.) But confronted as it was by the jury question, the assumption made no sense. *See Leonardo V. People*, 728 P.2d 1252, 1256 (Colo. 1986) (explaining presumption that jury understands its instructions can be overcome).

The division also said the prosecution did not intentionally elicit the statement, even though the prosecutor was on notice and asked the question *Feldman, ¶41.* While intentional prosecutorial misconduct may

merit sanction, prosecutorial intentionality has nothing to do with the prejudicial effect of the improper evidence.

IV. Testimony from Mr. Feldman's neighbor was improper character and credibility evidence requiring reversal.

Abuse-of-Discretion Review governs evidentiary rulings, but de novo review governs "whether the court applied the correct legal standard," *People v. Montoya,* 2024 CO 20, ¶41.

This issue is preserved. The trial court allowed Mr. Feldman's neighbor, Ben Smith, to testify that Mr. Feldman expressed disingenuous emotions over Stacy's health about a week before her death. (TR_4/12/22 pp. 301-306.) Over objection, Smith testified:

- "I know him, and I know who he is," and Smith didn't "believe" Mr. Feldman's tears. (TR_ 4/13/22(AM) p.16:4-5.)
- "I did get the feeling something was really wrong, very bad, and it just.. Felt like that night I was-something bad was going to happen and I was going to be, like an alibi."(*Id.* p 18:14-25.)
- Smith repeated he "had a bad feeling" the week leading up to Stacy's death. (*Id.* p 45:2-46:1.)
- Smith felt "guilty" because he "could have done something" to prevent Stacy's death. (*Id.* p.46:8-20.)

The testimony was irrelevant, speculative, and inflammatory. Admitting it was

error under this Court's case:

"Neither lay nor expert witnesses may give opinion testimony that another witness was telling the truth on a specific occasion." *People v Wittrein*, 221 p.3d 1076, 1081 (Colo. 2009). This prohibition extend, for example, to comments on a witness's sincerity, *People v. Eppens,* 979 P.2d 14, 17 (Colo. 1999); believability, *People B. Gaffney*, 769 P.2d 1081, 1088 (Colo.1989); or predisposition to fabricating allegations, *People v. Snook*, 745 P.2d 647,649 (Colo. 1987).
People v Bobian, 2019 COA 183, ¶38 (Berger, j., specially concurring); *see* CRE 401,402,403,404,608,701.

The division said Smith gave a "Summary opinion of another person's behavior, motivation, intent, or state of mind" *Feldman,* ¶47 (looking to *People v. Acosta*, 2014 COA 82, ¶33). But this isn't like *Acosta*, where the witness characterized the defendant's physical behavior as "guilty-looking." *Acosta,* ¶64. Smith did not merely "characterize Feldman's demeanor." *Feldman*¶48. He testified he did not believe the demeanor he observed Mr. Feldman exhibit. *See* People *v. Hall*, 107 P.3d 1073, 1078 (Colo. App. 2004) (Testimony that other witnesses seemed "sincere" was improper).

This isn't like the case *Acosta* relied on, either. In *Elliot v. People*, 490 P.2d 687, 689 (Colo.1971), this Court allowed an eyewitness to testify" that the defendant ' was getting ready to hit'" the storeowner. And in *People v. Farley*, 712 P.2d 1116,1119-20 (Colo. App. 1985), aff'd, 746 P.2d 956 (Colo. 1987), a counselor permissibly testified the victim was in a "sate of shock."

Smith's testimony that Mr. Feldman's emotions were insincere, however, was an accusation that he was lying and was not harmless given the centrality of Mr. Feldman's credibility in this weak case.

V. This Court should review for cumulative error.

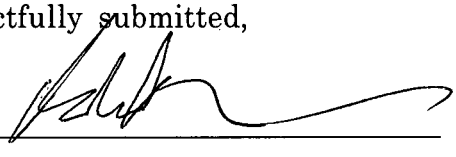
The division found no error, *Feldman,* ¶50, but this Court should review the cumulative-error question if it grants review of multiple issues, *see Howard-Walker v. People,* 2019 CO69, ¶¶ 23-26.

CONCLUSION

This Court should grant the Petition.

The petition for a writ of certiorari should be granted. In the equity of justice.

Respectfully submitted,



Date: 12-3-25