THIRTY-SECOND ANNUAL
DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 16-1789

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

-against-

PAUL RUTHERFORD,
Respondent.

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

RECORD ON APPEAL

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA

15-CR-021

-against-

I N D I C T M E N T
18 U.S.C. § 1512(a)(1)

PAUL RUTHERFORD,
Defendant.
----------X

THE GRAND JURY CHARGES:

On or about October 10, 2014, within the Eastern District of Boerum, the Defendant Paul Rutherford did knowingly and willfully kill another person, to wit: Victor Smith, with intent to prevent the attendance or testimony of Smith in an official proceeding, and with intent to prevent the communication by Smith to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense, all in violation of Title 18, United States Code, Section 1512(a)(1)(A) and (a)(1)(B).

A TRUE BILL

/s/ Miguel H. Jones
FOREPERSON

January 21, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM

- X

IN THE MATTER OF AN APPLICATION FOR A SEARCH WARRANT FOR

THE PREMISES KNOWN AND DESCRIBED AS:

ALL DIGITAL COMPUTER FILES CONTAINED WITHIN THE OFFICE AND PERSONAL COMPUTERS AND LAPTOPS OF GOVERNOR PAUL RUTHERFORD, 365 PLAZA STREET, BOERUM CITY, BOERUM 11201

AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT

(18 U.S.C. § 1512(a)(1))

- X

EASTERN DISTRICT OF BOERUM, SS:

ESPERANZA FONSECA, being duly sworn, deposes and states that she is a Special Agent with the Federal Bureau of Investigation ("FBI"), duly appointed according to law and acting as such.

Upon information and belief, there is probable cause to believe that, presently concealed within THE PREMISES KNOWN AND DESCRIBED AS: ALL DIGITAL COMPUTER FILES CONTAINED WITHIN THE OFFICE AND PERSONAL COMPUTERS AND LAPTOPS OF GOVERNOR PAUL RUTHERFORD, 365 PLAZA STREET, BOERUM CITY, BOERUM 11201, there is evidence that Rutherford had the motive and means to kill another person with intent to: (A) prevent the attendance or testimony of that person in an official proceeding; (B) prevent the production of a record, document, or other object, in an official proceeding; and (C) prevent the communication by that person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense, all in violation of 18 U.S.C. § 1512(a)(1).

The source of your deponent's information and the grounds for her belief are as follows:[1]

1. I have been a Special Agent with the FBI for over 15 years. During that time, I have participated in numerous homicide investigations and executed more than one hundred search warrants and property seizures. I am familiar with the facts and circumstances of this investigation from my personal participation in the investigation and from information obtained from other law enforcement agents.

2. Paul Rutherford is the Governor of Boerum. Rutherford was elected in 2012, in part based upon his campaign promise to renovate the Cobble Hill Bridge and develop the areas around the bridge. The development plans included new parks, schools, and waterfront condominiums. Millions of dollars in federal grants were secured for the project, and a similar amount in state revenue was committed to the project.

3. Contracts worth more than one hundred million dollars were put out for bid in late 2013. The contracts were awarded on a rolling basis during the first few months of 2014.

4. Shortly after the contracts were awarded, bidders who were not selected began making allegations that Rutherford's friends and campaign contributors were given special treatment and that the bidding process was rigged.

5. On or about June 17, 2014, the United States Attorney's Office and the FBI began an investigation focused on allegations that Rutherford and high-level members of his staff steered lucrative contracts for the renovation of the Cobble Hill Bridge and development of the

[1] Because this affidavit is submitted for the limited purpose of establishing probable cause for a search warrant, I have not set forth each and every fact learned during the course of the investigation.

surrounding area to Rutherford's close friends and campaign contributors. At the same time, an independent state investigation into the same allegations was commenced by the Boerum State Attorney General and the Boerum State Police.

6. In August 2014, the United States Attorney's Office interviewed Victor Smith, Rutherford's top aide, as part of the corruption investigation. Smith appeared with his attorney, Justin Baker, on August 13, 2014. During the interview, an Assistant United States Attorney confronted Smith with incriminating evidence about his role in the alleged corruption. After consulting with his lawyer, Smith signed a cooperation agreement with the United States. The terms of the agreement offered Smith immunity from prosecution on the condition that he disclose all information about any and all criminal wrongdoing by public officials about which he knew or would come to know.

7. On or about August 29, 2014, the United States Attorney's Office issued a grand jury subpoena for all electronic documents stored on Rutherford's computers that related to the bidding process for the Cobble Hill Bridge renovation. The Governor's office indicated that it would cooperate and provide the documents.

8. On September 19, 2014, the United States Attorney's Office issued a grand jury subpoena for the testimony of Smith. Smith was scheduled to testify before the grand jury on October 16, 2014.

9. On October 11, 2014, the Boerum State Police contacted the FBI to notify agents that Smith had been found dead by his fiancée that morning. The State Police contacted FBI agents because they were aware of the pending federal investigation into Rutherford and that Smith was Rutherford's top aide.

10. FBI agents interviewed Anita Flores, Smith's fiancée, on October 12, 2014. Flores stated that on October 11, 2014, she arrived at Smith's apartment early in the morning and found him dead in his bedroom. Flores was unsure how Smith died. She told the agents she had spoken to Smith the night before, at which time Smith told her he was going to meet Rutherford at the Governor's apartment for dinner and was going out for drinks with friends after that. Flores also told the agents that, about one or two weeks prior to his death, Smith had told her he learned information about Rutherford that upset him. Although Smith did not tell Flores what the information was, he did say that he discovered it while reviewing documents on Rutherford's laptop computer. Flores said Smith did not mention this incident again and that she was not concerned when he told her about his dinner plans.

11. FBI Special Agent Ian Loyal has been assigned to the corruption investigation since its inception. Until last year, Loyal was supervised by Joe Turner. Turner retired in 2013 after a long career at the FBI and accepted a position as head of security for Rutherford.

12. A day after learning of Smith's death, Loyal came forward to his new supervisors with the following information: In late August or early September, Loyal called Turner, his long-time friend and colleague, and suggested that Turner might want to start looking for a new job because the investigation into Rutherford was heating up. Loyal told Turner that someone very close to the Governor had just signed up as a cooperator, and he urged Turner to be careful.

13. On October 13, 2014, FBI agents interviewed Smith's attorney, Justin Baker. Baker has been practicing criminal law in the federal courthouse in Boerum for decades. During the interview, Baker stated that he and Smith had a debriefing session with the FBI and an Assistant U.S. Attorney in early September. The meeting was held on a Sunday, when the

downtown area is very quiet, to make it as private as possible. When the session was over, Baker and Smith walked out of the building toward the subway and parted ways. When Baker turned around, he saw Joe Turner. Baker recognized Turner from cases in which they were both involved over the years. Turner said a quick hello and walked away.

14. On October 16, 2014, the Boerum State Police executed a search warrant obtained in the course of the state corruption investigation. Officers searched the computers in Rutherford's office, located at 365 PLAZA STREET, BOERUM CITY, BOERUM 11201. The search warrant authorized the search of all office computers for information related to the bidding process for the Cobble Hill Bridge renovation project. Because the bids in question had all been awarded by June 1, 2014, the warrant authorized officers to search only for electronically stored documents created on or before that date.

15. At the time of the search by State Police, Rutherford was in his office with his attorney and FBI Agent Loyal. Loyal was questioning Rutherford about Smith's death. According to Loyal, Rutherford acknowledged he knew Smith was scheduled to testify before the grand jury, but he denied knowing anything about the circumstances under which Smith died. Rutherford stated that the last time he saw Smith was when the two of them were reviewing documents stored on the Governor's laptop computer in an effort to identify and collect all documents responsive to the federal grand jury subpoena issued on August 29, 2014.

16. The execution of the search warrant obtained by the Boerum State Police for Rutherford's office was supervised by State Police Officer Andrew Scott. While at Rutherford's office, Loyal told Scott that the FBI was there to question Rutherford about Smith's death.

17. Scott has been interviewed by agents of the FBI. Scott reported that, after he learned that Smith had died and that FBI agents were questioning Rutherford about Smith's death, Scott inferred that Smith likely died under suspicious circumstances. Because Scott had Rutherford's computer open and was conducting a search of it for documents connected to the bidding process, he decided to look at Rutherford's recent email activity to see whether there might be clues to the circumstances of Smith's death. Although Scott was aware that the search warrant was limited in scope to electronically stored documents created on or before June 1, 2014, he also believed that examining the "to" and "from" information in an email account was analogous to using a pen register on a telephone and therefore did not require a search warrant.[2]

18. When Scott started scrolling through Rutherford's recent email activity, he found an email from Pestex Corp., a well-known company that sells pesticides. The subject line of the email confirmed that Rutherford placed an order with the company for Pest-X, one of the company's pesticides, on October 4, 2014, one week before Smith's death. A second email and its subject line indicated that the Pest-X ordered by Rutherford was delivered on October 10, 2014. Scott revealed these findings to federal investigators.

[2] To obtain a pen register or trap and trace device, an officer or agent of a law enforcement agency need only certify that "the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." 18 U.S.C. § 3122(b)(2). An order issued under the statute for pen registers and trap and trace devices is sufficient to authorize agents to record and decode the incoming and outgoing address and routing information pertaining to electronic communications, such as emails, but not the content of those communications. 18 U.S.C. § 3127(3), (4); *see also In re United States*, 416 F. Supp. 2d 13, 17-18 (D.D.C. 2006) (holding that "the scope of 18 U.S.C. §§ 3121-3127 encompasses the use of pen registers and trap and trace devices on e-mail accounts," but also pointing out that use of these devices pursuant to these statutes must "exclude all information relating to the subject line and body of the communication").

19. On October 12, 2014, Assistant Medical Examiner Lawrence Fleischer examined Smith's body and reached a preliminary conclusion that Smith died after ingesting Pest-X, a pesticide manufactured by Pestex Corp.

20. Pest-X is a strong poison typically used by gardeners to address persistent rodent infestations. Rutherford has a home in a rural upstate Boerum. He held several press conferences on the subject of nutrition at the extensive vegetable garden he maintains there.

21. WHEREFORE, your affiant respectfully requests that a warrant be issued authorizing FBI Agents, with such other assistance as may be necessary, to search the OFFICE AND PERSONAL COMPUTERS AND LAPTOPS OF GOVERNOR PAUL RUTHERFORD for any and all electronically stored information related to the death of Victor Smith, all of which constitutes evidence that Rutherford had the motive and means to kill another person with intent to: (A) prevent the attendance or testimony of that person in an official proceeding; (B) prevent the production of a record, document, or other object, in an official proceeding; and (C) prevent the communication by that person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense, all in violation of 18 U.S.C. § 1512(a)(1).

/s/ Esperanza Fonseca
ESPERANZA FONSECA
FBI Special Agent

Sworn to before me this
18th day of November, 2014

/s/ HON. OLIVIA MADDALENA
THE HONORABLE OLIVIA MADDALENA
UNITED STATES MAGISTRATE JUDGE
EASTERN DISTRICT OF BOERUM

Boerum State Autopsy Law (B.S.C. § 11-16-16)

What Types of Deaths Are Required to be Autopsied?

The Office of the State Medical Examiner should be notified when death is/has:

1. Sudden when individual was in apparent good health;
2. Of a person who was not attended to or examined by a legally qualified physician;
3. Apparently resulted from a disease that constitutes a threat to public health;
4. Occurred in a jail or corrections facility, foster home, or mental health treatment facility;
5. Resulted from violence;
6. Occurred in a suspicious, unusual, or unnatural manner;
7. Involved an unidentified decedent;
8. Apparently resulted from the presence of drugs or poisons in the body;
9. Of a minor child, when there is an indication of child abuse prior to death;
10. Related to disease resulting from employment or to an accident while employed; and
11. Of persons whose bodies are to be cremated, dissected, buried at sea, or otherwise disposed of as to be thereafter unavailable for examination.

If, under any of the circumstances listed above, and in the opinion and discretion of the Chief Medical Examiner, an autopsy is reasonably necessary for public safety purposes, such autopsy shall be performed by the Chief Medical Examiner or an Assistant Medical Examiner. It shall be in the sole discretion of the Chief Medical Examiner to determine whether or not an autopsy is required, provided that he/she give due consideration to the opinions of the coroner and the peace officer in charge.

Recording Devices and Other Requirements of Autopsies

All autopsy laboratories are required to have recording devices available to Medical Examiners performing autopsies at all times. If appropriate in the medical examiner's discretion, the autopsy shall be observed by a standby medical examiner, or shall be recorded.
Such necessary devices shall include:

1. Video camera;
2. Audio recorders; and
3. Any and all other recording devices that the Chief Medical Examiner deems appropriate.

To: Boerum Police Department - Homicide Division
From: Dr. Lawrence Fleischer
Re: Autopsy Report of Victor Smith
Date: October 12, 2014

To Whom It May Concern:

I am writing to inform the Boerum Police Department of some concerns I had while conducting the autopsy of decedent Victor Smith. While conducting the autopsy, it became apparent to me that Victor Smith's death could have been due to either homicide or suicide. I think it would be wise for a detective to take a look at the autopsy report, which I am attaching to this email. Please let me know if there are any questions regarding my findings.

Sincerely,
Dr. Lawrence Fleischer
Assistant Medical Examiner
Office of the Medical Examiner for Boerum City, Boerum

AUTOPSY REPORT

OFFICE OF THE MEDICAL EXAMINER
FOR
BOERUM CITY, BOERUM

Assistant Medical Examiner Conducting Autopsy: Lawrence Fleischer, M.D.
Time of Autopsy: Sunday, October 12, 2014, 9:04 AM

Decedent: Victor Smith
Rigor: Absent
Age: 35
Race: Caucasian
Sex: Male
Length: 72 inches
Weight: 185 pounds
Eyes: Hazel
Hair: Black
Body Temperature: Refrigerated
Time of Death: October 10, 2014, at approximately 11:00 PM

External:

- Upper torso and shirt covered in vomit.
- Dark brown stains located on decedent's lips, cheeks, and eyelids.
- Mouth and nose covered in frothy substance containing some blood.
- Six red blotches, each approximately two inches in diameter covered decedent's neck.
- Eyes bloodshot. Could be due to excessive discharge of tears.
- Unnatural odor coming from the mouth and nose. Odor similar to that of vinegar.
- Clear signs of asphyxia.
- No track marks indicative of drug use located on either the right or left arms or wrists.

Internal:

- Strong unnatural odor emanating from the body upon opening. Odor was similar to that of vinegar. Odor was strongest in the stomach.
- Esophagus filled with frothy looking substance containing some blood.
- Patches of minimal erosion of the mouth and throat.
- Substantial erosion of the nasal cavity.
- Tongue, measuring 4.5 inches, dark purple in color.
- Mucosa of respiratory passage congested. Also covered in a frothy substance containing some blood.
- Internal organs much more congested and cloudy than they would ordinarily be.
- Lungs: 2.9 pounds each. Cloudy and seemingly congested.
- No opioids detected in decedent's system.
- Exceedingly high level of fluoride found in system.

Decedent's Medical History:

- Anita Flores informed the responding paramedics that she was the decedent's fiancée and that decedent had been previously prescribed Oxycodone after sustaining an injury a few years ago. Flores also told the paramedics that decedent had abused the drug for a period of time. Although, to her knowledge, decedent had not used Oxycodone in over one year, Ms. Flores had concerns that he may have relapsed due to recent stressors in his life.
- Oxycodone is ingested orally. When there is an overdose of Oxycodone, it can have the same or similar effects as Pest-X ingestion, including:
    - Signs of asphyxia;
    - Froth near the mouth and nose;
    - Unnatural odors inside of the body;
    - Congested lungs; and
    - Congested internal organs.

Summary:

- 35-year-old white male died due to ingestion of a lethal amount of Pest-X. Evidence indicates homicide or suicide. Although no traces of Pest-X were found in the decedent's system, this examiner is aware from prior cases involving lethal exposure to Pest-X that the poison itself quickly metabolizes, and the high level of fluoride detected indicates that the substance ingested was a rat poison, as fluoride is common in rat poison.

Cause of Death:

- Ingestion of lethal Pest-X.
- Approximate time of consumption: 9:00 PM on October 10, 2014.

Manner of Death:

- Unknown.
- Suicide is very common with this substance; homicide is rare, but has occurred, with the poison ingested when mixed with food, sweets, or alcohol.

OFFICE OF THE UNITED STATES ATTORNEY
for the
DISTRICT OF BOERUM

March 3, 2015

Loretta Z. Barnes
Diaz, Gambini, & Howle LLP
180 Park Avenue
Boerum City, Boerum 11201

Re: United States v. Paul Rutherford
Criminal Docket No. 15-CR-021

Dear Counsel:

Pursuant to our obligations under 18 U.S.C. § 3500 and Giglio v. United States, 405 U.S. 150 (1972), and in an abundance of caution, the government discloses the following information regarding Dr. Lawrence Fleischer, a former Assistant Medical Examiner from the Office of the Medical Examiner for Boerum City, Boerum. Dr. Fleischer performed the autopsy of Victor Smith and created the autopsy report in the above-referenced case.

Despite our best efforts, we have been unable to contact Dr. Fleischer to confirm his availability to testify at trial. According to Human Resources personnel at the Medical Examiner's Office with whom we have been in contact, Dr. Fleischer's employment was terminated on December 5, 2014, after his supervisor found a bottle of whisky in his desk drawer. It is unclear whether any Boerum City personnel have communicated with him since.

Although we plan neither to call Dr. Fleischer as a witness nor to offer his report in evidence, we disclose this information because Dr. Elizabeth Chin, Assistant Medical Examiner for Cobble County, Boerum, is expected to offer her independent opinion after reviewing the objective data in Dr. Fleischer's report. Attached to this email is the disclosure letter of Dr. Chin, which describes her anticipated testimony.

The government acknowledges that no one other than Dr. Fleischer, including Dr. Chin, was present at the time of the autopsy, and that no video or audio recording of the autopsy was made. However, the lab has thoroughly reviewed all of the available autopsies and reports prepared by Dr. Fleischer in the past and has not discerned any problems or errors with his work. There is no indication that substance abuse interfered with his work in any way.

Very truly yours,

NICHOLAS ALLARD
United States Attorney

By: /s/ Gerald V. Callo
Gerald V. Callo
Assistant United States Attorney
250 Church Street
Boerum City, Boerum 11201

OFFICE OF THE MEDICAL EXAMINER
for
COBBLE COUNTY, BOERUM

February 24, 2015

Dear AUSA Callo:

On the basis of my extensive experience as an Assistant Medical Examiner, you have asked me to review the report of the autopsy of Victor Smith, "decedent," which was performed on October 12, 2014 by Dr. Lawrence Fleischer, an Assistant Medical Examiner at the Office of the Medical Examiner for Boerum City, Boerum. You have informed me that Dr. Fleischer will be unavailable to testify at trial and have asked me to review his report for the purpose of testifying in court as to my personal analysis and conclusions about the cause and manner of Victor Smith's death.

In conducting my analysis, I have consulted the following sources:

a. The autopsy report of Victor Smith, drafted by Dr. Lawrence Fleischer on October 12, 2014;
b. Literature surrounding Homydine;
c. Literature surrounding Pest-X, a rat pesticide manufactured by Pestex Corporation;
d. Treatises and reports relating to the effects of opioids; and
e. Treatises and reports relating to the effects of other types of common drugs.

My review of the autopsy report reveals the following:

Decedent was a 35-year-old male who had been in generally good health, other than having a known history of recreational drug use. Common indications of serial opioid use include:

a. Signs of asphyxia;
b. Froth near the mouth and nose;
c. Unnatural odors inside of the body;
d. Congested lungs; and
e. Congested internal organs.

Relating to the exterior body, decedent's upper torso was covered in vomit. Decedent's mouth and nose smelled distinctly of vinegar. His lips, cheeks, and eyelids were tinted a dark brown color. The mouth and nostrils were covered by a froth-like substance, which contained traces of the decedent's blood. Decedent's neck was covered in red blotches. Decedent's eyes were bloodshot, indicating that decedent may have been crying. There were no signs of needle punctures in the arms or wrists. The report contains no indications of forced contact on the exterior of decedent's body.

Relating to the interior body, decedent's esophagus was filled with a froth-like substance, which contained traces of decedent's blood. When the froth-like substance was removed, it revealed large patches of erosion in the lining of decedent's esophagus, and substantial erosion along the nasal cavity. Decedent's tongue was a deep purple color. There was a strong odor of vinegar emanating from the body, and the odor was strongest in the stomach. An excessive level of fluoride was found in decedent's stomach. The report states that no opioids were detected in decedent's internal organs.

Based on my review of various treatises and reports relating to the effects of different types of common drugs, along with the extensive research I conducted after my review of this report, I conclude that these effects are consistent with an overdose of the drug Homydine, an ingredient most commonly found in rat pesticides manufactured after approximately 2012. This substance is ingested orally and, apart from its intended use as a pesticide, is frequently used in suicides and, on rare occasions, in homicides. The presence of excessive levels of fluoride indicates that decedent ingested rat poison, as this is a common ingredient in pesticides. Although these symptoms are similar to those resulting from excessive use of opioids, the autopsy did not reveal the presence of any opioids, even though that presence would commonly be detected within 24-48 hours after last use. There are no other symptoms demonstrating chronic opioid use.

In summary, I conclude that the cause of death was overdose of Homydine. The manner of death is still unknown.

The opinions rendered above are given to a reasonable degree of medical probability. Please contact me if further information is required.

My resume/curriculum vitae is attached hereto.

Elizabeth L. Chin

Elizabeth L. Chin, M.D.
Associate Medical Examiner
Cobble County, BR 11201
(822) 555-3434

CURRICULUM VITAE

Elizabeth L. Chin, M.D.
Associate Medical Examiner
Cobble County, BR 11201
(822) 555-3434

EDUCATION
Schermerhorn University, 1983 B.S. Degree
Henry Remsen School of Medicine, 1987 M.D. Degree

POST-GRADUATE TRAINING
1987-1988 Intern, Medical Division East Clinton Hospital
1988-1992 Resident, Medical Division East Clinton Hospital
1992-1994 Fellow, Pathology Division at Pierrepont Hospital
1993-1994 Student, Tillary Accredited Forensic Pathology Program

LICENSURE
Boerum State License (1988)
Diplomate, National Board of Medical Examiners (1988)
Diplomate, American Board of Pathology
Anatomic Pathology (1994)
Clinical Pathology (1995)
Forensic Pathology (1995)

PROFESSIONAL POSITIONS
1995-Present Associate Medical Examiner, Cobble County, Boerum

TEACHING APPOINTMENTS
2008-Present Visiting Professor of Pathology, Cadman School of Medicine
2002-2004 Adjunct Professor of Law, Livingston School of Law
2001, 2004 Visiting Professor, Court Order College

PROFESSIONAL ORGANIZATIONS
Committee Member, American Board of Pathology (1997-2000)
Boerum State Medical Society (1994-Present)
American Medical Association (1994-Present)
Fellow, American Society of Clinical Pathologist (1995-Present)

APPEARANCES AT TRIALS
I have testified in numerous trials in the state of Boerum, including multiple appearances in Boerum Federal District Court. Citations available upon request.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X

UNITED STATES OF AMERICA 15-CR-021
-against-
PAUL RUTHERFORD,
Defendant.
----------X
July 24, 2015

TRANSCRIPT OF HEARING ON PRE-TRIAL MOTIONS
Before: The Honorable Robert Pitler, District Judge, United States District Court

APPEARANCES:

For the United States of America: Gerald V. Callo
Assistant United States Attorney
250 Church Street
Boerum City, Boerum 11201

For Defendant Paul Rutherford: Loretta Z. Barnes
Diaz, Gambini, & Howle LLP
180 Park Avenue
Boerum City, Boerum 11201

Court Reporter: Selena P. Malloy
Eastern District Reporter Services
500 Montague Street
Boerum City, Boerum 11201

CLERK: United States of America versus Paul Rutherford.

MR. CALLO: Gerald Callo for the United States. Good morning, your Honor.

MS. BARNES: Loretta Barnes of Diaz, Gambini, & Howle for Governor Paul Rutherford. Good morning, your Honor.

THE COURT: Good morning, counsel. I understand we are here to discuss the Defendant's motion to suppress and his two motions *in limine*. First, let's address the motion to suppress the files and documents obtained from the Defendant's personal computer. Before we get to the substantive arguments, Mr. Callo, would you briefly tell me what was seized that you intend to offer at trial?

MR. CALLO: Certainly your Honor. The evidence obtained during the FBI's warranted search of the Defendant's laptop includes: 1) the Defendant's internet search history, showing he extensively researched Pest-X, the poison used to kill Victor Smith, during the days leading up to Smith's murder; 2) an email from Pestex, the sole manufacturer of Pest-X, indicating the Defendant's purchase of Pest-X; 3) a second email from Pestex, confirming the delivery of the Defendant's Pest-X order to his address on October 10, 2014, the day before Smith's fiancée found Smith dead; 4) a password-protected file containing screenshots of several conversations between the Defendant and various teenage girls – some of whom described themselves as being as young as 15 – in which the Defendant impersonated a teenage boy, as well as pictures of the girls in various stages of undress; and finally, 5) meta-data indicating that this password-protected file was accessed and opened on the same day that files concerning the bidding on the Cobble Hill Bridge and related development projects were reviewed.

THE COURT: What is the relevance of that last item?

MR. CALLO: We suggest, your Honor, it is circumstantial evidence that the murder victim, Victor Smith, and the Defendant were reviewing files together in an effort to comply with a federal grand jury subpoena issued in connection with a pending corruption investigation, and that during that review Smith came upon the password-protected files involving the teenage girls. In fact, the Defendant acknowledged in an interview with FBI agents that he and Smith had reviewed documents together on his laptop while gathering material responsive to the federal grand jury subpoena. And Smith's fiancée reported to FBI agents that Smith told her he learned some disturbing information about the Defendant while reviewing documents on the Defendant's laptop. We plan to argue that Smith must have discovered the password-protected files, and that was what provoked the Defendant to kill him.

THE COURT: Mr. Callo, has the Government brought any charges based on the photographs of and communications with the teenage girls?

MR. CALLO: Your honor, the images on Defendant's laptop do not seem to be of sexually explicit conduct, as defined by federal law, and so they may not violate 18 U.S.C. § 2251. But they certainly might provide grounds for future state criminal charges. And, of course, they're highly relevant to Defendant's motive.

THE COURT: Thank you, counselor. Let's now turn to the substance of the motion to suppress. Ms. Barnes, the floor is yours.

MS. BARNES: Your Honor, suppression is required here because the evidence the Government just described was discovered and seized pursuant to a defective search warrant. I say that because the evidence used to establish probable cause for its issuance was obtained by violating Governor Rutherford's Fourth Amendment rights. More specifically, part of the probable cause showing was based on an unauthorized search of Governor Rutherford's email account

conducted by Boerum State police officers and, in particular, Officer Andrew Scott. Admitting this evidence would condone Officer Scott's clear violation of Governor Rutherford's Fourth Amendment rights and encourage future police misconduct. We submit that failing to suppress the evidence under these circumstances would essentially allow law enforcement officers to cleanse their illegal searches by presenting the evidence they illegally obtained to a magistrate judge in support of a subsequent search warrant application. That would create a terrible incentive, Judge.

MR. CALLO: As the Court is well aware, the seminal case on this issue, *Leon*, stands for a simple proposition: When agents obtain a search warrant from a neutral magistrate judge, and they do not lie or mislead the court in their warrant application, they act in good faith. Accordingly, when they execute that warrant, any evidence they seize should not be suppressed even if, in hindsight, a subsequent court finds that a prior Fourth Amendment violation occurred. That aptly describes what happened here. The evidence we seek to offer was obtained pursuant to a warrant granted by Judge Olivia Maddalena—a neutral magistrate judge. The warrant application explicitly set forth the challenged conduct of Boerum State Police Officer Scott, and Judge Maddalena still issued the warrant. Moreover, to the extent that the Defendant's Fourth Amendment rights were violated, it was not by FBI agents or anyone else associated with the federal murder prosecution. The FBI agents conducting the search were acting in good-faith reliance on a warrant issued by a neutral magistrate judge, just like the agents in *Leon*. Accordingly, there is no wrongful conduct to deter here and no basis for suppression.

MS. BARNES: Your Honor, the Government is mischaracterizing *Leon. Leon* did not address a situation where the probable cause for issuing a warrant was developed by violating a defendant's Fourth Amendment rights.

THE COURT: Thank you, counselors, but let me stop you right there. Before we get too far, let me understand this: Does the Government concede that the warrant application presented to Judge Maddalena was supported by evidence obtained in violation of the Defendant's Fourth Amendment rights?

MR. CALLO: Yes, your Honor. As attorneys, examining the circumstances with the benefit of hindsight, we agree that Officer Scott's search of recent emails was not explicitly authorized. However, the violation of the Defendant's Fourth Amendment rights was neither blatant nor even clear.

THE COURT: Why do you say that?

MR. CALLO: We acknowledge that the recent email activity Officer Scott examined was not within the scope of the warrant he was executing at the time. But Officer Scott explained that he understood incoming and outgoing email addresses to be searchable without a warrant, and to that extent, he was correct and acting in good faith.

MS. BARNES: Your Honor, that is complete and utter nonsense. First of all, while it might be possible to obtain an order for a pen register and trap and trace, and thereby to discern incoming and outgoing email addresses without a showing of probable cause, no such order was obtained here. Officer Scott was executing a warrant, and he went beyond its explicit and unequivocally stated scope when he looked at the Governor's email activity. Moreover, even if Officer Scott had obtained an order authorizing a pen register and trap and trace, that order would provide no basis for viewing any content, such as the subject line of an email. Yet, Officer Scott examined the subject lines of at least two emails, and the content he viewed was used as part of the evidence the FBI presented to Judge Maddalena in order to obtain the warrant at issue.

THE COURT: I see your point. Go on.

MS. BARNES: Your Honor, as we explained at length in our written submissions, the Government relies on *Leon*'s good-faith exception. But *Leon* did not address a warrant that was obtained based upon an underlying constitutional violation. In fact, several circuit courts have held that when a constitutional violation occurs and taints the subsequent warrant application, the good-faith exception may not be invoked to salvage evidence obtained during the execution of the subsequently issued warrant. Two examples are *United States v. Zarabozo* decided by the Eleventh Circuit and *United States v. Vasey* decided by the Ninth Circuit.

Your Honor, it's called the good-faith exception for a reason. The Government cannot contend that its agents acted in good faith here, because they knew the probable cause for their warrant was based, at least in part, on an illegal search. We respectfully submit that the Eleventh and Ninth Circuits got it right. Governor Rutherford's Fourth Amendment rights were violated by the conduct of law enforcement officers, and it is now the responsibility of this Court to suppress the evidence they illegally obtained.

THE COURT: Thank you, Ms. Barnes. Mr. Callo, you get the last word on this subject.

MR. CALLO: Your Honor, the Defense characterizes holdings from certain other circuits as establishing an "unequivocal rule" against application of the good-faith exception when probable cause for a warrant is based, even in part, on unlawfully obtained evidence. First, while we concede that Officer Scott's search of the Defendant's email raises a Fourth Amendment question, we do not concede that there was a clear and unambiguous Fourth Amendment violation. Officer Scott was executing a lawfully obtained warrant to search the Defendant's electronic devices. Although the emails viewed were not within the purview of that warrant, it is not necessary to establish probable cause and obtain a warrant to review email address and receipt information; a court order obtainable upon a mere certification of relevance would

suffice. Moreover, we respectfully ask the Court to bear in mind that a murder investigation was unfolding. Officer Scott reasonably believed that the Defendant was hiding evidence of something even more serious than corruption and that the evidence could be destroyed if they did not act expeditiously. In fact, he found in the emails probable cause to believe that the Defendant was indeed involved in the death of the victim. Even assuming Officer Scott's conduct violated the Fourth Amendment, Agent Fonseca's affidavit fully disclosed that conduct and the circumstances under which Officer Scott discovered the emails involving Pest-X. A neutral magistrate judge reviewed those circumstances and determined that even if a violation occurred, it was not sufficient to preclude the granting of the second warrant.

Finally, the law enforcement personnel who executed this second warrant were federal agents completely unaffiliated with the first investigation conducted by Officer Scott and his fellow state officers. This fact alone distinguishes most of the cases cited by the Defendant. Denying the Defendant's suppression motion here would reaffirm *Leon*'s most basic principle: that suppression is inappropriate where reliance on a warrant was objectively reasonable.

THE COURT: Thank you. That will be enough. I have your briefs, so let's turn to the defense's motion *in limine* to exclude Mr. Smith's statement. I understand the Government is seeking to offer a statement under the hearsay exception set forth in Rule 803(3)?

MR. CALLO: Correct, your Honor. As the Court is already aware, Victor Smith was found dead in his bedroom by his fiancée, Anita Flores, on the morning of October 11, 2014. When FBI agents interviewed Flores the following day, she provided a great deal of information helpful to the investigation. We invoke Rule 803(3) to support the admissibility of only one statement made by Flores: that on the day before he was found dead, Smith told Flores he would be

meeting with the Defendant for dinner at the Defendant's apartment and then going out for drinks with friends.

THE COURT: Let's hear from the defense first. Ms. Barnes?

MS. BARNES: Your Honor, Smith's statement to his fiancée that he was going to meet with Governor Rutherford on the night of his death is rank hearsay. The only purpose the Government has for seeking to admit the statement is to prove its truth, so clearly it is inadmissible unless it falls within a hearsay exception. The Government invokes Rule 803(3) to admit the statement as one reflecting Smith's then-existing state of mind, but they seek to use the statement to prove not only what Smith did, but also as proof of what Governor Rutherford did. The Rule is simply not broad enough to support that. Indeed, the Government offers Smith's statement as proof that the Governor met with Smith on the night he died and therefore had an opportunity to poison him, but there is not one iota of evidence other than Flores's recounting of Smith's statement that this supposed meeting ever happened. Allowing Smith's fiancée to testify about this statement clearly violates my client's rights.

THE COURT: Mr. Callo?

MR. CALLO: Your Honor, Smith's statement falls squarely within the state of mind exception described in Rule 803(3). Smith told Ms. Flores that he was going to meet the Defendant at the Defendant's apartment on the night of his death. That is clearly a statement of intent and can be used to show that he then acted in accordance with that intent and met with the Defendant.

MS. BARNES: But your Honor, the Government intends to use this statement as evidence that *the Governor* hosted Smith for dinner and thus had the opportunity to poison him there. Rule 803(3) does not apply to statements used to show subsequent conduct of a third party.

MR. CALLO: There is nothing in the language of Rule 803(3) that limits its scope as defense counsel suggests. That is why so many courts have admitted statements under the state of mind exception even when those statements are used to show future conduct by a third party. In *United States v. Houlihan*, for example, the District of Massachusetts held that the clear language of 803(3) endorses admitting statements for these purposes. The court based its decision on the well-known *Hillmon* case, from which Rule 803(3) is derived. The Advisory Committee Note to Rule 803(3) explicitly states that Congress meant to leave *Hillmon* "undisturbed," indicating that the Rule is intended to permit statements that fall under it to be used as evidence of the subsequent conduct of a third party. And what we ask the Court to do here is exactly what the Supreme Court did in *Hillmon*.

THE COURT: Thank you, counselor. Ms. Barnes, your response?

MS. BARNES: Your Honor, we urge the Court to reject the Government's argument and exclude this statement for several reasons. First of all, the Government's reliance on the legislative history of 803(3) as laid out in the *Houlihan* case is misguided. While the Advisory Committee Note does suggest an intention to leave *Hillmon* intact, the House Judiciary Notes are more nuanced and explain that the committee intended to limit the application of *Hillmon* to allow statements of state of mind only as evidence of the *declarant's* future conduct, not the future conduct of others. Properly understood, *Hillmon* does not support admitting one person's statement of intent to show the subsequent conduct of another person.

Finally, several courts have rejected claims that such statements fall under 803(3). Examples include the Seventh Circuit's decision in *Johnson v. Chrans* and the Tenth Circuit's decision in *United States v. Joe*. Moreover, the only evidence the Government has that Governor

Rutherford met with Smith on the night of his death is Smith's statement to his fiancée. There is no corroborating evidence.

THE COURT: Hold on, counselor. You keep mentioning the lack of any other evidence that the meeting took place. Even if there were such evidence, would that be relevant to the Court's decision?

MS. BARNES: Well, your Honor, that brings me to my next argument. We urge you to follow the Seventh and Tenth Circuits and categorically reject the use of 803(3) statements as evidence of a third party's subsequent conduct. We also point out that while other courts seem to allow statements of intent to be used as proof of a third party's conduct, they do so only if there is independent corroborating evidence that the conduct described in the statement actually took place. We refer the Court, for example, to the Second Circuit's decision in *United States v. Best* and the Fourth Circuit's decision in *United States v. Jenkins*. The Government has no corroborating evidence in this case, and so we would urge the Court, if it does not accept the holdings of the Seventh and Tenth Circuits, to at least follow the Second and Fourth Circuits and adopt a rule that requires independent corroborating evidence.

THE COURT: Thank you, counselor. Mr. Callo, a brief final word?

MR. CALLO: Your Honor, we urge the Court to adopt a bright-line rule allowing these types of statements under Rule 803(3). While some courts do require independent evidence that the subsequent conduct took place, the result of this restriction is the exclusion of relevant evidence. The jury is perfectly capable of weighing the evidence and deciding whether it is reliable. There is no need or basis to create another procedural hurdle for the admission of evidence that falls squarely within the plain language of a Rule of Evidence and that can easily be evaluated and accepted or rejected by a jury.

THE COURT: All right, counselors. Let's move on to Defendant's motion *in limine* regarding Dr. Chin's testimony about the autopsy report. Ms. Barnes, can you explain to me what's going on here?

MS. BARNES: Yes, your Honor. The Government wants to introduce at trial opinions and conclusions from an autopsy report prepared by medical examiner Lawrence Fleischer. But the Government doesn't plan to present Dr. Fleischer as a witness or make him available for Governor Rutherford to cross-examine. Instead, they're trying to sneak in Dr. Fleischer's statements through the testimony of a second . . . a surrogate medical examiner, Dr. Elizabeth Chin, who wasn't even present when Dr. Fleischer conducted the autopsy.

The introduction of Dr. Fleischer's out-of-court statements through a surrogate would violate Governor Rutherford's rights under the Confrontation Clause of the Sixth Amendment. The statements in Dr. Fleischer's autopsy report are testimonial. And in *Crawford*, the Supreme Court made clear that the Confrontation Clause bars the out-of-court, testimonial statements of a witness, unless that witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. Neither of those criteria are satisfied here. The Government has failed to provide a good reason for its failure to make Dr. Fleischer available, and Governor. . .

THE COURT: One moment—Mr. Callo, I assume that you're relying on Federal Rule of Evidence 703 here?

MR. CALLO: Yes, your Honor. Although the parties disagree about the admissibility of Dr. Fleischer's report, the Court doesn't even need to reach that issue. We're not asking that the report be admitted into evidence or even that Dr. Chin be permitted to testify to Dr. Fleischer's conclusions. We're just asking that Dr. Chin, after reviewing the report, be allowed to testify as

to her own opinions about the cause and manner of Smith's death. And Rule 703 permits this, your Honor. So, there's no Confrontation Clause issue here.

THE COURT: Ms. Barnes?

MS. BARNES: Your Honor, the Court's analysis doesn't end with Rule 703, it begins with it. Rules of evidence don't trump the Confrontation Clause, and Rule 703 doesn't create a Confrontation Clause exception. Even if Dr. Chin's testimony satisfies the Rule's criteria, it still has to be admissible under the Confrontation Clause. It's not. Your Honor, in *Bullcoming* the Supreme Court held that the Confrontation Clause barred a surrogate expert analyst's testimony about conclusions by a different analyst. And we would ask the Court to come to the same conclusion here.

THE COURT: Mr. Callo, what do you say to that? Why doesn't *Bullcoming* bar the Court from allowing the surrogate M.E. to testify?

MR. CALLO: *Bullcoming* is distinguishable, your Honor. This case is closer to the Supreme Court's decision in *Williams*, in which the Court held that similar expert testimony was not barred by the Confrontation Clause. Here, Dr. Chin will not be parroting the conclusions in Dr. Fleischer's autopsy report. She will testify only to her own analyses and conclusions based on her own interpretation of the objective, factual data in the report. And Dr. Chin will be available at trial, thereby removing her from the reach of *Crawford*. Further, your Honor, nothing in the report is being offered for its truth.

THE COURT: Ms. Barnes?

MS. BARNES: Your Honor, that's a distinction without a difference. The Government is trying to pass off Dr. Fleischer's findings as Dr. Chin's conclusions. And even if she is testifying to her own conclusions, her conclusions are based entirely on Dr. Fleischer's statements and opinions

and therefore have value only if Dr. Fleischer's statements are true. A juror couldn't find that Dr. Chin's findings were true if he or she didn't believe Dr. Fleischer's statements were true. And that is precisely the point made by Justice Kagan in her *Williams* dissent and by Justice Thomas in his concurring opinion there.

THE COURT: But the Government isn't trying to admit Dr. Fleischer's statements, just Dr. Chin's opinion, right?

MS. BARNES: But it's functionally the same thing, your Honor. Dr. Chin's testimony is meaningless without the underlying statements in the autopsy report. And those statements are not limited to objective facts but are, for the most part, Dr. Fleischer's subjective opinions. If the report itself is not reliable, then neither is opinion testimony based on the report. And Dr. Chin has no way of knowing whether Dr. Fleischer used sound judgment or sound methodologies. Only Dr. Fleischer does. So the Confrontation Clause requires that Governor Rutherford be allowed to cross-examine Dr. Fleischer.

THE COURT: Okay, Mr. Callo, your response?

MR. CALLO: Thank you, your Honor. The Defense's arguments are meritless. First, it would render Rule 703 meaningless to bar an expert from basing opinion testimony on inadmissible underlying facts. That's the whole point of the Rule. Second, Dr. Chin plans to explain that her opinions are just that, opinions. She will not, at any time, characterize them as facts. Third, any concerns created by allowing Dr. Chin to testify can be resolved through a jury instruction.

THE COURT: Mr. Callo, with that in mind, do you agree that the underlying report is testimonial?

MR. CALLO: No, your Honor. The report is not testimonial. The Supreme Court in *Crawford* and other subsequent cases explicitly included business records among "statements that by their

nature [are] not testimonial." And the great majority of state and federal courts that have considered the issue have agreed that autopsy reports are categorically not testimonial.

THE COURT: Ms. Barnes?

MS. BARNES: Your Honor, the Government is misstating the law. The Supreme Court has never categorically excluded business records from Confrontation Clause analysis. The language from *Crawford* on which the Government relies was dicta. And it doesn't mean what the Government says it means. In fact, in *Melendez-Diaz,* the Court clarified what this dicta actually meant and rejected a similar argument that "certificates of analysis" on a substance believed to be cocaine were not testimonial just because they were business records.

Your Honor, the categorical rule proposed by the Government would exempt all or most forensic lab reports from Confrontation Clause analysis. And that's not the law. The Supreme Court has repeatedly held that lab reports are testimonial when they are created for use in criminal trials. And autopsy reports meet this criterion. Medical examiners who conduct autopsy reports are well aware that they may be used at trial. And in this case, the autopsy report was clearly created for later use at a criminal trial. Dr. Fleischer even emailed the report to the Boerum Police Department. The content of the email makes the primary purpose clear.

THE COURT: Mr. Callo? The email seems to create some doubt as to the primary purpose of this report doesn't it?

MR. CALLO: No, your Honor. First of all, defense counsel misstates the applicable legal standard. An out-of-court statement is testimonial only if its primary purpose is to accuse a targeted individual of engaging in criminal conduct. This report does not target or even name any specific person. In fact, it doesn't even specify a manner of death. Dr. Fleischer couldn't conclusively determine whether the manner of death was homicide or suicide. And prior to

performing the autopsy, he had no reason to believe that Mr. Smith's death was the result of foul play and not an accidental opioid overdose. So, under the circumstances, it's illogical for the defense to claim that Dr. Fleischer created the document for the primary purpose of accusing a targeted individual of engaging in criminal conduct.

THE COURT: Ms. Barnes, is Mr. Callo right? Is that the correct legal standard? Do the statements have to target a specific individual?

MS. BARNES: No, your Honor. Statements in a lab report don't have to target the defendant to be testimonial. The report's primary purpose just has to be for use as evidence in a criminal proceeding. The "targeted individual" standard the Government is relying on was proposed by a four-justice plurality in *Williams*, and it was explicitly rejected by five other justices in concurring and dissenting opinions. Indeed, in *Williams*, the only "holding" that a majority of justices could agree on was that the surrogate testimony in that case was admissible. But no five justices could agree on why. So, the case has little meaningful application outside of its specific facts.

THE COURT: Mr. Callo, if Ms. Barnes is correct in her interpretation of the applicable legal standard, is it still true that reports of this type are not testimonial?

MR. CALLO: Yes, your Honor. Autopsy reports are not testimonial. The primary purpose of an autopsy report is not for use as evidence in a criminal proceeding. Its primary purpose is administrative organization and record-keeping. That's especially true in this case. This state's autopsy law requires that autopsies be performed in a variety of circumstances. Evidence of homicide or criminal behavior is not required for a medical examiner to conduct an autopsy. Your Honor, when Dr. Fleischer prepared the report, the police had not identified a suspect, and, in the report, Dr. Fleischer didn't conclusively attribute Smith's death to a criminal act. Further,

the cover email to which Dr. Fleischer attached the report is not evidence of its primary purpose. When Dr. Fleischer wrote the email, he had already completed the autopsy and the report. There is absolutely no evidence that Dr. Fleischer performed the autopsy or prepared the report because he believed his conclusions would be used in a criminal investigation.

THE COURT: But don't autopsies often reveal information that the Government later uses at trial?

MR. CALLO: Yes, your Honor. But that's not their primary purpose.

THE COURT: Ms. Barnes, any response?

MS. BARNES: Autopsies performed pursuant to the Boerum state autopsy law are created with the primary purpose of being used as evidence at a criminal trial. The law requires autopsies only under circumstances where the cause of death suggests some irregularity or involves some evidence of foul play. Put simply, only people who die under suspicious circumstances have autopsies. So, if a medical examiner is performing an autopsy, he or she is fully aware that death could be due to a criminal act.

THE COURT: Okay, Ms. Barnes. And how do you respond to the Government's assertion that the weight of authority is on its side?

MS. BARNES: Your Honor, there is a circuit court split and a state court split on whether autopsy reports are testimonial. Many courts have concluded that they are.

THE COURT: Okay. Counselors, neither of you has mentioned anything about the solemnity and formality of this report.

MR. CALLO: The Government concedes the report is adequately solemn and formal.

THE COURT: Understood. And I assume you're okay with that, Ms. Barnes? (All laugh).

MS. BARNES: (Laughs). Yes, we are, your Honor.

THE COURT: I thought you would be. Anything else, counselors?

MS. BARNES: Yes, your Honor. There is a strong policy argument for requiring that statements in autopsy reports be subject to cross-examination.

THE COURT: And that is?

MS. BARNES: Your Honor, in creating an autopsy report a medical examiner exercises his or her judgment. The reports are not machine-generated. They do not include only objective facts. Because of the subjectivity involved, the reports are vulnerable to human error and bias. Human error and bias can make an accidental death or suicide look like a homicide. Human error and bias can lead to a person being tried for a crime he or she didn't commit. Therefore, the Confrontation Clause requires that a defendant be permitted to cross-examine the medical examiner who conducted the autopsy.

THE COURT: Understood. Mr. Callo?

MR. CALLO: Your Honor, it's true that documents are subject to human error, but this does not exclude them from being admitted as business records or as some other category of evidence. The Supreme Court has never required that documents be machine-generated in order to be admissible at trial. The autopsy report is admissible, and even if it is not, under Rule 703, Dr. Chin's testimony is. And Defense counsel's argument essentially stands for the proposition that this Court should implement a statute of limitations on murder—calculated by the number of years that the M.E. who conducted the autopsy remains living or easy to locate. The implications of such a rule are staggering.

MS. BARNES: Your Honor, this is not about imposing a statute of limitations on murder. It's about a defendant's ability to fully exercise his or her rights under the Sixth Amendment of the

Constitution. It's about giving defendants a fair trial by allowing them to cross-examine any witness against them.

THE COURT: One final question, Mr. Callo: Does the Government not intend to argue that statements in autopsy reports would have been admissible in a criminal case at the time of the founding?

MR. CALLO: We do not, your Honor.

THE COURT: Okay counselors. I've heard your arguments on these matters, and you will be informed when I have reached a decision.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA 15-CR-021
-against-
PAUL RUTHERFORD,
Defendant.
----------X
July 31, 2015

TRANSCRIPT OF DECISION ON PRE-TRIAL MOTIONS
Before: The Honorable Robert Pitler, District Judge, United States District Court

APPEARANCES:

For the United States of America: Gerald V. Callo
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Boerum City, Boerum 11201

For Defendant Paul Rutherford: Loretta Z. Barnes
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CLERK: United States of America versus Paul Rutherford. Counsel, please note your appearances for the record.

MR. CALLO: Gerald Callo for the United States. Good morning, your Honor.

MS. BARNES: Loretta Barnes of Diaz, Gambini, & Howle for the Governor, Paul Rutherford. Good morning, your Honor.

THE COURT: Good morning, counsel. I have reached a decision on the Defendant's motions. I will be ruling from the bench. I heard arguments on three pending pre-trial motions on July 24, 2015. After considering the parties' memoranda of law and oral arguments, I hereby grant Defendant's motions in all respects.

I will first address the Defendant's motion to suppress evidence seized from his laptop computer. As the Government in essence concedes, Officer Scott violated the Defendant's Fourth Amendment rights when he examined the addresses, and certainly the subject lines, of the Defendant's recent emails. It is also undisputed that the FBI presented information gleaned from Officer Scott's unlawful examination of those emails in support of its application for a warrant to search the Defendant's computer. The Government argues that suppression is not appropriate because federal agents relied in good faith upon a warrant issued by a neutral magistrate judge. For the following reasons, I disagree.

Some circuits apply a *per se* rule holding that the government may not invoke *Leon*'s good-faith exception when a constitutional violation taints a warrant application. As stated by the Ninth Circuit in *United States v. Wanless*, reported at 882 F.2d 1459, at page 1466, "the good-faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search." The court in *Wanless* reasoned that the good-faith exception applies only when agents rely on a finding of probable cause made by a magistrate judge and the

finding is later held to be incorrect. I find this reasoning persuasive, because *Leon* stands only for the proposition that suppression is unwarranted where officials acted in good-faith reliance on a search warrant that was subsequently held to be defective not because of any conduct of a law enforcement officer but because of a magistrate judge's probable cause determination. Clearly, *Leon* is distinguishable here.

While some courts have applied the good-faith exception even when a warrant is based upon evidence collected in violation of a defendant's rights, those courts have held that the exception does not apply where the violation of rights was clear and obvious. *See United States v. McClain*, reported at 444 F.3d 556 and *United States v. Holley*, reported at 831 F.3d 322. Officer Scott's violation of the Defendant's Fourth Amendment rights in this case was clear. Officer Scott exceeded the unambiguous scope of the warrant he was executing. Even if some of the information he examined might have been subject to collection had he obtained authority to use a pen register and trap and trace device, that is of no moment, because he did not obtain such authority. Moreover, even if Officer Scott had a pen register order in hand, the viewing of the subject lines of at least two emails would have been unlawful.

The FBI was aware of Officer Scott's conduct yet included the evidence he unlawfully obtained in its warrant application. The Court finds that an objectively reasonable officer would have realized that the resulting warrant was tainted because of the prior illegal search and therefore that the FBI could not have relied on the warrant issued by Magistrate Judge Maddalena in good faith. For all these reasons, the Defendant's motion to suppress the evidence seized from his laptop is granted.

Next, I turn to the Defendant's motion to exclude the victim's statement about his dinner plans with Governor Rutherford. The Government argues that Smith's statement is admissible

under Federal Rule of Evidence 803(3) as proof that the Governor had dinner with Smith on the night Smith was poisoned. The Government posits that its reading of Rule 803(3) is no broader than the holding in *Mutual Life Insurance Co. v. Hillmon*, the Supreme Court case on which the Rule is based.

This Court is not persuaded. The Rule clearly states that it applies to a statement of the *declarant's* then existing state of mind, and it makes no mention of using a statement by one person to prove the intended action of another. If the prosecution were offering Smith's statement as evidence of his own subsequent conduct, it would clearly be admissible under 803(3). However, allowing the statement to be used as evidence of the Defendant's subsequent conduct goes too far. A primary concern of the Federal Rules of Evidence is reliability, and a declarant's state of mind is simply not reliable evidence of the conduct of someone else.

Furthermore, the legislative history of the Rule is unclear, and is therefore not a useful place to look for guidance. Left unable to definitively determine Congress's intent with respect to codifying the *Hillmon* doctrine, this Court bases its holding on the plain language of the Rule. Nothing in that language suggests that the state of mind exception permits admitting a declarant's statement to be used as evidence of a non-declarant's subsequent conduct. The Court also declines to adopt the Second and Fourth Circuits' requirement of corroborating evidence, as there is no basis for this interpretation in the language of 803(3). In any event, there is no corroborating evidence here. Given the plain language of 803(3) and the reliability concerns inherent in this type of statement, the Court grants the Defendant's motion to exclude Smith's statement to his fiancée.

Finally, the Court grants Defendant's motion *in limine* to exclude the expert testimony of the surrogate medical examiner, Dr. Elizabeth Chin. I am convinced by the Defendant's

argument that Dr. Chin's testimony is simply a backdoor method of admitting into evidence the conclusions made by Dr. Fleischer in his autopsy report. Contrary to the Government's contentions, Rule 703 does not trump the Confrontation Clause. If admitting the underlying autopsy report would violate the Confrontation Clause, then admitting Dr. Chin's testimony, which relies on statements in the report, does as well.

And admitting the report would indeed violate the Confrontation Clause. Because, as the Defendant correctly argues, the Supreme Court's plurality decision in *Williams v. Illinois* applies only to the specific facts of that case, I conclude that this case is governed by the Court's holdings in *Bullcoming v. New Mexico* and *Melendez-Diaz v. Massachusetts*. Under those cases, the statements in the autopsy report are testimonial. The Government has conceded that autopsy reports are sufficiently solemn and formal. Furthermore, the primary purpose of the report in this case was its potential use as evidence in a criminal trial.

Because the statements in the autopsy report are testimonial, the Defendant must be afforded his right under the Confrontation Clause to cross-examine Dr. Fleischer. To admit Dr. Fleischer's statements, even through the testimony of a surrogate, would violate that right. For these reasons, I am precluding admission of Dr. Chin's testimony.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
----------X
UNITED STATES OF AMERICA,
Appellant,
-against-
PAUL RUTHERFORD,
Defendant-Appellee.
----------X
February 9, 2016

Before: FALK, CAPLOW, and BENTELE, Circuit Judges:

OPINION OF THE COURT

FALK, *Circuit Judge*.

The United States brings this interlocutory appeal pursuant to 18 U.S.C. § 3731 from three District Court rulings. For the reasons given below, we affirm the District Court and hold that (1) the good-faith exception to the exclusionary rule does not apply when the Government obtains a search warrant based on illegally seized evidence; (2) hearsay about a declarant's state of mind may not be admitted pursuant to Federal Rule of Evidence 803(3) to prove the conduct of a non-declarant; and (3) admitting testimony of a surrogate medical examiner that relies upon statements in an autopsy report prepared by another, unavailable medical examiner violates a criminal defendant's Sixth Amendment right of confrontation under *Crawford v. Washington* and its progeny.

Procedural Background

The Defendant-Appellee, Governor Paul Rutherford of Boerum (the "Defendant"), is charged with murdering Victor Smith to prevent his attendance or testimony in an official proceeding, in violation of 18 U.S.C. § 1512(a)(1). The Defendant moved before the District Court to (1) suppress information seized from his computer; (2) exclude a statement Smith made to his fiancée on the night of his death that he had dinner plans with the Defendant; and (3) exclude opinion testimony by a surrogate medical examiner that relied upon statements from an autopsy report prepared by a different medical examiner. The District Court ruled in favor of the Defendant on all three issues.

Factual Background

On October 11, 2014, Victor Smith was found dead in his apartment. The Government alleges that the Defendant murdered Smith, his top aide, to prevent Smith from testifying before a grand jury investigating bribery and corruption allegations involving the Defendant. The Government further claims that the Defendant murdered Smith not only to silence him with respect to the corruption investigation but also to prevent Smith from disclosing that the Defendant's computer contained sexually suggestive images of and conversations with teenage girls.

In June 2014, state and federal officials began independent investigations into allegations of bribery and corruption in connection with the renovation of the Cobble Hill Bridge and the development of the surrounding area. Both investigations were sparked by claims that the Defendant arranged for contracts to be awarded to his close friends and campaign contributors. Smith began cooperating with federal law enforcement authorities sometime in August 2014.

On August 29, 2014, the United States Attorney's Office issued a grand jury subpoena for all documents on the Defendant's computers that were related to the bidding process for the Cobble Hill Bridge renovation project. The Defendant's office indicated it would cooperate with the investigation, and the Defendant and Smith worked together to identify responsive documents. In September, the United States Attorney's Office issued a grand jury subpoena for Smith's testimony, which was scheduled for October 16, 2014.

On the morning of October 11, 2014, Smith's fiancée, Anita Flores, arrived at Smith's apartment and found him dead. During an interview with FBI agents, Flores said she had spoken to Smith the previous day, and that Smith had stated that he planned to have dinner with the Defendant at the Defendant's apartment. Flores also mentioned that, one or two weeks earlier, Smith told her that he had learned some disconcerting information about the Defendant while reviewing documents on the Defendant's laptop computer. Flores said that Smith did not disclose the information to her and that he did not mention it again.

On October 12, 2014, Dr. Lawrence Fleischer, Assistant Medical Examiner for Boerum City, Boerum, conducted an autopsy of Smith's body and concluded that Smith died from ingesting a pesticide known as Pest-X. Dr. Fleischer was subsequently fired for unrelated reasons, and the Government has been unable to locate him to secure his testimony at trial. The Government plans to call at trial Dr. Elizabeth Chin, Assistant Medical Examiner for Cobble County, Boerum, who would offer her expert opinion as to the cause and manner of Smith's death. Dr. Chin, who was not present when Dr. Fleischer performed the autopsy, would base her opinion mostly on information in Dr. Fleischer's autopsy report.

On October 16, 2014, the Boerum State Police executed a search warrant for the Defendant's office computers in connection with the state corruption investigation. At the time of the search, FBI agents were interviewing the Defendant in his office about Smith's death. Boerum State Police Officer Andrew Scott was in charge of executing the search warrant, which authorized officers to search all of the Defendant's computers for documents created on or before June 1, 2014 that were related to the bidding process for the Cobble Hill Bridge renovation project. While searching the Defendant's laptop, Officer Scott, who was aware of Smith's death and of his relationship with the Defendant, decided to search the Defendant's recent email activity for information that might connect the Defendant to Smith's death. Although Officer Scott was aware that this information was beyond the scope of the warrant, he proceeded to examine the "to" and "from" sections of the Defendant's emails. As he searched, Officer Scott found an email that had been sent to the Defendant from Pestex Corp., the manufacturer and distributor of Pest-X. He read the email subject line, which indicated that the Defendant had ordered Pest-X a week before Smith's death. Officer Scott also saw a second email from Pestex Corp., the subject line of which confirmed that Pest-X was delivered to the Defendant's apartment the day before Smith died.

Officer Scott told FBI agents about the emails and how he discovered them. The FBI agents used this information to obtain a warrant to conduct additional searches of the Defendant's computers. FBI agents executed the warrant on November 21, 2014. They reviewed the emails described by Officer Scott and the Defendant's search history, which revealed extensive research about Pest-X. FBI agents also uncovered a password-protected file that contained screenshots of conversations between the Defendant and teenage girls in which the Defendant pretended to be a teenage boy and photos of teenage girls in various stages of undress. They also discovered meta-data revealing that the file containing the conversations and pictures was opened on October 1, 2014—the same day that the files responsive to the grand jury subpoena issued in the corruption investigation were opened.

The Defendant was subsequently indicted for murdering Smith with the purpose of preventing him from testifying before the federal grand jury in violation of 18 U.S.C. § 1512(a)(1).

Discussion

A. Admissibility of the Evidence Obtained from the FBI's Search of Defendant's Laptop

The Government's appeal raises a Fourth Amendment issue of first impression in this Circuit: whether the good-faith exception to the exclusionary rule applies when a search warrant is issued on the basis of evidence obtained during a prior illegal search. We conclude that it does not.

It is well-established that the exclusionary rule generally requires suppression of evidence obtained through an unreasonable search and seizure so that law enforcement officers are deterred from committing future Fourth Amendment violations. *Davis v. United States*, 564 U.S. 229, 236-37 (2011); *see also United States v. Leon*, 468 U.S. 897, 919 (1984). Also well-established is *Leon*'s so-called "good-faith" exception to suppression. The *Leon* exception applies where the suppression of evidence would "deter objectively *reasonable* law enforcement activities." *Leon*, 468 U.S. at 919 (emphasis added).

However, *Leon*'s good-faith exception is narrow, and it applies only where law enforcement officials rely in good faith on a search warrant held to be defective after a reviewing court determines that the magistrate judge's initial probable cause determination was mistaken. Under that circumstance, the error rests with the issuing judge, and there is no police misconduct to deter. *Id.* at 921 ("Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."). It follows, then, that the good-faith exception does not apply when the error is committed by a law enforcement officer. *See United States v. Herrera*, 444 F.3d 1238, 1250-51 (10th Cir. 2006).

The Government urges us to apply *Leon*'s good-faith exception even though, in this case, to borrow Justice Cardozo's phrase, it was "the constable [who] blundered." *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). The Government further contends that application of the exception in the present case is justified because "the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search." *See United States v. McClain*, 444 F.3d 556, 566 (6th Cir. 2005). However, *Leon* provides no basis for distinguishing

between the officers who committed the prior illegal search and those who applied for the warrant. Indeed, *Leon* makes clear that the goal of suppression is to deter law enforcement misconduct generally. *See Leon*, 468 U.S. at 919.

As our dissenting colleague reminds us, some circuits have applied *Leon* even when a search warrant affidavit relies on evidence obtained in violation of the Fourth Amendment. *See*, *e.g.*, *United States v. Ganias*, 755 F.3d 125 (2d Cir. 2014), *rev'd en banc*, 824 F.3d 199 (2d Cir.), *cert. denied*, __ U.S.__, 20162016 WL 4540481 (Dec. 5, 2016). For the reasons stated above, we are not inclined to follow these cases. Even if we were, we would not reverse the District Court's ruling here. The cases cited by the Government involve officers who reasonably believed they were conducting lawful searches even though they were not. Here, in contrast, Officer Scott's search was not "close enough to the line of validity to make the officer's belief in the validity of the warrant objectively reasonable." *McClain*, 444 F.3d at 566 (quoting *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989)). To the contrary, Officer Scott's search of the Defendant's email account was clearly illegal.

Lastly, that the search warrant affidavit candidly revealed the circumstances of the prior unlawful search and contained no misrepresentations is irrelevant. A magistrate judge's issuance of a warrant "cannot sanitize the taint" of an illegal search. *See United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987). When evaluating a warrant application, a magistrate judge is not "in a position to evaluate the legality of a search." *Id.* To hold that a magistrate judge might "cleanse" pre-existing violations of constitutional rights would frustrate the deterrent value of suppression by inviting law enforcement officers to avoid the consequences of their misconduct by simply making new warrant applications.

The Supreme Court has not extended the good-faith exception to a search warrant that is issued based on a predicate Fourth Amendment violation, and this Court finds little to justify doing so. Accordingly, the District Court's suppression of the evidence found on the Defendant's computer is affirmed.

B. Admissibility of Mr. Smith's Statement

The Government also seeks to offer at trial the statement Smith made to his fiancée, Anita Flores, that he was planning to meet with the Defendant on the night of October 10, 2014. The Government, relying on *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), argues that the statement, while admittedly hearsay, is admissible because it falls within the state of mind exception in Federal Rule of Evidence 803(3). Rule 803(3) provides that the rule against hearsay does not exclude "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan)."

The District Court held that Smith's statement, while admissible as evidence of Smith's own conduct, was inadmissible to prove the Defendant's conduct. The District Court emphasized that the language of Rule 803(3) contains no suggestion that statements admitted pursuant to the Rule may be received as evidence of the actions of anyone other than the declarant. The District Court also reasoned that statements of a declarant's state of mind are not reliable evidence of the conduct of someone else. While we agree with the District Court's concerns regarding reliability, we conclude that a categorical exclusion of such statements whenever offered as proof of a non-

declarant's conduct is improper. Nevertheless, for the reasons stated below, we affirm the District Court's decision to exclude the statement.

We begin by noting that the legislative history is unhelpful because it is inconsistent. The Advisory Committee Note to Rule 803(3) states that "the rule of *Mutual Life Ins. Co. v. Hillmon* . . . allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed." However, the Report of the House Judiciary Committee expresses a contrary view. *See* H.R. REP. No. 650, 93rd Cong., 1st Sess. (1973) ("[T]he committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, . . . so as to render statements of intent by a declarant admissible *only to prove his future conduct, not the future conduct of another person*.") (emphasis added).

On the other hand, the language of the Rule is hardly as clear as the District Court suggests. The Rule allows statements of the "declarant's then-existing state of mind" as an exception to the hearsay rule, but does not specify the purposes for which such a statement may or may not be used. Given this uncertainty, we think it is best to balance the Government's interest in presenting competent evidence with the reliability concerns identified by the District Court. Accordingly, we conclude that when independent evidence corroborates the declarant's statement, a court may find that the statement is sufficiently reliable to be received even as evidence of the conduct of someone other than the declarant and that a jury may then determine what weight to afford the evidence. We therefore adopt the approach of the Second and Fourth Circuits and find that statements that fall under 803(3)'s state of mind exception may be admitted as evidence of a non-declarant's conduct only if there is independent corroborating evidence that "connected the declarant's statement with the non-declarant's activities." *United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000); *see also United States v. Jenkins*, 579 F.2d 840, 843-44 (4th Cir. 1978). Because the Government presents no such corroborating evidence in this case, we affirm the District Court's decision to exclude Smith's statement.

C. Admissibility of Dr. Chin's Testimony

Finally, the Government appeals the District Court's decision to exclude the testimony of a surrogate medical examiner, Dr. Elizabeth Chin, regarding information in the report of Smith's autopsy where Dr. Lawrence Fleischer, the medical examiner who conducted the autopsy and prepared the report, is unavailable to testify at trial. We affirm the holding of the District Court.

We hold that the Confrontation Clause does not permit expert testimony based on statements in an autopsy report if admitting the statements themselves would violate the Confrontation Clause. Nothing in Federal Rule of Evidence 703 contradicts this conclusion. Rule 703 permits an expert witness to "base an opinion on facts or data in the case that the expert has been made aware of or personally observed" even where the facts or data would "otherwise be inadmissible," so long as they are the kind of facts or data on which "experts in the particular field would reasonably rely . . . in forming an opinion on the subject" and the probative value of the facts and data "outweighs their prejudicial effect." But the Federal Rules of Evidence do not trump the Constitution. Indeed, because Rule 703 is "an innovation of the second half of the twentieth century, from a time when modern Confrontation Clause doctrine was in its infancy," it "provides no help whatsoever in interpreting the Confrontation Clause." *See* Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 Tex. Tech L. Rev.

51, 72 (2012). Furthermore, Rule 703 does not adequately shield defendants from the dangers with which the Confrontation Clause is concerned. *See Williams v. Illinois*, 132 S. Ct. 2221, 2259 (2012) (Thomas, J., concurring) (Rule 703's "balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the accused.").

We also find unconvincing the Government's argument that we should allow Dr. Chin to rely on the autopsy report because the statements in the report are not being offered for their truth. "[I]f a testimonial statement helps support the expert's opinion only if it is true, then there is no distinction in substance between admitting the statement to prove the truth of what it asserts and admitting it in support of the opinion." Friedman, *supra* at 72-73; *see also Williams*, 132 S. Ct. at 2258 (Thomas, J., concurring); *id.* at 2268-69 (Kagan, J., dissenting).

Nor does the Supreme Court's decision in *Williams* compel us to admit Dr. Chin's testimony. Although the Court in *Williams* held, in a plurality opinion, that the surrogate expert testimony *in that case* was admissible, a majority of the Court could not agree on a single rationale for admitting the testimony, let alone a generally applicable rule or standard for determining when such testimony is admissible. Therefore, in the absence of further guidance from the Court, we conclude that the holding in *Williams* is limited to the facts of that case. Because this case concerns facts that are distinguishable, *Williams* does not apply. Instead, we are guided by the Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). As we discuss below, under those cases, Dr. Fleischer's report would be inadmissible under the Confrontation Clause, and we find no basis for allowing the Government to backdoor that report into evidence through Rule 703.

The Confrontation Clause prohibits the admission of a testimonial statement unless the declarant is available to testify at trial or the defendant had a prior opportunity to cross-examine the declarant. *See Crawford*, 541 U.S. at 53-54. Because Dr. Fleischer is not available at trial for cross-examination by the Defendant and Defendant has not had a prior opportunity to cross-examine him, the Confrontation Clause bars the statements in Dr. Fleischer's autopsy reports if those statements are testimonial. We hold that they are.

The Confrontation Clause "applies to witnesses against the accused—in other words, those who bear testimony. 'Testimony,' in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (internal quotations and citations omitted). The Government concedes that autopsy reports, including the report at issue in the present case, are sufficiently solemn and formal. And we conclude that the circumstances of an autopsy "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011), *aff'd in part sub nom, Smith v. United States*, 133 S. Ct. 714 (2013) (quoting *Melendez-Diaz*, 557 U.S. at 311).

We find unpersuasive the Government's argument that autopsy reports are categorically excluded from the Confrontation Clause's reach because they are business records. The Supreme Court has never created a categorical rule excluding business records from Confrontation Clause analysis, and it has indicated in dicta that no such rule exists. *See Melendez-Diaz*, 557 U.S. at 324.

We also reject the Government's contention that the autopsy report in this case was nontestimonial because it did not target a specific individual. The Supreme Court has never required that a statement target a specific person to be testimonial. And although Justice Alito proposed such a standard in his plurality opinion in *Williams*, five justices rejected Justice Alito's proposal. *See Williams*, 132 S. Ct. at 2262 (Thomas, J., concurring); *id.* at 2273-74 (Kagan, J., dissenting).

Finally, we agree with the Defendant that as matter of policy the Confrontation Clause should require that a defendant be permitted to cross-examine the medical examiner who actually performed the autopsy and prepared the autopsy report. Absent such a requirement, a defendant is deprived of the opportunity to test the veracity, reliability, and judgment of the original medical examiner, and the jury is deprived of the ability to determine whether the original medical examiner made any mistakes in conducting the autopsy or preparing the report, whether he or she used sound judgment, and whether he or she had any biases that may have impaired that judgment.

Our decision today is consistent with the decisions of several state and federal courts that, having recently considered the issue, have held that autopsy reports are testimonial. For example, the Superior Court of Pennsylvania recently held that "an autopsy report that is prepared because of a sudden, violent, or suspicious death or a death that is the result of other than natural causes, is testimonial." *Commonwealth v. Brown*, 139 A.3d 208, 216 (Pa. Super. Ct. 2016); *see also United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012); *Moore*, 651 F.3d at 69-74; *State v. Kennedy*, 735 S.E.2d 905, 917-18 (W. Va. 2012); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 228 (Okla. Crim. App. 2010); *State v. Locklear*, 681 S.E.2d 293, 305 (N.C. 2009); *Wood v. State*, 299 S.W.3d 200, 209-10 (Tex. App. 2009); *Commonwealth v. Nardi*, 893 N.E.2d 1221, 1233 (Mass. 2008); *see also, generally*, Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports—A "Testimonial,"* 74 La. L. Rev. 117 (2013) (cases cited).

For these reasons, we affirm the holding of the District Court and hold that Dr. Chin's testimony regarding the autopsy report is inadmissible.[1]

[1] The Government did not argue to the District Court, and does not argue here, that statements in autopsy reports are among the types of "out-of-court statements that would have been admissible in a criminal case at the time of the founding." *See Ohio v. Clark*, 135 S. Ct. 2173, 2180–81 (2015). Therefore, we consider that argument waived, and we need not address the issue, raised in dicta in *Clark*, of whether the Confrontation Clause permits such statements, or whether autopsy reports would qualify if it did. *Id.*

CAPLOW, *Circuit Judge, dissenting.*

A. Admissibility of the Evidence Obtained from the FBI's Search of Defendant's Laptop

In its decision today, the majority misconstrues the Supreme Court's landmark holding in *United States v. Leon*, 468 U.S. 897 (1984), and affirms suppression of compelling evidence that a sitting governor murdered his aide to avoid disclosure of his vulgar crimes. The majority would suppress this evidence even though the agents who uncovered it violated no constitutional right, made no misleading statements in their warrant application, and fully disclosed the relatively minor misconduct of a state police officer who was executing a different warrant in a different case.

Multiple circuits have concluded that evidence should not be suppressed when law enforcement officials rely in good faith on a warrant that is later challenged or found to be invalid—even in certain circumstances where there has been prior unconstitutional law enforcement conduct. *See, e.g.*, *United States v. Ganias*, 824 F.3d 199, 225 (2d Cir. 2016); *United States v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014); *United States v. Woerner*, 709 F.3d 527, 534-35 (5th Cir. 2013); *United States v. McClain*, 444 F.3d 556, 566 (6th Cir. 2006); *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989). Contrary to the majority, I find these cases persuasive. Officer Scott's underlying violation was not so egregious as to require suppression; he exceeded the scope of the warrant he was executing only marginally and in a manner that, with small exception, would have been authorized had he gone through the largely ministerial step of obtaining a pen register and trap and trace order or, to the extent he sought only to look at addresses involving existing emails, a subpoena. Moreover, Officer Scott is not the one who applied for the warrant at issue here, and Officer Scott's agency is not the one that seeks to make use of the evidence seized pursuant to that warrant.

The majority relies on decisions holding that if a warrant is based on probable cause obtained pursuant to a Fourth Amendment violation, then as a *categorical rule* the good-faith exception does not apply and any seized evidence must be suppressed. But the majority's reliance is misplaced, because the cases on which it relies are readily distinguishable for two reasons: in those cases, (1) the initial search was clearly unconstitutional and (2) the officers executing the subsequent warrant were the very same ones who committed the underlying constitutional violation. *See United States v. Mowatt*, 513 F.3d 395, 405 (4th Cir. 2008); *United States v. Herrera*, 444 F.3d 1238, 1248 (10th Cir. 2006); *United States v. Wanless*, 882 F.2d 1459, 1466-97 (9th Cir. 1989).

In this case, as noted above, any constitutional violation that occurred was more technical than meaningful, as it could have been avoided by obtaining a subpoena or pen register. Moreover, whatever violation occurred was committed by a state police officer, and the federal agents who applied for the search warrant at issue were entirely uninvolved with the underlying violation. This distinction is crucial because the rationale of the exclusionary rule is *deterrence*. It is plain enough that when one officer commits a clear constitutional violation and then seeks to capitalize upon it by obtaining a magistrate judge's approval for a warrant, the officer is attempting to "launder [his] prior unconstitutional behavior," *State v. Hicks*, 707 P.2d 331, 333 (Ariz. Ct. App. 1985), and suppression serves to deter such conduct. But how suppressing

evidence seized by federal agents in support of a federal prosecution will deter the misconduct of a state police officer uninvolved in that prosecution escapes me. For these reasons, I respectfully dissent.

B. Admissibility of Mr. Smith's Statement

The District Court held that Smith's statement to Ms. Flores that he was planning to meet with the Defendant on October 10, 2014 was inadmissible because Rule 803(3) categorically bars admitting a declarant's statement under the state of mind exception as evidence of a non-declarant's subsequent conduct. The majority affirms, but for different reasons—stating that while the statement is inadmissible in this case, an 803(3) statement may be admitted to prove the conduct of someone other than the declarant when there is independent corroborating evidence, thus demonstrating the statement's reliability. Because the majority imposes an obstacle to admissibility found nowhere in the language of the Rule, I respectfully dissent.

Nothing in the language of Rule 803(3) supports imposing an additional requirement on the admission of evidence under the state of mind exception. As the majority notes, the Rule's language in no way suggests that statements admitted under it may be received as evidence only of the subsequent conduct of the declarant. If Congress had intended to limit the admissibility of these statements, it could have done so in the Rule itself. *See United States v. Houlihan*, 871 F. Supp. 1495, 1501 (D. Mass. 1994). Because the Rule contains no such limiting language, I would allow Smith's statement to be admitted into evidence as proof of the Defendant's conduct.

The majority adopts a so-called "balancing test" to determine when a statement may be admitted under 803(3) to prove the conduct of someone other than the declarant. This approach is misguided. Although the majority states that it is concerned with reliability, the language of Rule 803 expresses Congress's determination as to what sort of evidence is sufficiently reliable to be admitted. That language, moreover, was clearly crafted to protect against admission of unreliable evidence. For example, Rule 803(3) provides that statements of the declarant's state of mind are admissible, "but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." Fed. R. Evid. 803(3). This limitation demonstrates that the "balancing test" the majority seems to thinks is required was conducted by Congress when it drafted the Rule. Admitting a declarant's statement under the state of mind exception as evidence of a non-declarant's subsequent conduct "meets the indicia of reliability because it falls within a firmly rooted hearsay exception." *Terrovona v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988).

The plain language of 803(3) demonstrates that it is proper to admit Smith's statement as proof of the Defendant's conduct. Neither the District Court's rule of categorical exclusion nor the majority's corroboration requirement have any basis in the language of the Rule, and both are improper. It is not within this Court's province to rewrite the Federal Rules of Evidence. Therefore, I would reverse the District Court's ruling and allow the statement to be used at trial as evidence of the Defendant's conduct.

C. Admissibility of Dr. Chin's Testimony

Finally, the majority has stretched the meaning of the Confrontation Clause far beyond what the framers intended or how the Supreme Court interpreted it in both *Crawford* and *Williams*.

The majority is wrong for four distinct, yet related, reasons: (1) Dr. Chin's opinion testimony is admissible under Federal Rule of Evidence 703, even if some of the underlying statements on which she relies for her opinions are not; (2) autopsy reports are categorically non-testimonial; (3) even if they are not, the autopsy report in this case is not testimonial; and (4) as a matter of policy, adopting the majority's standard would put law enforcement and prosecutors in an impossible situation.

First, Dr. Chin's testimony is admissible whether or not the underlying report is testimonial. Rule 703 stands for the proposition that under certain circumstances an expert may base opinion testimony on certain documents, even when the documents themselves are not admissible. For Rule 703 to permit expert testimony based on evidence that is otherwise inadmissible, the expert must testify only to his or her own conclusions. This was clearly Dr. Chin's intention in the present case. She would have testified only as to her own conclusions based on the underlying *facts* in the autopsy report. Contrary to the majority's assertions, she did not plan to offer any conclusions reported by Dr. Fleischer. Indeed, the autopsy report contains only objective, factual data. There would be no danger in allowing Dr. Chin to testify as to her own conclusions about these facts.

Moreover, even if the underlying document were inadmissible, Rule 703 would still require the Court to consider whether the proffered testimony was more probative than prejudicial. Notably, the majority has not offered any explanation for why it has not conducted such a balancing test. This is likely because, if it did, there could be only one conclusion: the probative value of the testimony greatly outweighs its prejudicial effect, for the enormously important policy reasons that I explain below.

The majority also states, incorrectly, that the Government is trying to use an evidentiary rule to trump the Constitution. However, as *Williams* makes quite clear, the use of surrogate expert testimony in circumstances like these is entirely consistent with the Constitutional right of a defendant to cross-examine the witnesses who will be testifying against him or her. *See Williams*, 132 S. Ct. at 2228.

Second, the majority wrongly rejects the weight of authority, which holds that autopsy reports are categorically non-testimonial. While I agree with the majority that *Williams* has left a fair amount of confusion it its wake, I do not believe that the majority has resolved the issue correctly on this point. To the contrary, I am convinced, as is almost every other federal and state court that has considered the issue, that the Supreme Court intended to create a business records exception to the Confrontation Clause and that autopsy reports fall within it. *See, e.g. McNeiece v. Lattimore*, 501 F App'x 634, 636 (9th Cir. 2012); *United States v. De La Cruz,* 514 F.3d 121, 133-34 (1st Cir. 2008); *U.S. v. Feliz,* 467 F.3d 227, 233-37 (2d Cir. 2006); *People v. Dungo*, 286 P.3d 442 (Cal. 2012); *People v. Hall,* 84 A.D.3d 79 (N.Y. App. Div. 2011); *see also* Ginsberg, *supra* (cases cited).

Furthermore, the primary purpose of an autopsy report is not use in a criminal proceeding. Indeed, in light of the many possible alternative explanations for why a medical examiner might prepare such a report, courts, rather than presuming that autopsy reports are testimonial, should presume the opposite. I would hold that autopsy reports are categorically non-testimonial, and offer an exception for the rare instances where clear, indisputable evidence shows that a report

was prepared primarily for use in a criminal trial, such as in cases where a criminal suspect has already been identified prior to the autopsy.

Third, even if autopsy reports are categorically, or at least presumptively, testimonial, the report in this case is not. Dr. Fleischer prepared it *not* for the primary purpose of being used in a criminal investigation, but for administrative and record-keeping purposes. Although, as the majority points out, the state autopsy law requires that autopsies be performed when a death occurs under suspicious circumstances, it also requires that they be conducted when the evidence suggests that death may have been caused by drug use. Based on the information provided by Ms. Flores and the condition of Smith's body when the police arrived, it is clear that the primary reason for the autopsy and report in this case was the strong possibility that Smith died of a drug overdose. This conclusion is further supported by the fact that Dr. Fleischer refused to come to a conclusion about whether the manner of death was homicide or suicide.

Finally, and perhaps most importantly, the Government's policy arguments are highly persuasive. To accept the standard adopted by the majority is to impose a statute of limitations on murder by assuring that evidence needed to establish cause and manner of death—or other similar valuable evidence—will be inadmissible in cases where the passage of time, because of death or other reasons, makes unavailable the person who observed and/or recorded that evidence.

Indeed, the plurality's decision in *Williams* leaves open a question that has persisted since *Bullcoming*: in determining which witnesses must be made available at trial to adequately protect a defendant's Confrontation Clause rights, where must we draw the line? Do we need the person who carried the decedent into the ambulance? The ambulance driver? The individual who lifted the decedent's body off the stretcher and placed it onto the autopsy table?

The majority's opinion holds some theoretical value, but we do not live in a theoretical world. We need real, practical answers that do not leave courts pondering whether an endless parade of witnesses is required to establish even incidental background facts. When we view the problem with common sense and logic, we quickly realize that the Confrontation Clause does not require that every single person involved in the process of determining the cause and manner of a victim's death testify. Today's result simply cannot be what the Supreme Court had in mind when it decided *Crawford* and its progeny. Of course, the Defendant's rights are not to be cavalierly disregarded just because the Government cannot locate the original medical examiner, but we also need not cut the prosecution off at the knees when those rights are not implicated at all. For the reasons stated, I respectfully dissent.

No. 16-1789

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

--against--

PAUL RUTHERFORD,
Respondent.

Date: October 15, 2016

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limited to the following questions:

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.