No. 16-1789

In the
Supreme Court of the United States

March Term 2017

UNITED STATES OF AMERICA

PETITIONER,

V.

GOVERNOR PAUL RUTHERFORD

RESPONDENT

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

BRIEF FOR THE RESPONDENT

Counsel for Respondent

Questions Presented

I. Should the good faith exception to the exclusionary rule, as articulated in *United States v*. *Leon*, be expanded to cover evidence that is collected pursuant to a search warrant, where that warrant was issued on the basis of the tainted fruits of a prior constitutional violation effectuated by law enforcement.

II. Can the Government offer, under Federal Rule of Evidence 803(3), a declarant's then-existing statement of intent to prove the conduct of a non-declarant despite foundational concerns regarding the reliability of that evidence.

III. Whether a criminal trial 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 almost entirely on testimonial statements in an autopsy report prepared by another, unavailable medical examiner who was fired before trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

Other Cases

Constitutional Provisions

Statutes

Federal Rules

Legislative History

Secondary Sources

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Boreum has not been officially published but is contained within the record. (R. at 36-40.) The opinion of the United States Court of Appeals for the Fourteenth Circuit has not been officially published but is contained within the record. (R. at 41-51.)

STATEMENT OF CASE AND FACTS

A. Facts

This case originated in Boerum City, Boerum as the result of concurrent state and federal investigations into allegations of corruption—and later murder—against Boerum governor Paul Rutherford. Governor Rutherford was elected in 2012 after a campaign predicated on promises to begin a major redevelopment project in Boerum, specifically by repairing the Cobble Hill Bridge and revitalizing the surrounding area. (R. 3.)

From late 2013 into 2014, the Boreum government took bids and awarded contracts for the Cobble Hill Bridge project. (R. 3.) After many of the contracts were awarded, several contractors who were dissatisfied at not being selected began levying allegations against Governor Rutherford that the bidding process for the project was rigged in favor of bidders who were friendly to his administration. (R. 3.) In June of 2014, federal and state law enforcement agencies began investigating the corruption claims against Governor Rutherford. (R. 3-4.)

In August 2014, Victor Smith, Governor Rutherford's top aide, was interviewed in connection with the federal investigation. Faced with evidence of his role in the alleged conspiracy, Smith signed a cooperation agreement with the U.S. Attorney. (R. 4.) In exchange for the information Smith was to provide, the U.S. Attorney granted Smith immunity from prosecution for his involvement the corruption allegations. (R. 4.) Shortly after this agreement was reached, the U.S. Attorney issued grand jury subpoenas for Smith's testimony as well as for any documents on Governor Rutherford's computer that might pertain to the bidding process for the Cobble Hill Bridge project. (R. 4.) Smith's grand jury testimony was scheduled for October 16, 2014. (R. 4.)

On October 11, Smith's fiancée, Anita Flores, arrived at Smith's apartment to find him deceased in his bedroom. (R. 5.) She reported his death to state authorities who then notified the FBI due to Smith's involvement in the active federal corruption investigation. (R. 4-5.) The following day, FBI agents interviewed Flores regarding Smith's death. (R. 5.) Flores told the agents that she had spoken to Smith the night before his death and that he had told her he planned on enjoying dinner with Governor Rutherford before joining some friends for a few drinks. (R. 5.) She further told the agents that, a couple weeks prior, Smith had confided in her that he had learned some upsetting information about Governor Rutherford while going through documents on his computer, though she did not know the specifics of what troubled him. (R. 5.)

The following morning, Dr. Lawrence Fleischer, an Assistant Medical Examiner with Boerum City, conducted Smith's autopsy. (R. 11.) Dr. Fleischer estimated that Smith died on October 10, at 11:00 PM. (R. 11.) In the autopsy report, Dr. Fleischer described the findings that led to his conclusion that Smith's death was caused by ingesting a lethal amount of Pest-X. (R. 11-12.) The report went on to detail Smith's medical history, including a history of Oxycodone abuse. According to Dr. Fleischer's report, someone who overdoses on Oxycodone will often experience symptoms similar to one who ingests Pest-X. (R. 12). Dr. Fleischer was unable to conclusively determine the manner of Smith's death, but noted in his report that "[s]uicide is very common with [Pest-X]; homicide is rare, but has occurred . . . ." (R. 12.)

After federal charges had been brought against Governor Rutherford in connection with the allegations in the instant case, the Government notified Governor Rutherford's trial counsel, Loretta Z. Barnes, of its inability to contact Dr. Fleischer for the purposes of testifying at trial. (R. 13.) In a letter dated March 3, 2015, Assistant U.S. Attorney Gerald V. Callo explained that his office had learned that Dr. Fleischer had been fired in December 2014 after his supervisor

discovered a bottle of whisky in his desk drawer. (R. 13.) Mr. Callo informed Ms. Barnes that, due to Dr. Fleischer's unavailability, the Government would instead be calling Dr. Elizabeth Chin, a Cobble County Assistant Medical Examiner, to offer her independent opinion based on the autopsy report that had been prepared by Dr. Fleischer. (R. 13.)

On October 16, state investigators—in connection with the state corruption investigation—executed a search warrant at Governor Rutherford's office in Boerum City. (R. 6.) The scope of that warrant was limited to electronically stored documents on office computers, created on or before June 1, 2014,[1] that related to the bidding process for the Cobble Hill Bridge project. (R. 6.) The execution of the state-issued warrant was overseen by Boerum State Police Officer Andrew Scott. (R. 6.)

As the state investigators executed the warrant for documents relating to the corruption allegations, FBI agent Ian Loyal sat with Governor Rutherford in Rutherford's office, questioning him about Smith's death. (R. 6.) Governor Rutherford denied any involvement in Smith's death and asserted that the last time he had seen Smith was when the two of them were working together to identify electronic documents to be included in the Governor's response to the grand jury subpoena of August 29, 2014. (R. 6.) At some point during the period in which agents from both agencies were at Governor Rutherford's office, Agent Loyal informed Officer Scott that the FBI's presence was in relation to the death investigation. (R. 6.)

Scott later told FBI agents that when he learned of Smith's death that he assumed that it had occurred under suspicious circumstances. (R. 7.) Consequentially, as he was in the process of searching Governor Rutherford's computer for the documents described in the search warrant, he decided to also search Governor Rutherford's email for recent messages that might provide

[1] The warrant only concerned documents created on or before June 1, 2014 because it was issued only for the purposes of the corruption investigation and all of the bids had been awarded by this date. (R. 6.)

clues regarding Smith's death. (R. 7.) In inspecting the "to/from" and "subject" lines of Governor Rutherford's recent messages, Scott learned that Governor Rutherford had recently ordered and received a shipment of Pest-X, a strong pesticide commonly used for gardening.[2] (R. 7-8.) He then reported these findings to federal investigators.[3] (R. 7.)

Although Scott admitted to being aware at the time that the search warrant for Governor Rutherford's office computers did not authorize a inspection of his recent email activity, he apparently assumed that his reading of the "to/from" and "subject" lines of Governor Rutherford's messages was exempt from the warrant requirement. (R. 7.)

B. Procedural History

On January 21, 2015, a grand jury in the Eastern District of Boerum issued an indictment charging Governor Rutherford with murdering Smith with the intent to prevent his attendance or testimony at an official proceeding, and with the intent to prevent his communication to law enforcement information relating to the possible commission of a federal offense, in violation of 18 U.S.C. §1512(a)(1)(A) and (a)(1)(B). (R. 1.)

Prior to trial, Governor Rutherford moved to suppress the documents obtained from his personal computer. (R. 19). He also moved *in limine* to exclude a statement from Flores that the Government sought to introduce pursuant to FRE 803(3) as well as the testimony of Dr. Chin that was based on the conclusions of Dr. Fleischer. (R. 24-28) The trial court heard arguments on all three motions on July 25, 2015. On July 31, United States District Judge Robert Pitler issued his ruling in favor of Governor Rutherford on all three motions. (R. 37.)

The Government then brought an appeal to the United States Court of Appeals for the Fourteenth Circuit. (R. 41.) On February 9, 2016, the Fourteenth Circuit issued its opinion

[2] Governor Rutherford, who owned a home in rural upstate Boerum, was known for his gardening prowess. (R. 8.)

[3] The death investigation eventually determined that Smith's death was a result of his ingesting Pest-X. (R. 8.)

affirming the District Court with respect to all three pretrial motions.[4] (R. 41.) On October 15, 2016, this Honorable Court granted certiorari to review the holding of the Fourteenth Circuit. (R. 52.)

SUMMARY OF ARGUMENT

This case is about preserving the constitutional right to a fair trial, respecting that all criminal defendants are entitled to a presumption of innocence, and effectuating the fundamental protections that are enshrined in the Bill of Rights. Respondent respectfully asks that this Honorable Court affirm the Fourteenth Circuit on all three issues in its Petition for Certiorari.

With respect to the good faith exception issue, this Court should affirm the Fourteenth Circuit and endorse the prevailing notion in the circuit courts that, out of deference to the exclusionary rule's traditional purpose, and to safeguard the protections of the Fourth Amendment, the good faith exception should not be extended to circumstances involving deliberate law enforcement misconduct. If the exclusionary rule is to sustain the guarantee of the Fourth Amendment, it must continue to apply where law enforcement show no regard for the privacy of citizens who—rightly or wrongly—are suspected of criminal wrongdoing.

This Court should follow *Leon*'s guide in analyzing the applicability of the exception and consider the conduct of all of the officers involved in the investigation. Because the Boerum State Police and FBI were working in close proximity to investigate the same suspect for the same crimes, Officer Scott's deliberate misconduct should be held to impair the validity of the subsequent search warrant if the exclusionary rule is to continue to suppress the "fruit of the poisonous tree."

Moreover, because the magistrate's consideration of the facts in the warrant affidavit is limited to assessing whether those facts establish probable cause for a *subsequent* search, the

[4] In dissent, Judge Caplow argued for reversing the District Court's holding on all three motions. (R. 48-51.)

magistrate cannot touch upon the constitutionality of the prior search. Allowing invocation of the good faith exception where officers purposefully violate the Fourth Amendment in collecting evidence that establishes probable cause for a search warrant would allow a magistrate to "sanitize the taint" of the underlying constitutional violation. This Court should thus hold that the police cannot cleanse their hands of the poisonous fruits of a constitutionally repugnant search merely by seeking a magistrate's *ex parte* rubberstamp.

With respect to the statement of intent issue, this Court should similarly affirm the Fourteenth Circuit. With any discussion about the application of an evidence rule, the rules' objective of ensuring the reliability of evidence must be a chief consideration. Accordingly, the uncertainty among legislative and judicial bodies regarding the application of Rule 803(3) to infer the future conduct of non-declarant's should be resolved in a way that first and foremost effectuates the goal of reliability.

To reconcile the Government's need to admit competent evidence with the reliability demands inherent in the evidence rules, this Court should adopt an approach similar to that articulated by the Second Circuit: allowing those statements to be used to show a non-declarant's future conduct, but only where the Government can offer independent corroborating evidence connecting the non-declarant's activities to the declarant's stated intent. Because there is no independent corroborating evidence in the instant case, the hearsay statement that the Government seeks to introduce is patently unreliable. Therefore, in keeping with the evidence rules' emphasis on reliability, this Court should affirm the Fourteenth Circuit's holding that the hearsay statement does not qualify under Rule 803(3) and must be excluded.

With respect to the Confrontation Clause issue, this Court should also affirm the Fourteenth Circuit. In considering whether to admit testimonial statements from any source, the

demands of the Confrontation Clause must trump any evidentiary exceptions. Allowing testimonial statements made by an unavailable expert to be admitted through the opinions of a substitute expert witness would consistently and substantially impair the ability of defendants in criminal trials to uncover the truth of the matter through the "crucible of cross examination." Thus, in keeping with the demands of the Confrontation Clause, this Court should affirm the Fourteenth Circuit's holding that Dr. Chin's opinions, which are based solely on testimony contained in an autopsy report prepared by another, unavailable medical examiner, are inadmissible.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE FOURTEENTH CIRCUIT AND HOLD THAT THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY TO EVIDENCE COLLECTED PURSUANT TO A SEARCH WARRANT THAT WAS BASED ON EVIDENCE THAT WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT.

The abiding characteristic of the exclusionary rule is that its "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment . . . by removing the incentive to disregard it." *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see also Herring v. United States*, 555 U.S. 135, 144 (2009). The emphasis on the exclusionary rule's deterrent value guided this Court in *United States v. Leon*, 468 U.S. 897, 906-10 (1984), to concede that not all constitutional violations are the result of purposeful misconduct, and thus hold that suppression is not appropriate in such cases where there is no misconduct to be deterred. Accordingly, the "good faith" exception provides that where an officer's objectively reasonable reliance on a subsequently invalidated search warrant unearths incriminating evidence, the exclusionary rule does not apply because "[it] is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id*. at 917-22. In

immunizing the conduct of officers who act in *true* good faith, the *Leon* Court cautioned that good faith cannot be invoked where law enforcement seeks to mislead a magistrate in a warrant affidavit. *See id*. at 923; *see also United States v*. *Reilly*, 76 F.3d 1271, 1280 (2d Cir. 1996).

Over time, this Court has extended the principles of *Leon* to other constitutional violations—irrespective of whether or not a search warrant is involved—where the facts similarly indicate a lack of deliberate police misconduct. *See Illinois v*. *Krull*, 480 U.S. 340, 349-50 (1987) (holding that the good faith exception applies where the police act with objectively reasonable reliance on a statute that is later held to be unconstitutional); *Davis v*. *United States*, 564 U.S. 229, 232 (2011) (good faith exception applies where the police conduct a search in reliance on binding appellate precedent that is later overturned); *Arizona v*. *Evans*, 514 U.S. 1, 14-15 (1995) (applying the good faith exception where a faulty arrest that led to the discovery of incriminating evidence was the result of a court employee's recordkeeping error); *Herring*, 555 U.S. at 703-04 (extending the holding in *Evans* by applying the exception where the faulty arrest was the result of a negligent police recordkeeping error).

The common thread woven through these decisions is that in each example the constitutional defect originates from a source other than an investigating officer. Because judges, legislators, and administrative personnel differ from police officers in that they do not have an "[inclination] to subvert the Fourth Amendment," this Court treats their mistakes as innocuous for the purposes of the exclusionary rule. *Cf*. *Krull*, 480 U.S. at 350 (quoting *Leon*, 468 U.S. at 916); *Evans*, 514 U.S. at 15-16; *see also United States v*. *Herrera*, 444 F.3d 1238, 1249 (10th Cir. 2006) (noting that this Court "has still limited [the good faith] exception to circumstances where *someone other than a police officer* has made the mistaken determination that resulted in the Fourth Amendment violation") (emphasis added). In other words, because a non-officer's

mistakes are generally not treated as culpable, they presumably cannot be deterred and therefore will not be suppressed. This analysis avoids society bearing the costs of unnecessary evidence suppression while respecting the exclusionary rule's traditional purpose of deterring future police misconduct. *See Calandra*, 414 U.S. at 347; *Herring*, 555 U.S. at 141.

Clearly, modern exclusionary rule jurisprudence is quite forgiving to police officers who happen upon incriminating evidence after an unintentional constitutional violation. There does, however, remain a critical line in the sand between truly unwitting conduct and deliberate constitutional violations. *See*, *e.g*., *United States v*. *Clarkson*, 551 F.3d 1196, 1203-04 (10th Cir. 2009) (relying on the reasoning of *Leon* in refusing to extend the exclusionary rule to mistakes made by law enforcement). Because judicial invocation of the exclusionary rule turns on the existence of police misconduct and a determination that the benefits of suppression outweigh the costs, it is axiomatic that where police culpability is higher, stronger is the constitutional justification for suppressing the fruits of unlawful conduct. *See Herring*, 555 U.S. at 700-02. Thus, where unlawful police conduct does not arise from reasonable reliance a non-officer's constitutional error, and is deliberate and culpable to the extent that it can be meaningfully deterred, suppression is appropriate.[5] *See Leon*, 468 U.S. at 920-21; *Herring*, 555 U.S. at 144.

This case exemplifies police misconduct at its most severe and highlights the importance of precluding the Government from using the purported "good faith" of one officer to cleanse the squalid misconduct of another. Here, state and federal police agencies were investigating the same suspect on the basis of the same allegations, and, to some extent, coordinated their investigative efforts. In the course of this investigation, Officer Scott's search of Governor

[5] Although this Court in *Herring* qualified the jurisprudential precept that all culpable police misconduct is subject to suppression by holding that suppression must create a deterrent effect that is "worth the price paid by the justice system," its aim was to remove "nonrecurring and attenuated negligence" from the purview of the exclusionary rule and does not affect the good faith exception analysis. 555 U.S. at 144.

Rutherford's email messages—which the Government concedes was in violation of the Fourth Amendment[6]—uncovered information that the FBI later used in its warrant affidavit. Because it was an investigating officer's purposeful constitutional violation that was responsible for the defect in the warrant, the warrant search and its fruits were the byproducts of the type of police misconduct that can be efficaciously deterred by the exclusionary rule. *Calandra*, 414 U.S. at 348; *Herring*, 555 U.S. at 143-44. Because the scope of a judicially created remedy is a pure issue of law, the applicability of the good faith exception in this case is to be reviewed *de novo*. *United States v. Clay*, 646 F.3d 1124, 1127 (8th Cir. 2011); *United States v. Luong*, 470 F.3d 898, 903 (9th Cir. 2006); *United States v. Robinson*, 336 F.3d 1293, 1295 (11th Cir. 2003).

A. It is inconsequential that the underlying Fourth Amendment violation was effectuated by a different law enforcement agency than who obtained and executed the warrant because *Leon* expressly requires that courts assess the objective reasonableness of all officers involved in the investigation.

This Court made clear—in the very case in which it adopted the good faith exception—that when a trial court is tasked with determining whether to invoke the good faith exception to "save" tainted evidence, that it must assess the reasonableness of the conduct of all officers involved in the investigation. *Leon*, 468 U.S. at 923, n.24.

> References to 'officer' throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it *or who provided information material to the probable cause determination*.

Id. (emphasis added); *see also Herring*, 555 U.S. at 699.

In the present case, federal and state agencies were investigating Governor Rutherford in connection with the corruption allegations. Although the investigations were technically distinct in their origin, they inexorably converged as both agencies zeroed in on Governor Rutherford. In

[6] *See* (R. 22.)

fact, on October 16, state and federal investigators were simultaneously present at Governor Rutherford's office to investigate matters related to the corruption allegations.

As he was executing a limited search warrant for historical documents on Governor Rutherford's computer, Officer Scott learned of the FBI's ongoing investigation into Smith's death. Despite being aware of the narrow scope of the warrant, Officer Scott chose to exceed the its lawful bounds by inspecting Governor Rutherford's recent email messages. As a result, he discovered messages that he believed substantiated the FBI's suspicion of Governor Rutherford's culpability for Smith's death. He gladly passed these fruits along to FBI agents, who used it to establish probable cause in their warrant affidavit. In doing so, Officer Scott clearly "provided information material to the probable cause determination" that led to the warrant in this case. *Leon*, 468 U.S. at 923, n.24. Indeed, there would be no warrant in this case but for the cooperation between the Officer Scott and the FBI. Accordingly, under *Leon*, any good faith analysis in this case must not stop at the actions of the FBI agents, but also consider the acts of the Boerum State Police—particularly those of Officer Scott.

B. Because Officer Scott committed a purposeful and flagrant violation of Governor Rutherford's Fourth Amendment rights by exceeding the scope of the initial warrant, and because that violation yielded evidence that supported the subsequent warrant affidavit, his actions exemplify the type of misconduct that the exclusionary rule seeks to deter. Accordingly, this Court should require that the foregoing evidence be suppressed.

The good faith exception should not be extended to cover an officer's reliance on a warrant that is tainted by underlying law enforcement misconduct because such a holding would severely undercut the exclusionary rule's core purpose of deterring police misconduct. Although extending the exception several times to various sources of unintentional error, this Court has avoided applying it to any party with an "inclination to subvert the Fourth Amendment". *Leon*,

486 U.S. at 916. As a result, Government arguments in favor of immunizing underlying police misconduct have been met with great skepticism in the lower courts.

In *United States v. McGough*, officers responded to the home of Gary McGough after his daughter made an accidental 911 call while he was out picking up dinner. 412 F.3d 1232, 1233 (11th Cir. 2005). While on the scene, two officers unlawfully entered the home where they noticed marijuana and a revolver sitting on a bar top. *Id*. at 1234. Based on their observations, one of the officers left to seek a search warrant while the others remained at the scene. *Id*. at 1235. Once the warrant was issued, they searched the home and found several firearms and multiple bags of marijuana. *Id*. As a result, McGough was convicted of multiple weapons and drug charges and sentenced to over thirteen years in prison. *Id*. On appeal, the Eleventh Circuit reversed the trial court's denial of his motion to suppress and vacated his convictions. *Id*. at 1235-36. After concluding that the officers' original entry was unlawful, the court rejected the Government's good faith argument "because it was not 'objectively reasonable law enforcement activity' but rather the officers' unlawful entry into McGough's apartment" that led to the affidavit. *Id*. at 1239-41. Thus, *Leon* did not apply because the warrant was tainted by the officers' underlying misconduct. *See id*.

In *United States v. Vasey*, 834 F.2d 782, 784 (9th Cir. 1987), Michael Allen Vasey was taken into custody on an outstanding arrest warrant after a lawful traffic stop. As Vasey was handcuffed in the back of a patrol car, officers conducted a warrantless search of his vehicle. *Id*. After discovering a gold watch and $5,000 under the driver's seat, they ceased searching and sought a warrant. *Id*. at 784-85. After obtaining the warrant, they discovered three kilograms of cocaine in Vasey's vehicle. *Id*. The trial court denied Vasey's motion to suppress, but the Ninth Circuit reversed, holding that the initial warrantless search was unconstitutional. *Id*. at 788. The

court further concluded that the good faith exception did not apply because the warrant had been issued on the basis of tainted evidence. *Id*. at 789. It reasoned that "the *Leon* Court made it very clear that the exclusionary rule should apply if the exclusion of evidence would alter the behavior of individual law enforcement officers or the policies of their department." *Id*. (citing *Leon*, 468 U.S. at 918). Therefore, in the court's view, the officers' conduct in obtaining the evidence in support of the affidavit was "an activity that the exclusionary rule was meant to deter." *Id*.

The Tenth Circuit has similarly refrained from broadening the good faith exception to whitewash intentional police misconduct precedent to a warrant affidavit. In *United States v*. *Scales*, 903 F.2d 765, 766-67 (10th Cir. 1990), DEA agents boarded a passenger train in New Mexico, unlawfully seized a suitcase belonging to Quinton Scales, brought the suitcase to a nearby state prison, and subjected it to a dog sniff for narcotics. *Id*. at 766-67. Upon positive alerts from two separate dogs, the agents obtained a warrant to search the suitcase which produced a large quantity of cocaine. *Id*. at 767. On appeal, the Tenth Circuit reversed the trial court's use of the good faith exception to justify admission of that evidence.[7] *Id*. at 767-68. After concluding that the agents' seizure of Scales' suitcase prior to the issuance of the warrant was unlawful, the court held that *Leon* was not applicable because the agents were not relying in good faith on a warrant when they effectuated the underlying constitutional violation. *See id*.

By refusing to extend the good faith exception to cases where warrants are based on underlying police misconduct these courts have employed a conservative application of the exception. In fact, even the courts that have extended the exception into the realm of situations

[7] Because the trial court admitted the evidence solely on the basis of the good faith exception, it failed to reach the merits of Scales' challenge to the constitutionality of the underlying police conduct, namely the lengthy warrantless detention of his suitcase before the dog sniff. *Scales*, 903 F.2d at 767. Because the Tenth Circuit ultimately reversed on the good faith issue, it analyzed the underlying conduct and concluded that the agents' actions were indeed constitutionally suspect. *See id*. at 768-69.

involving officer misconduct have done so cautiously—and over time have further narrowed its application in these circumstances. *See United States v*. *White*, 890 F.2d 1413, 1419 (8th Cir. 1989) (holding that the investigating officers' reliance on a search warrant was sufficient to invoke the good faith exception even where the warrant was based on a prior unlawful seizure because the facts "were close enough to the line of validity to make the officers' belief . . . objectively reasonable"); *United States v*. *Thomas*, 757 F.2d 1359, 1369 (2d Cir. 1985) (applying the good faith exception to the fruits of a subsequent warrant search where the affidavit was supported by facts gathered from a search that was technically unlawful but not apparently so); *but see United States v*. *Reilly*, 76 F.3d 1271, 1280 (2d Cir. 1996) (holding that the good faith exception does not apply where officers include the fruits of an unconstitutional search in a warrant affidavit and fail to give the magistrate a full account of their activities).

The Eighth Circuit clarified its position on applying the good faith exception in these types of cases in *United States v. O'Neal*, 17 F.3d 239, 245 n.6 (8th Cir. 1994). There the court held that the exclusionary rule did not apply because the underlying police activity was "clearly illegal" and therefore the evidence collected pursuant to the subsequent warrant should be suppressed. *Id*. at 243. The court differentiated *O'Neal* from its prior holding in *White* by emphasizing that the good faith exception should only be applied in cases of police error where the facts show that the underlying conduct is "close enough to the line of validity" to be in *Leon*'s "grey area." *O'Neal*, 17 F.3d at 245 n.6 (quoting *White*, 890 F.2d at 1419). Thus, because the focal point of the exclusionary rule is deterring police misconduct, officers cannot have a good faith belief in the constitutionality of a warrant search based on "clearly illegal" police behavior. *Id*; *see also United States v McClain*, 444 F.3d 556, 566 (6th Cir. 2005) (in a case the court described as "unique," applying the "close enough" doctrine from *White* to

conclude that the good faith exception was appropriate despite the underlying constitutional violation).

The lower courts are justifiably hesitant to breach the line in the sand between innocuous errors and purposeful police misconduct when it comes to articulating the breadth of the good faith exception. The opinions in *McGough*, *Vasey*, and *Scales* reflect deference to the exclusionary rule's traditional purpose of deterring police misconduct by holding the police accountable for purposeful constitutional violations. Moreover, the absence of police culpability has been a driving force in each extension to the exclusionary rule embraced by this Court. *See Krull*, 480 U.S. at 349-50; *Evans*, 480 U.S. at 14-15; *Davis*, 564 U.S. at 232; *Herring*, 555 U.S. at 703-04. Conversely, the extension of the good faith exception for which the Government advocates in the instant case lacks this characteristic. The Government urges that this Court traverse the line in the sand, and begin the judicial evisceration of the exclusionary rule by immunizing purposeful police misconduct from suppression. This Court should reject that approach and hold that a search warrant is tainted where the underlying constitutional error is made by a law enforcement officer, and that the fruits of those searches should be suppressed.

However, even if this Court embraces the approach taken by the Eighth, Second, and Sixth Circuits, the facts in the instant case point overwhelmingly to suppression. In this case, the warrant and its fruits were the byproducts of an episode of "clearly illegal" police conduct. *O'Neal*, 17 F.3d at 245 n.6. Although the Government asserts that the constitutional violation in the instant case lies within *Leon*'s "grey area," *Id*., the record on appeal illustrates that this argument is without merit. Despite the Governments proposition that Officer Scott was merely confused about the legal standard for inspecting the subject line of an email, he was far beyond the bounds of the warrant which only authorized a search of Governor Rutherford's computer for

information "on or before June 1, 2014." (R. 7.) As the incriminating emails that he discovered referenced a purchase made on October 4, 2014, it is indisputable that they were received no earlier than that date. *Id*. Thus, Officer Scott's search was beyond the scope of the warrant by over four months. No lawful execution of the original search warrant would justify Officer Scott's perusing of Governor Rutherford's email activity months outside warrant's lawful scope. This search is an example of a clearly unlawful, purposeful violation of the Fourth Amendment that is far away from the line of validity. *White*, 890 F.2d at 1419. Accordingly, Officer Scott's actions are squarely within the class of police conduct that justifies suppression for the purposes of ensuring the continuing vitality of the Fourth Amendment. *See Calandra*, 414 U.S. at 347. Regardless of whether this Court categorically bars application of the good faith exception where the underlying constitutional violation was effected by the police, it should conclude on these facts that the evidence obtained as the result of the clear constitutional violation must be suppressed.

C. The police should not be empowered to "sanitize the taint" of a constitutionally repugnant search or seizure by merely bringing forth its poisonous fruits before a magistrate in a warrant affidavit.

One of the recurring concerns of the lower courts when considering whether to apply the good faith exception where the underlying constitutional violation is effected by the police is the notion that the warrant is "tainted." *See*, *e.g*., *McGough*, 412 F.3d at 1240; *O'Neal*, 17 F.3d at 245 n.6. If the police are able to use tainted evidence to obtain a lawful warrant, the warrant affidavit will become a mere tool for post hoc ratification of constitutional violations. *Cf*. *Scales*, 765 F.2d at 768. As the Eighth Circuit cautioned in *O'Neal*, "[i]f clearly illegal police behavior can be sanitized by the issuance of a search warrant, then there will be no deterrence, and the

protective aims of the exclusionary rule will be severely impaired if not eliminated." 17 F.3d at 245 n.6.

In *Vasey*, the Ninth Circuit addressed this concern head on, holding that "the magistrate's consideration of the evidence does not sanitize the taint of the illegal warrantless search." 834 F.2d at 789. The court noted that a magistrate has a limited role in the warrant process—merely weighing the evidence for the purposes of making a probable cause determination. *Id*. Further, the warrant application process is an *ex parte* proceeding that is often conducted under severe time constraints, affording no ability for an adverse party to challenge the legal basis of the application. *Id*. at 789; *see also Reilly*, 76 F.3d at 1273.

The instant case comes with the very risk foreshadowed by *O'Neal* and *Vasey*. Imposition of the good faith exception in this case would amount to judicial sanctioning of "policing by ignorance" whereby officers would be empowered violate the Fourth Amendment and simply turn the fruits over to another ignorant officer with a wink and a nudge. That officer could then "sanitize the taint" by bringing the evidence before a magistrate and obtaining a warrant. Countless Fourth Amendment violations would slip through the cracks, and the exclusionary rule would soon be rendered moot. This Court should ensure that such a culture is never realized by ordering the suppression of the evidence in the instant case and plainly stating that the police cannot sanitize the taint of a purposeful constitutional violation by bringing its fruits before a magistrate in a warrant affidavit.

In sum, because the Boerum State Police and FBI worked in concert to investigate Governor Rutherford in connection with the corruption and murder allegations, and because the warrant obtained by the FBI subsequent to Officer Scott's flagrant and purposeful violation of Governor Rutherford's Fourth Amendment rights, this Court should hold that the warrant was

tainted by the violation. This Court should also hold that bringing the unlawfully obtained evidence before the magistrate in the warrant affidavit cannot sanitize the taint, and therefore the evidence collected from the agents' unconstitutional investigative episode should be suppressed in order "effectuate the guarantee of the Fourth Amendment." *Calandra*, 414 U.S. at 347.

II. THE FOURTEENTH CIRCUIT DID NOT ERR IN HOLIDING THAT THE GOVERNMENT, BEFORE IT CAN USE 'STATEMENT OF INTENTION' EVIDENCE, UNDER FEDERAL RULE OF EVIDENCE 803(3), TO SHOW THE CONDUCT OF A NON-DECLARANT, MUST OFFER INDEPENDENT CORROBORATING EVIDDNCE. ACCORDINGLY, BECAUSE THE GOVERNMENT FAILED TO PRESENT ANY SUCH CORROBORATING EVIDENCE, EXCLUSION OF SMITH'S STATEMENT WAS PROPER.

A. This Court should adopt the "middle ground" approach, articulated by the Second Circuit and embraced by the Fourteenth Circuit below, by holding that a declarant's statement of intention under Rule 803(3) can be introduced to infer the conduct of a non-declarant only where the Government offers independent corroborating evidence.

In 1975, Congress enacted the Federal Rules of Evidence in an effort imbue the federal court system with a greater focus on fairness, efficiency, and achieving just determinations. Fed. R. Evid. 102. Inherent in this purpose is that these rules are to ensure the reliability of evidence that is admitted at trial. *Bullcoming v. New Mexico*, 564 U.S. 647, 669 n.1 (2011) (Sotomayor, J., concurring); *see also Khumo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). Thus, these rules should be interpreted in such a way that restricts the admission of unreliable evidence. Similarly to federal statutes, the evidence rules are promulgated by Congress; therefore, the Court's interpretative analysis must begin with the plain text of the provision. *Id.*; *Beach Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). Relatedly, judicial interpretations of the evidence rules are subject to *de novo* appellate review. *Sharif v. Picone*, 740 F.3d 263, 267 (3rd Cir. 2014).

In the present case, the Government seeks to admit, through Anita Flores' testimony, a blatant hearsay statement made by Smith prior to his death. The Government asserts that the statement falls within the ambit of the hearsay exception contained in Rule 803(3), which provides that:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness . . . A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), 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).[8] The construction of the Rule for which the Government advocates—that a declarant's statement of intent *can be admitted to infer the conduct of a non-declarant*—is an unusual application of 803(3) upon which the plain text of the rule sheds little light. Moreover, both the federal circuit courts and state courts have been unable to reach a consensus on the proper scope of Rule 803(3). *See* Lynn McClain, *I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—and the Role of the Due Process Clause*, 32 CARDOZO L. REV. 373, 389-90 (2010). Therefore, to resolve the question of the Rule's applicability in this context, the Court should look to the history of the rule—paying particular attention to Congress' objectives in revisiting a common law principle in its creation of the evidence rules.

During the eighty-three year period preceding the original enactment of the Federal Rules of Evidence, there existed undisturbed a common law principle that permitted a declarant's statement of intent to be used at trial to infer the future conduct of a non-declarant. *Mutual Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 290 (1892). However, since the "statements of intent" exception was codified in Rule 803(3), there has been uncertainty as to whether the current

[8] Ordinarily, this provision allows the introduction of a declarant's statement of intent to support a factual inference that the declarant himself acted in accord with their intention stated intention.

exception can be invoked only to show that the declarant acted in conformity with her stated intention, or whether 803(3) can be used more loosely to draw an inference that a non-declarant's later actions were consistent with the declarant's intention. *See* Fed. R. Evid.803(3) advisory committee's note ("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") (internal citation omitted); *but see* H.R. REP. No. 650, 93rd Cong., 1st Sess. (1973) (construing Rule 803(3) to limit the holding of *Hillmon* by "render[ing] statements of intent by a declarant admissible *only to prove his future conduct*, not the future conduct of another person") (emphasis added).

These incongruous interpretations of Rule 803(3) have resulted in lower courts assembling a myriad of different approaches in dealing with the question of the admissibility of a statement of intent to infer the conduct of a non-declarant. *E*.*g*., *United States v*. *Jenkins*, 579 F.2d 840, 843 (4th Cir. 1978) (relying on the legislative history of Rule 803(3) in holding that it is a complete bar to introducing a statement of intent to prove the conduct of a non-declarant); *Gual Morales v*. *Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978) (noting that 803(3) would bar a declarant's statement that he indented on meeting with a defendant from being used against that defendant); *contra United States v*. *Pheaster*, 544 F.2d 353, 379 ("[W]e read the note of the Advisory Committee as presuming that the *Hillmon* doctrine would be incorporated in full force . . . ."); *United States v*. *Houlihan*, 871 F. Supp. 1495, 1501 (D. Mass. 1994) (reaching the same conclusion).

Unsatisfied with the forgoing courts' resolution of Rule 803(3)'s ambiguity in this context, the Second Circuit has taken a middle ground approach to reconciling these interpretations that provides: "[a] declarant's statement of intent may also be admitted against a non-declarant when there is independent evidence which connects the declarant's statement with

the non-declarant's activities." *United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir. 1987); *See also United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000); *United States v. Badalamenti*, 794 F.2d 821, 825-26 (2d Cir. 1986). In *Badalamenti*, the Government sought to introduce a statement from an informant that he planned on meeting the defendant in that case at a local café to purchase heroin. 794 F.2d at 825. The trial court admitted the statement under 803(3) against the defendant because it found that the statement of intent was corroborated by independent evidence of the defendant's involvement. *Id*. On appeal, the Second Circuit, viewing the independent corroborating evidence as providing a connection between the declarant's statement of intent and the defendant's activities, held that the trial court's admission of the evidence was a proper application of 803(3). *Id*. Years later, in *Best*, the Second Circuit loosened the corroboration requirement, holding that "[c]orroboration of the nature of the transaction need not be eyewitness observations and may be provided by circumstantial evidence." 219 F.3d at 199. The requirement of independent corroborating evidence adds a layer of reliability to evidence that is admitted pursuant to Rule 803(3).

The Second Circuit's approach sustains the basic premise of *Hillmon*, while modifying it to further the fundamental objective of the evidence rules—ensuring the reliability of admitted evidence. That this approach strikes a balance between the Government's need to present competent evidence and the reliability concerns inherent in the evidence rules drove the Fourteenth Circuit below to adopt the "independent corroborating evidence" rule. *See* (R. 45.)

This Court should similarly train a keen eye to the reliability concerns that would accompany any possible interpretation of Rule 803(3). Unlike when it is used to establish a declarant's activities, a statement of intention raises serious reliability questions when invoked to infer a non-declarant's future conduct. *See* McLain, *supra*, at 388. Even assuming arguendo the

sincerity of the declarant in making the statement, "perception and memory problems are introduced because the declarant is speaking implicitly about someone else's intentions, and must be basing his or her statement on some previous communication from or with the non-declarant." *Id*. These concerns underscore the importance of preventing the Government from wielding an unlimited ability to offer statements of intention against non-declarant defendants.

Moreover, the approach described is far from a complete bar on the government using Rule 803(3) in this way. Rather, it merely requires that the Government offer some independent corroborating evidence showing a link between the declarant's intent and the non-declarant's involvement in those activities. As this requirement can be satisfied with nearly any type of evidence, it places a minimal burden on the Government. *Cf*. *Best*, 219 F.3d at 199. Clearly, the burden of the "independent corroborating evidence" requirement is outweighed by the promise of increased reliability of trial evidence. Accordingly, this Court should adopt an approach, similar to that articulated by the Second Circuit, to govern the admission under Rule 803(3) of statements of intention as applied to non-declarants.

B. This court should affirm the Fourteenth Circuit's exclusion of the hearsay evidence in this case because the Government offered no independent corroborating evidence connecting Smith's statement of intention to Governor Rutherford's alleged conduct. Moreover, that evidence, as it relates to Governor Rutherford, is plainly unreliable and should be excluded.

In the instant case, the Government seeks to introduce under Rule 803(3) an uncorroborated, unreliable hearsay statement, made by Smith to his girlfriend, for the purposes of goading the jury into inferring Governor Rutherford's culpability. However, as the Government effectively conceded during arguments on pretrial motions before the trial court, it

has no independent corroborating evidence to connect Smith's statement to any of Governor Rutherford's actions.[9]

The record reflects that Flores has no firsthand knowledge of any plans, cancellations, arrivals, or departures made by Governor Rutherford in the days leading up to Smith's death. While Smith's statements of intentions may be reliable for what *he* planned on doing, those predictions are more tenuous as they relate to Governor Rutherford because he was "speaking implicitly about [Governor Rutherford's] intentions." McLain, *supra* at 388. Therefore, the possibility of misunderstanding, miscommunication, and eleventh hour scheduling adjustments[10] is ever present to any party seeking to infer Governor Rutherford's actions based on this hearsay alone.

Due to the Government's lack of independent corroborating evidence, and because the statement itself is rife with credibility and reliability questions, the hearsay statements do not fit the exception in Rule 803(3). As a result, the courts below acted correctly in ordering exclusion of the hearsay statement that the Government sought to elicit from Flores. .

III. THIS COURT SHOULD AFFIRM THE FOURTEENTH CIRCUIT AND HOLD THAT DR. ELIZABETH CHIN'S OPINIONS, WHICH ARE BASED ALMOST ENTIRELY ON INADMISSIBLE TESTIMONIAL STATEMENTS CONTAINED IN AN AUTOPSY REPORT PREPARED BY ANOTHER, UNAVAILABLE MEDICAL EXAMINER, ARE INADMISSIBLE BECAUSE THEIR ADMISSION WOULD VIOLATE GOVERNOR RUTHERFORD'S SIXTH AMENDMENT RIGHT OF CONFRONTRATION UNDER *CRAWFORD V. WASHINGTON*.

The enduring legacy of the Sixth Amendment Confrontation Clause has been the protection of defendants in criminal cases from the principle evils of "*ex parte* in-court testimony

[9] At that hearing, the Government *did not dispute* the assertion of Governor Rutherford's trial counsel that Smith's statement is inadmissible under the Second Circuit approach due to a lack of independent corroborating evidence, but merely advanced that the trial court should adopt a rule of per se admissibility for 803(3) statements to show the conduct of a non-declarant. (R. at 27.); Relatedly, the lack of this evidence was acknowledged below. (R. 45.)

[10] At the time of these events, Rutherford was the sitting Governor of Boerum and undoubtedly had the robust schedule of professional and personal obligations typical of a high profile politician.

or its functional equivalent." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). The Sixth Amendment provides, in relevant part, that "in *all criminal* prosecutions, the accused shall enjoy the righ . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. (emphasis added). This Court has recently held that the Confrontation Clause demands that, once evidence has met the bar of admissibility, questions reliability can be assessed "by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. In keeping with the spirit of the Sixth Amendment, the *Crawford* Court reaffirmed that the demands of the Confrontation Clause apply to both in-court and out-of-court testimony when it held that the admission of testimonial out-of-court evidence, where the declarant is unavailable to testify at trial, violates the Sixth Amendment Confrontation Clause where the defendant did not have a prior opportunity to cross examine the declarant. *Id*. at 54-55.

Following the *Crawford* case, this Court clarified through *Davis v. Washington* and its progeny that a defendant's protections under the Confrontation Clause apply only to testimonial statements offered against the defendant and that the Confrontation Clause would not provide protection when the statements offered by the Government against defendants were not testimonial in nature. 126 S.Ct. 2266, 2276-2277 (2006) (holding that 911 interrogation did not produce testimonial statements because 911 operator's questions were to enable police assistance to meet an ongoing emergency); *Michigan v. Bryant*, 562 U.S. 344, 346 (2011) (holding that a totality of circumstances indicated that a victim's statement to police was nontestimonial and thus admissible under the Confrontation Clause).

In this case, the use of Dr. Chin, as a substitute medical examiner, to testify about testimonial statements contained within the autopsy report is an attempt by the Government to circumvent the Confrontation Clause and usher in otherwise inadmissible testimonial statements

from the autopsy report through the back door of the Federal Rules of Evidence. *See Crawford*, 541 U.S. at 54-55. This is a clear violation of Governor Rutherford's Sixth Amendment Confrontation Clause rights. Because determining the admissibility of Dr. Chin's opinions is a pure question of law involving the Confrontation Clause, the appropriate standard of review is *de novo*. *United States v. Brooks*, 772 F.3d 1161, 1167 (9th Cir. 2014); *United States v. Clifford*, 791 F.3d 884, 887 (8th Cir. 2015).

A. This Court's decisions in *Bullcoming* and *Melendez-Diaz v. Massachusetts* should govern this Court's analysis of the Confrontation Clause issue in the instant case rather than *Williams v. Illinois*, because *Williams* applies only to the facts of that specific case.

One of the most difficult problems confronting modern lower courts when determining whether a testimonial document is admissible against a defendant in a criminal trial, when that document's original author is unavailable, is whether the analysis should be governed by this Court's decision in *Bullcoming* or by *Williams v. Illinois*. 564 U.S. at 647; 132 S. Ct. 2221 (2012). This Court first considered, post-*Crawford*, whether a testimonial document can be admitted if its author is unavailable in *Melendez-Diaz v. Massachusetts*. 557 U.S. 305, 329 (2009). There, it was asked to determine whether a document certified by an analyst could be admitted under the Confrontation Clause when the certifying analyst was unavailable for cross examination. *Id*. In another 6-3 decision, this Court held that the Confrontation Clause required the defendant to have an opportunity to cross-examine the analysts who certified the documents before they could be admissible. *Id*. at 329-30. This Court notably described the decision as "little more than the application of our holding in *Crawford* . . . ." *Id*. at 329.

In *Bullcoming*, this Court was asked to determine whether the use of a surrogate analyst was an adequate substitute for the analyst that had certified the testimonial documents that were to be used against the defendant. 564 U.S. at 652. In a 6-3 decision in which Justice Sotomayor

concurred in part, this Court followed an analysis similar to that in *Melendez-Diaz* and held that a surrogate analyst is not an adequate substitute for the purposes of admitting testimonial documents certified by another, unavailable analyst. *Id*. at 650, 668. The Court's primary concern with the surrogate analyst was his inability to speak about what the original certifying analyst "knew or observed about the events his certification concerned . . . ." *Id*. at 661.

The *Williams* Court attempted to answer whether "*Crawford* bar[s] an expert from expressing an opinion based on facts about a case that ha[s] been made known to the expert but about which the expert is not competent to testify." 132 S. Ct. at 2227. In a plurality opinion, Justice Alito wrote that that the expert could testify about the case, while two concurring justices wrote separate opinions *Id*. The plurality further indicated a preference for a two-requirement approach to qualify a statement as testimonial. *See id*. at 2242. Those two requirements being that it must have "the primary purpose of accusing a targeted individual of engaging in criminal conduct and . . . involve[e] formalized statements . . . ." *Id*. Five other justices rejected this approach. *See id*. at 2275 (Kagan, J., dissenting); *id*. at 2264 (Thomas, J., concurring) (noting that the only reason he found the out-of-court statements to be non-testimonial was because they lacked formality and solemnity and thus were not subject to the Confrontation Clause).

Due to the splintered ruling of the Court in *Williams v*. *Illinois*, the holding of that case should be limited to only the facts of that specific case. As none of the justices could fully agree on a rationale for admitting the testimony in the case, nor on a rule for determining when similar testimony is admissible, the ruling is difficult to apply consistently to any other case that is at all distinguishable. *Melendez-Diaz* and *Bullcoming* both provide a clear applicable standard for analyzing the admission of testimonial evidence which remains in keeping with the precedent set

by *Crawford* and its progeny and therefore should govern the analysis of the Confrontation Clause issue in the instant case. *See* 557 U.S. at 329; 564 U.S at 674.

B. Under the Sixth Amendment Confrontation Clause, the statements in the autopsy report would not be admissible, even through Federal Rule of Evidence 803(6), because the medical examiner who prepared it is unavailable, the defense had no prior opportunity for cross examination, and the statements it contains are testimonial.

The statements in Dr. Fleisher's autopsy report are testimonial and thus subject to Confrontation Clause analysis. This Court in *Crawford* defined testimonial statements governed by the Confrontation Clause as:

> material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

541 U.S. at 51-52. This Court further narrowed the definition of testimony to "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id*. (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). Though in *Williams* Justice Alito proposed that statements should only considered testimonial if they target specific individuals, five other justices rejected the proposal, and it should not be considered a factor in determining whether a statement is testimonial under the Confrontation Clause. *See Williams*, 132 S. Ct. 2221, 2262 (2012) (Thomas, J., concurring); *id*. at 2273-74 (Kagan, J., dissenting).

Several federal courts have recently held that autopsy reports are testimonial. *United States v*. *Ignasiak* concerned a Medical Examiners Commission that existed within the Florida Department of Law Enforcement. 667 F.3d 1217, 1231 (11th Cir. 2012). Under Florida law, if a

death was reported under any circumstance listed in the statute, the medical examiner was obligated to investigate the death and report her findings to law enforcement. *Id*. at 1232. The *Ignasiak* Court held that the reports were testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. (quoting *United States v*. *Baker*, 432 F.3d 1189, 1203 (11th Cir. 2005)).

In *United States v*. *Moore*, multiple co-conspirator defendants were tried for conducting a drug distribution business that resulted in thirty-one people being murdered. 651 F.3d 30, 39 (D.C. Cir. 2011). The *Moore* court also considered whether the circumstances in which the autopsies were conducted "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 72-73 (quoting *Melendez-Diaz*, 557 U.S. at 311). The D.C. Code in *Moore* required the medical examiner to investigate deaths at the request of law enforcement agencies. 651 F.3d at 72-73. Additionally, police officers were present at some of the autopsies and the autopsies were formalized in signed documents titled "reports." *Id*. Consequentially, the court held that the autopsies in *Moore* were testimonial. *Id*. Other federal and state courts have also decided that autopsy reports can be testimonial. *See United States v*. *Williams*, 740 F. Supp. 2d 4, 7 (D.D.C. 2010); *Commonwealth v*. *Brown*, 139 A.3d 208, 216 (Pa. Super. Ct. 2016); *see also State v*. *Kennedy*, 735 S.E.2d 905, 917-18 (W. Va. 2012); *State v*. *Locklear*, 681 S.E.2d 293, 305 (N.C. 2009).

Here, Dr. Fleischer's autopsy report is testimonial because it was created to establish or prove a fact at trial. Under B.S.C. §11-16-16, the Office of the State Medical Examiner is to be notified of deaths that occur unexpectedly or under suspicious circumstances. (R. 9.) The Chief Medical Examiner, after considering statements from the corner and the peace officer in charge,

determines whether an autopsy is required for public safety purposes. (R. 9.) Clearly it was determined that an autopsy was necessary in this case. (R. 11-12.) Dr. Fleischer also notified the Boerum Police Department, in an email after Smith's autopsy, that he suspected the death was due to either suicide or homicide. (R. at 10.) Furthermore, the Government has conceded in this case that autopsy reports are adequately solemn and formal. (R. at 33.) That the circumstances surrounding Smith's death were among those listed in the state statute requiring notice to be given to the medical examiner, that Dr. Fleischer was asked to perform an autopsy on Smith's body by the Chief Medical Examiner, that Dr. Fleischer sent an email detailing his concerns to the Boerum Police Department following the autopsy, and that the autopsy report was a formal document, an objective witness would reasonably believe that the autopsy report would be available for use at a later trial. *See Ignasiak*, 667 F.3d at 1232; *Moore*, 651 F.3d at 72-73.

Autopsies are not excluded from the reach of the Confrontation Clause even if they fall under the Federal Rule of Evidence 803(6) business records hearsay exception. In *California v. Green*, this Court determined that despite the similar values protected by the rules of hearsay and the Confrontation Clause, the two do not completely overlap and the Confrontation Clause is not a codification of the rules of hearsay. 399 U.S. 149, 155-56 (1970). In *Melendez-Diaz*, this Court indicated in dicta that business records are generally admissible under the Confrontation Clause because they have been "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." 557 U.S. at 324. In the instant case, the autopsy report is testimonial and even if it were a business record, it would nevertheless be subject to the demands of the Confrontation Clause. *See Ignasiak*, 667 F.3d at 1232; *Melendez-Diaz*, 557 U.S. at 324.

The testimonial statements in the autopsy report are inadmissible because Dr. Fleischer, is not available to testify. Under *Crawford*, a witness's testimony is inadmissible "unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." 541 U.S. at 54, 60. This Court has held that when the Government has attempted to admit a certified document which contained testimony that was used against the defendant and the analyst who signed the certified document was unavailable to the defendant for cross examination, the certified document was inadmissible under the Confrontation Clause. *Melendez*-Diaz, 557 U.S. at 329. Even providing an equally qualified substitute analyst is not sufficient to avoid the inadmissibility of a certified document under the Confrontation Clause when the substitute analyst was not the signer of the certified document. *Bullcoming*, 564 U.S. at 668.

Because Dr. Fleischer was unavailable to testify, the Government should not be permitted to use the testimonial statements in his autopsy report against Governor Rutherford. Dr. Fleischer was fired on December 5, 2014. (R. 13.) The Government has been unable to contact Dr. Fleischer to confirm his availability for trial since the time of his firing. (R. 13.) There was nobody else present when Dr. Fleischer conducted Smith's autopsy. (R. 14.) Moreover, there is also no video or audio record of the autopsy. (R. 14.) Because Dr. Fleischer is unavailable for trial and the defense did not have the prior opportunity to cross examine him, and because nobody else was present during the autopsy, the testimonial statements in the autopsy report would not be admissible under the Confrontation Clause. *See Bullcoming*, 564 U.S. at 668; *Melendez-Diaz,* 557 U.S. at 329.

C. Because Dr. Chin's opinions are substantively the same as, and based almost entirely on the otherwise inadmissible autopsy report, they exemplify the type of testimony, under Federal Rule of Evidence 703, that the *Bullcoming* Court sought to exclude under Confrontation Clause.

The Government's attempt to use Dr. Chin as a surrogate medical examiner to admit otherwise inadmissible testimonial statements contained in the autopsy report is most analogous to the state's use of the surrogate analyst in *Bullcoming*. There, the defendant was initially arrested for driving while under the influence. 564 U.S. at 653. The police seized a blood sample from the defendant and sent it to a laboratory for blood alcohol content analysis. *Id*. While the blood was at the lab, an analyst, Caylor, evaluated the sample and prepared a report that detailed his methodology during testing and affirmed his compliance with testing procedures. *Id*. An examiner also reviewed Caylor's work and certified that he was qualified to conduct the test and that the established procedures for handling and analyzing the sample had been followed. *Id*. Because Caylor was placed on unpaid leave shortly before trial, the state attempted to use a second analyst who was familiar with the laboratory's testing procedures to introduce the testimony from Caylor's report. *Id*. at 657. The *Bullcoming* Court rejected the substitution of the second analyst because he "could not convey what Caylor knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses [of judgment] or lies on the certifying analyst's part." *Id*. at 661-62.

In the instant case, as with the testimony of the second analyst in *Bullcoming*, Dr. Chin's opinions are substantially the same as the testimonial statements in Dr. Fleischer's autopsy report.[11] *Id*. at 657. In her report, Dr. Chin described the same observations made by Dr. Fleischer during the autopsy, reached the same conclusions about Smith's opiate use, and similarly determined that Smith's cause of death was the ingestion of rat poison. The only semi-original conclusion that Dr. Chin reached is that Smith died following the consumption of

[11] *See* (R. at 11-12, 15-16.)

Homydine which is an ingredient in the rat poison that Dr. Fleischer originally identified. Additionally, the concerns of this Court in *Bullcoming* about the surrogate analyst's inability to testify about the original analyst's testing methods are equally applicable in this case; Dr. Chin has no personal knowledge of Dr. Fleischer's methods for testing the presence of opiates in Mr. Smith's body, his procedures in conducting the autopsy, whether Dr. Fleischer was competent in his work, or whether Dr. Fleischer had lied on his report. *See* 564 U.S. at 661-62.

The Government's attempted invocation of Rule 703 does not exempt Dr. Chin's opinions from the demands of the Confrontation Clause. The Rule allows 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." Rule 703, however, is a comparatively recent legal development, which is not designed to provide the same protections as the Confrontation Clause. *See* Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 Tex. Tech L. Rev 51, 72 (2012). This design difference makes Rule 703 impractical for use in interpreting the Confrontation Clause. *Id*. As Justice Thomas pointed out in *Williams*, Rule 703's "balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the accused." 132 S. Ct. at 2259 (2012) (Thomas, J., concurring).

Bullcoming differs from the instant case because there the state attempted to use the business records exception to admit the certifications whereas in the instant case the Government seeks to use Rule 703. 564 U.S. at 655;(R. at 28-29.) In the instant case, Dr. Chin's opinions are substantially the same as Dr. Fleischer's and any juror that accepts Dr. Chin's opinions as true, would similarly conclude the same with respect to Dr. Fleischer. As Friedman pointed out"if 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. This clearly indicates that Rule 703 exceptions must be kept in check by the Confrontation Clause. Dr. Fleischer's autopsy report testimony, due to its substantial resemblance to Dr. Chin's opinions, is not being offered as the basis for Dr. Chin's own independent opinions, rather it is essentially being offered to prove the truth of the matter asserted and should be regulated by the Confrontation Clause rather than admitted under Rule 703.

Ultimately, because Dr. Fleischer's autopsy report would not be admissible due to his absence without opportunity for cross examination, and because Dr. Chin's opinions are substantively the same as, and based solely on Dr. Fleischer's otherwise inadmissible testimonial autopsy report, Dr. Chin should not be allowed to testify about her opinions in the instant case. *See Bullcoming*, 564 U.S. at 668. Governor Rutherford would have no opportunity to test the reliability of Dr. Fleischer's testimony in the crucible of cross-examination which would violate his Sixth Amendment rights. *See Crawford*, 541 U.S. at 61. Consequently, this Court should affirm the holding of the Fourteenth Circuit.

CONCLUSION

For the forgoing reasons, Respondent respectfully asks that this Honorable Court affirm the Fourteenth Circuit's with respect to all three issues in its Petition for Certiorari.

Respectfully Submitted,

_____

Team 32
Counsel for Respondent

Appendix: Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Evidence 102 provides: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."

Federal Rule of Evidence 703 provides:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Federal Rule of Evidence 803(3) provides, in relevant part:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), 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.

Federal Rule of Evidence 803(6) provides, in relevant part:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: A record of an act, event, condition, opinion, or diagnosis if: the record was made at or near the time by — or from information transmitted by — someone with knowledge; the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; making the record was a regular practice of that activity; all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with

> Rule 902(11) or (12) or with a statute permitting certification; and the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The Boerum State Autopsy Law, B.S.C. §11-16-16 provides, in relevant part:

> The Office of the State Medical Examiner should be notified when death is/has: sudden when individual was in apparent good health; … occurred in a suspicious, unusual, or unnatural manner; … apparently resulted from the presence of drugs or poisons in the body. 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.