

No. 09-5434

IN THE SUPREME COURT OF THE UNITED STATES

THE UNITED STATES OF AMERICA,

Petitioner,

-against-

MICHAEL MORRISON,

Respondent.

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT**

BRIEF FOR RESPONDENT

TEAM 3R

QUESTIONS PRESENTED FOR REVIEW

- I. Whether Federal Rule of Evidence 702 precludes latent fingerprint testimony as a matter of law if it is not a scientifically proven theory with known error rates or objective standards, identification through subjective comparison involves confirmation bias, and there are no additional indicia of reliability?

- II. Whether the Sixth Amendment Confrontation Clause bars from evidence against a criminal defendant a testimonial autopsy report if the report was prepared twenty years early by a since-deceased medical examiner, the defendant never had a prior opportunity for cross-examination, and no hearsay exception applies?

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STATEMENT OF THE CASE

On December 16, 2008, Respondent Michael Morrison (“Dr. Morrison”) was indicted and charged with Second Degree Murder under 18 U.S.C. § 1111 and Involuntary Manslaughter under 18 U.S.C. § 1112 in relation to the death of Roxy Starr (“Ms. Starr”). (R at 5-6).

I. DR. MICHAEL MORRISON

Dr. Morrison is a licensed physician. (R. at 3). In 1967, Dr. Morrison received a PhD in pharmaceutical sciences and an M.D. from Boerum College of Medicine. (R. at 3). After receiving these degrees, Dr. Morrison served in the United States Army from 1967 until his discharge in 1971. (R. at 3). While in the military, Dr. Morrison worked on top-secret projects, including the development of E2379. (R. at 3). In 1984, Dr. Morrison was hired by music sensation Roxy Starr to be her personal physician. (R. at 3). Dr. Morrison served as Ms. Starr’s personal physician until she died in 1987. (R. at 4).

II. E2379

The substance known as E2379 was developed by the military for covert operations. (R. at 3). E2379 is a combination of a drug called alphacol and cocaine, which when ingested, causes elevated heart rates and induces behavioral changes. (R. at 3). E2379 also induces a temporary euphoric high and is highly addictive. (R. at 3). E2379, does not, however, cause immediate death. (R. at 3).

III. ROXY STARR

Ms. Starr was a popular singer songwriter who maintained a lucrative career in the late 1970s through the 1980s. (R. at 3). Throughout her career Ms. Starr sold millions of records, set records for concert attendance, television ratings, and record sales, and was inducted into multiple music halls of fame. (R. at 3).

Beginning in 1983, Ms. Starr became increasingly eccentric and refused to leave her yacht, the SS Rock Star. (R. at 3). In 1984, Ms. Starr hired Dr. Morrison as her personal physician which required him to live on the SS Rock Star fulltime. (R. at 3). While on the SS Rock Star, Dr. Morrison provided medical care to Ms. Starr. (R. at 3).

Unwilling to leave her yacht, in 1987 Ms. Starr embarked on world tour of the world's 15 largest ports. (R. at 4). She was to perform from aboard the SS Rock Star in each port. (R. at 4). The port of Boerum City was the first stop on the tour. (R. at 4).

On May 15, 1987, during the first week of the tour, the SS Rock Starr put out a distress call to Boerum Hospital, requesting helicopter transfer because Ms. Starr was thought to be having a heart attack. (R. at 4). When the helicopter arrived, Dr. Morrison informed paramedics of Ms. Starr's symptoms and medical history. (R. at 4). Ms. Starr was airlifted from the SS Rock Starr to Boerum Hospital where she was declared dead at 12:23PM. (R. at 4). On July 4, 1987, Ms. Starr was cremated. (R. at 4).

IV. DR. MARTINA PHELPS'S AUTOPSY REPORT

Prior to cremation, pursuant to state law, Dr. Martina Phelps ("Dr. Phelps"), a licensed medical examiner employed by the Boerum Office of the Chief Medical Examiner, performed an autopsy on Ms. Starr. (R. at 4, 98-108). Dr. Phelps created an autopsy report in conjunction with her examination. (R. at 4, 98-108). In her report, Dr. Phelps noted Ms. Starr's heart, brain, lungs and liver were enlarged and the descending coronary artery was narrowed. (R. at 4, 98-108). Dr. Phelps found a pill in Ms. Starr's stomach which contained alphachol and cocaine. (R. at 4, 98-108). Dr. Phelps determined Ms. Starr's ultimate cause of death was arteriosclerotic heart disease. (R. at 4, 98-108). Dr. Phelps did not report her findings to the District Attorney.

(R. at 4, 98-108). Dr. Phelps was the only medical examiner responsible for the case, and she died on April 13, 1996. (R. at 4, 98-108).

V. PRESERVATION OF THE SS ROCK STARR AND THE STARR FOUNDATION

After Ms. Starr's death, the SS Rock Starr was permanently anchored in Boerum Harbor as a museum and memorial dedicated to Ms. Starr. (R. at 4). The museum is owned and operated by the Starr Foundation, a for-profit corporation. (R. at 4). The interior of the yacht was preserved exactly as it was at the time of her death; all of the rooms and cabins were sealed off with plexiglass so the public could view Ms. Starr's living arrangements. (R. at 4). Thus, visitors could view the cabin but were prevented from tampering with or removing any items. (R. at 4).

VI. FOREVER ROXYSTARR.COM PUBLISHES STARR'S AUTOPSY REPORT

In June 2008, ForeverRoxyStarr.com, a website dedicated to Ms. Starr, obtained and published her autopsy report. (R. at 4). A blogger writing for the website questioned Ms. Starr's cause of death. (R. at 4). The blogger made claims that Ms. Starr's symptoms were caused by a drug designed by the military to mimic symptoms of a heart attack. (R. at 4).

VII. FBI INVESTIGATION OF STARR'S DEATH AND DR. MORRISON'S GRAND JURY INDICTMENT

On September 8, 2008, in response to calls for a new investigation of Ms. Starr's death, FBI agents searched the SS Rock Starr. (R. at 4-5). During their search, agents discovered an unlabeled vial containing four unmarked pills. (R. at 5). A single latent fingerprint was obtained from the pill vial. (R. at 5). The fingerprint matched Dr. Morrison's. (R. at 111). A chemical analysis of the four pills revealed a combination of alprazolam and cocaine. (R. at 5).

On December 16, 2008, Dr. Morrison was indicted by a federal grand jury and charged with Second Degree Murder under 18 U.S.C. § 1111 and Involuntary Manslaughter under 18 U.S.C. § 1112. (R. at 5-6).

VIII. THE DISTRICT COURT DECISION

On July 27, 2009, Dr. Morrison filed a pretrial motion in limine seeking (1) to preclude the Government from introducing latent fingerprint identification evidence under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); and (2) to preclude the autopsy report prepared by now deceased medical examiner, Dr. Phelps. (R. at 9, 68).

On August 18, 2009, after conducting a *Daubert* hearing and hearing arguments on the admissibility of the autopsy report, the United States District Court for the Southern District of Boerum granted Dr. Morrison's motion in limine in its entirety, holding (1) that latent fingerprint evidence is inadmissible under Rule 702 as a matter of law, and (2) the autopsy report is testimonial evidence and therefore inadmissible absent confrontation under the Sixth Amendment of the Constitution. (R. at 9, 68-69).

IX. THE COURT OF APPEALS DECISION

On October 22, 2009, the Court of Appeals for the Fourteenth Circuit affirmed the district court's decision to preclude the introduction of latent fingerprint evidence under Rule 702 and Dr. Phelps's autopsy on the grounds that it is testimonial hearsay. (R. at 111). With regards to admissibility of the latent fingerprint evidence, the Fourteenth Circuit simply stated that "[i]t would serve no purpose to rehash [the district court's] opinion and the order appealed from is AFFIRMED ON THE OPINION BELOW." (R. at 112). With regard to the autopsy report, the court explained that it was testimonial hearsay because it was sufficiently formal and Dr. Phelps

should have reasonably believed that her autopsy report could have been used in future prosecution. (R. at 115-19). Judge Johnson filed a dissent on both issues. (R. at 119-30).

On December 8, 2009, the Supreme Court certified both issues on appeal. (R. at 131).

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fourteenth Circuit properly concluded that Federal Rule of Evidence 702, which regulates the admission of expert testimony, precludes latent fingerprint testimony as a matter of law and that Federal Rule of Evidence 803(6), which regulates the admission of testimonial evidence, precludes Dr. Phelps's autopsy reports.

I. LATENT FINGERPRINTS

According to Federal Rule of Evidence 702, expert testimony is only admissible if it will assist the trier of fact to determine a fact in issue and is based on sufficient data and reliable principles. To help courts determine which types of expert testimony satisfy the admissibility requirements of Rule 702, this Court created a five-factor balancing test in *Daubert v. Merrell Dow Pharmaceuticals*. Under this test, courts are required to examine: (1) whether the particular theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has achieved general acceptance in the relevant scientific or expert community. Latent fingerprint identification testimony fails each of these five factors. This is largely in part because the error rate of latent print analysis is known, there are no objective standards for identification, and identification through subjective comparison involves confirmation bias.

In addition to applying the five-factor *Daubert* test, courts must also consider whether the expert testimony has any additional indicia of reliability. Here, the Government contends that long-term acceptance of latent print analysis and the adversarial nature of trial courts supports reliability. This is not the case, however. Long-term acceptance forces defendants to overcome an immense uphill burden when challenging latent print evidence in court and therefore runs

counter-intuitively against admissibility. Similarly, the adversary process of cross-examination and calling one's own experts is ineffective at curing reliability deficiencies because at the outset of trial, jurors almost conclusively presume that fingerprint identification is infallible. For these reasons, latent fingerprint identification testimony is unreliable and inadmissible under Federal Rule of Evidence 702.

II. CONFRONTATION CLAUSE

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Under this Court’s holding in *Crawford v. Washington*, the prosecution may not offer testimonial hearsay against a defendant unless the witness is unavailable and the defendant had prior opportunity for cross-examination. While this Court has yet to define “testimonial,” it has articulated various formulations of the term including: (1) statements which are functionally equivalent to live testimony; (2) formalized testimonial materials; (3) statements made under circumstances which would lead an objective witness to reasonably believe their statement would be available for later criminal prosecution; and (4) statements where the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. Dr. Phelps’s autopsy report regarding the death of Ms. Starr qualifies as testimonial under each of these core categories because it is a formal document that is functionally equivalent to live testimony, made to establish a past event with an eye toward criminal prosecution. Accordingly, Dr. Phelps’s autopsy report should not be admitted without confrontation.

Federal Rule of Evidence 803(6) allows for the admission of hearsay evidence when such evidence is a business record kept in the course of a regularly conducted business activity. A number of state and federal courts have erroneously admitted autopsy reports under this

exception. These courts are misguided in their analyses for two reasons. First, only records that were admissible when the exception was created in 1791 are admissible business records. As the exception was quite narrow in 1791, autopsy reports were not admissible. Second, even if it is determined that Dr. Phelps's autopsy report is a business record, admitting it as such goes against this Court's finding in *Crawford*. Specifically, the business record exception is based on the inherent reliability of business records. In *Crawford*, however, this Court ruled that "adequate indicia of reliability" is not enough for the admission of testimonial hearsay evidence. For these reasons, Dr. Phelps's autopsy report may not be admitted under the Sixth Amendment or the business records exception.

STANDARD OF REVIEW

This Court reviews evidentiary rulings for abuse of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997). When a trial court's evidentiary ruling is based solely on the resolution of a legal issue, however, the standard is *de novo*. *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1305-06 (5th Cir. 1991) (citing *Nachtsheim v. Been Aircraft Corp.*, 847 F.2d 1261, 1266 (7th Cir. 1988); *United States v. Pecora*, 798 F.2d 614, 626 (3d Cir. 1986), cert. denied, 479 U.S. 1064 (1987)). As such, both issues certified for appeal will be reviewed *de novo*.

ARGUMENT

I. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THAT LATENT FINGERPRINT TESTIMONY IS INADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 702 BECAUSE IT FAILS THE FIVE-FACTOR RELIABILITY TEST ESTABLISHED IN *DAUBERT V. MERRELL DOW PHARMACEUTICALS*.

The Court of Appeals for the Fourteenth Circuit properly precluded the Government from introducing latent fingerprint evidence under Federal Rule of Evidence 702 and the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Federal Rule of Evidence 702 allows for the admission of expert testimony only when it “will assist the trier of fact to determine a fact in issue” and (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. FED. R. EVID. 702. In *Daubert*, this Court agreed upon specific guidelines for the admission of scientific testimony under Federal Rule of Evidence 702.¹ These guidelines established that trial judges were responsible for “gatekeeping”, or keeping out expert testimony not based on scientific knowledge, and that expert testimony had to be both “relevant to the task at hand” and rest “on a reliable foundation.” *Daubert*, 509 U.S. at 584-87. To help courts determine whether testimony is based on a reliable foundation, this Court established a five-factor balancing test. *Id.* at 593-94. Latent fingerprint identification fails each of these five factors. In addition, there are no additional indicia of reliability outside the *Daubert* factors. For these reasons, this Court should find that expert testimony on latent fingerprints should be precluded under Federal Rule of Evidence 702.

¹ *Daubert*’s general holding regarding scientific testimony has since been expanded to include testimony based on ‘technical’ and ‘other specialized’ knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

A. LATENT FINGERPRINT TESTIMONY FAILS EACH OF THE FIVE *DAUBERT* FACTORS BECAUSE IT IS NOT A SCIENTIFICALLY PROVEN THEORY SUBJECT TO OBJECTIVE STANDARDS.

The five *Daubert* factors, while “flexible” and not an exhaustive checklist, must be used by courts to determine whether expert evidence is based on sufficient data and reliable methods and principles. *Id.* In *Kumho Tire*, this Court held that “a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.” 526 U.S. at 152. The five-factor test requires courts to examine: (1) whether the particular theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the technique has achieved general acceptance in the relevant scientific or expert community. *Id.* Latent fingerprint identification evidence fails each of these five inquires, most notably because it is not a scientifically proven theory subject to objective standards. For this reason, expert fingerprint testimony is inadmissible under Federal Rule of Evidence 702.

1. Latent fingerprint testimony fails the first *Daubert* factor because it has not been scientifically proven and there are a number of questions concerning its reliability.

The first, and perhaps most significant, *Daubert* factor is whether the particular theory in question can be and has been subjected to scientific testing. *Cummins v. Lyle Indus.*, 93 F.3d 362, 368 (7th Cir. 1996); *Daubert*, 509 U.S. at 593-94. This inquiry requires courts to consider “whether the proffered opinion has been subjected to the scientific method” in order to rule out “subjective belief or unsupported speculation.” *Cummins*, 93 F.3d at 368. Although it appears that latent fingerprint analysis is amenable to scientific testing, such testing has never been performed. *United States v. Sullivan*, 246 F.Supp.2d 700, 704 (E.D. Ky. 2003); National

Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 144 (Nat'l Acad. Press 2009) [hereinafter Nat'l Acad. Report].

Scientific scrutiny of latent print identification is especially necessary in light of a number of reliability concerns. (R. at 77).

- i. ACE-V, the dominant methodology used by latent fingerprint examiners, has never been tested for reliability.

Fingerprint examiners generally rely on a process known as “ACE-V” for determining whether a latent print matches a known print. Jennifer L. Mnookin, *The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate*, 7 LAW, PROBABILITY & RISK 127, 130 (2008).² ACE-V methodology involves four steps: (1) Analysis of the latent print and known print separately; (2) Comparison of the latent print and the known print side-by-side; (3) Evaluation of whether there is a match; and (4) Verification by a second examiner of whether there is a match. *United States v. Baines*, 573 F.3d 979, 983 (10th Cir. 2009); The Scientific Working Group for Friction Ridge Analysis, Study and Technology. The ACE-V process, as the Government concedes, has never been scientifically tested for reliability. *United States v. Crisp*, 324 F.3d 261, 286 (4th Cir. 2003); Nat'l Acad. Report 144; (R. at 80). Yet for over 100 years, courts have generally accepted latent print evidence without giving it much thought. Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint “Science” is Revealed*, 75 Cal. L. Rev. 605, 605 (2002); *but see Crisp*, 324 F.3d 261 (J. Michael, dissenting) (finding that

² Latent prints, according to their definition, are “concealed” or “dormant” prints, and are commonly used to describe fingerprints left at a crime scene. *State v. Rose*, No. K06-0545 at 11 (Md., Balt. Co. Cir. Oct. 19, 2007) *available at* <http://www.baltimoresun.com/media/acrobat/2007-10/33446162.pdf>.; BLACK'S LAW DICTIONARY 410 (3d ed. 1996). Known prints, on the other hand, are prints taken under controlled circumstances, such as during an arrest, and are positively linked to a particular person. *Rose*, No. K06-0545 at 13.

fingerprinting was problematic under *Daubert*); *United States v. Llera Plaza*, 179 F.Supp.2d 492 (E.D. Pa. 2002) (originally finding that fingerprinting failed *Daubert*, but then reversing upon rehearing). The long history of accepting latent fingerprint testimony is not sufficient to establish reliability. *Rose*, No. K06-0545 at 24. The first *Daubert* factor requires that the theory in question be subjected to scientific scrutiny and, to this day, latent fingerprint identification has not undergone adequate scrutiny.³

ii. Scientific testing is critical because there are a number of questions concerning the reliability of latent print identification.

Scientific scrutiny is especially necessary for latent print analysis because there are a number of concerns about its reliability. Nat'l Acad. Report 144. Without answers to these questions, courts and juries are unable to assess the reliability of an expert's assertions. Lyn Haber & Ralph Haber, *Scientific Validation of Fingerprint Evidence under Daubert*, LAW, PROBABILITY & RISK 87, 97 (2008). One question is whether latent prints provide sufficient data for an examiner to make a reliable match. (R. at 78). Latent prints are typically only a small fraction of the size, about 1/5th, of known prints. *United States v. Mitchell*, 365 F.3d 215, 220-221 (3d Cir. 2004).⁴ Latent prints are also subject to distortions as a result of variations in pressure and movement, and external factors such as dirt or other fingerprints. *Id.* Moreover,

³ The Government incorrectly argues that the adversarial process of trial courts eliminates the need for scientific testing of latent fingerprint analysis. (R. 80). The Government raises this argument again under the third *Daubert* inquiry and it will be addressed there. *Id.*

⁴ In addition, the smaller the print, the more likely it is to be common to more than one person. (R. 55-56). A study by Israeli fingerprint examiners found that prints from two different people had seven matching "ridge characteristics", or contours on the skin's surface. Epstein, 75 S. CAL. L. REV. at 611 (citing Y. Mark & D. Attias, *What Is the Minimum Standard of Characteristics for Fingerprint Identification?*, 22 *Fingerprint Whorld* [sic] 148, 148, 150 (Oct. 1996)). The examiners concluded from their findings that "'an expert with many years experience behind him' could make a false identification when comparing two such prints." *Id.*

latent prints, unlike known prints, are often left on irregular surfaces and have problems of blurring, smudging, and contamination from particles. *Id.* These problems beg a number of questions about the reliability of latent prints: how much of a latent print is needed for the print to remain unique? Must the latent print be the same size as the known print? And what effects to distortions and contaminants have on an examiners ability to make a match? Nat'l Acad. Report 144; (R. at 77).

Another question is how accurate are examiners when they conclude they have made a match? Fingerprint examiners, like all humans, are influenced by external factors and their own expectations. Mnookin, 7 LAW, PROBABILITY & RISK 129. This is especially true in the absence of formalized methodologies, such as with latent print analysis. *Id.* at 130. One example of human bias by fingerprint examiners occurred in the highly-publicized Brandon Mayfield scandal. *See* OFFICE OF THE INSPECTOR GEN. AND REVIEW DIV., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S HANDLING OF THE BRANDON MAYFIELD CASE, Mar. 2006, at 6-11, *available at* <http://www.usdoj.gov/oig/special/s0601/exec.pdf> (recognizing a number of errors in the FBI's latent fingerprint identification analysis). In this case, three top-notch, highly-experienced fingerprint examiners erroneously identified Oregon attorney, and Muslim-convert, Brandon Mayfield, as the 2004 Madrid train bomber. *Id.* This well-known case demonstrates that even highly-experienced fingerprint examiners are subject to human error.⁵

Problems associated with latent print identification, and questions concerning reliability that arise from those problems, make scientific scrutiny of latent print analysis even more necessary.

⁵ *Mayfield* is not the only case of an erroneous identification. *See, e.g., Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992).

2. Latent fingerprint testimony fails the second *Daubert* factor because the ACE-V process is has not been subjected to adequate peer review.

The second *Daubert* factor requires courts to examine whether the theory in question has been subjected to peer review and publication. 509 U.S. at 593-94. As this Court explained, “submission to the scrutiny of the scientific community is a component of ‘good science [because it] increases the likelihood that substantive flaws in methodology will be detected.’” *Id.* With latent fingerprint testimony, any evidence of peer review is insufficient to establish reliability. *Baines*, 573 at 990 (holding that evidence of peer review for latent print analysis “falls short of the rigors demanded by the ideals of science”). The Government argues that fourth verification step of the ACE-V process, which requires a second examiner to verify the first examiner’s findings, makes latent fingerprint identification reliable. (R. at 81). This is not the case, however, because the fourth verification step involves confirmation bias. *Rose*, No. K06-0545 at 30; *Id.* Under this step, the verifying examiner does not conduct a “blind” review of the original examiner’s finding. *Baines*, 573 F.3d at 983. Rather, the verifying examiner is presented with the original examiner’s notes and work product before evaluating whether there is a match. *Id.* Moreover, the reviewer is usually a colleague or supervisor in the same forensic lab and is aware of who the original examiner was. *Rose*, No. K06-0545 at 30. These problems with confirmation bias make the verification step of ACE-V an inadequate to establish reliability. *Rose*, No. K06-0545 at 30. As the Tenth Circuit stated, “the ACE-V process is not the independent peer review of true science.” *Baines*, 573 F.3d at 990.

3. Latent fingerprint testimony fails the third *Daubert* factor because the error rate of latent identification is unknown.

Under the third *Daubert* requirement, courts must consider the known or potential rate of error of the theory in question. *Daubert*, 509 U.S. at 594. As this Court explained, the focus of

the error must be “solely on principles and methodology.” *Id.* Error rates are usually established through scientific studies. *Id.* at 593-94. Since, as mentioned above, there have not been any scientific studies on latent print identification, the error rates of latent print analysis are unknown. (R. at 84). It is known, however, that the error rate is above zero.

The Government contends that the methodological error rate of latent print identification is zero. (R. at 82). The Government’s expert, Agent Stephen Meagher, testified that “the methodological error . . . [has] a zero error [rate]”, and claimed that when the process is followed perfectly, errors cannot occur. (R. at 33, 82-32). As the National Research Council stated, however, the assumption that “the method itself, if followed correctly (*i.e.*, by well-trained examiners properly using the method), has zero error rate . . . [is c]learly . . . unrealistic, and moreover, it does not lead to a process of method improvement.” Nat’l Acad. Report 143. The National Research Council’s statement is supported by numerous examples of latent fingerprint examiner error. The most well-known example is the Brandon Mayfield case discussed above, *supra* Part 1.ii. Another example is the false identification of Maria Maldonado. Richard Winton, *Mistakes in Fingerprint Analysis Trigger Review of Nearly 1,000 LAPD Cases*, L.A. TIMES, Jan. 15, 2009). In 2006, an LAPD fingerprint specialist determined that several prints lifted from a cell phone store that had been burglarized belonged to Maldonado. *Id.* Two other LAPD fingerprint specialists signed off and the identification and Maldonado was charged with the burglary. *Id.* Maldonado claimed she was innocent and the analysts stood by their work, but months later it was determined that the prints did not belong to Maldonado. *Id.* The fingerprint examiners who originally identified Maldonado have been linked to nearly 1,000 other criminal cases that authorities say must now be reviewed to ensure that similar errors did not occur. *Id.*

Other examples of latent fingerprint identification errors also exist, *see, e.g.*, Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 1070 T.1 (2005), and the occurrence of such errors appear to be on the rise, Richard Winton, *Mistakes in Fingerprint Analysis Trigger Review of Nearly 1,000 LAPD Cases*, L.A. TIMES, Jan. 15, 2009. In addition, there is reason to believe many identification errors have not been documented. *See* Andre Moenssens *et al.*, SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 516 (4th ed. 1995). These examples of error demonstrate, contrary to the Government's claim, the error rate of latent print identification is above zero.

Even if the Government's claim that the error rate of fingerprint is zero is true, it must be proven with scientific evidence. As courts have established, "an error rate must be demonstrated by reliable scientific studies, not by assumption." *Crisp*, 324 F.3d at 274; *see also United States v. Santiago*, 199 F.Supp.2d 101, 112 (S.D.N.Y. 2002) (requiring that an expert on forensic bullet matching provide how often the expert's "identifications have been wrong in the past"). The Government attempts to prove a zero present error rate by direct examining examiners who assert that errors are effectively zero. (R. at 33, 50). The Government cannot point to any scientific studies establishing an error rate, however, because studies to establish error-rates are weak and flawed in design and analysis. *See* Nat'l Acad. Report 143-44, n.35.

4. Latent fingerprint testimony fails the fourth *Daubert* factor because point standards are insufficient to prove the existence and maintenance of standards controlling latent print operation.

The fourth *Daubert* factor requires courts to look to the existence and maintenance of standards governing the technique's operation. *Daubert*, 509 U.S. at 594. The purpose behind requiring controlling standards is to decrease the chance of poor and inconstant applications of the theory. Nat'l Acad. Report 140; (R. at 86). Controlling standards also allow the fact-finder

to determine whether the expert properly applied the theory to the evidence. *United States v. Cordoba*, 991 F.Supp. 1199, 1202 (C.D. Cal. 1998). There is a significant lack of controlling standards in latent print analysis. *Baines*, 573 F.3d at 991 (citing *United States v. Mitchell*, 365 F.2d 215, 241 (3d Cir. 2004)); (R. at 86). Neither point standards nor the ACE-V process provide sufficient controls.

- i. Point standards do not provide adequate controls because there is no universal standard and standards that do exist have proven ineffective.

Point standards regulate the number of areas on a latent print that must be similar to areas on a known print before a match can be declared. (R. at 38-39, 87). There is no universal standard, however, for how many points are required in order to declare a match. (R. at 33, 87). For example, Italy requires 17-points, some regions in Australia have a 12-point standard, and the United Kingdom used to require 16-points until they abandoned point standards altogether. (R. at 44). The United States also does not have a current point standard. (*See* R. at 23). In fact, point standards have largely begun to disappear. (*See* R. at 23, 87). A lack of uniformity and use of point controls make it ineffective at improving the reliability of latent print evidence.

Even if universal and widespread point standards did exist, it is unclear whether reliability of latent print analysis would improve. (R. at 87). In *Mayfield*, for example, Spanish examiners were required to find a minimum of 10 points before declaring a match. *See* Review of Mayfield Case, p. 83 at 4-5. Spanish authorities, however, were only able to match 8 points on the latent print to Brandon Mayfield's known print. *Id.* The FBI, on the other hand, which did not have a point standard, found 14 matching points and falsely identified the latent print as

belonging to Mayfield.⁶ *Id.* Thus, even if the FBI had been working under the same 10-point standard as Spanish authorities, they still would have misidentified the latent print as Mayfield's. *Id.*

- ii. The ACE-V process does not provide adequate controls because of bias and unreliability.

The Government claims that the ACE-V process is a sufficient controlling standard. (R. at 88). As previously discussed, however, *supra* Parts 1.ii, 2, the ACE-V process suffers from human and confirmation bias and unreliability. (R. at 88). As stated by the National Research Council, “merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results.” Nat’l Acad. Report 139-41. This is, in part, due to the fact that the ACE-V methodology “does not guarantee that two analysts following [ACE-V] will obtain the same results.” *Id.* In addition, there are few, if any, standards for how latent print examiners are trained and certified as experts. *Id.*

5. Latent fingerprint testimony fails the fifth *Daubert* factor because the “relevant community” has not generally accepted latent print analysis.

Under the fifth *Daubert* requirement, a technique that has “minimal support within the [relevant scientific or technical] community” may “properly be viewed with skepticism.” *Daubert*, 509 U.S. at 585. A threshold issue in this analysis is what constitutes a “relevant community.” (R. at 89). The Government contends that the relevant community is composed of latent fingerprint examiners and, perhaps, even law enforcement officials. (R. at 89). Both parties agree that examiners and law enforcement officials have generally accepted latent

⁶ FBI examiners in the current case found 16 matching points in the latent print and Dr. Morrison's known print. (R. at 45)

fingerprint analysis. *Id.* As this Court established in *Kumho Tire*, however, when the issue is the general acceptance of *the entire field*, general acceptance must come from a broader community than just the entire field. 526 U.S. at 151. This is because it is unrealistic to expect a community of experts, because they have a vested interest, to conclude that their entire field of study is unreliable. (R. at 89). Thus, according to this Court, the “relevant community” in question must compose more than just latent fingerprint examiners.

The relevant community, beyond latent print examiners and their close law enforcement counterparts, is divided on whether latent print examination is a reliable identification technique. *See generally* Mnookin, 7 LAW, PROBABILITY & RISK 127. Courts have generally accepted latent fingerprint analysis. In fact, the seven circuit courts to hear whether latent print evidence is admissible, have found that it was. *See, e.g., Baines*, 573 F.3d 979 (10th Cir. 2009); *Mitchell*, 365 F.3d 215 (3rd Cir. 2004); *but see Rose*, No. K06-0545. Legal scholars, however, disagree. Mnookin, 7 LAW, PROBABILITY & RISK 127. Academic publications, including law reviews and other academic journal articles and books, express significant doubts about the reliability of latent print evidence. *Id.*; *see generally* Haber, LAW, PROBABILITY & RISK 87; Cole, 95 J. CRIM. L. & CRIMINOLOGY 985; Epstein, 75 CAL. L. REV. 605. As a result of this strong divide between courts and legal scholars, it cannot be said that the relevant community has generally accepted latent print evidence.

B. NO ADDITIONAL INDICIA OF RELIABILITY EXISTS PROVING THAT LATENT FINGERPRINT TESTIMONY SHOULD BE ADMISSIBLE.

In addition to considering the specific *Daubert* factors, courts must also consider whether the expert testimony has any additional indicia of reliability. (R. at 90). The Government contends that the long-term acceptance of latent print evidence and the adversarial nature of trial

courts support the reliability of fingerprint identification. (R. at 90-92). These arguments are misguided, however, and lend themselves towards the unreliable nature of fingerprint analysis.

1. The long-term acceptance of latent print evidence by courts and law enforcement does not support reliability.

Both parties agree that a presumption of infallibility of latent fingerprint identification has permeated courts for over 100 years. *See* Nat'l Acad. Report 136; (R. at 90). This long-term judicial acceptance, however, runs counter to the court's gate keeping function established in *Daubert*. *See Crisp*, 324 F.3d at 272 (Michaels, J., dissenting). This is because latent print evidence continues to be presented by experts as not perfectly reliable, infallible evidence. Nat'l Acad. Report 142-42. As discussed above, *supra* Parts 1.ii, 2, many instances of false identification show that latent print evidence is not infallible. Yet, latent print evidence is offered as conclusive proof of guilty. *Williamson v. Ward*, 110 F.3d 1508, 1520 n.13 (10th Cir. 1997). As a result, defendants must overcome an immense uphill burden when challenging latent print evidence at trial.⁷ As such, long-term acceptance of latent print identification runs counter-intuitively against admissibility.

2. The adversarial nature of trial courts does not support reliability.

The adversarial process before the trier-of-fact, including cross-examination and calling one's own expert, does not cure deficiencies in latent fingerprint reliability. As established by this Court, the adversarial process at trial is well suited to challenge the probative value of evidence for some evidentiary issues. *Daubert*, 509 U.S. at 596. This is not the case with latent

⁷ The defendant's burden increases on appellate review. *See United States v. Gallardo*, 497 F.2d 727, 737 (7th Cir. 2007) (finding that appellants face a "nearly insurmountable" challenge in attempting to challenge evidence presented to a jury) (internal quotation marks and citations omitted).

print evidence, however. At the outset of trial, jurors almost conclusively presume that fingerprint identification is reliable. (R. at 92). As a result of this presumption, it is rare for a jury to reject fingerprint evidence no matter how strong of a challenge the defendant mounted. *Id.* Accordingly, it is important that latent print analysis be subject to a pretrial judicial determination of reliability. *Daubert*, 509 U.S. at 589; *see also McElroy v. Albany Mem'l Hosp.*, 323 F.Supp.2d 502 (N.D.N.Y. 2004). For these reasons, the adversarial nature of trial courts does not support reliability of latent fingerprint testimony and such evidence must be excluded under Federal Rule of Evidence 702.

II. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THAT ADMISSION OF DR. PHELPS'S AUTOPSY REPORT WOULD VIOLATE DR. MORRISON'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES BECAUSE THE REPORT CONSTITUTES TESTIMONIAL EVIDENCE AND NO HEARSAY EXCEPTION APPLIES.

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. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the Sixth Amendment “guarantees a defendant’s right to confront those ‘who bear testimony against him,’ ” except in cases where confrontation was excused at the time of the Founding in 1791. 541 U.S. at 51. The purpose of the Confrontation Clause is to ensure reliability of evidence by granting the defendant a procedural right to challenge evidence through the “crucible of cross-examination.” *Id.* at 61. Accordingly, the prosecution may not offer testimonial hearsay against a defendant unless the witness is unavailable and the defendant had prior opportunity for cross-examination. *Id.* at 54; *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531 (2009); *Davis v. Washington*, 547 U.S. 813, 821 (2006). Here, Dr. Phelps is unavailable and Dr. Morrison did not have a prior opportunity for cross-examination. Therefore, admissibility of the autopsy report turns on this

Court’s determination of whether the report is testimonial. As the lower courts concluded, Dr. Phelps’s autopsy report is testimonial evidence because it is a formal document that is functionally equivalent to live testimony, made to establish a past event with an eye toward criminal prosecution. Moreover, no hearsay exception applies.

A. DR. PHELPS’S AUTOPSY REPORT IS TESTIMONIAL BECAUSE IT SATISFIES THE FOUR FORMULATIONS OF “TESTIMONIAL STATEMENTS” ARTICULATED BY THIS COURT.

The right to confront a declarant applies to testimonial statements offered against the accused in a criminal prosecution to prove the truth of the matter asserted. *Crawford*, 541 U.S. at 51. Only “testimonial statements” give rise to this prohibition within the meaning of the Confrontation Clause. *See id.* While this Court has yet to explicitly define “testimonial,” it has articulated various formulations of the term: (1) “ex parte in-court testimony or its functional equivalent”, *Id.* at 51-52; (2) formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”, *Id.*; (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”, *Id.*; and (4) “statements . . . [where] . . . the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822. Dr. Phelps’s autopsy report satisfies each of these four formulations. *See generally Melendez-Diaz*, 129 S.Ct. 2527. As such, this Court should find the report inadmissible under the Sixth Amendment.

1. Dr. Phelps’s autopsy report is functionally equivalent to in-court testimony.

Statements are testimonial when they are “functionally identical to live, in-court testimony,” and communicate “precisely what a witness does on direct examination.” *Melendez-*

Diaz, 129 S.Ct. at 2532 (citing *Davis*, 547 U.S. at 830). In *Melendez-Diaz*, the prosecution sought to admit a certificate of analysis to prove that the defendant possessed an illegal substance. 129 S.Ct. at 2527. This Court held that because the certificate was “the precise testimony” that would be provided by the analyst at trial, it was functionally equivalent to live, in-court testimony. *Id.* at 2532. This Court reasoned that because the certificate was doing “precisely what a witness does on direct examination,” establishing or proving a fact in question, it constituted a “testimonial statement.” *Id.* Accordingly, absent a showing that the analysts were unavailable to testify and that defendant had a prior opportunity for cross-examination, this Court held the certificate was inadmissible under the Sixth Amendment. *Id.*

Like the certificate of analysis in *Melendez-Diaz*, Dr. Phelps’s autopsy report is functionally equivalent to live, in-court testimony. Autopsy reports, by their very nature, are made for the purpose of establishing or proving facts surrounding the time and cause of death. *See United States v. De La Cruz*, 514 F.3d 121, 133 (1st Cir. 2008); *United States v. Feliz*, 467 F.3d 227, 233-34 (2006), cert. denied, 127 S.Ct. 1323 (2007); *State v. Lackey*, 120 P.3d 332, 350-52 (Kan. 2005); *Rollins v. State*, 897 A.2d 821, 840-43 (Md. 2006); *People v. Durio*, 794 N.Y.S.2d 863, 868-69 (N.Y. Sup. Ct. 2005); *State v. Craig*, 853 N.E.2d 621, 632 (Ohio 2006); *Moreno Denoso v. State*, 156 S.W.3d 166, 180-81 (Tex. App. 2005). Prosecutors routinely use autopsy reports during trial to support the testimony of medical examiners. *Id.* If a medical examiner is unavailable to testify, the prosecutor will still offer the report and ask another medical examiner to explain the findings. *Id.* As such, autopsy reports function to do precisely what a medical examiner does on direct examination – establish or prove facts surrounding death – and are thus the type of statements this Court deemed testimonial in *Melendez-Diaz*.

2. Dr. Phelps's autopsy report is a formalized document.

As this Court established in *Crawford* and *Davis*, documents that are formal in nature are testimonial. *Crawford* 541 U.S. at 51; *Davis* 547 U.S. at 826. While this Court has declared certain statements to be formal, including “affidavits, depositions, prior testimony, [and] confessions,” this list is not exhaustive. *Crawford*, 541 U.S. at 51-52. Rather, a document is considered formal when deliberate falsification of the document results in severe consequences. *Davis*, 547 U.S. at 826. Here, Dr. Phelps's autopsy report is a signed document that, if falsified, results in criminal sanctions. Bor. Penal Law § 275.50. Under Boerum Penal Law section 275.50, falsifying an autopsy report may result in “a class I misdemeanor punishable by no more than a year in jail and/or a fine not to exceed \$10,000.” *Id.* As such, the severe consequences for falsification of autopsy reports in Boerum make Dr. Phelps's autopsy report a formal document and therefore testimonial.

3. Under the circumstances of this case, an objective witness would have reasonably believed Ms. Starr's autopsy report could be used in later criminal prosecution.

This Court has also declared statements to be testimonial when made under circumstances that would lead an objective witness to reasonably believe their statement would be available for use at a later trial. *Melendez-Diaz*, 129 S. Ct. at 2532 (citing *Crawford* 541 U.S. at 52); *see also State v. Sutton*, 908 N.E.2d 50, 64 (Ill. 2009). Here, an objective witness would have reasonably believed Ms. Starr's autopsy report could be used at a later trial because medical examiners are required to report their findings when death results from apparent criminal activity and because medical examiners frequently work with law enforcement to produce autopsy reports for evidence.

- i. Boerum General Health Code section 730 requires medical examiners to notify the state’s attorney when death results from criminal activity.

Boerum General Health Code requires medical examiners to conduct autopsies, 06 BOR. § 725, and prepare attending reports for a variety of situations and purposes. *See* 06 BOR. § 730. For example, medical examiners have a duty to perform autopsies in cases where the person dies “suddenly, when in apparent good health . . . under suspicious or unusual circumstances . . . [or when death appears] due to poison or acute or chronic use of drugs or alcohol.” 06 BOR. § 725. Moreover, section 730 requires a medical examiner to report his or her findings to the state’s attorney when death results from apparent criminal activity. 06 BOR. § 730. As the District Court properly stated, “these obligations demonstrate that whenever [medical examiners] prepare an autopsy, . . . [they] are acutely aware that the autopsy reports may well play a significant evidentiary role in any subsequent criminal prosecution.” (R. 116). Here, Ms. Starr was a high-profile celebrity⁸ who died at the young age of thirty-two (32). Under these circumstances, any reasonable medical examiner would have contemplated that criminal suspicions about Ms. Starr’s death could arise and that her autopsy report could be used as evidence at a later trial.

- ii. Medical examiners frequently work with law enforcement and prepare autopsy reports for trial.

A reasonable medical examiner also would have been aware that Ms. Starr’s autopsy report could be used at trial because medical examiners frequently work alongside law enforcement officials to prepare reports for trial. During homicide investigations especially, law enforcement officers and medical examiners “collaborate closely.” Stefan Timmermans,

⁸ Roxy Starr was known as the “Queen of Rock ‘n’ Roll” and throughout her career set records for concert attendance, television ratings, and record sales. (R. at 3). Starr sold more than 50 million records within the span of six years. *Id.*

Postmortem: How Medical Examiners Explain Suspicious Deaths 163 (2006). Often times, police call medical examiners to the scene of the crime to take custody of the victim's body, survey the scene of the crime, and evaluate the circumstances of death. *Id.* Police may also attend the performance of the autopsy and, in some instances, medical examiners, police officers, and the district attorney will meet to discuss the case. *Id.* at 164. The relationship between law enforcement and medical examiners is so close that “[t]he mutual exchange of evidence and information, the coordination of schedules, and the prerogative of police to attend autopsies as a matter of course underscore the routinized [sic] collaboration of a joint investigation.” *Id.* For example, medical examiners collect crucial pieces of evidence, including bullets, hairs or fibers, poisonous substances, and semen, which are used by law enforcement to prove their case. National Association of Medical Examiners, *So You Want To Be A Medical Detective* (2007). Given the close relationship between medical examiners and law enforcement officials, reasonable medical examiners are constantly aware of the use and significance of their reports in criminal matters. Accordingly, Dr. Phelps's autopsy report was made under circumstances that would lead an objective witness to reasonably believe their report could be used at a later trial and is therefore considered testimonial evidence.

4. The primary purpose of Dr. Phelps's autopsy report was to establish a past event potentially relevant to later criminal prosecution.

In *Davis*, and its companion case *Hammon v. Indiana*, this Court held that a statement is testimonial when circumstances objectively indicate there is no ongoing emergency, but rather that the primary purpose of the statement is to establish or prove past events potentially relevant to later criminal prosecution. 547 U.S. at 822, 830. Here, Dr. Phelps's autopsy report did not

relate to an ongoing emergency and was created to establish or prove the circumstances surrounding Ms. Starr's death.

In *Hammon*, a woman spoke to a police officer in her living room after the police responded to a domestic violence call. *Id.* at 819. She made statements describing the violence while her husband spoke with a second police officer in the kitchen. *Id.* at 819-820. This Court held the statements were testimonial because they described past facts, not a present emergency, which were potentially relevant to later criminal prosecution. *Id.* at 830.

Like the woman's statements to police in *Hammon*, Dr. Phelps's autopsy report is testimonial because it is a narrative of past fact. Specially, Dr. Phelps's autopsy report was created to establish the circumstances surrounding Ms. Starr's death - a past event. Moreover, Dr. Phelps did not perform the autopsy in response to any ongoing emergency. As such, the report is exactly the type of evidence this Court declared to be testimonial in *Hammon*. 547 U.S. at 830. Accordingly, the Court of Appeals was proper to conclude Dr. Phelps's autopsy report could not be admitted under the Sixth Amendment.

B. DR. PHELPS'S AUTOPSY REPORT IS INADMISSIBLE BECAUSE IT DOES NOT QUALIFY AS A BUSINESS RECORD FEDERAL RULE OF EVIDENCE 803(6).

Federal Rule of Evidence 803(6) allows for the admission of hearsay evidence when such evidence is a business record kept in the course of a regularly conducted business activity. FED. R. EVID. 803(6). A number of state and federal courts have admitted testimonial records such as autopsy reports under the business record hearsay exception. *See De La Cruz*, 514 F.3d at 133; *Feliz*, 467 F.3d at 233-34 (2d Cir. 2006); *Durio*, 794 N.Y.S.2d at 867-69; *Craig*, 853 N.E.2d at 632. Classifying autopsy reports as business records under the exception, however, is inappropriate for two main reasons. First, autopsy reports were not admissible as business

records in 1791 when the exception was created. Second, admitting autopsy reports under a *per se* business record exception implicates the reliability framework this Court expressly rejected in *Crawford*. 129 S.Ct. 2523. Accordingly, Dr. Phelps’s report may not be admitted as a business record.

1. Autopsy reports were not admissible as business records in 1791.

The threshold inquiry for determining whether a report is admissible under the business records exception is whether the report would have been admissible when the exception was created in 1791 (at the time of “the Founding”). *Crawford*, 541 U.S. at 54. The business record exception, when created in 1791, was not as broad as it is today. *See Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943); *State v. Miller*, 144 P.3d 1052, 1059 (Or. Ct. App. 2006) (citing *Palmer*, 318 U.S. 109). The exception was originally established as a “shop-book exception” and only permitted the introduction of shop-books and ledgers that identified items shipped, sold, and received in the course of business. *Radtke v. Taylor*, 210 P. 863, 867-70 (Or. 1922); 5 John H. Wigmore, *Wigmore on Evidence* §§ 1517-18, at 347 (3d ed. 1940). Here, Dr. Phelps’s report details, among other things, toxicological analyses, external bodily examination results, therapeutic procedure results, internal bodily examination results including hemic and lymphatic system review, genitourinary system analysis, and endocrine system analysis. (R. at 99-102.) Dr. Phelps’s report is therefore far removed from the daily business recordings, such as shop-books and ledgers, which were admissible under the exception in 1791.

In addition, the business records exception in 1791 did not include records prepared specifically for litigation. *Palmer*, 318 U.S. at 113-115; *Radtke*, 210 P. at 867-70. As previously discussed, medical examiners like Dr. Phelps prepare autopsy reports with the understanding that the report may be used as evidence in future litigation. Due to the fact that Dr. Phelps’s autopsy

report would not have been admitted under the business records exception in 1791, it cannot be admitted today.

2. Admitting Dr. Phelps’s autopsy report would go against this Court’s finding in *Crawford*.

Even if it is determined that Dr. Phelps’s autopsy report is a business record, admitting it as such goes against this Court’s finding in *Crawford*. In *Crawford*, this Court abandoned the test established in *Ohio v. Roberts*, 448 U.S. 56 (1980), declaring that it is not enough to admit evidence simply because it bears “adequate indicia of reliability.” 541 U.S. 36. This Court explained that “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.” *Id.* at 51. Moreover, this Court cautioned against admitting evidence on the sole determination of reliability, stating that reliability is “so unpredictable that it fails to provide meaningful protection from even core confrontation violations.” *Id.* at 63.

The business records exception is based upon a determination of reliability. As one court stated, “[t]he justification for the admission of regularly kept business records is based upon . . . [the fact] . . . that such records bear a great degree of reliability.” *People v Selassie*, 140 Misc.2d 616, 619 (NY Sup Ct Bronx County 1988). Thus, the business records exception is based upon reliability; exactly what this Court said the admission of testimonial hearsay evidence could not be based on. Therefore, admitting Dr. Phelps’s autopsy report under the business records exception would go against this Court’s shift from whether evidence bears “indicia of reliability” to whether it is “testimonial hearsay.” *Crawford*, 541 U.S. at 61-62. Accordingly, Dr. Phelps’s autopsy report may not be admitted as a business record.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Fourteenth Circuit should be affirmed.

Respectfully Submitted,

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