Team 12P - Original

Docket No. 21 – 778

IN THE

Supreme Court of the United States

ALEXANDER KENSINGTON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether compelling the subject of a warrant to use their fingerprint to unlock a smartphone is a testimonial statement in violation of the Fifth Amendment privilege against self-incrimination.

II. Whether expert testimony on the reliability of eyewitness identifications is admissible under Federal Rules of Evidence 702 and 403.

III. Whether Federal Rule of Evidence 615 implicitly forbids sequestered witnesses from learning of each other's testimony outside of courtroom proceedings.

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OPINIONS BELOW

The District Court's ruling and transcript for the Motion to Suppress appears in the record at pages 18–27. The District Court transcript for the Hearing on the Motion in Limine appears in the record at pages 32–41. The District Court's order denying the Motion in Limine appears in the record at pages 42–44. The order of Witness Sequestration appears in the record at page 45. The Hearing on Motion for Post Conviction Relief appears in the record at pages 46–54. The Opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 55–66.

CONSTITUTIONAL PROVISIONS

The text of the constitutional provision of Amendment V is as follows:

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unlesson a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witnessagainst himself, nor be deprived of life, liberty, or property, without due process oflaw; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF FACTS

"Two explosions rocked the Boerum Capitol District" on September 20, 2019. R. at 3. The Federal Bureau of Investigation ("FBI") investigated the incident. The FBI used eyewitness testimony from Ms. Lily Holzer ("Holzer")— a bystander who had a migraine who does not recall how she got home that day. R. at 4–5. Holzer accused someone of Mr. Kensington's description as the assailant. *Id*. The FBI also interviewed Mr. Andrew Gerber ("Gerber")— who has a "personal schism" with Mr. Alexander Kensington ("Mr. Kensington"). R. at 6–7. Gerber told the FBI that he overheard strangers speculating whether Mr. Kensington was responsible for the explosions. R. at 7.

The FBI used Holzer and Gerber's accusations to apply for a search warrant to seize an iPhone presumed to belong to Mr. Kensington. R. at 8–12. The FBI presumed such a phone

belonged to Mr. Kensington per a confidential informant and a few Instagram comments. *Id.* The FBI also requested to unlock the phone with Mr. Kensington's biometric fingerprint. R at 11. Judge Thomas granted part of the warrant; however, authorization to compel the biometric data extraction was noticeably absent from the warrant. R. at 13. Despite no authorization, the FBI compelled Mr. Kensington's fingerprint scan.

At trial, the Government used the contents found on the iPhone as evidence, along with Holzer's eyewitness testimony and Gerber's testimony. R. at 56–57. The trial court judge, Judge Hicks, did not allow the defense to admit an expert on eyewitness identifications. R. at 43–44. Judge Hicks also ruled that Gerber did not violate the witness sequestration order when he read the trial transcript before being called as a witness for the Government. R. at 54. On August 31, 2020, the jury convicted Mr. Kensington of violating 18 U.S.C. §§ 844(f)(1), 844(n), and 924(c)(1)(B)(ii). R. at 56. He now faces 15 years in prison. R. at 57.

I. The Government's compulsion of Mr. Kensington to provide a biometric scan

The Government compelled Mr. Kensington to disclose his biometric data to bypass the combination passcode and unlock the seized iPhone. R. at 22, 58. Agent Theodore Schermerhorn ("Agent Schermerhorn") applied for a warrant to search Mr. Kensington and seize an iPhone based on Gerber's comments on the Planeteers' Instagram account. R. at 9.

Additionally, Agent Schermerhorn produced a suspect description from a confidential informant ("CI") statement on October 5, 2019. R. at 10. The CI pointed to Mr. Kensington because he is an organizing member of the Planeteers Earth Warriors. R. at 10. The CI did not know Mr. Kensington's address but described his cell phone and gave Agent Schermerhorn the phone number Mr. Kensington allegedly used to contact Planeteers and use Instagram to post about environmental issues. R. at 10.

The FBI relied on two Instagram posts on September ninth and tenth on the "Planeteers_UniteAndFight" Instagram account as the basis for trying to place Mr. Kensington and the iPhone at the scene. R. at 11. The Government did not identify Mr. Kensington as the creator of the first post, nor is he tagged in the first post. Mr. Kensington only commented on the first post. On the second post, Mr. Kensington commented an instruction to protestors to communicate with him as an organizer of the protest. *Id.* Mr. Kensington's instruction is not unusual because he commonly coordinated peaceful protests with the Planeteers. *Id.*

Accordingly, the Government requested authorization from a warrant to seize the iPhone and "compel the fingerprint or other biometric data for any biometric recognition sensor-enabled digital devices." *Id.* In the same affidavit, the FBI wrote, "Law enforcement agents are not seeking authorization to compel ALEXANDER KENSINGTON to state or provide the password *or any other means* that may be used to unlock or access the [iPhone]." *Id.* (emphasis added).

On October 8, 2019, Judge Thomas authorized the search and seizure of the iPhone. R. at 13. Judge Thomas did not authorize the FBI to use Mr. Kensington's biometric data to unlock the iPhone. *Id*. Nevertheless, the Government concedes that Agent Schermerhorn detained Mr. Kensington in his car to execute the warrant and "then compelled [Mr. Kensington] to enable [his phone's] 'press-to-unlock' feature." R. at 23.

II. Motion in limine to tenure Dr. Closeau as an expert in eyewitness unreliability

Defense Counsel offered the expert testimony of Dr. Jack Closeau ("Dr. Closeau") to testify about seven factors that make Holzer's testimony unreliable according to scientific research. R. at 28. Dr. Closeau has extensive qualifications testifying on the fallibility of eyewitness identifications. *See* R. at 29–31.

Dr. Closeau found Holzer's identification unreliable based on scientific research for seven reasons. Dr. Closeau concluded such because: (1) there is a weak correlation between eyewitness confidence and accuracy, (2) stress has a detrimental effect on memory, (3) the presence of weapons leads to unreliable identifications, (4) memory deteriorates rapidly, (5) eyewitnesses gain false confidence when supplied with post-event information, (6) there are flaws in cross-racial identifications, and (7) unconscious transference. R. at 28.

Holzer witnessed the explosions because she left work early due to a "migraine and was unable to keep working." R. at 4. She did not see the first explosion. *Id.* Holzer was approximately 30 yards away from the explosion; "felt the ground shudder and heard a loud explosion[;]" saw the air fill with smoke; and heard people screaming as they ran away. R. at 3–4. Additionally, Holzer alleges she "clearly" saw Mr. Alexander Kensington ("Mr. Kensington") from 50 yards away through smoke from the first explosion. R. at 4. After allegedly seeing Mr. Kensington light a Molotov cocktail and throw it, Holzer "heard the vehicle explode behind her." R. at 5. She says the rest of the afternoon was 'fuzzy,' and she does not remember how she got home." *Id.*

Holzer waited five days after the explosions to reach out to the FBI. R. at 4–5. Holzer only came to the FBI after reading THE BOERUM TIMES article describing the September 20, 2019, explosions. R. at 5. Such article contained language identifying a suspected assailant responsible for the two explosions: "Eyewitnesses at the scene of the vehicle explosion indicated the culprit was a white male in a black hoodie. … The police are said to be investigating a person of interest described as a tall, slim, white male in his 30s or 40s." R. at 3. After reading this article, Holzer told the FBI that the individual she

saw with the Molotov cocktail was: “a thin, white man, about six feet, four inches tall, in his mid-30s or early 40s… he was wearing a black hoodie….” R. 4–5.

Holzer did not identify Mr. Kensington in a lineup until October 20, 2019— a month after the explosions. R. 3, 17. Ten days before Holzer identified Mr. Kensington at the October 20, 2019, lineup, THE BOERUM TIMES published an article stating that Mr. Kensington was 41 years old and a suspect. R. at 16. Holzer— a black woman, R. at 35— identified Mr. Kensington in the lineup on October 20, 2019; the FBI’s report from the lineup did not specify if Mr. Kensington was the only 41-year-old in the lineup. R. at 17. Holzer stated she was “absolutely certain” she correctly identified Mr. Kensington. *Id.*

III. Gerber’s reading of the trial transcript after the sequestration order

On August 25, 2020, Judge Hicks issued a witness sequestration order pursuant to Rule 615 excluding “anyone designated as a witness….” R. at 45. The Government ethically informed Gerber— a practicing attorney since 2010, R. at 6— of the order before Gerber testified and explained it meant Gerber could not be in the courtroom until the Government called him. R. at 49. Gerber told the prosecutor he understood. *Id.*

Despite the Government explicitly instructing Gerber to leave the courtroom, Gabriela Sterling (“Sterling”)— a court reporter— saw Gerber stay in the courtroom and read the trial transcript. R. at 49. Sterling stated that while Gerber was reading the trial transcript, she saw Gerber “look over his shoulder and around the courtroom.” R. at 49–50. When Gerber left the courtroom, Sterling walked over to the prosecutor’s table, where Gerber placed down the trial transcript he was reading, and she noticed it was turned to pages of Holzer’s testimony. R. at 50.

Gerber’s testimony on direct examination had many similarities to Holzer’s testimony, including “that Kensington used the slogan ‘Fossil Fools’ and had a limp.” R. at 50. Such

testimony contradicts Gerber's prior testimony that "he had not seen Kensington since before the protest." R. at 50. It also contradicts Gerber's statement to the FBI on October 5, 2019, that he "witnessed the aftermath of an explosion outside of the Capitol Building. He did not see it directly." R. at 6. After the jury convicted Mr. Kensington on August 31, 2020, Sterling came forward and wrote a letter to the trial court explaining that she saw Gerber read the trial transcript. R. at 50.

STATEMENT OF THE CASE

Mr. Kensington challenged the Government's compelled extraction of a biometric scan to unlock the iPhone in question through a motion to suppress. R. at 18–27. At the motion to suppress hearing, the parties articulated the current circuit split to Judge Hicks regarding whether the Government could compel a suspect to provide a fingerprint scan to unlock a smartphone. *Id.* Judge Hicks was "concerned about this privacy issue…" R. at 25 but ultimately held in line with the circuits cited by the Government and denied Mr. Kensington's motion to suppress. R. at 27.

Mr. Kensington submitted an Expert Report Pursuant to Fed. R. Crim. P. 16(b)(1)(C) to tenure Dr. Closeau as an expert on the unreliability of eyewitness identifications. R. at 28–31. At the hearing, defense counsel told Judge Hicks that "Decades of studies have shown that cross-racial identifications are statistically less accurate than intra-racial identifications." R. at 35. Defense counsel also discussed *United States v. Smith* (an Alabama trial court that delved into detail regarding such scientific studies) with Judge Hicks's during such motion in limine. R. at 34. One day later, Judge Hicks denied the defense's motion in limine. R. at 44. Judge Hicks wrote that "allowing Dr. Jack Closeau to testify on the issues of eyewitness unreliability would not meaningfully assist the jury and that any juror assistance would be substantially outweighed by the prejudicial effect of Dr.

Closeau's 'aura of special reliability and trustworthiness.'" R. at 43. Despite Judge Hicks citing *Young v. Conway* in his written opinion,[1] Judge Hicks never determined the reliability of Dr. Closeau's scientific reasoning. R. at 43.

After his conviction, Mr. Kensington moved for a motion for post-conviction relief, arguing a violation of the witness sequestration order. R. at 52–53. Judge Hicks found "that Andrew Gerber read Lily Holzer's testimony during the Court's lunch recess on the day Gerber testified." R. at 54. Yet, Judge Hicks denied the defense's motion holding that such conduct "did not 16 violate Rule 615 or the terms of this Court's sequestration Order." *Id.*

Mr. Kensington appealed Judge Hicks's rulings to circuit court. R. at 55. With Circuit Judge Rogers dissenting, the Fourteenth Circuit affirmed Judge Hicks' Rulings. R. at 62. Mr. Kensington petitioned this Court for a writ of certiorari for these three issues. R. at 67. On November 15, 2021, this Court granted certiorari on all three issues on November 15, 2021. *Id.* The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

SUMMARY OF THE ARGUMENT

This case involves three certified issues. First, whether law enforcement forcibly inducing the Petitioner to produce incriminating evidence by extracting his fingerprint scan to unlock a seized cell phone is a violation of his Fifth Amendment privilege against self-incrimination. Second, whether expert testimony regarding the reliability of eyewitness identifications are admissible per Rule 702, *Daubert*, and Rule 403. Finally, the issue of whether the government's witness entering the courtroom in flagrant disregard of the Court's sequestration instructions to read another witness's court recorded testimony violated Federal Rule of Evidence 615.

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[1] "recent research has exposed the inherent unreliability of eyewitness identifications, which can ultimately lead to mistaken identifications and false convictions. *See Young v. Conway*, 698 F.3d 69, 78–79 (2d Cir. 2012)." R. at 43.

FBI agents detained the Petitioner in his vehicle for the execution of a search and seizure warrant. While detained in his vehicle, agents forced the Petitioner to produce evidence of his ownership and control over the phone. The cell phone seized from the Petitioner contained incriminating testimonial statements that, once accessed, disclosed the contents of his mind.

The compelled biometric scan testified of the Petitioner's ownership and control over the iPhone and forced him to produce a link in the chain of evidence that would incriminate himself. The compelled production of testimonial incriminating evidence violates the Petitioner's privilege against self-incrimination. The compelled testimonial statement was not a foregone conclusion because the agents did not establish who owned the phone before forcing the Petitioner to prove it. The FBI only had a hunch of what the phone may contain, which is not sufficient to satisfy the exception to Amend V. Therefore, the Court should reverse and remand the decisions of the District Court and Fourteenth Circuit for retrial with instruction to suppress the evidence arising from the Government's violation of the Fifth Amendment.

The District Court erred by failing to admit the expert testimony of Dr. Closeau, which comported with admissibility requirements under Rules 702, the *Daubert* standard, and Rule 403. Judge Hicks abused his discretion when he failed to analyze Dr. Closeau's qualifications and the reliability of his methods pursuant to *Daubert*. Had Judge Hicks properly analyzed the expert witness under *Daubert*, he would have found Dr. Closeau's methods were reliable and fit because it meaningfully assisted the jury in evaluating Holzer's credibility. Such testimony has high probative value; its minimal prejudicial value does not substantially outweigh such probative value pursuant to Rule 403. Therefore, this Court should reverse and remand the decision of the District Court with instruction to admit the expert testimony of Dr. Closeau.

The District Court erred by failing to rule that Gerber violated Judge Hicks's sequestration order when he read the trial transcript before the Government called him to testify. The purpose of sequestration is to prevent one witness's testimony from tainting or influencing the other witness's testimony. The prosecutor explicitly told Gerber not to be in the courtroom until called to testify, yet Gerber stayed in the courtroom and looked over his shoulder while reading deliberately reading the trial transcript of Holzer. When Gerber testified later in the trial, he changed his testimony to corroborate Holzer's testimony despite having contradicting earlier testimony. Such a violation harmed Mr. Kensington because it corroborated the facts attested to by Holzer, making both Government witnesses appear more credible. Therefore, Gerber's conduct deliberately violated the sequestration order. Accordingly, the Court should vacate the Petitioner's convictions; or, at the very least, remand the case for retrial with instruction to exclude Gerber's testimony.

ARGUMENT

I. The District Court and Fourteenth Circuit erred by failing to grant Mr. Kensington's motion to suppress because compelling the subject of a warrant to use biometric data to unlock a smartphone is a testimonial statement in violation of the Fifth Amendment privilege against self-incrimination.

The District Court of Boerum and Fourteenth Circuit Court of Appeals erred in denying the Petitioner's motion to suppress on an issue of first impression in the Fourteenth Circuit. The Fifth Amendment privilege against self-incrimination precludes the government from compelling a suspect to provide his biometric data as a shortcut to unlock a password-protected cellphone. R. at 57. Constitutional privileges like the Fifth Amendment privilege against self-incrimination are so foundational to our judicial system that any derogation thereof must be narrow in scope and nature to pierce it. *Shapiro v. United States*, 335 U.S. 1, 33 (1948). The Government must prove that the FBI had knowledge of the actual phone's existence, its authenticity, and the non-seeking

party's possession and control over the phone to prevail on a forgone conclusion exception. *United States v. Sideman & Bancroft, LLP*, 704 F.3d 1197, 1202 (9th Cir. 2013).

A compulsion that will "furnish a link in the chain of evidence needed to prosecute[,]" constitutes a violation of a suspect's constitutional privilege against self-incrimination. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 190 (2004) (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). In other words, a suspect's production of the biometric fingerprint has testimonial significance if such production authenticates a phone as that suspect's phone. The Government compelling a suspect to produce his fingerprint scan to unlock a phone is analogous to a polygraph test, which is considered testimonial. *Matter of Residence in Oakland, California*, 354 F. Supp. 3d 1010, 1016 (N.D. Cal. 2019).

When the FBI compelled Mr. Kensington to scan his fingerprint, the Government used such scan as a shortcut to bypass a combination code. The Government used the biometric scan to ascertain the truth of Mr. Kensington's control and ownership over the locked iPhone and the incriminating contents within. R. at 22. Such a scan is analogous to a polygraph test, which is testimonial and used to determine guilt or innocence. *See Oakland*, 354 F. Supp. 3d at 1016.

A. Standard of Review

A challenge to a Fifth Amendment privilege against self-incrimination requires an implied assertion of fact and its application is a question of law. This Court reviews mixed questions of law and fact under a hybrid standard of review. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). This Court reviews mixed questions primarily of law de novo, and ones primarily of fact for clear error. The instant case constitutes a primary question of law. Therefore this Court should review this issue de novo.

B. The Government violated Mr. Kensington's Const. amend. V privilege against self-incrimination.

The Fifth Amendment provides, *inter alia,* that "no person… shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Curcio v. United States* this Court held that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity.'" 354 U.S. 118, 123–24 (1957). In the landmark case *Miranda v. Arizona*, this Court explained that the constitutional interests protected by the Fifth Amendment privilege ensure that the Government "shoulder[s] the entire load." 384 U.S. 436, 460 (1966). The "system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Id.*

There are three requirements for communication to qualify under the Amendment V privilege against self-incrimination. Such communication must be: (1) testimonial, (2) incriminating, and (3) compelled. *E.g., Hiibel*, 542 U.S. at 189. Although courts typically consider testimony written or oral, a physical act may also qualify. *United States v. Oloyede*, 933 F.3d 302, 309 (4th Cir. 2019) (citing *United States v. Sweets*, 526 F.3d 122, 127 (4th Cir. 2007)). For a physical act to be considered testimonial, it must express the content of the suspect's mind. *Id.* (citing *cf. Doe v. United States*, 487 U.S. 201, 210 n.9 (1988)). Accordingly, the privilege against self-incrimination does not apply to non-testimonial evidence.

This Court has affirmed that the privilege is a bar against compelling 'communications' or 'testimony,' but not a bar against evidence that makes a suspect a "source of real or physical evidence" used for comparison like a blood sample or standing in a certain way. *United States v. Dionisio,* 410 U.S. 1, 6 (1973) (citing *Schmerber v. California*, 384 U.S. 757, 764 (1966). Such

privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture[,]" or other like compulsions providing a point of comparison. *Schmerber*, 384 U.S. at 764; *see Dionisio*, 410 U.S. at 4. In *Hoffman*, this Court established that the privilege afforded by the constitutional guarantee against testimonial compulsion "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant…." 341 U.S. at 486 (citing *Blau v. United States*, 340 U.S. 159 (1950). In *Kastigar v. United States*, this Court defined *incriminating* as "any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." 406 U.S. 441, 445 (1972).

The FBI compelled Mr. Kensington to be a witness against himself when FBI agents detained him in his vehicle and forced him to produce a biometric scan, thereby authenticating the iPhone, proving ownership and control over it, and allowing access to the locked iPhone. Mr. Kensington's private thoughts, relationships, finances, private notes to himself, health information, and more were locked behind the passcode of the iPhone. Several items locked inside the iPhone were incriminating evidence used for criminal prosecution at the District Court of Boerum. The biometric scan was not used for comparison or diagnostic evidence, unlike a blood sample or fingerprinting. Instead, it was used as a shortcut to bypass the combination passcode protecting the iPhone. Therefore, Mr. Kensington requests this Court reverse the decisions of the Fourteenth Circuit and District Court of Boerum and hold that compelling a suspect to produce a fingerprint scan to unlock a cell phone containing the contents of his mind, including incriminating evidence is a testimonial violation of Amend. V.

C. The production of biometric data to unlock a cell phone is testimonial.

1. A biometric scan is a mere substitute for a combination passcode.

The Fourteenth Circuit first erred in its interpretation and application of this Court's decision in *Fisher v. United States*, 425 U.S. 391, 409-10 (1976). In *Fisher*, this Court explains that the production of documents that may incriminate a taxpayer are not themselves testimonial pursuant to Fourth Amendment searches and seizures, especially when they are voluntary and prepared for tax purposes by a tax preparer. *Id.*

This case distinguishes those productions that are compelled and incriminating, viewed in light of the particular facts and circumstances under which the production arose. *Id.* at 409–11. The Fourteenth Circuit Court, citing *Fisher*, denied the testimonial nature of the fingerprint scan because the scan did not "compel the *creation* the information discovered on the phone." R. at 58. The production of the password to a safe also fails to create the documents contained within but compelling a suspect to produce the passcode to unlock it is a testimonial communication that violates the Fifth Amendment. *Doe*, 487 U.S. 201.

In *Doe,* this Court made a clear distinction between compelled production that is testimonial and not testimonial. 487 U.S. 201. Justice Stevens analogized that while compelling a suspect to surrender the key to a safe or strongbox is permissible because it is not testimonial, compelling the disclosure of a memorized combination to a safe is forbidden. *Id.* at 210 n.9. The cell phone seized from the Petitioner contained incriminating testimonial statements that, once accessed, disclosed the contents of his mind. *Holt v. United States*, 218 U.S. 245, 252–53 (1910).

Whereas compelling a suspect to provide the combination to unlock a strongbox containing private information is forbidden, so too is compelling a suspect to unlock a smartphone. Logically following and incorporating the standard this Court advanced in *Riley v.*

California, any advanced technology providing a shortcut to convenience cell phone users should therefore also be forbidden. 573 U.S. 373, 382, 403 (2014).

The Court should reverse the decisions of the District Court of Boerum and the Fourteenth Circuit Court of Appeals to conclude that compelling a suspect to provide the Government biometric data to the government for the express purpose of bypassing a combination password is testimonial and therefore impermissible. Apple's website makes it evident that the biometric scan technology ranging from a fingerprint scan to Face ID is a shortcut for the passcode on iPhones. *See About Touch ID advanced security technology*, APPLE, (February 7, 2022, 3:36 PM) https://support.apple.com/en-us/HT204587. Apple phones require a passcode to set up a fingerprint scan. *Id.* Per iPhone security guidelines, passcodes are required in lieu of the fingerprint scan shortcut on several other occasions, such as when: the device has just been turned on or restarted; after five unrecognized fingerprint scan attempts; the device has not been unlocked via passcode the previous 48 hours; to change the passcode. *Id.*

2. The FBI exceeded the warrant's scope when agents compelled Mr. Kensington to produce *other means* to *unlock or access* the iPhone.

There is no meaningful distinction between using a biometric scan and a combination passcode to enter a locked cell phone. A biometric scan is merely a shortcut in lieu of the combination passcode to unlock or access a target cell phone. *Oakland*, 354 F. Supp. 3d at 1015. Agent Schermerhorn encroached on Mr. Kensington's constitutional privileges when Agent Schermerhorn attempted to assuage the magistrate judge's concerns about forbidden compulsion in his affidavit in support of his warrant. The warrant Agent Schermerhorn requested to compel Mr. Kensington's biometric data stated, "[L]aw enforcement agents are not seeking authorization to compel ALEXANDER KENSINGTON to state or provide the password **or any other means that may be used to unlock or access** the Target Cell Phone." R. at 11 (emphasis added). Agent

Schermerhorn sought to compel Mr. Kensington to unlock and access the seized iPhone. It is undisputed that the biometric fingerprint scan was another means of accessing the Target Cell Phone because that is precisely what the FBI sought upon the apprehension of Mr. Kensington. When the FBI agent placed Mr. Kensington's finger on the biometric scanner, he bypassed the passcode and accessed the locked iPhone found inside the vehicle. R. 19–20. The officers were authorized to seize and search an iPhone with a specific number associated with it. Such a search is essentially the same as being authorized to seize and search a specific safe containing incriminating information. In either case, the Fifth Amendment forbids federal agents from compelling a suspect to produce a passcode to gain access to private and potentially incriminating content.

Therefore, the agents exceeded the scope of their permitted intrusion upon Mr. Kensington's privilege when they compelled his testimonial production of the fingerprint scan to unlock the iPhone.

D. The foregone conclusion exception to the Fifth Amendment does not apply.

The Fifth Amendment privilege against self-incrimination is so foundational to the fabric of the United States that any exception must be narrow in scope and nature. *Shapiro*, 335 U.S. at 33, 68.[2] For the "foregone conclusion" exception to apply, the party seeking production (here, the Government) "must establish its independent knowledge of three elements: the documents' existence, the documents' authenticity, and the production non-seeking party's possession or control of the documents." *Sideman*, 704 F.3d at 1202; *see e.g., Seo v. State*, 148 N.E.3d 952 (Ind. 2020) (held: Foregone Conclusion Doctrine is inapplicable when law enforcement attempts

[2] This Court held that the petitioner's control over the incriminating documents it required produced was inevitable, both as a result of his employment and as contemplated by Congress in the formulation of the Price Control Act. That inevitability rendered the privilege and immunity coterminous concerning the privilege the petitioner would have been afforded as an individual.

to compel the defendant to unlock her smartphone and the compelled unlocking would provide the Government with new information usable in furtherance of her prosecution). In other words, neither a mere hunch nor an attenuated idea is sufficient to pierce Mr. Kensington's privilege against self-incrimination.

The Foregone Conclusion Doctrine does not apply to this case because, at the time of seizure, the Government did not know of: (1) the actual existence of the iPhone's contents; (2) the seized iPhone's authenticity prior to the compelled fingerprint scan; nor (3) the Mr. Kensington's actual possession or control over the seized iPhone or its contents prior to the compelled fingerprint scan.

During the motion to suppress hearing at the District Court of Boerum, the Government argued that the Foregone Conclusion Doctrine overrides any testimonial evidence derived from the compelled biometric scan. R. at 25. While this suggests the Government's knowledge of the phone's existence, it does not address the Government's knowledge of the contents of the iPhone, its authenticity, or Mr. Kensington's control over the phone.

The Government's argument that Mr. Kensington used the iPhone to communicate with other Planeteers is not conclusive of any incriminating contents within the phone. There is nothing criminal about membership in or communication with Mr. Kensington's environmental rights group that he provided pro bono legal support. Reports that Mr. Kensington used his phone to communicate with Planeteers do not make it a foregone conclusion that the government would find incriminating evidence related to a bombing on the phone. Consequently, the Government failed to specify the cell phone contents in the warrant application when the warrant was issued.

The Government failed to independently determine the phone's authenticity by, for example, calling it using the phone number specified in the search warrant or some other means. When overreaching FBI agents surrounded Mr. Kensington's vehicle for a lawful search and seizure, the agents were lawfully permitted to seize the phone. R. at 13. The warrant did not permit the agents to compel Mr. Kensington to unlock his phone via fingerprint scan; however, the Government concedes that agents compelled Mr. Kensington to produce such a scan. R. at 13, 23. If the Government had the prior knowledge required of a foregone conclusion, they could have waited to get to a more appropriate location to compel Mr. Kensington to unlock the phone. Instead, they pressured Mr. Kensington into providing an on-the-spot testimony via his fingerprint scan to prove authenticity. R. at 19. This was a Government-led fishing expedition for evidence against Mr. Kensington because the Government did not describe with any particularization the contents sought from Mr. Kensington's phone. *See* R. at 8–12.

Despite having a phone number for Mr. Kensington, as discussed above, the Government did not know who owned and controlled the seized iPhone. Therefore, because the Government's knowledge at the time of the compulsion is insufficient to satisfy the three elements of this test, the Foregone Conclusion Doctrine exception does not apply. *See Seo*, 148 N.E.3d 952.

II. The District Court erred when it failed to admit Defendant's motion to introduce Dr. Closeau's expert testimony because the proffered testimony is sufficient and admissible pursuant to Rule 702, the *Daubert* Standard, and Rule 403.

The issue of unreliable eyewitness identification is nothing new to this Court. In 1967, Justice Brennan wrote: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Half a century later, there is now broad-based judicial recognition with empirical, scientific data to support Justice Brennan's assertion that eyewitness identifications

are potentially unreliable in various ways. *See, e.g., Young v. Conway*, 698 F.3d 69 (2d Cir. 2012) (citing many scientific journal articles and studies discussed later in this brief); *See also United States v. Smith*, 621 F. Supp. 2d 1207 (M.D. Ala. 2009) (citing more scientific authorities covered later in this brief).

Parties seeking to follow the modern trend of allowing experts on the unreliability of eyewitness testimony to testify at trial must comply with Rule 702[3] and the *Daubert* standard. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Rule 702 and the *Daubert* standard required Judge Hicks to consider whether Dr. Closeau was (1) qualified, (2) utilizing reliable methods, and (3) fit.[4] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591–94 (1993).

Dr. Closeau and his proffered testimony meet all three of these requirements, yet Judge Hicks barred this testimony without ruling on whether Dr. Closeau was (1) qualified, nor whether (2) Dr. Closeau's methods were reliable. R. at 42–44. Judge Hicks abused his discretion when he failed to determine Dr. Closeau's scientific reasoning and methodology. *United States v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000) (held that a judge failing to undertake a complete *Daubert* analysis is an abuse of discretion).

A. Standard of Review

This Court applies an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." *General Elec. Co. v. Joiner*, 522 U.S. 136, 138–

[3] Fed. R. Evid. 702 reads: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

[4] "Fit" refers to "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985).

39 (1997). This Court applies the same abuse-of-discretion standard to Rule 403 hearings. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008).

B. Dr. Closeau is qualified as an expert pursuant to Rule 702 & *Daubert*.

The threshold question under Rule 702 is whether a witness is qualified to provide expert testimony on the subject proffered. Courts consider a witness's knowledge, education, experience, or skill with the subject matter of the proffered testimony to determine whether qualified. *See United States v. Mathis*, 264 F.3d 321, 333 (3d Cir. 2001) (expert in human perception and memory was qualified with a doctoral degree, experience as a professor, and subsequent published studies and articles on the topic).

In the case at hand, like the expert in *Mathis*, Dr. Closeau's knowledge, education, experience, and skill qualify Dr. Closeau as an expert. Dr. Closeau has, *inter alia*, obtained a Ph.D. in psychology, is a professor at the university level and has performed extensive research in the area of psychology and memory. R. at 29–30. Therefore, if Judge Hicks properly evaluated Dr. Closeau, he would have ruled that Dr. Closeau was qualified.

C. Dr. Closeau's theories are reliable and fit pursuant to Rule 702.

Whether the expert's theories are reliable is a four-part test: "(1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the particular degree of acceptance within the scientific community."[5] *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir. 1994) (citing *Daubert*, 509 U.S. at 593–94).

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[5] "Nothing in the text of [Rule 702] establishes 'general acceptance' as an absolute prerequisite to admissibility." Daubert, 509 U.S. at 588. "[A] rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules…." *Id.* (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988).

Dr. Closeau's seven proffered theories satisfy all four of these factors as seen in the decades of scientific literature referenced in *Smith*, 621 F. Supp. 2d 1207 and *Young*, 698 F.3d 69. Admittedly, Mr. Kensington's pretrial counsel did not submit any studies to the district court on the record verifying Dr. Closeau's reliable methods; however, his counsel provided sufficient authority. Mr. Kensington's counsel referenced "decades of studies" to the trial court, R. at 35, referenced *Smith*, in the hearing, R. at 34, and the fact that Judge Hicks knew that Mr. Kensington was taking the position from *Young* before the ruling. R. at 43. The *Smith* and *Conway* cases served as a directory to the "decades of studies" Mr. Kensington's counsel referenced. Therefore Mr. Kensington sufficiently informed Judge Hicks of the information Judge Hicks needed to make an informed decision as to the district court's gatekeeper.

1. The weak correlation between confidence and accuracy

Courts across the country accept Dr. Closeau's assertion of such a weak relationship. *State v. Guilbert*, 306 Conn. 218, 237 (2012); *See e.g., United States v. Williams*, 522 F.3d 809, 811 (7th Cir. 2008). Specifically, in *Young*, the appellate court noted that "[R]esearch indicates that the passage of time both degrades correct memories and heightens confidence in incorrect ones." 698 F.3d at 84 (citing Kenneth A. Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 139, 147–48 (2008)). "[M]ock-juror studies have found that confidence has a major influence on mock-jurors' assessments of witness credibility and verdicts." 698 F.3d at 88 (citing Neil Brewer & Gary L. Wells, *The Confidence–Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target–Absent Base Rates,* 12 J. EXPERIMENTAL PSYCHOL.: Applied 11, 11 (2006)). "Yet scientific research suggests that "eyewitness confidence is a poor postdictor of accuracy." 698 F.3d at 88 (citing Steven M. Smith

et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?,* 85 J. APPLIED PSYCHOL. 542, 548 (2000)).

There are enough facts in the case at hand for Dr. Closeau to apply these reliable principles to eyewitness testimony. Holzer stated she was "absolutely certain" in her lineup identification of Mr. Kensington. R. at 17. Holzer also confidently declares she "clearly" saw Mr. Alexander Kensington on September 20, 2019, from 50 yards away through smoke from the first explosion. R. at 4. Therefore, Judge Hicks failed to rule that Dr. Closeau's proffered testimony on the weak correlation between eyewitness confidence and accuracy is reliable pursuant to rule 702 and *Daubert*.

2. Stress has a detrimental effect on memory.

Generally, courts across the country acknowledge that high stress at the time a witness is making her observation may render that witness less able to retain accurate perceptions and memories from such incident. *Guilbert*, 306 Conn. At 237; *see also e.g.*, *United States v. Downing*, 753 F.2d 1224, 1231 (3d Cir.1985). The *Young* court acknowledged this phenomenon as well, writing: "high levels of stress have been shown to induce a defensive mental state that can result in a diminished ability accurately to process and recall events, leading to inaccurate identifications." 698 F.3d at 81 (citing Kenneth A. Deffenbacher et al., *A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 687, 699–700 (2004); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265 (2004)). "For example, a review of 16 studies involving 1727 participants found that accurate identifications decreased 22.2% under high stress conditions." 698 F.3d at 81. (citing Deffenbacher, *A Meta–Analytic,* at 692, 694).

There are enough facts in the case at hand for Dr. Closeau to apply these principles of stress and aggravating circumstances deteriorating eyewitness testimony. Holzer was undergoing stress and aggravating circumstances on September 20, 2019. Notably, Holzer admits that she only witnessed the September 20, 2019 explosions because she left work early due to a "migraine and was unable to keep working." R. at 4. Although Holzer did not see the first explosion, she: was approximately 30 yards away from it; "felt the ground shudder and heard a loud explosion[;]" saw the air fill with smoke in seconds; and heard people screaming as they ran away from the building in front of her. R. at 3–4. After allegedly seeing Mr. Kensington, Holzer "heard the vehicle explode behind her. Holzer admitted that the rest of the afternoon was 'fuzzy,' and she does not remember how she got home." R. at 5. Holzer also admitted, "she had been ill following her migraine and the events she had witnessed." *Id*. Therefore, Judge Hicks failed to rule that the proffered expert testimony on stress's detrimental effect on memory was reliable pursuant to rule 702 and *Daubert*.

3. Weapon-focus leads to less accurate identifications.

Many courts accept that a witness's weapon focus on a weapon diminishes the reliability of the witness's identification. *Guilbert*, 306 Conn. At 237; *see e.g.*, *United States v. Brownlee*, 454 F.3d 131, 136–37 (3d Cir. 2006). The *Young* court noted: "the scientific literature indicates that the presence of a weapon during a crime will draw central attention, thus decreasing the ability of the eyewitness to adequately encode and later recall peripheral details." 698 F.3d at 80–81 (internal quotation marks and citations omitted) (citing Nancy Mehrkens Steblay, *A Meta–Analytic Review of the Weapon Focus Effect,* 16 LAW & HUM. BEHAV. 413, 414–17 (1992)).

Dr. Closeau can apply such weapon-focus finding to the Holzer because Holzer saw Mr. Kensington light a Molotov cocktail before throwing such explosive. R. at 5. Therefore, Judge

Hicks failed to rule that Dr. Closeau's proffered testimony on how the presence of weapons leads to unreliable identifications is reliable pursuant to Rule 702 and *Daubert*.

4. Memory Deteriorates Rapidly

Courts recognize that an eyewitness's memory diminishes rapidly over hours, never mind days, weeks, and months. *Guilbert*, 306 Conn. At 237; *see also e.g.*, *Brownlee*, 454 F.3d at 136–37. *Young* acknowledged: "According to studies, even a one-week delay can cause the "typical eyewitness viewing a perpetrator's face that [is] not highly distinctive… to have no more than a 50% chance of being correct in his or her lineup identification." *Young*, 698 F.3d at 84 (citing Deffenbacher et al., *Forgetting,* at 147).

There are applicable facts in the case at hand for Dr. Closeau to apply to this scientific data. Notably, Holzer waited five days to reach out to the FBI regarding the events she witnessed on September 20, 2019. R. at 4–5. Holzer did not identify Mr. Kensington in a lineup until October 20, 2019— a month after the explosions. R. 3, 17. Therefore, Judge Hicks failed to rule that Dr. Closeau's proffered testimony on memory rapidly deteriorating is reliable pursuant to rule 702 and *Daubert*.

5. Post-event information reinforces witnesses' incorrect beliefs.

Jurisdictions across the country recognize that post-event and post-identification information makes an eyewitness more likely to develop unwarranted confidence in their identifications. *Guilbert*, 306 Conn. At 237; *see e.g.*, *Brownlee,* 454 F.3d at 136–37. Judge Thompson acknowledged in *Smith*: "Research regarding post-event information shows that access to facts after an occurrence can, under some circumstances, 'change a witness's memory and even cause nonexistent details to become incorporated into a previously acquired memory.'"

621 F. Supp. 2d at 1216 (citing Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 PACE L.REV. 237, 246 (1996)).

Dr. Closeau can apply the principles established in *Smith* and *Young* to explain how the newspaper articles Holzer read before interacting with the FBI gave her a false sense of confidence and ultimately led her to select Mr. Kensington. In the case at hand, THE BOERUM TIMES published two newspaper articles after the incident on September 20, 2019. After reading the first article describing the explosions, Holzer came to the FBI. R. at 5. The article contained language identifying the suspected: "Eyewitnesses at the scene of the vehicle explosion indicated the culprit was a white male in a black hoodie. … The police are said to be investigating a person of interest described as a *tall, slim, white male in his 30s or 40s [wearing a black hoodie].*" R. at 3 (emphasis added). After reading this article, Holzer told the FBI that the individual she saw with the Molotov cocktail was: "*a thin, white man, about six feet, four inches tall, in his mid-30s or early 40s… he was wearing a black hoodie*…" R. 4–5 (emphasis added). Additionally, ten days before Holzer identified Mr. Kensington at the October 20, 2019, lineup, THE BOERUM TIMES published an article stating that Mr. Kensington was 41 years old. R. at 16. Holzer correctly identified Mr. Kensington in the lineup on October 20, 2019; the FBI's report from the lineup did not specify if Mr. Kensington was the only 41-year-old in the lineup. R. at 17. Therefore, Judge Hicks failed to rule that Dr. Closeau's proffered testimony on post-event information was reliable pursuant to rule 702 and *Daubert*.

6. There are flaws in cross-racial identification.

Many courts accept such a proposition. *Guilbert*, 306 Conn. At 237; *see e.g.*, *United States v. Rodriguez–Felix*, 450 F.3d 1117, 1124 n. 8 (10th Cir.), cert. denied, 549 U.S. 968 (2006). *Young* noted: "social science research indicates that people are significantly more prone

to identification errors when trying to identify someone of a different race, a phenomenon known as 'own-race bias.' 'There is a considerable consistency across scientific studies, indicating that memory for own-race faces is [79%] superior to memory for other-race faces.'" 698 F.3d at 81 (citing Robert K. Bothwell et al., *Cross–Racial Identification*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 19, 19, 23 (1989)). "Studies have thus found a 'tendency for people to exhibit better memory for faces of [members of their own race] than for faces of members of another race.'" 698 F.3d at 81 (citing Tara Anthony et al., *Cross–Racial Facial Identification: A Social Cognitive Integration*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 296, 299 (1992)).

Turning to the case at hand, the eyewitness and Mr. Kensington are of different races. Holzer is a black woman. R. at 35. Mr. Kensington is a white man. *Id*. Dr. Closeau had enough facts in the case at hand to properly apply the phenomenon of cross-racial unreliability. Therefore, Judge Hicks failed to rule that Dr. Closeau proffered testimony on cross-racial identifications was reliable pursuant to rule 702 and *Daubert*.

7. Unconscious transference explains why Holzer's lineup selection.

Again, courts across the country commonly recognize the validity of unconscious transference. *Guilbert*, 306 Conn. at 237; *see also, e.g., United States v. Harris*, 995 F.2d 532, 535 (4th Cir.1993). *Young* acknowledged: "[unconscious transference is a] phenomenon [that] occurs because 'the witness is unable to partition… her memory in such a way as to know that the suspect's increased familiarity is due to the exposure in the photo array, rather than the suspect's presence at the time of the crime.'" 698 F.3d at 82 (citing Ryan D. Godfrey & Steven E. Clark, *Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value*, 34 LAW & HUM. BEHAV. 241, 242 (2010)).

It is undisputed that Mr. Kensington helped plan the peaceful portion of the September 20, 2019, protest at the Boerum Capital. R. at 15. Accordingly, it is very plausible that Holzer did see Mr. Kensington at some point during the protest. Dr. Closeau can use the unconscious transference phenomenon to explain to the jury that if Holzer did see Mr. Kensington at all during the protest, that might be why she believes Mr. Kensington is the assailant responsible for the explosion. Therefore, Judge Hicks failed to rule that Dr. Closeau's proffered testimony on how the unconscious transference phenomenon is reliable pursuant to rule 702 and *Daubert*.

D. Dr. Closeau's testimony is admissible pursuant to Rule 403.

Federal Rules of Evidence Rule 403 reads: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: *unfair* prejudice…." (Emphasis added). There is a presumption of admissibility of relevant evidence under Rule 403. "Rule 403 is an extraordinary remedy[,] which should be used only sparingly[,]" and the balance "should be struck in favor of admissibility." *United States v. Edouard*, 485 F.3d 1324, 1344 n.8 (11th Cir. 2007), (quoting *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir.2006)). Thus, in reviewing issues under Rule 403, courts should maximize the evidence's probative value and minimize its dangers. *Edouard*, 485 F.3d at 1344 n.8, (quoting *United States v. Brown*, 441 F.3d 1330, 1362 (11th Cir.2006)); *United States v. McDermott*, 245 F.3d 133, 140 (2d Cir. 2001) (citations omitted).

1. Dr. Closeau's proffered testimony has a substantial probative value that would meaningfully assist jurors.

This Court's precedents recognize the probative value of eyewitnesses. "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352, (1981) (Brennan, J., dissenting)). Eyewitnesses, however, are not without fault. "The vagaries of eyewitness

identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Wade*, 388 U.S. at 228.

The solution proposed by Circuits is clear: allow the admission of expert testimony on the unreliability of eyewitness identifications. *United States v. Smithers*, 212 F.3d 306, 312 (6th Cir. 2000). "Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct." *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009). "A lay juror would not know, for example, about the likely impact on perception of extreme stress and weapon focus, nor would the juror necessarily understand that the detective's identification practices were highly suggestive." *United States v. Nolan*, 956 F.3d 71, 82 (2d Cir. 2020). *See also Young*, 698 F.3d at 79 ("Many of [Dr. Closeau's proffered] factors are counterintuitive and, therefore, not coterminous with 'common sense.'"). "[E]xperts who apply reliable scientific expertise to juridically pertinent aspects of the human mind and body should generally, absent explicable reasons to the contrary, be welcomed by federal courts, not turned away." *Mathis*, 264 F.3d at 340.

There is no doubt that a defendant offering evidence that attacks the reliability of eyewitness testimony is relevant to a defendant's defense. *Rincon*, 28 F.3d at 925. In *Rincon*, the defendant motioned to tenure an expert witness in the reliability of eyewitness identifications. *Id.* at 924. The expert proffered that eyewitness accuracy is affected by "stress, duration of exposure, cross-racial identification, and availability of facial (whether or not the face is partially obscured). The storage and retrieval stages are affected by time delay and suggestibility." *Id*. The Ninth Circuit held that "[t]he expert testimony Rincon offered was no doubt relevant to his defense." *Id*. at 925 (citing *United States v. Amador-Galvan*, 9 F.3d 1414, 1418 (9th Cir. 1993).

The case at hand is analogous to *Rincon* in that Mr. Kensington proffered an expert witness to testify regarding the unreliability of eyewitness identifications.[6] R. at 28–31. Dr. Closeau's testimony is probative and would meaningfully assist the jurors because it would explain to them concepts lay jurors would not know, including counterintuitive, applicable concepts. *See Bartlett,* 567 F.3d at 906; *Nolan*, 956 F.3d at 82; *Young*, 698 F.3d at 79.

2. Such testimony has minimal unfairly prejudicial value.

Dr. Closeau's testimony is not unfairly prejudicial simply because it discredits their key eyewitness because it is a attempt to prove a fact. "Evidence is unfairly prejudicial when 'it tends to have some adverse effect upon [an adverse party] beyond tending to prove the fact or issue that justified its admission into evidence.'" *United States v. Bayon*, 838 F. App'x 618, 620 (2d Cir. 2021), cert. denied, 141 S. Ct. 2835 (2021) (quoting *United States v. Massino*, 546 F.3d 123, 132 (2d Cir. 2008)). "Evidence is prejudicial under Rule 403 where it appeals to an illegitimate basis for persuasion and thereby goes beyond proving the fact or issue it is offered to prove." *United States v. 0.161 Acres of Land, more or less, situated in City of Birmingham, Jefferson Cty.*, Ala., 837 F.2d 1036, 1041 (11th Cir. 1988) (citing *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir.1980)). Eyewitness credibility is a legitimate basis for persuasion. *Cf. State v. Copeland*, 226 S.W.3d 287, 299 (Tenn. 2007) ("[s]cientifically tested studies, subject to peer review, have identified legitimate areas of concern" in area of eyewitness identifications). There is no reason to categorize evidence with a potential "aura of reliability" as unfairly prejudicial if

[6] The case at hand does have some distinctions from *Rincon*. Notably, in *Rincon*, the Ninth Circuit ultimately held Rincon failed to produce sufficient evidence that the expert testimony would assist the jury because Rincon submitted an inconclusive article regarding the effect an eyewitness identification expert would have on the jury. 28 F.3d at 925. After ruling, the Ninth Circuit noted "Our conclusion does not preclude the admission of such testimony when the proffering party satisfies the standard established in Daubert by showing that the expert opinion is based upon "scientific knowledge" *Id*. at 926. In the case at hand— 28 years later— there is now a plethora of conclusive evidence of such expertise's probative value supporting the admission predicted in *Rincon*'s dicta.

such reliability is warranted based on qualifications, reliability of methods, and fit. *Mathis*, 264 F.3d at 339.

The case at hand is analogous to the facts in *Mathis*. Like in *Mathis*, Dr. Closeau proved his qualifications, the reliability of his theories, and how they fit the case at hand. R. at 28–31. Dr. Closeau's proffered testimony sought to legitimately and scientifically explain why Holzer was not as credible as she appeared. R. at 28. Dr. Closeau's testimony is not *unfairly* prejudicial because its purpose was to justifiably uncover Holzer's reliability— the only eyewitness the government called. *See Copeland*, 226 S.W.3d at 299; *See also Bayon*, 838 F. App'x at 620; *Jefferson Cty.*, Ala., 837 F.2d at 1041. Therefore, like in *Mathis*, any "aura of special reliability or trustworthiness" is not unwarranted and is not *unfairly* prejudicial. *See* R. at 43.

E. Cross-examination and jury instructions are not sufficient alternatives.

This Court recognizes that it is essential for the proper functioning of the adversary court system for an adverse party to cross-examine such witness "in an attempt to elicit the truth." *United States v. Havens*, 446 U.S. 620, 626–27 (1980). Cross-examination, however, does not serve its intended purpose for eyewitness identification accuracy, "[b]ecause eyewitnesses sincerely believe their testimony and are often unaware of the factors that may have contaminated their memories, they are more likely to be certain about their testimony." *Young*, 698 F.3d at 88.

Despite being somewhat helpful, "generalized jury instructions that merely touch on the subject of eyewitness identification evidence do not suffice as a substitute for expert testimony on the reliability of such evidence." *Guilbert*, 306 Conn. at 266; *see State v. Doolin*, 942 N.W.2d 500, 561 (Iowa 2020) (Appel, J., dissenting). If the court only issues jury instructions, more than

one out of every four jurors will not comprehend them.[7] Expert evidence can bridge the gap left by uncomprehended jury instructions and "help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct." *Bartlett*, 567 F.3d at 906.

Holzer stated that she was "absolutely certain" that Mr. Kensington was the man she saw light a Molotov cocktail responsible for the explosions at hand. R, at 17. Even if Holzer is mistaken, cross-examination will not uncover such an error if Holzer sincerely believes she is correct. *See Havens*, 446 U.S at 626–27; *See also Young*, 698 F.3d at 88. Jury instructions— although somewhat helpful— merely scratches the surface of Dr. Closeau's proffered testimony. *See Guilbert*, 306 Conn. at 266. Additionally, jurors are likely not completely to understand the jury instruction. *See* Saxton, *How Well*, at 89. Therefore, Judge Hicks abused his discretion by excluding Dr. Cloesau as an expert witness and instead only issuing jury instructions and allowing defense counsel to cross-examine Holzer.

III. Judge Hicks failed to rule that Gerber violated the Rule 615 sequestration because he read the trial transcript of Holzer.

Rule 615 reads: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." Rule 615 permits the exclusion of witnesses from hearing or learning of the testimony of other witnesses. The advisory committee's notes explicitly state, "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Fed. R. Evid. 615 Advisory Committee Notes. This rule's purpose is to prevent the shaping of witness testimony and collusion between witnesses and discourage fabrication. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373 (5th Cir. 1981). Gerber violated Rule 615's purpose when he

[7] Jurors only understand jury instructions about 70% of the time. Bradley Saxton, *How Well Do Jurors Understand Jury Instructions - A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 89 (1998).

intentionally read Holzer's testimony in court and tailored his own despite explicitly receiving instructions from the prosecutor that he was not allowed in the courtroom. Such violation unfairly prejudiced Mr. Kensington by allowing an unreliable hostile witness to tailor their testimony to corroborate against him.

A. Standard of Review

This Court reviews a trial judge's decision to exclude the testimony of a witness violating Rule 615 with the abuse-of-discretion standard. *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978).

B. Gerber violated the witness sequestration order when he intentionally read the trial transcript of Holzer because such reading altered his testimony and tainted reinforcing Holzer's eyewitness account.

"The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript." *United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) (holding that cross-examination is a suitable remedy for a Rule 615 violation when "the violation of the rule was not deliberate."). Allowing a fact witness to read a trial transcript without finding a violation of rule 615 would eviscerate the sequestration's public policy, purpose, and goal. *Miller*, 650 F.2d at 1373. In *Miller*, the trial court found that an expert witness received portions of the trial transcript prior to testifying. 650 F.2d at 1373. The trial court held that the expert reading such transcriptions was a "clear and intentional violation of the sequestration order and refused to allow Professor Sullivan to testify." *Id.*

A district court may not deny relief related to sequestration violations when the sequestration violations prejudice a defendant. *United States v. Engelmann*, 720 F.3d 1005, 1012 (8th Cir. 2013). There is a harmful error when a witness violates rule 615 by reading a trial

transcript because there is no way to undo or mitigate the harm and prejudice arising from the information obtained. *See United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978).

The case at hand is analogous to *Miller*. Here, Gerber read the trial transcript before he testified. R. at 50. Gerber reading such transcript eviscerated the purpose of Rule 615 because Gerber testified to key facts that corroborated Holzer's testimony, despite contradicting Gerber's earlier testimony. R. at 66.

Like the witness in *Miller*, Gerber deliberately violated the sequestration order by reading the trial transcript. The trial prosecutor even instructed Gerber to leave the courtroom until the court called him to testify. R. at 49. Gerber— an attorney since 2010 and had had a feud with Mr. Kensington for several years— told the prosecutor he understood his instructions yet stayed in the courtroom and read the trial transcript. *Id.* Additionally, Gerber attempted to conceal his malfeasance by "look[ing] over his shoulder and around the courtroom." *Id.*

Gerber's new testimony of key facts corroborating Holzer's eyewitness recount harmed Mr. Kensington by bolstering the credibility of Holzer— whom Dr. Closeau articulated is unreliable for seven reasons based on scientific research. *See* discussion *supra* Part II; *See also Johnston*, 578 F.2d at 1355. A mere cross-cross examination is not a sufficient remedy for Gerber's deliberate violation of the sequestration order. *See Robertson* 895 F.3d at 1215. Therefore, Judge Hicks abused his discretion when finding that Gerber did not violate the Rule 615 sequestration order when he read the trial transcript and ruled that such reading did not harm Mr. Kensington. Accordingly, this court should vacate Mr. Kensington's conviction; alternatively, this Court must remand the case to another trial, excluding Gerber as a witness. *See Miller* 650 F.2d at 1373.

CONCLUSION

The district and appellate courts erred by denying Mr. Kensington's motion to suppress evidence arising from unlawfully compelled testimony that the Foregone Conclusion Doctrine does not cure. Therefore, the Court should rule that compelled production of a biometric passcode to unlock a smartphone is a testimonial and a violation of the Fifth Amendment. Further, the court should remand the case for retrial with the testimony obtained from the compelled access to the iPhone properly suppressed.

The Court should also reverse the decisions of the District Court of Boerum and the Fourteenth Circuit Court of Appeals because it abused its discretion by excluding qualified Dr. Closeau expert witness testimony without considering its probative value to provide fact-finders with veritable scientific witness credibility information nor assessing that testimony for compliance under the *Daubert* standard. Therefore, the Petitioner respectfully requests the Court vacate Mr. Kensington's convictions; or, at the very least, remand the case and tenure Dr. Closeau an expert in the reliability of eyewitness identifications.

The Court should also find that Judge Hicks abused his discretion when failing to find that Gerber violated the Rule 615 sequestration order when he read a prior witness's testimony in advance of his testimony. The Petitioner respectfully requests this Court to vacate Mr. Kensington's convictions; or, at the very least, remand the case and exclude Gerber's testimony.

For the foregoing reasons, the Petitioner, Alexander Kensington, respectfully requests the Court to reverse the decisions of the District Court of Boerum and the Fourteenth Circuit Court of Appeals with respect to certified Issues I, II, and III.

Respectfully submitted,

Team 12
Counsel for Petitioner