Team 5

Case No. 16-1789

In the Supreme Court of the United States

UNITED STATES OF AMERICA
Petitioner,

v.

PAUL RUTHERFORD
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourteenth Circuit

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

I. Whether the good faith exception to the exclusionary rule announced in *United States v. Leon* applies to evidence seized pursuant to a search warrant where the probable cause supporting issuance of the warrant has been established with evidence seized in violation of the Fourth Amendment.

II. Whether Federal Rule of Evidence 803(3) permits admission of a statement of a declarant's then-existing state of mind to prove conduct of someone other than the declarant.

III. Whether a criminal defendant's Sixth Amendment right of confrontation under *Crawford v. Washington* is violated by admitting opinion testimony of a surrogate medical examiner concerning cause of death where that opinion is based on statements in an autopsy report prepared by another, unavailable medical examiner.

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STATEMENT OF THE CASE

Respondent Paul Rutherford was elected as the Governor of Boerum in 2012, based in part upon his campaign promise to renovate the Cobble Hill Bridge and to develop areas around the bridge. (R. at 3). More than one hundred million dollars' worth of contracts were secured from government grants to develop city infrastructure. (R. at 3). On or about June 17, 2017, the United States Attorney's Office (USAO) and the FBI began an investigation focused on allegations that Respondent and high-level members of his staff steered these lucrative renovation contracts to friends and campaign contributors. (R. at 3). At the same time, the Boerum State Attorney General and Boerum State Police commenced independent investigations into the same allegations. (R. at 4).

Among Respondent's high-level staff members was the now-deceased Victor Smith, Respondent's top aide. (R. at 4). On August 13, 2014, Smith and his attorney, Justin Baker, attended a debriefing session with the FBI and USAO regarding the corruption investigation. (R. at 4). Smith agreed to sign a cooperation agreement with the United States, which offered Smith immunity from prosecution provided Smith disclose all information about any and all criminal wrongdoing by public officials that he knew or would come to know, including information regarding Rutherford. (R. at 4). After Smith and Baker departed ways, Baker saw former FBI agent Joe Turner outside the building. (R. at 6). Turner was head of security for Rutherford. (R. at 5). Turner had been informed by former subordinate, FBI Agent Ian Loyal, that someone close to the governor had been enlisted as an informant against Rutherford. (R. at 5).

On or about August 29, 2014, the USAO issued a grand jury subpoena for all electronic documents stored on Rutherford's computers relating to the corruption investigation. (R. at 4). Respondent indicated he would cooperate. (R. at 4). On September 19, 2014, the USAO issued

a grand jury subpoena for Smith's testimony. (R. at 4). Smith was scheduled to testify before the grand jury on October 16, 2014, but he was found dead by his fiancée on October 11, 2014. (R. at 4). Since Smith was Respondent's top aide, and they were aware of the pending federal investigation against Respondent, Boerum State Police contacted the FBI. (R. at 4).

During an interview with the FBI on October 12, 2014, Smith's fiancée, Anita Flores, stated that she found Smith dead in his bedroom the morning before. (R. at 5). Flores said that the night before Smith's death, he told Flores that he was going to Rutherford's apartment for dinner. (R. at 5). Flores also stated that one or two weeks before, Smith said that while reviewing documents on Rutherford's laptop, he learned some upsetting information about Rutherford. (R. at 5). Smith did not reveal what this information was. (R. at 5).

On October 16, 2013, Boerum State Police executed a search warrant that authorized a search of all computers in Rutherford's office related to the corruption investigation. (R. at 6-7). During the State's search, Rutherford was interviewed by the FBI, and acknowledged that he knew Smith was scheduled to testify before the grand jury prior to his death. (R. at 6). During the search, Officer Scott found email activity regarding the deadly chemical Pest-X. (R. at 7). Officer Scott inferred that Smith died under suspicious circumstances, and took it upon himself to search for evidence. (R. at 7). He believed that searching the "to" and "from" information in the emails was legally permissible under the federal pen registry statute. (R. at 7).

FBI Special Agent Fonseca used the information from Officer Scott's search in an affidavit for a search warrant. (R. at 7, 8). The warrant was approved by Judge Maddalena. (R. at 7, 8). The FBI's subsequent search discovered evidence that Rutherford had extensively researched Pest-X, subsequently purchased Pest-X, and had a password-protected file containing pictures of underage girls in various stages of undress. (R. at 19).

Smith's autopsy was performed prior to Rutherford's suspected involvement in Smith's death. (R. at 12). The autopsy report contained evidence that Smith died of poisoning related to the chemical Pest-X. (R. at 11-12). Boerum State Autopsy Law § 11-16-16 requires autopsies to be performed as reasonably necessary for public safety purposes, and when death is sudden and unexpected—among other reasons. (R. at 9). Dr. Lawrence Fleischer, the medical examiner who performed the autopsy, is unable to testify at Rutherford's trial because he was laid off when a bottle of alcohol was found in his desk drawer. (R. at 13). The State plans to call Dr. Elizabeth Chin, Associate Medical Examiner of Cobble County, Boerum, as a witness to testify as to Smith's cause of death. (R. at 17).

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision because (1) evidence obtained pursuant to a warrant is admissible where the probable cause supporting issuance contained a Fourth Amendment violation as long as the officer relied on the warrant in good faith; (2) Smith's statement regarding his state of mind can be used to show the subsequent conduct of Rutherford; and (3) Dr. Chin can testify as to her independent opinion regarding Smith's cause of death using the underlying autopsy report as a basis for her conclusions.

The good faith exception to the exclusionary rule should apply in this case because no meaningful deterrence of police misconduct will result if evidence obtained from Respondent's computer is suppressed. In *United States v. Leon*, this Court recognized that when an officer relies in good faith on a warrant issued by a neutral magistrate, the evidence seized pursuant to that warrant should not be suppressed even if the warrant was later found to have contained a Fourth Amendment violation. The purpose of the exclusionary rule is to deter unlawful police misconduct, and is used as a last resort. Here, Agent Fonseca's warrant affidavit disclosed any

alleged Fourth Amendment violation to Magistrate Judge Maddalena, who thoroughly reviewed and, despite the disclosed violation, approved the search warrant. FBI Agent Fonseca was not related to the prior unlawful search conducted by Officer Scott. Agent Fonseca was entitled to rely on the warrant in good faith, as there was nothing more she could have done to ensure the legality of her search. Finally, Officer Scott's reliance on the pen registry laws in searching Rutherford's computer was close enough to the line of constitutional validity such that his negligent conduct does not warrant the extreme remedy of evidence suppression.

Next, the plain meaning of Federal Rule of Evidence 803(3) allows the admission of the then existing state of mind of a declarant to prove the conduct of a third party. As a firmly rooted hearsay exception, the statement's reliability makes independent corroboration unnecessary. Rule 803(3) codified *Hillmon*, which expressly allowed the inclusion of statements to prove the conduct of someone other than the declarant. In the instant case, Smith's statement to Flores tends to show that Smith went to Rutherford's apartment the night of the murder.

Finally, Dr. Chin should be allowed to testify as to her independent conclusions of Smith's cause of death because the autopsy report (1) is not being admitted for its truth, and (2) is nontestimonial. Under Federal Rule of Evidence 703, experts are permitted to use inadmissible hearsay evidence as a basis for their conclusions. The autopsy report in this case is not being offered for its truth, and thus the Confrontation Clause is not implicated. The defendant can also adequately cross-examine Dr. Chin as to the nature of her conclusions. Further, the autopsy report is nontestimonial as defined by *Crawford*. The underlying autopsy report did not implicate Rutherford in any criminal activity. Thus, it was not prepared for the primary purpose of accusing an individual, and is nontestimonial.

ARGUMENT

I. EVIDENCE OBTAINED PURSUANT TO A WARRANT-AUTHORIZED SEARCH SHOULD BE ADMITTED UNDER THE *LEON* "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE DESPITE AN EARLIER FOURTH AMENDMENT VIOLATION WHEN THE OFFICERS ACTED WITH AN OBJECTIVELY REASONABLE GOOD-FAITH BELIEF THAT THEIR CONDUCT WAS LAWFUL.

Suppression of evidence has always been this Court's "last resort, not [its] first impulse." *Hudson v. Michigan*, 547 U.S. 586, 590 (2006). Because the exclusionary rule generates "substantial social costs," which often includes "setting the guilty free and the dangerous at large," this Court has repeatedly emphasized that it is "applicable only where its remedial objectives are most efficaciously served." *Hudson*, 547 U.S. at 591 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). If the exclusionary rule does not result in "appreciable deterrence," its use is "unwarranted." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998). Moreover, because the exclusionary rule is judicially created rather than constitutionally mandated, this Court has held it to be applicable only when the balance of interests favors deterrence. *United States v. Leon*, 468 U.S. 897, 907 (1984).

This Court has "repeatedly held" that the exclusionary rule's "sole purpose" is to deter future Fourth Amendment violations. *Davis v. United States*, 564 U.S. 229, 236-37 (2011). Only police practices that are "deliberate enough to yield meaningful deterrence, and culpable enough to be 'worth the price paid by the justice system' trigger the 'harsh sanction of exclusion.'" *Davis v. United States*, 564 U.S. at 240, 241 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)). When law enforcement officers act with an "objectively reasonable good-faith belief that their conduct is lawful," or when their conduct involves only "simple, isolated negligence," the deterrence "loses much of its force" and exclusion cannot "pay its way." *Davis v. United States*, 564 U.S. at 238 (quoting *Leon*, 468 U.S. at 908 n.6.)

Under the good faith exception, the exclusionary remedy is not applicable where an officer relies on a search warrant issued by a neutral and detached magistrate that is ultimately found to be unsupported by probable cause. *Leon,* 468 U.S. at 900. In creating this exception, this Court explained that no significant deterrent effect on police misconduct would be served by suppressing evidence seized in good faith by an offending officer. *Id.* at 908.

This Court should find that the evidence found on Respondent's laptop is admissible. The FBI agents who seized this evidence "violated no constitutional right, made no misleading statements in their warrant application, and fully disclosed the relatively minor misconduct of the state police officer (Scott) who was executing a different warrant in a different case." (R. at 48). Excluding this evidence would not serve the sole purpose of the exclusionary rule—deterring future Fourth Amendment violations. Further, the Fourth Amendment violation that occurred in the predicate search was close enough to the constitutional line of validity to support an objectively reasonable good faith reliance on the warrant. Finally, even without the tainted evidence, the warrant contains sufficient probable cause to stand on its own. Accordingly, this Court should find this evidence admissible under the good faith exception.

A. Suppressing The Evidence Seized On Respondent's Laptop Would Not Serve The Purpose Of The Exclusionary Rule As No Meaningful Deterrence Of Future Violations Would Result

Exclusion is not designed to "redress the injury" caused by an unconstitutional search. *Davis v. United States*, 564 U.S. at 249 n.10 (quoting *Stone v. Powell*, 428 U.S. 433, 454 (1976)). This Court has "emphasized repeatedly that the governments' use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Scott*, 424 U.S. at 362. A Fourth Amendment violation is "fully accomplished" by the unlawful search or seizure itself, and no exclusion of evidence from a judicial proceeding can "cure the invasion of the

defendant's rights which he has already suffered." *Leon*, 468 U.S. 906 (quoting *Stone*, 428 U.S. at 540 (White, J., dissenting)).

Rather than redressing the violation of the defendant's rights, the exclusionary rule's "sole purpose" is to deter future Fourth Amendment violations. *Davis v. United States*, 564 U.S. at 236-37. The rule is "not an individual right and applies only where it results in *appreciable* deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009) (emphasis added). This Court has never applied the rule to exclude evidence obtained in violation of the Fourth Amendment where the police misconduct was not "patently unconstitutional."[1] *See Herring*, 555 U.S. at 142-44. Police misconduct must demonstrate a violation of Fourth Amendment rights that is "sufficiently deliberate," "reckless," or "grossly negligent" to outweigh the substantial costs of suppression. *Herring*, 555 U.S. at 144. When law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on guilty defendants "offends basic concepts of the criminal justice system." *Leon*, 468 U.S. at 908.

The case at bar is strikingly similar to the facts in a recent Sixth Circuit Case. *United States v. McClain*, 444 F.3d 556 (6th Cir. 2005). In *McClain*, the court held that officers of the Drug Task Force acted in good faith when the circumstances of an initial warrantless search were fully disclosed to a neutral and detached magistrate, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search, and that the facts surrounding the initial warrantless search were "close enough to the line of validity to make the executing officers' belief in the initial warrantless search objectively reasonable." *McClain*, 444 F.3d at 566. The court stated that under these circumstances, "there was nothing

[1] The Court in *Herring* gave examples of flagrant conduct which triggered the exclusionary rule. All were "sufficiently deliberate" such that "exclusion can meaningfully deter it." *Herring*, 555 U.S. at 144.

more" that the executing officer "could have or should have done . . . to be sure his search would be legal." *Id.* The court concluded that "this is one of those unique cases in which the *Leon* exception should apply despite an earlier Fourth Amendment Violation." *Id.* at 565. The case at bar is also one of those unique cases. In short, deterrence would not be served by excluding evidence that Respondent ordered and received rat poison allegedly involved in Smith's death. (R. at 19).

1. FBI Agent Fonseca Disclosed All Alleged Fourth Amendment Violations In The Affidavit To A Neutral And Detached Magistrate Who Granted The Warrant

Exclusion is unwarranted when full and accurate disclosure of a potentially illegal predicate search is disclosed to a neutral and detached magistrate in support of a warrant affidavit. Similar to the executing officer in *McClain*, FBI Agent Fonseca adequately disclosed all Fourth Amendment violations to a neutral and detached magistrate in the warrant affidavit. (R. at 6, 7); *McClain*, 444 F.3d at 566. The magistrate in the instant case was not "misled" by any information in the affidavit, and thus suppression is inappropriate. (R. at 6-7) (disclosing not only the alleged Fourth Amendment violation, but the rationale behind Officer Scott's search); *Leon*, 468 U.S. at 923.

Here, the inclusion of the violations allowed the neutral magistrate to thoroughly and sufficiently determine whether the warrant should be granted. (R. at 7, 8); *see McClain*, 444 F.3d at 566. Thus, the subsequent FBI agents could rely on the magistrate's determination in good faith. *See United States v. Woerner*, 709 F.3d 527, 534 (5th Cir. 2013) (stating that if "the officer applying for the warrant knew or had reason to know that the information was tainted and included it anyway without full disclosure and explanation, then suppressing the evidence seized pursuant to that warrant" deters unlawful conduct); *McClain*, 444 F.3d at 566; *United States v. Massi*, 761 F.3d 512, 526-27 (5th Cir. 2014). The situation would be materially different if no

disclosure was made. *See Woerner*, 709 F.3d at 534; *United States v. Reily*, 76 F.3d 1271, 1281 (2d Cir. 1996).

Further, the disclosure in the instant case is sufficient to cure any potential issues of using a magistrate to "sanitize the taint of [an] illegal warrantless search." *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987). In *Vasey*, the court held that "a magistrate's consideration does not protect from exclusion evidence seized during a search under a warrant if that warrant was based on evidence seized in an unconstitutional search." *Vasey*, 834 F.2d at 789-90. However, the facts in *Vasey* were different in that full disclosure of the alleged Fourth Amendment violation was not made explicit to the neutral magistrate. *Id.* at 788, 789-90. The magistrate simply reviewed facts in an affidavit purporting to support probable cause. *Id.* In the instant case, the magistrate was notified of not only the scope of the initial search warrant that Officer Scott was acting under, but also how Officer Scott exceeded the scope of that warrant and his rationale for doing so. (R. at 7). This placed the magistrate in the instant case in the position to fully evaluate whether it was appropriate to grant the warrant application, unlike the magistrate in *Vasey*. Therefore, Respondent's concern that the FBI agents in this case were attempting to "cleanse" Officer Scott's illegal search is simply unwarranted. (R. at 21).

2. No Deterrence Results When Officers Who Were Not Involved In The Alleged Fourth Amendment Violation Are Penalized Through Evidence Suppression

Disallowing the evidence would penalize the wrong parties, thus running afoul of the purpose behind the exclusionary rule. Here, the officers involved in the predicate search were different than the FBI Agents that applied for the search warrant at issue. (R. at 2). Deterrence would not be served by penalizing the FBI agents, who did not engage in any Fourth Amendment violations. (R. at 2, 6-7); *see Woerner*, 709 F.3d at 535 (stating that suppression was not justified since the subsequent officers "could not have known that statements made by

Woerner in the FBI interview would later be suppressed"); *McClain*, 444 F.3d at 566 (6th Cir. 2005) ("More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search."); *Massi*, 761 F.3d at 525-26 (stating that a crucial fact is the relation of the officers applying for a warrant using tainted evidence, and those executing it). The lack of deterrent effect in cases such as this simply does not justify the "grave adverse consequence that exclusion of relevant incriminating evidence always entails." *Hudson*, 547 U.S. at 595.

Petitioners contend that several circuit courts have categorically refused to apply the *Leon* good faith exception to cases where information used to obtain a search warrant was acquired through an unlawful search. (R. at 23); *see Vasey*, 834 F.2d at 789; *United States v. Wanless*, 882 F.2d 1459, 1466-1467 (9th Cir. 1989); *United States v. McGough*, 412 F.3d 1232, 1239-1240 (11th Cir. 2005). However, the facts in these cases are readily distinguishable. In *Vasey*, the officers involved in the tainted search were the same officers applying for the search warrant. *Vasey*, 834 F.2d at 784-85. In *Wanless* and *McGough*, the warrants were obtained by officers who participated in the prior unlawful conduct. *Wanless*, 882 F.2d at 1460-62; *McGough*, 412 F.3d at 1233-35. In the case at bar, the officer who committed the alleged Fourth Amendment violation was not the same officer applying for the subsequent warrant. Further, the FBI Agents did not participate in the predicate unlawful search. Thus, the evidence should be allowed because no deterrent effect would result.

B. Officer Scott's Actions Were Close Enough To The Constitutional Line Of Validity To Make The Executing FBI Officers' Reliance On The Warrant Objectively Reasonable

Officer Scott did not engage in any of the flagrant conduct the exclusionary rule sought to prevent. The exclusionary rule was formed to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 555 U.S. at 144.

In this case, Officer Scott's simple, isolated negligence should not result in forcing society to swallow the "bitter pill" of the exclusionary remedy. *Davis v. United States*, 564 U.S. at 237.

When the transgression is isolated and nonrecurring, the violation is "far removed from the core concerns that led . . . to adopt[ing] the rule in the first place." *Herring*, 555 U.S. at 144. This attenuation "can occur . . . when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson*, 547 U.S. at 593 (citations omitted). In this case, Officer Scott's error was not the result of a "deliberate violation of rights," but rather an act of "isolated negligence attenuated" from the subsequent search.[2] *Herring*, 555 U.S. at 137, 143. Attenuated negligence by a police officer, such as Officer Scott, does not trigger the exclusionary rule.

1. The Exclusionary Rule Was Created To Exclude Patently Unconstitutional Conduct Not Present In The Instant Case

The history of the exclusionary rule was based on "patently unconstitutional" violations. *Herring*, 555 U.S. at 143. Specifically, the rule was created to deter "flagrant" or "deliberate" police misconduct resulting in violation of Fourth Amendment rights. *Id.* The value of the exclusionary rule "is most likely to be effective" when "official conduct was flagrantly abusive." *Id.* (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part).

[2] "The word "attenuated" in *Herring* conceivably refers to any number of things: (i) that the negligence was by someone other than the officer who made the arrest; (ii) that the negligence was an omission rather than an act; (iii) that the negligence occurred five months prior to the arrest; (iv) that the negligence was by a person in a different jurisdiction than the locale of arrest or prosecution, who for that reason is not as amenable to deterrence; (v) that the negligence had to do with the maintenance of police records, a subset of police activity not prone to error or in need of deterrence; or (vi) that while the negligence was by a law enforcement employee, that employee, by virtue of his or her assignment, is less in need of deterrence than the typical policeman. Wayne R. Lafave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 771–72 (2009) (footnotes omitted).

Assessing "the flagrancy of the police misconduct constitutes an important step in the calculus" in determining whether the exclusionary rule applies. *Leon*, 468 U.S. at 911.

Such flagrancy and deliberate police misconduct is absent in the instant case. *See, e.g.*, *Weeks v. United States*, 232 U.S. 383, 393-94 (1914); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390-91 (1920); *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Weeks*, the misconduct involved a United States marshal searching the premises of the accused. *Weeks*, 232 U.S. at 393. The marshal held "no warrant for [the accused's] arrest and none for the search of his premises." *Id.* Further, the court stated that "not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused." *Id.* at 393-94; *see also Silverthorne*, 251 U.S. at 390 (where officers "without a shadow of authority went to the office of [defendants'] company and made a clean sweep of all the books, papers and documents found there"); *Mapp*, 367 U.S. at 644-45, 655 (featuring a "flagrant abuse" of Constitutional rights where officers barged into defendant's home under color of a false warrant, forced defendant into handcuffs, and searched the premises for obscenities).

2. Officer Scott's Conduct Was Not Flagrant, Thus Exclusion is Unwarranted

When police misconduct does not rise to level of intent and culpability as in *Weeks*, *Silverthorne*, or *Mapp*, this Court has "never applied the rule to exclude evidence." *Herring*, 555 U.S. at 144. Officer Scott did not pretend to have a warrant; he actually had one. (R. at 7). Officer Scott also held a reasonable belief that his search did not require a warrant pursuant to his belief that his actions were authorized under the pen register statute. (R. at 7).

Even if Officer Scott's reliance on the pen registry statute was mistaken, "mere isolated negligence is insufficient to rise to the level of culpability required to invoke the exclusionary

rule." *Herring*, 555 U.S. at 140-43. The only necessary prerequisites in applying for a pen register or trap and trace device is application to a court and a certification that the information "likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." 18 U.S.C. § 3122 (2012). Further, because the of the definitions in the statute, "there can be no doubt it is broad enough to encompass e-mail communications." *In re United States*, 416 F. Supp. 2d 13, 16 (D.D.C. 2006). The breadth of statute makes it clear that Officer Scott's misapplication of the pen registry law was mere isolated negligence.

Officer Scott did not engage in deliberate unlawful activity, unlike officers in the plethora of jurisprudence where the evidence was excluded. *See Davis v. United States*, 564 U.S. at 241 (holding "that that the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity'") (quoting *Leon*, 468 U.S. at 919). Exclusion of the evidence would result in harm to society with no benefit of deterring flagrant and blatantly unlawful police misconduct. Thus, the evidence should be admitted.

C. Even Without The Tainted Evidence, The Warrant Would Still Be Valid

Finally, excluding all evidence seized as a result of reliance on a warrant containing tainted evidence is unworkable because even a minor Constitutional violation would result in appreciable harm to society by way of excluding important evidence. In *Vasey*, for example, the court held that evidence should be excluded because the "search warrant was issued, at least in part, on the basis of . . . tainted evidence." *Vasey*, 834 F.2d at 789. In a subsequent case in the Ninth Circuit, the court conceded that a search pursuant to a warrant containing a Fourth Amendment violation "would be valid only if the legally obtained evidence, standing alone, was sufficient to establish probable case." *Wanless*, 882 F.2d at 1466-67.

Here, there is enough evidence in the warrant to support probable cause even without the tainted evidence of Officer Scott's search. The evidence found as a result of the transgression

only bolstered the already powerful evidence tending to show that Respondent killed the victim. To suppress evidence incriminating Respondent of murder would be so out of bounds with the interests of society so as to be patently unjust. The evidence in the warrant affidavit shows motive and opportunity of Respondent, even without the tainted evidence. Respondent knew that he was being investigated by officers. (R. at 4-6). He knew that Smith was scheduled to testify before the grand jury. (R. at 6). Respondent's head of security, Turner, saw and acknowledged Smith leaving an interview with police officers. (R. at 5-6). At the time Turner saw Smith, Turner had knowledge obtained through his former subordinate at the FBI, Ian Loyal, that "someone very close to the Governor had just signed up as a cooperator." (R. at 5, 6). Smith was dead before he had a chance to testify at the grand jury. (R. at 6-7).

The motive and opportunity of Respondent is clearly shown through evidence not involving Officer Scott's tainted search. Nothing in the exclusionary rule's history suggests that a minor Constitutional transgression should result in a guilty defendant going free. *See Leon*, 468 U.S. at 906; *Hudson*, 547 U.S. at 590; *Herring*, 555 U.S. at 144; *Davis v. United States*, 564 U.S. at 229, 236-37. For all the foregoing reasons, the evidence should be admitted.

II. SMITH'S STATEMENT TO FLORES THAT HE WAS PLANNING TO MEET RESPONDENT IS ADMISSIBLE TO SHOW RESPONDENT WAS WITH THE VICTIM THE NIGHT BEFORE SMITH WAS DISCOVERED DEAD

Smith's statement falls squarely within the state of mind exception in Federal Rule of Evidence 803(3). Rule 803(3) is a hearsay exception that allows admission of a declarant's then existing state of mind, such as "motive, intent, or plan," to show that he acted in accordance with that belief. FED. RULE EVID. 803(3) (codifying *Mut. Life Ins. Co. N.Y. v. Hillmon*, 145 U.S. 285, 295-96 (1892)). Courts have held that such statements can be admitted to prove the conduct of a third party. *See, e.g.*, *United States v. Delvecchio*, 816 F.2d 859 (2d Cir. 1987); *United States v. Best*, 219 F.3d 192 (2d Cir. 2000); *United States v. Pheaster*, 554 F.2d 353 (9th Cir. 1976);

United States v. Houlihan, 871 F. Supp. 1495 (D. Mass. 1994).[3] In *Hillmon*, the common law ancestor to Rule 803(3), this Court held that such statements could be used to prove, when relevant, not only that a declarant had a certain state of mind, but that the declarant later acted in conformity with an expressed present intention. *Hillmon*, 145 U.S. at 295-96. The plain language of Rule 803(3) does not restrict admission of statements of the declarant's state of mind from applying to the conduct of a third party. FED. RULE EVID. 803(3). Federal circuits are currently split as to the circumstances under which the 803(3) hearsay exception can be used to show the state of mind of a third party. *Compare, e.g.*, *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976) (holding that the state of mind exception can show conduct of third parties); *with United States v. Delvecchio*, 816 F.2d 859 (2d Cir. 1987) (holding that the statement needs corroborating evidence to be admitted).

This Court should hold that corroborating evidence is unnecessary to accompany an already reliable exception to the hearsay rule. All hearsay exceptions, including the state of mind exception, have been deemed reliable through the fiery crucible of a long history of jurisprudence. *See, e.g.*, *Hillmon*, 145 U.S. at 295-96; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Lilly v. Virginia*, 527 U.S. 116, 126 (1999). Such statements are reliable due to "their spontaneity and resulting probable sincerity." MCCORMICK ON EVIDENCE § 274, at 475 (Kenneth S. Brown et al. eds., 6th ed. 2006). Therefore, this Court should reverse the Fourteenth Circuit's exclusion of Smith's statement.

A. As A Firmly Rooted Hearsay Exception, The State Of Mind Exception Does Not Require Corroborating Evidence To Be Considered Reliable And Admissible

Requiring corroborating evidence to admit an already reliable, firmly rooted hearsay exception would go against Supreme Court jurisprudence as a whole. *See Idaho v. Wright*, 497

[3] However, courts are split as to whether corroborating evidence is required for the statements to be admissible.

U.S. 805, 820-21 (1990) (stating that firmly rooted hearsay exceptions are based on a history of reliability); *see generally* A. Perry Wadsworth, Jr., *Constitutional Admissibility of Hearsay Under the Confrontation Clause: Reliability Requirement for Hearsay Admitted Under a Non-"Firmly Rooted" Exception*—Idaho v. Wright, 14 CAMPBELL L. REV. 347 (1992). Firmly rooted hearsay exceptions are considered reliable "because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Wright*, 497 at 817; *see also White v. Illinois*, 502 U.S. 346, 355-56 (1992) (stating that firmly rooted hearsay exceptions carry "substantial guarantees of trustworthiness" that cannot be recaptured by later in-court testimony).[4]

1. The Historical Analogues Of The State Of Mind Exception As Res Gestae Have Never Required Corroborating Evidence

The evolution and history of 803(3) is such that corroborating evidence is unnecessary. The statement that Smith "was going to meet [Respondent] at [his] apartment for dinner" was *res gestae*; that is, the statement was merely "part of a transaction rather than merely a witness' account of it." (R. at 5); William Gorman Passannante, *Res Gestae, the Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 FORDHAM URB. L.J. 89, 96 (1989) [hereinafter Passannante].

The state of mind exception has historical analogues with Federal Rules of Evidence 803(1) and 803(2), which similarly have no corroborating evidence requirement. FED. RULE EVID. 803(1)-(2); *see* Passannante, at 106. *Hillmon* recognized the *res gestae* of the state of mind exception, stating that when the "intention is of itself a distinct and material fact in a chain

[4] The Seventh and Tenth Circuits have held that 803(3) does not apply to past memory or belief. *See generally* Johnson v. Chrans, 844 F.2d 482 (7th Cir. 1988); United States v. Joe, 8 F.3d 1488 (10th Cir. 1993). However, the statement in this case is of a forward looking statement or belief.

of circumstances, it may be proved by contemporaneous oral or written declarations of the party." *Hillmon*, 145 U.S. at 295; *see also* Passannante, at 111 n.143.

Smith's statement was such a contemporaneous oral declaration. At the time Smith spoke to Flores about his plan to meet Respondent, his words imported no wrongdoing to anyone. Smith's reference to Respondent was nothing more than an indication of who he was meeting, and was nothing more than an additional circumstance of his going. *See, e.g., United States v. Blakey*, 607 F.2d 779, 785 (7th Cir. 1979) (rationalizing that hearsay statements sharing a common *res gestae* heritage, such as the present sense impression, minimize "unreliability due to defective recollection or conscious fabrication"). Thus, Smith's statement is a reliable recounting of his state of mind and is admissible.

2. Firmly Rooted Hearsay Exceptions Are Inherently Reliable

The state of mind exception is widely considered to be "firmly rooted," and thus inherently reliable without corroborating evidence. *See, e.g.*, *Horton v. Allen*, 370 F.3d 75, 85 (1st. Cir. 2004).[5] Federal Rule of Evidence 803(3) codified *Hillmon*, which stated explicitly that a declarant's statement can be used to infer conduct of a third party. FED. RULE EVID. 803(3); *Hillmon*, 145 U.S. at 299. The *Hillmon* court further approved the reasoning of a previous case deciding the same issue, asking "[i]f it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems uncontestable, why may it not be proved in the same way that a designated person was to bear him company?" *Id.* (quoting *Hunter v. State*, 40 N.J.L. 495, 536-38 (1878)).

[5] The court in *Horton* cited a myriad of cases from various courts recognizing the state of mind exception as "firmly rooted." *See Horton*, 370 F.3d at 85 (citing Hayes v. York, 311 F.3d 321, 326 (4th Cir. 2002); Moore v. Reynolds, 153 F.3d 1086, 1107 (10th Cir.1998); Terrovona v. Kincheloe, 852 F.2d 424, 427 (9th Cir.1988); Barber v. Scully, 731 F.2d 1073, 1075 (2d Cir.1984); Lenza v. Wyrick, 665 F.2d 804, 811 (8th Cir.1981); Frazier v. Mitchell, 188 F. Supp.2d 798, 813-14 (N.D. Ohio 2001); United States v. Alfonso, 66 F. Supp.2d 261, 267 (D.P.R.1999); Reyes v. State, 819 A.2d 305, 313 (Del.2003); People v. Waidla, 996 P.2d 46, 67 n. 8 (2000); Wyatt v. State, 981 P.2d 109, 115 (Alaska 1999); State v. Wood, 881 P.2d 1158, 1169 (1994)).

Firmly rooted hearsay exceptions are further reliable due to "the totality of circumstances that surround the making of the statement." *Wright*, 497 U.S. at 820. These statements carry "'special guarantees of credibility' essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony." *Lilly*, 527 U.S. at 126 (quoting *White*, 502 U.S. at 356); *see also Bourjaily v. United States*, 483 U.S. 171, 183 (1987) ("We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements.").

The statement here meets all of the indicia of reliability contemplated by the history of 803(3). Requiring corroborating evidence would add a requirement to a hearsay exception that goes against the purpose of the rule. The corroborating evidence sought to be admitted would further "permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness" of the hearsay statement. *Wright*, 497 U.S. at 823. Thus, the Fourteenth Circuit's determination that 803(3) requires corroborating evidence is unfounded.

B. The Plain Meaning Of 803(3) Does Not Exclude Intentions Of A Third Party, And Inquiry Into Congressional Intent Is Therefore Irrelevant

The language of Rule 803(3) is unambiguous and contains no limit to its applicability. FED. RULE EVID. 803(3). Because nothing in the language of the rule limits its scope, the rule as written codifies *Hillmon* and does not disturb its conclusion or reasoning. *See Houlihan*, 871 F. Supp. at 1500. Thus, a statement under the exception can be used to prove both the declarant's conduct and that of a third party.

The Advisory Committee's Note to Rule 803(3) clearly states *Hillmon*'s rule, stating "allowing evidence of the intention as tending to prove the doing of the act intended is of course, left undisturbed." FED. R. EVID. 803(3) advisory committee's note. By contrast, the Report of

the House Committee on the Judiciary states its intent to limit the *Hillmon* doctrine so "as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." H.R. Rep. No. 650, 93rd Cong., 1st Sess., at 13 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7087. The Senate Report and the Conference Report are silent on this issue, indicating that only one committee of one chamber approved the limitation of *Hillmon*. *Houlihan*, 871 F. Supp. at 1499. This inconclusive legislative history is weak evidence of a desire by the legislature to limit the rule's scope.

Although Respondent insists that this Court should look to the legislative history of Rule 803(3), this Court has repeatedly held that the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Extrinsic materials only have a role in statutory interpretation when they can shed a reliable light on understanding "otherwise ambiguous terms." *Id.* Legislative history "is often murky, ambiguous, and contradictory." *Id.* Further, even if this Court were to engage in an examination of Rule 803(3)'s legislative history, "the conflicting nature of that evidence . . . would nevertheless lead us right back to the text." *Houlihan*, 871 F. Supp. at 1501 (1994) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971)). Finally, had Congress intended to limit the scope of 803(3), it could have done so during the Rule's codification. *See Houlihan*, 871 F. Supp. at 1500 (comparing 803(3) to other rules of evidence that contain explicit limitations). Therefore, inquiry into Rule 803(3)'s legislative history is unnecessary.

Because the state of mind exception is firmly rooted and sufficiently reliable, Smith's statement should be admitted to prove that he intended to meet, and in fact met, Respondent at the apartment.

III. THE CONFRONTATION CLAUSE IS NOT VIOLATED WHEN AN EXPERT WITNESS TESTIFIES AS TO HER OWN INDIVIDUAL OPINION ABOUT DATA GLEANED FROM A NONTESTIMONIAL AUTOPSY REPORT NOT OFFERED FOR ITS TRUTH WHEN THE DEFENDANT HAS AN OPPORTUNITY TO CROSS-EXAMINE THE EXPERT WITNESS

The Confrontation Clause of the Sixth Amendment is not violated when an expert offers independent opinion testimony based on data not admitted into evidence, as long as the underlying source is not introduced for its truth. *Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Williams v. Illinois*, 132 S. Ct. 2221, 2239 (2012). The autopsy report in this case is not being offered for its truth; rather, it will be used as a source for an independent expert opinion, and thus there is no Sixth Amendment violation. *See Williams*, 132 S. Ct. at 2251 (Breyer, T., concurring). Ultimately, any questions about the basis for an expert's opinion speak to the weight of the testimony, not to its admissibility. *Williams*, 132 S. Ct. at 2235.

Moreover, autopsy reports are not testimonial. Autopsy reports are business records, which are outside the contemplation of the Confrontation Clause. *See Crawford*, 541 U.S. at 56. The autopsy report in the instant case was neither prepared for the primary purpose of accusing a targeted individual, nor to create evidence for use at a later criminal proceeding. (R. at 9-12); *see Williams*, 132 S. Ct at 2243; *United States v. James*, 712 F.3d 79, 97 (2d Cir. 2013). Autopsy physicians, similar to analysts in other forensic fields, generally have no way of knowing whether their findings will be incriminating. *See Williams*, 132 S. Ct at 2244. The only incentive a medical examiner has in producing an autopsy is to "produce an accurate description of the state of the body." *People v. Dungo*, 286 P.3d 442, 546 (Cal. 2012). Accordingly, autopsy reports are not at risk for creating the "principal evil [of using *ex parte* examinations against the accused] at which the Confrontation Clause was directed." *Williams*, 132 S. Ct. at 2248 (2012) (Breyer concurring) (quoting *Crawford*, 541 U.S. at 51). Thus, this Court should admit Dr. Chin's testimony.

A. As An Expert Witness, Dr. Chin Is Permitted To Use The Autopsy Report As The Basis Of Her Independent Conclusion Regarding Smith's Cause Of Death

The ability for a criminal defendant to cross-examine a testifying expert satisfies the Confrontation Clause. When an expert testifies as to her own independent opinion, the defendant is given a full and fair opportunity to probe and expose any errors, omissions, or gaps in an expert's knowledge. *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985). A defendant only has the right to confront underlying source data in expert testimony if that source is introduced for its truth. *Williams*, 132 S. Ct. at 2251; *United States v. Johnson*, 587 F.3d 625, 635 (2009). No confrontation violation occurs where, as here, an expert witness available for cross examination testifies about her own opinions formed after reviewing an autopsy report and other materials.

This Court's recent trio of cases relating to the admissibility of scientific evidence at criminal trials is instructive. This Court first held that an affidavit stating only the results of a forensic test without an expert witness testifying to its accuracy was impermissible. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009). This Court stated that the affidavit was created for the "sole purpose" of "establishing or proving some fact" in a criminal proceeding; thus, it could not be admitted as substantive evidence under the Confrontation Clause without a live witness at trial competent to testify to the truth of the statements in the affidavits. *Melendez-Diaz*, 557 U.S. at 313.

This Court next held that, even with an expert witness to testify regarding the results of a forensic test, the testimony is inadmissible if the expert did not perform the test and merely parroted the conclusions of another analyst. *Bullcoming v. New Mexico*, 564 U.S. 647, 653, 663-65 (2011). The *Bullcoming* Court applied *Melendez-Diaz* to hold that the Confrontation Clause did not allow the admission of the forensic report certifying the results of a blood alcohol test admitted through the testimony of another scientist who "did not sign the certification or perform

or observe the test" and who had no "independent opinion" about its results. *Id* at 659-660. Such "surrogate testimony . . . does not meet the constitutional requirement." *Id* at 652.

Finally, in a plurality opinion by Justice Alito, this Court concluded that an expert's testimony *was* admissible when she testified as to her own independent opinion regarding facts gleaned from a DNA profile prepared by another. *Williams v. Illinois*, 132 S. Ct. 2221 (2012). In *Williams,* the State did not seek to rely on formal certifications, affidavits, or otherwise, and the expert witness was allowed to testify and render her own independent opinion. *Id.* at 2244. Thus, the Confrontation Clause was not violated. *Id* at 2240.

In the case at bar, Dr. Chin's testimony satisfies the requirements of *Melendez-Diaz, Bullcoming,* and *Williams*. Unlike the prosecution in *Melendez-Diaz,* the State of Boerum neither submitted the autopsy report for use at trial, nor was the government seeking to rely on formal certifications. (R. at 28). Dr. Chin's expert testimony would be based on her own independent opinion, unlike the witness in *Bullcoming*, who merely served as a conduit for the conclusions made in the underlying certified report. (R. at 15-16); *see Bullcoming*, 564 U.S. at 662. Dr. Chin's testimony would consist only of her independent conclusion based on her subjective opinion about the cause and manner of Smith's death. (R. at 29). Thus, Dr. Chin's testimony does not run afoul of the Confrontation Clause, and the Court should admit her opinion testimony.

1. The Only Testimony Dr. Chin Offers For Its Truth Is Her Expert Opinion

A defendant's confrontation rights are only implicated by the admission of testimonial statements when those statements are admitted to establish the truth of the matter asserted. *Williams*, 132 S. Ct. at 2235 (plurality op. of Alito, J.); *id.* at 2256 (Thomas, J., concurring in the judgment) (endorsing the *Crawford* rule); *id.* at 2268 (dissenting op. of Kagan, J.) (endorsing the *Crawford* rule). The autopsy report in the instant case is not being offered for its truth.

Under well-established principles of evidence, an expert may testify about the findings and conclusions of a nontestifying expert that she used in forming her opinions. FED. RULE EVID. 703; *Williams*, 132 S. Ct. at 2245 (2012) (Breyer, T., concurring); *People v. Lovejoy,* 235 Ill. Ed 97, 143 (2009); 6 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 703:1 (7th ed. 2016). An expert witness who applies her "training and experience" to the sources before her and "reaches an independent judgment" does not offend the Confrontation Clause. *Johnson*, 587 F.3d at 635. The Federal Rules of Evidence provide that an expert's source materials need not be introduced or even admissible in evidence. FED. RULE EVID. 703. Vital questions such as "was the lab work done properly?" and "what do the readings mean?" can be put to the testifying surrogate. *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008). The background data need not be presented to the jury. *Id.*

a. Dr. Chin Is Not A Conduit for the Underlying Autopsy Report

The purpose of Dr. Chin's testimony is to give an independent opinion as to cause of death. The crucial question is whether the expert is "giving an independent judgment or merely acting as a transmitter for testimonial hearsay." *Johnson*, 587 F.3d at 635. As long as the expert is applying her "training and experience" to the sources she relies upon and "reach[es] an independent judgment, there will typically be no *Crawford* problem." *Id.*; *see also United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012); *United States v. De La Cruz*, 514 F.3d 121, 134 n.5 (1st Cir. 2008) (stating that "a physician's reliance on reports prepared by other medical professionals" is "plainly justified" as "a matter of expert opinion testimony") (quoting *Crowe v. Marchand*, 506 F.3d 13, 17-18 (1st Cir. 2007)); *United States v. Williams*, 740 F. Supp. 2d 4, 9-10 (D.C. Cir. 2010). A testifying expert may not "parrot out-of-court testimonial statements of

cooperating witnesses" in the "guise of expert opinion." *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir. 2007).

A host of courts have recognized that an expert who merely relies on data, without introducing it for its truth, does not violate the Confrontation Clause. This applies even outside the realm of forensic evidence. For example, in *United States v. Johnson*, the State presented two officers as expert witnesses to help the jury interpret intercepted phone calls between various members of a drug conspiracy. *Johnson*, 587 F.3d at 633 (4th Cir. 2009). The expert witnesses testified that several seemingly innocuous terms in the phone calls were actually code words for narcotics. *Id.* The defendant objected that the officers were impermissibly presenting hearsay evidence based on their conclusions from the phone calls. *Id.* The Fourth Circuit disagreed, holding that the experts were not mere conduits for the hearsay because they made no direct reference to the content of the interviews, presented their own independent judgment and specialized understanding to the jury, and utilized their "many years of experience" to decipher various code words in the phone calls. *Id.* Using raw data as base evidence for drawing an independent conclusion is not a Confrontation Clause violation. *See, e.g.*, *Marshall v. People*, 2013 CO 51, ¶ 22 (Colo. 2013); *Smith v. Florida*, 28 So.3d 838, 854-55 (Fla. 2009). *But see United States v. Ignasiak*, 667 F.3d 1217, 1230-31 (11th Cir. 2012) (Confrontation Clause violation where the doctor who testified at trial did not "personally observe or participate" in the autopsies because the observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy).[6]

[6] However, *United States v. James* correctly noted that *Ignasiak* warranted a different conclusion because the Florida Medical Examiner's Office existed "within the Department of Law Enforcement," thus rendering the opinion to be more likely testimonial than not. United States v. James, 712 F.3d 79, 99 n.11 (2d Cir. 2013).

In this case, Dr. Chin would not be serving as a conduit for otherwise inadmissible evidence; rather, she would testify as to her own independent opinion regarding Smith's cause of death. (R. at 15-16). As long as Dr. Chin "has a sound basis for [her] opinion and conclusions, [her] testimony would not offend the Confrontation Clause." *United States v. Williams*, 740 F. Supp. 2d 4, 9 (D.C. Cir. 2010). Dr. Chin considered several sources in conducting her analysis, such as literature surrounding Homydine and Pest-X, and treatises and reports relating to the effects of opioids and other types of common drugs. (R. at 15). Similar to the expert officers in *Johnson* who applied "expertise, derived over many years" in drug trafficking to decipher the phone calls, Dr. Chin's "extensive experience" as an Assistant Medical Examiner allows her to interpret the data contained in the multiple sources she used as base evidence. *Johnson*, 587 F.3d at 636; (R. at 15).

b. <u>The Autopsy Report Is Raw Data That Dr. Chin Can Use As A Basis For Her Expert Opinion</u>

Expert opinion evidence is admissible when an expert independently evaluates "objective raw data" obtained from an underlying source, and exercises her own judgment in reaching her own independent conclusion. *United States v. Summers*, 666 F.3d 192, 201 (4th Cir. 2011). The testifying expert's independent opinion is an "original product" that can be readily "tested through cross-examination," and thus does not violate the Confrontation Clause. *Id.* at 202.

Two commentators state that expert opinions and conclusions, inevitably and necessarily, require reliance on source materials, data, judgments and opinions reached by others. Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 151 (2012) [hereinafter Mnookin & Kaye]. This collective knowledge, or "distributed cognition," is "precisely why Rule 703 permits experts, unlike lay witnesses, to rely on data and materials provided by others in forming their own conclusions." *Id.* Much of

the base data within the expert's network of distributed cognition will not itself raise Confrontation Clause issues. *Id.* For example, the expert witness in *Williams* testified as to the DNA report, and was "engaged in a mixture of independent judgment, expertise and epistemic deference," illustrating an example of "distributed cognition." Mnookin & Kaye, at 157-58.

Here, the autopsy report can be said to consist of such "distributed cognition." This "raw data"—calculations and measurements that Dr. Fleischer recorded while conducting scientific analysis in a certified laboratory—is not subject to the ambit of Confrontation Clause. (R. at 11-12). The observations contained in the autopsy report, such as the odor of the body, the lack of opioids in the decedent's system, and "cloudy" and "congested" organs, are comparable to observations of objective fact in a report by a physician created for treatment purposes, which would not violate the Confrontation Clause. (R. at 11); *see Melendez-Diaz*, 557 U.S. at 312 n.2. The underlying autopsy is inconclusive, and states that the manner of death is "unknown." (R. at 12). As raw data, the underlying autopsy report is not offered for its truth. Dr. Chin does not violate the Confrontation Clause by using the report as one of the sources for her independent analysis and conclusions.

2. As A Practical Matter, Public Policy Dictates That Surrogate Expert Testimony Regarding Autopsy Reports Be Admissible; To Hold Otherwise Would Place An Impermissible Statute Of Limitations On Murder

The availability, or lack thereof, of a physician who performed an autopsy should not be the determinative factor for a conviction of murder. The practical effects of applying *Crawford* to surrogate testimony of forensic evidence simply cannot be ignored. First, *Crawford* gives no guidance as to who must testify, and what the limits of confrontation are. *See Melendez-Diaz*, 557 U.S. 305, 331-34 (questioning which analyst is sufficient to testify) (Kennedy, J., dissenting); *Bullcoming*, 564 U.S. 647, 674-76 (questioning again why one analyst's testimony is deemed sufficient for Confrontation purposes, but another was not) (Kennedy, J., dissenting).

This Court has recognized the practical problems involved in applying the Confrontation Clause to crime laboratory reports. Justice Scalia aptly pointed out that requiring "everyone who laid hands on the evidence" to be called as a witness is impractical and not required. *Melendez-Diaz*, 557 U.S. at 311 n.1. Although the prosecution has an obligation to establish the chain of custody for scientific evidence, "gaps in the chain of custody" go to the weight of the evidence, not its admissibility. *Id.*

Next, non-analytical "findings" contained in an autopsy report are not part of the "core class" of testimonial statements that the Confrontation Clause is intended to prevent. *Rollins v. State*, 897 A.2d 821, 839-40 (Md. 2005). Expert testimony that is based on raw data that is non-accusatory, contemporaneously recorded, and objectively inconclusive does not offend the Confrontation Clause. *See People v. Rawlins*, 884 N.E.2d 1019, 1035 (N.Y. 2008). Therefore, the need to cross-examine the medical examiner who prepared the underlying autopsy is "considerably diminished." *See Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring) (reasoning that data observed by professional analysts working on technical matters at a certified laboratory, working "behind a veil of ignorance" as to the defendant's identity, does not implicate the Confrontation Clause).

Finally, the unavailability of the physician who performed the autopsy should not determine the outcome of a murder trial.

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the autopsy report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interests to

> permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

United States v. De La Cruz, 514 F.3d 121, 134 (1st Cir. 2008) (citing *People v. Durio*, 794 N.Y.S.2d 863, 869 (N.Y.Sup.Ct. 2005)). Further, disallowing the surrogate testimony would "*effectively amount to a statute of limitations on murder* where non otherwise exists" in a case where, "for example, the medical examiner who performed the autopsy passes away before a perpetrator is apprehended and tried." *People v. Hall*, 923 N.Y.S.2d 428, 432 (N.Y. App. Div. 2011) (emphasis added); *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring); *see also Durio*, 794 N.Y.S.2d at 869. Further, repetition of an autopsy is impossible, highlighting the practical importance of allowing surrogate testimony. *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring). The balance of interests weighs heavily in favor of the State, particularly where the cross-examination rights of the defendant are preserved.

B. Dr. Chin's Surrogate Testimony Is Admissible Because the Underlying Autopsy Report is Nontestimonial—Its Primary Purpose Is Neither To Accuse A Targeted Individual Nor Provide Evidence for a Criminal Proceeding

Autopsy reports are a recitation of facts contemporaneously recorded and are thus nontestimonial. Only testimonial statements implicate the Constitutional requirement of confrontation. U.S. CONST. AMEND. VI; *Crawford*, 541 U.S. at 59. Testimonial statements by an unavailable declarant may not be admitted into evidence unless the defendant had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 59. Although the *Crawford* Court declined to "spell out a comprehensive definition of 'testimonial,'" it did offer a number of observations that "suggest the contours of that definition." *United States v. Feliz*, 467 F.3d 227, 232 (2006) (quoting *Crawford*, 541 U.S. at 68). *Crawford* and its progeny consider whether a statement fits within a "core class" of testimonial statements that were historically subject to abuse in courts, such as affidavits and *ex parte* statements against the accused. *Crawford*, 541 U.S. at 50.

The underlying autopsy report in the instant case is clearly not testimonial.[7] Autopsy reports in general are outside the scope of the Confrontation Clause as they are business records. Further, the report in this case was not created for the primary purpose of creating a record for use at a later criminal trial. Therefore, Dr. Chin's testimony should be admitted.

1. Autopsy Reports Are Outside The Ambit Of The Confrontation Clause As They Are The Quintessential Business Record

Business records are inherently nontestimonial unless created for the primary purpose of accusing an individual. *Crawford* specifically excludes business records from the definition of testimonial. *Crawford*, 541 U.S. at 56. A business record is fundamentally inconsistent with what this Court had suggested comprised the defining characteristics of testimonial evidence. *See Crawford*, 541 U.S. at 56 (noting that business records are not testimonial by nature); *see also id.* at 76 (Rehnquist, C.J., concurring) (praising the Court's exclusion of business records from the definition of "testimonial" falling within the ambit of the Confrontation Clause); *Feliz*, 467 F.3d at 236-37 (noting that autopsy reports are kept in the course of a regularly conducted business activity and are nontestimonial under *Crawford*); *Manocchio v. Moran*, 919 F.2d 770, 778 (1st Cir.1990) (recognizing that autopsy reports are business records akin to medical records, prepared routinely and contemporaneously according to "statutorily regularized procedures and established medical standards" and "in a laboratory environment by trained individuals with specialized qualifications"); *De La Cruz*, 514 F.3d at 133 (citing *Crawford*, 541 U.S. at 56).

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the

[7] Although the definition of testimonial is unsettled, after "*Bullcoming*, the primary purpose test had been accepted in some form by every member of the Court except Justice Thomas. The test had been applied to two categories of out-of-court statements: statements made by witnesses to the police and statements contained in reports of forensic testing." People v. Leach, 2012 IL 111534, ¶ 113.

administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. *Melendez-Diaz*, 557 U.S. at 324. An autopsy report involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. This memorialized record keeping renders an "autopsy report, prepared by a medical examiner and documenting objective findings, [to be] the 'quintessential business record.'" *Rollins v. State*, 866 A.2d 926 (Md. 2005).

This does not mean, however, that a business record or public record can never be testimonial. *People v. Leach*, 2012 IL 111534, ¶ 81; *see also Rawlins*, 10 N.Y.3d at 150-51. But, in general, business records are not subject to the same civil-law abuses that the Confrontation Clause targeted. *Feliz*, 467 F.3d at 234. Some courts have held that business records are not categorically outside the scope of the Sixth Amendment. *See, e.g., Rawlins*, 884 N.E. 2d at 1028-29. However, if the business record was created for the primary purpose of implicating a targeted individual, then it would subsequently fail under the primary purpose test.

2. The Autopsy Report's Primary Purpose Was Not For Later Use At A Criminal Proceeding

Even if autopsy reports are not categorically excluded from the Confrontation Clause, the testimony from Dr. Chin would be admissible because the underlying autopsy report was not primarily developed for use in a criminal proceeding.[8] All Justices agree that an autopsy report is testimonial "only if its primary purpose pertains in some fashion to a criminal prosecution." Michael. H. Graham, *Confrontation Clause:* Williams *Creates "Significant Confusion" Prompting California Avoidance; Bryant's Dual Perspective Primary Purpose Approach*, 49

[8] This court, as well as Federal Circuits and State Courts, have various determinations as to the definition of "testimonial." *Compare, e.g.*, United States v. James, 712 F.3d 79, 97 (2d Cir. 2013) (stating that testimonial is a case-by-case determination focusing on whether the evidence was prepared for the "primary purpose of creating a record for use at a later criminal trial"), *with* People v. Leach, 2012 IL 111534 ¶ 117-22 (formulating multiple definitions of "testimonial" in accordance with *Williams*), *and* People v. Rawlins, 884 N.E.2d 1019, 1029 (N.Y. 2008) (analyzing the evidence through factors demonstrating "various indicia of testimoniality").

CRIM. L. BULLETIN 1533 (2013). The Justices considered two factors to determine whether a statement was testimonial: "(a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions." *Williams*, 132 S. Ct. at 2242.

An autopsy report is a far cry from formalized statements against a defendant, such as "affidavits, custodial examinations, [or] prior testimony that the defendant was unable to cross-examine." *Crawford*, 541 U.S. at 51. The autopsy report was not prepared for the purpose of accusing the defendant, who was not in custody or even under suspicion when the autopsy was performed. (R. at 11-12); *see also Vega v. Walsh*, 669 F.3d 123, 127-28 (2d Cir. 2012) (stating that it was not unreasonable to determine that an autopsy report was not part of the definition of "testimonial" as contemplated by *Crawford*).

The instant case simply does not have the same facts and factors which caused other jurisdictions to hold that autopsy reports are testimonial. Law enforcement officers in the instant case were neither present during the actual performing of the autopsy, nor is the Office of the State Medical Examiner under the direct supervision of Boerum Law Enforcement. (R. at 9); s*ee Dungo*, 286 P.3d at 625-26 (stating that a statement "should be deemed more testimonial to the extent it was produced through the agency of government officers engaged in a prosecutorial effort, and less testimonial to the extent it was produced for purposes other than prosecution or without the involvement of police or prosecutors"). This can be directly contrasted with facts in cases holding autopsy reports to be testimonial. *See, e.g.*, *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011). In *Moore*, the court an autopsy report was testimonial since the presence of law enforcement officers during the autopsies would "lead an objective witness reasonably to

believe that the statement would be available for use at a later trial." *Moore*, 651 F.3d at 73 (quoting *Melendez-Diaz*, 557 U.S. at 310 (citations omitted)). The circumstances surrounding the creation of the report in the instant case renders it non-testimonial. Dr. Fleischer did not perform the autopsy at the request of police, was not involved with law enforcement, completed his report well before any criminal homicide investigation, and ultimately was unsure as to whether the death was a homicide at all. (R. at 11-13); *see also People v. Leach*, 2012 IL 111534, ¶ 126-29 (holding that the autopsy report was nontestimonial even with the existence of a statute mandating autopsy reports because of the minimal involvement of law enforcement officers); *James*, 712 F.3d at 97-98 (concluding that the report was not testimonial because of the uncertainty as to whether the death was caused by homicide or suicide by recreational overdose, and that the report was completed "substantially before any criminal investigation into [decedent's] death").

Further, most autopsies by the State Medical Examiner in the State of Boerum are conducted for reasons other than criminal litigation. (R. at 9). The mere fact that an autopsy *could* be used in a later criminal proceeding is insufficient to render it testimonial.[9] An analysis of the surrounding factors must be considered. *See United States v. James*, 712 F.3d 79, 98-99 (2d Cir. 2013); *People v. Leach*, 2012 IL 111534, ¶ 126-29. *But see Commonwealth v. Brown*, 139 A.3d 208, 216 (Pa. Super. Ct. 2016) (holding that an autopsy report "prepared because of a sudden, violent, or suspicious death or a death that is the result of other than natural causes, is testimonial"), *appeal granted*, No. 357 EAL 2016, 2016 WL 7235589, at*1 (subject to revision or withdrawal).

[9] Some jurisdictions have stated that the existence of a statute requiring a medical examiner by law to investigate deaths under suspicious or violent circumstances renders the reports as "obviously" testimonial. *See, e.g.*, United States v. Ignasiak, 667 F.3d 1217, 1232 (11th Cir. 2012); Cuesta-Rodriguez v. State, 2010 OK CR 23, ¶ 34, 241 P.3d 214, 228.

Because of all of the factors mentioned above, the underlying autopsy report is clearly nontestimonial. Dr. Chin should be allowed to testify as to her expert opinion regarding the cause of death.

Conclusion

For the foregoing reasons, Petitioner respectfully requests this Honorable Court **REVERSE** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) the evidence obtained from Respondent's laptop is admissible under the good faith exception to the exclusionary rule; (2) the statement of Smith is admissible under Rule 803(3); and (3) the opinion testimony of Dr. Chin is admissible under the Confrontation Clause of the Sixth Amendment.

Respectfully Submitted,

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Team 5
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