Team 8P - Original

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 PETITIONER

Team 8P
Counsel for Petitioner

QUESTIONS PRESENTED

I. Can the subject of a search warrant assert their Fifth Amendment privilege against self-incrimination and refuse to unlock a cellphone with their fingerprint when that action would impliedly assert facts of ownership and control, even when the police have an otherwise valid search warrant for the phone?

II. Under the Federal Rules of Evidence, Rules 702 and 403, can expert testimony that analyzes the physiological and psychological limitations of a particular eyewitness identification be admitted into evidence?

III. Under the Federal Rules of Evidence, Rule 615, can a witness who is not permitted by the rule to hear another witness's testimony read the transcript of that witness's testimony?

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The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Alexander Kensington v. United States of America*, No. 20-1705, was entered June 16, 2020, and may be found in the Record. (R. 55–66.)

STATUTORY AND CONSTITUTIONAL PROVISIONS

This case is an appeal from a verdict under 18 U.S.C. §§ 844(f)(1), 844(n), and 924(c)(1)(B)(ii). This appeal concerns alleged violations of the Defendant's Fifth Amendment privilege against self-incrimination. U.S. Const. amend V. Additionally, this case involves the Federal Rules of Evidence, Rules 702, 403, and 615.

STATEMENT OF THE CASE

On September 20, 2019, Lily Holzer, an eyewitness to the alleged events, claims to have seen a man she later identified as Alexander Kensington (the "Defendant") "run towards the front of [a] vehicle, trip, and fall, [and then rise] and [light] a Molotov cocktail . . . [and] shout, "Fossil Fools!" (R. 5.) Holzer stated that "the rest of the afternoon was 'fuzzy' and she does not remember how she got home." (R. 5.)

As a result, a search warrant was issued for the Defendant on October 8, 2019. (R. 13.) The search warrant included instructions to seize "[a] silver Apple iPhone 8 cellular telephone, belonging to ALEXANDER KENSINGTON." (R. 13.) The search warrant did not specify with particularity any documents to be obtained from the phone. *See id.*

Mr. Kensington was pulled over in a traffic stop when the FBI executed the warrant on October 9, 2019. (R. 56.) The agents "pressed Defendant's right index finger against the phone's home button, 'unlocking' the contents of the cell phone." (R. 56.) Subsequently, a search of the phone "revealed text messages and search histories which demonstrated that Defendant had been

researching explosive devices and encouraging violence in support of his environmental activist goals." (R. 56.)

On October 20, 2019, Kensington was identified by Holzer, taken into custody, and indicted by the State in this action. (R. 17, 56.) Prior to trial, Kensington moved to have Dr. Jack B. Closeau admitted as an expert witness in the field of eyewitness identifications. (R. 33.) Dr. Closeau has his Ph.D in Psychology and is licensed to practice in the State of Boerum. (R. 29–30.) Dr. Closeau has testified as a qualified psychology expert in over 120 cases. (R. 30.) Dr. Closeau has received numerous honors and awards, published many articles on the unreliability of eyewitness identifications, led a research laboratory on psychology and memory at Beorum University, and lectured at many academic institutions and professional associations. (R. 30.) Dr. Closeau intended to testify, among other research driven details, as to the "stress and other aggravating circumstances [that] have a detrimental effect on memory" and may undermine eyewitness accuracy without diminishing the eyewitness's confidence in their identification. (R. 28.) The United States District Court for the District of Boerum, however, refused to admit Dr. Closeau as an expert. (R. 57.)

Additionally, Kensington moved to have the evidence obtained from the cell phone suppressed. (R. 57.) The District Court denied Kensington's motion because the court found that the use of Defendant's biometric features to unlock the contents of his cellphone did not violate Defendant's right against self-incrimination under the Fifth Amendment. (R. 27.)

At trial, the District Court issued an order to sequester the witnesses, under Rule 615. (R. 57.) While government witness Andrew Gerber was kept out of the courtroom during Lily Holzer's testimony, Gerber was able to obtain a transcript of her testimony, which he read. (R. 57.) Gerber's testimony subsequently reflected details from Holzer—details such as, the "Fossil Fools" slogan,

and the suspect's limp—that Gerber's prior statements to law enforcement did not reference. (R. 66.)

Post-conviction, Kensington filed a motion for either a directed verdict or a new trial based on Gerber's violation of the Rule 615 sequestration order. (R. 57.) The District Court found that Andrew Gerber read Lily Holzer's testimony during the court's lunch recess on the day that Gerber testified, but under a textual reading of Rule 615, denied Kensington's motion. (R. 54, 57.)

Subsequently, Kensington timely appealed the District Court's decision to the United States Court of Appeals for the Fourteenth Circuit. (R. 55, 57.) The Fourteenth Circuit affirmed the District Court's rulings because it found that (1) biometric data obtained through compulsion is not a testimonial statement under the Fifth Amendment; (2) expert witness testimony on eyewitness identifications is inadmissible because it fails to comply with *Daubert* and Rule 702; and (3) only the explicit restrictions contained in a Rule 615 order control the behavior of a sequestered witness. (R. 56.) Kensington timely filed a petition for writ of certiorari to this Court, which was granted on November 15, 2021. (R. 67.)

SUMMARY OF THE ARGUMENT

Every American citizen has the right to secure their phone—and with it what this Court has referred to as "the privacies of life"—in the manner of their choosing without risking waiver of their fundamental Fifth Amendment right against self-incrimination. Parties to a case have the right, under our country's laws, to bring in an expert witness to testify on medical and scientific facts that the common jury would not, without aid, understand. Yet this is a case that challenges those very promises. The Fourteenth Circuit's ruling favors an ease-of-policing approach while sidestepping the complexities inherent with assuring fundamental, constitutional rights to the accused.

We respectfully request that this Court reverse the Fourteenth Circuit and remand this case for a new trial because the court below (A) allowed into evidence materials contaminated by compelled testimony under the Fifth Amendment right against self-incrimination, (B) prevented a qualified expert witness from testifying about scientific information essential to the jury's understanding of a key eyewitness, and (C) allowed a witness to testify who had violated a Rule 615 sequestration order.

A. The Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment guarantees citizens the privilege not to self-incriminate. This Court has found that self-incrimination can be speech or action that implies an assertion of fact. In this case, the police forced the Defendant to unlock a phone using his fingerprint, which impliedly asserted the fact of the Defendant's ownership and control over the phone—and most pressingly, over any discovered content on the phone. But this is not just about the rights of Mr. Kensington - this is about the rights of all citizens of the United States. The Fourteenth Circuit's decision would allow police officers to use a phone that they know has unlawful content by checking to see which suspect's finger unlocks the magic phone. Or, alternatively, which phone is owned by a suspect based on which phone responds to that suspect's finger. Either version would empower the police to gain implied statements from suspects through compulsion. And that is against the promise of the Fifth Amendment.

This Court has held that a lie detector test may be testimonial in nature because it can assert implied facts through physiological responses. Much like a polygraph test, an individual cannot control the interaction between his body and the Touch ID system, and, if and when a reaction occurs, that action conveys information: for a polygraph, a positive or a negative, and the same is true for a Touch ID system. Either it opens or it does not. But through that positive or negative—

through that opening or not opening—the information is conveyed: the subject has (or has not) exerted prior control over that device by setting up Touch ID.

This Court has held that the act of producing documents can be testimonial in nature because having the documents can show ownership and control. The same is true here. By unlocking the phone, the subject shows the same dominion and control over the phone's contents.

In this case, by forcing the Defendant to unlock the phone, the Government was able to gain evidence that the Defendant had control over the "search histories" regarding "explosive devices." Without compelling the Defendant to unlock the phone, even if the same "search histories" had been uncovered by a search of the phone, the Government would not have had the proof that the Defendant had personal control over the device and, inferably, over the "search histories."

B. Qualified Experts under Rule 702

The Federal Rules of Evidence, enacted by Congress, allow parties to bring qualified expert witnesses before the court to testify on issues that, beyond the ken of a layperson, require expertise that is helpful to the jury in rendering a verdict. The Rules do not limit these experts from testifying about other witnesses. In fact, expert testimony commonly incorporates and analyzes information from other witnesses.

In this case, an eyewitness saw a traumatic, explosive event, and then lost her memory for an extended period of time. A month later, she allegedly identified the Defendant. Under the rules, an expert witness is allowed to provide medical, scientific, and other expertise to the jury to help the jury understand the psychological and physiological ramifications of being in close proximity to an explosion and losing one's memory. These are not common experiences of a layperson, and it is reasonable to allow an expert to testify—not to the "credibility" of the witness, but to the

science of the witness's brain's ability to accurately recall information. If an expert witness is qualified and can provide expertise that is helpful to the jury, and that expertise has probative value that is not substantially outweighed by the potential for jury misuse, that expert should be permitted to testify.

First, this Court, under *Kumho Tire*, expanded the *Daubert* standard beyond purely scientific expertise. But the Fourteenth Circuit predicated its holding on the fact that Dr. Closeau's testimony was not scientific. This is in direct conflict with this Court's reasoning in *Kumho Tire*. Second, Dr. Closeau's expertise is researched, repeatable, published, and well regarded—this makes this research reliable under the flexible *Daubert* standard. The, Fourteenth Circuit applied the wrong standard for assessing reliability, and ignored the flexible standard set by this Court. Third, Dr. Closeau's testimony would be helpful for the jury because it applies a scientific, studied context to trauma and memory loss. And fourth, a Rule 403 analysis does not preclude allowing Dr. Closeau to testify because Dr. Closeau is the only expert providing any information to the jury as to the physical and psychological limitations to memory recall during trauma and after memory loss—that makes the probative value of Dr. Closeau's testimony incredibly high.

C. Sequestering Witnesses under Rule 615

The Federal Rules of Evidence declare, under Rule 615, that when a witness is sequestered outside of the court, prior to testimony, that witness should not be allowed to "hear" the prior testimony. Yet, the Fourteenth Circuit incorrectly held that the witness is permitted to "read" the prior testimony." This is a distinction without merit.

The purpose of the rule, as explained by this Court, is to prevent the witness from bolstering, changing, or pivoting their testimony. And that is exactly what happened in this case: the witness who read a prior witness's testimony, delivered a particular phrase that witness had

never before said: "Fossil Fool." Allowing a witness to read testimony that the witness cannot hear contradicts the purpose of Rule 615.

Allowing Andrew Gerber's testimony to stand, after violating his sequestration order, also prejudices the Petitioner because it impermissibly reinforces Lily Holzer's eyewitness testimony. The District Court found that Gerber impermissibly read the trial testimony of Lily Holzer. Gerber incorporated specific details in his testimony that were notably absent from his interview with the FBI, and which mirrored the testimony of Lily Holzer's testimony. By violating the sequestration order, Gerber cast doubt on the veracity of his testimony, which strongly informed Defendant's conviction.

Because of these errors of law, we respectfully request that this Court reverse the Fourteenth Circuit's ruling and remand this case for a new trial that excludes the content found on the Defendant's cell phone and the corrupted witness testimony, while requiring the court below to allow Dr. Closeau to testify to the implications of memory loss on a witness's ability to identify a person.

ARGUMENT

I. Compelling a subject of a warrant to use their fingerprint to unlock a smartphone is violative of the Fifth Amendment privilege against self-incrimination because the action itself is, like the use of a polygraph, a testimonial statement due to the implied facts asserted through the conduct.

The Fourteenth Circuit incorrectly held that biometric data obtained through compulsion is not a testimonial statement under the Fifth Amendment. Compelling a subject to use his or her finger to unlock a phone ("Touch ID") is, like a polygraph, testimonial in nature and thus violative of the Fifth Amendment privilege against self-incrimination because it asserts implied facts. Under the Fifth Amendment, "no person . . . shall be compelled in any criminal case to be a witness

against himself." U.S. Const. amend. V. The Fifth Amendment "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber v. California*, 384 U.S. 757, 761 (1966). "Compelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *United States v. Hubbell*, 530 U.S. 27, 38 (2000) (quoting *Doe v. United States*, 487 U.S. 201, 208, n.6 (1988)).

Here, Respondent concedes that Kensington was compelled to unlock the phone. (R. 56.) And that the compelled testimony may have led to incriminating evidence. The only remaining question, therefore, is whether the evidence was of a "testimonial or communicative nature."

The act of engaging the Touch ID system conveys ownership over a device and, like the physiological response to a polygraph, is testimonial in nature. The Government cannot claim the foregone-conclusion exception to the Fifth Amendment privilege against self-incrimination when it was unaware of the existence of the evidence prior to conducting the search. Using Touch ID as a substitute for a four-digit passcode—which *cannot be compelled*—should not constitute an effective waiver of a defendant's Fifth Amendment privilege against self-incrimination because it is a technological distinction not deserving of right forfeiture, and it is against public policy to allow superior security and privacy technology to diminish individuals rights. Therefore, the decision of the Fourteenth Circuit should be reversed because compelling Petitioner to use his fingerprint to unlock a smartphone was violative of his Fifth Amendment privilege against self-incrimination.

A. Compelling the use of Touch ID to unlock a phone is testimonial in nature because it forces the Defendant to demonstrate control and accept ownership over the phone.

Compelling a subject to use Touch ID to unlock a phone is testimonial in nature because it forces a defendant to demonstrate control and ownership over the device and elicits a response that is essentially testimonial. "[A]cts that imply assertions of fact" are testimonial. *Hubbell*, 530 U.S. at 36 n.19 (2000) (citing *United States v. Doe*, 465 U.S. 605, 613, n.11 (1984)) ("[T]he Fifth Amendment privilege against self-incrimination applies to acts that imply assertions of fact."). This Court should find that the use of Touch ID is testimonial for two reasons: (i) because the use of Touch ID implies an assertion of fact, which in turn is testimonial, and thus privileged under the Fifth Amendment, and (ii) because the needs of the public, industry, and government security support extending Fifth Amendment rights to include Touch ID use.

i. Using Touch ID is testimonial under the Fifth Amendment because it asserts implied facts of ownership and control.

Technological devices that elicit unintentional physiological responses—such as lie detectors—can render actions testimonial in nature. *See Schmerber v. California*, 384 U.S. 757, 764 (1966). District courts have analogized Touch ID technology with lie detector tests and have held that the compelled unlocking of a smartphone using biometric data is a testimonial statement. *See, e.g.*, *United States v. Wright*, 431 F. Supp. 3d 1175, 1187 (D. Nev. 2020); *In re Residence in Oakland, California*, 354 F. Supp. 3d 1010, 1016 (N. D. Cal. 2019). Being compelled to produce documents also "may have a compelled testimonial aspect." *Hubbell*, 530 U.S. at 37 (2000). In fact, "'the act of production' itself may implicitly communicate 'statements of fact.'" *Id.* at 37. The "act of producing . . . documents" is testimonial because the act affirms "that the papers existed, were in his possession or control, and were authentic." *Id.* at 37, 40.

Here, the act of unlocking the phone confirms that the phone was Kensington's, and, just as this Court explained in *Hubbell*, that is testimonial in nature. Using a fingerprint to unlock the cellphone was not just a physical act: it was an act that implied an assertion of fact. The successful

unlocking of the cellphone posited that the Defendant possessed or controlled the phone, that he was therefore responsible for the contents within, and tit revealed the contents of his mind that he had previously set up the Touch ID feature.

In contrast, taking a subject's blood to determine its Blood Alcohol Concentration (BAC) is not testimonial in nature. *Schmerber*, 384 U.S. at 764–65. This Court, discussing the distinction between compelled *testimony* and "real or physical evidence," differentiated acts that produce static, "real or physical evidence"—such as "fingerprinting, photographing, or measurements," as well as compelling a person to "write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.* at 764. The *Schmerber* Court predicated its holding on the fact that "the results of the test [depended] on chemical analysis and on that alone." *Id.* at 765. The Court therefore held that measurements—whether physical, observable, or chemical—about the human body do not violate the Fifth Amendment, even when compelled. *See id.* at 764–65. But the Court carefully distinguished those observable qualities from compelling action that is "relating to some communicate act or writing by the petitioner." *Id.* at 765.

Forcing a subject to unlock a phone through Touch ID is an entirely different premise than administering a BAC test because the test is about quantifying an observation in the defendant's body—like any other physical, corporeal evidence—and compelling a fingerprint is about unlocking a device and ascertaining the relationship between the defendant and the device. Taking a sample of a defendant's blood for a BAC analysis examines the scientific composition of the body by observing a chemical detail that the naked eye cannot detect. It uses science—"chemical analysis"—to enhance the human sense. A detective can observe and count the number of scratches

on a body—that is not testimonial; however, a detective cannot count the amount of alcohol in the bloodstream. This requires a test.

But no amount of counting, measuring, photographing, or blood tests visited upon a defendant's body will render access to a phone through Touch ID permissable. Because what is being done here is not about analyzing or quantifying the defendant's body; it is about using the defendant's body to gain information about the defendant's relationship with a particular object. And here, a key piece of evidence that the Government relied upon were the "search histories which demonstrated that Defendant had been researching explosives devices." (R. 56.) The search histories themselves may have existed without Kensington unlocking the phone, but the act of unlocking the phone provided evidence to establish that Kensington controlled the phone, and thus the sole evidence the Government relied upon to show that "Defendant had been researching explosive devices." Kensington's—compelled—act implied the assertion of fact that the search history belonged to him, and that information was used to convict. This Court should reverse the Fourteenth Circuit and remand the case for a new trial where the evidence obtained by this Fifth Amendment violation is excluded.

ii. Using Touch ID as a substitute for a four-digit passcode should not constitute a waiver of a defendant's Fifth Amendment privilege not to self-incriminate.

Using a Touch ID, or a four-digit passcode, to unlock a smartphone is a distinction without a purpose when it comes to the Fifth Amendment privilege not to self-incriminate. This Court should, as a matter of public policy, encourage the advancements of security and privacy that come with advancements in technology. The constitutional foundation underlying the Fifth Amendment privilege against self-incrimination is "the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

The Fourteenth Circuit's decision cuts against the benefits of expanding privacy and security technology by creating an ambiguity for law enforcement to exploit. Providing biometric data to law enforcement is no different than providing a numeric passcode. *United States v. Warrant*, No. 19-71283-1, 2019 WL 4047615 (N.D. Cal. Aug 26, 2019). As this Court stated in *Riley v. California*, cellphones have become such "a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 573 U.S. at 385. Based on this rationale, protecting access to cellphones—as well as individuals' rights concerning their access—is of paramount purpose.

This Court stated in *Carpenter v. United States* that, "as technology has enhanced the Government's capacity to encroach" into the lives and privacy of citizens, this Court must seek to "assure preservation of [the] degree of privacy against government that existed" when the Constitution was adopted. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018). Smartphones are integral to modern life and contain a limitless scope of information concerning the privacy and security of individuals, their employers, and the United States. Following *Carpenter* and *Riley*, protections under the Fifth Amendment should not be eroded by advancements in security and technology.

Fifth Amendment rights must persist and evolve to include technological advances in privacy and security because national security and the economy are at stake. Both national security and critical elements of this country's infrastructure are vulnerable to cyber security breaches.[1] These breaches are often caused by security breaches of individuals.[2] To follow the Fourteenth

[1] *See* Kendahl Shoemaker Luce, Note, *White Collar Crime in the 21st Century: When Corporations and Individuals Collide: Incentivizing Adequate Cybersecurity: The Need for a Uniform Federal Cybersecurity Regulatory Framework and Corporate Liability*, 2 BELMONT CRIM L.J. 176, 179 (2019).

[2] Kellen Browning, *Hundreds of Businesses, From Sweden to U.S., Affected by Cyberattack*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/technology/cyberattack-businesses-ransom.html.

Circuit would mean effectively requiring individuals to waive Fifth Amendment protections in order to adopt new, superior technology, thus deterring individuals from updating to advanced security technology that would insulate society from these harms.

B. The foregone-conclusion exception to the Fifth Amendment is inapplicable here because the Government could not demonstrate that it knew of the contents of the phone at the time of the warrant application or the time of the seizure.

The foregone-conclusion exception to the Fifth Amendment is inapplicable to these facts because the Government cannot prove and has not asserted that it knew of the contents of Defendant's phone at the time of warrant application or seizure, the Government cannot prove that it knew the defendant had control over the unidentified documents, and the demonstration of control, by the defendant over the documents in question, added substantive evidence to the Government's case. The foregone-conclusion doctrine, as articulated by this Court in *Fisher v. United States*, establishes an exception for testimonial evidence that would normally be protected by the Fifth Amendment when the evidence "adds little or nothing" to a case against a defendant. 425 U.S. 391, 411 (1976). The foregone-conclusion doctrine (i) does not apply under this Court's precedent and (ii) should not be extended to apply as it undermines the public value of Fifth Amendment protections.

i. The Government had no knowledge of the search at the time of warrant application, which prohibits the application of the foregone-conclusion exception.

The rule, as expounded upon by the Second Circuit—which the Fourteenth Circuit relied on below—is that the exception applies if the Government establishes "'with reasonable particularity' its knowledge as to '(1) existence of the documents, (2) the taxpayer's possession or control of the documents[,] and (3) the authenticity of the documents.'" *United States v. Fridman*, 974 F.3d 163, 174 (2d Cir. 2020). But "[t]he Government cannot cure [a lack of prior knowledge

about a particular document] through the overbroad argument that a [person] such as [the subject] will always possess general business . . . records that fall within the broad categories described in this subpoena." *Hubbell*, 530 U.S. at 45.

When the Government is already aware of the "location, authenticity, and existence of the documents," the foregone-conclusion exception may apply. *Fisher*, 425 U.S. at 411. In *Fisher*, the defendants were being investigated for liability under federal income tax law and were subpoenaed for documents that were used to prepare their tax returns. *Id.* at 394. Defendants appealed and argued that turning over the documents was a testimonial act, and therefore would violate their Fifth Amendment rights. *Id.* at 395. The *Fisher* Court held that because the Government already knew the location, authenticity, and existence of the documents, the information gained was therefore a foregone conclusion, and the actual production of the documents would add little or nothing to the Government's case. *Id. But see Hubbell*, 974 U.S. at 44–45 (stating that a key factor to the *Fisher* outcome was that "the Government already knew that the documents were in the [subject's] possession and could independently confirm their existence and authenticity through [other parties] who created them").

The *Fridman* Court stated that the Government's proof of knowledge of the document's existence could be accomplished by requesting "customary account documents related to financial accounts that [the Government] knew existed." *Id.* at 175. The *Fridman* Court explained that while the "Government is not required to have actual knowledge of the existence and location of each and every responsive document," the Government is required to explain, "with reasonable particularity," the type of documents and information it is looking for in order for the foregone-conclusion exception to apply. *Id.* at 174–75. And in order to satisfy the control requirement of the foregone-conclusion exception, the Government must show that it had "knowledge of the physical

possession of the requested documents." *Id.* at 175. In *Fridman*, the Government could "prove it kn[ew] that an individual control[ed] the disposition of assets in an account, [and therefore it] follows that that individual control[ed] the requested documents associated with that account." *Id.*

Likewise, the Eleventh Circuit has held that when the Government does not know the location or existence of files on a hard drive, it cannot rely on the foregone-conclusion exception to cure a Fifth Amendment violation. *See United States v. Doe*, 670 F.3d 1335, 1348–49 (11th Cir. 2012). In *Doe*, the defendant was served with a subpoena to produce the unencrypted contents located on hard drives. *Id.* at 1337. The *Doe* Court held that compelling the defendant to unlock the encryption would be compelling testimony and violative of the Fifth Amendment. *Id.* at 1346. And when the Government asserted the foregone-conclusion exception as a defense to this Fifth Amendment violation, the *Doe* Court rejected the Government's argument because the Government did not know whether any files actually existed or their location on the hard drives. *Id.*

Here, unlike in *Fisher*, the Government was not aware of the specific search records, what they were searching, where they were located, or who controlled the search. (*See* R. 13.) By compelling the Defendant's testimonial conduct, the Government was able to find documents it was unaware of while establishing evidence that the Defendant was in control. (*See* R. 56.)

Knowing the location of a cell phone is not the same thing as knowing the location, authenticity, and existence of the documents on the cell phone. The Fourteenth Circuit erred by reading the word "phone" in substitution for the word "documents" in the analysis. A phone is analogous to a filing cabinet, containing many documents, rather than a document itself. *See Riley v. California*, 573 U.S. 373, 395–96, 403 (2014) ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many

Americans 'the privacies of life.'"). A phone, alone, lacks the specificity required by the Second Circuit in *Fridman*. Here, the Government knew of Kensington's phone, but the Government did not know that it would uncover "search histories" covering "explosive devices." (R. 56.) The Government used the evidence of Kensington's control over the phone to establish that this was the Defendant's search history, in particular. The Government cannot demonstrate that it knew of the existence of these search histories either at the time the warrant was issued or at the time the search was conducted.

And here, just as this Court asserted in *Hubbell*, the Government cannot cure its lack of knowledge at the time of the search warrant by asserting that, generally, search histories exist on phones and may provide fruitful evidence. Thus, the discovery of search histories on Kensington's phone, that the Government asserted was the product of Kensington's ownership and control, was not a "foregone conclusion" under this Court's holding in *Hubbell*. Additionally, this analysis holds true under both the Second and Eleventh Circuits' versions of the foregone-conclusion exception: the Government did not know of the existence of these records and cannot now use Defendant's testimonial conduct to demonstrate control over those documents by the Defendant.

Ultimately, evidence obtained through the search of the phone must be excluded because the act of compelling the Defendant to unlock the phone constituted a testimonial act. Unlocking the phone was an implied assertion of control over the documents and search histories—documents and search histories that the Government did not know existed when the search warrant was created. Thus, the Government cannot rely upon the foregone-conclusion exception. And, under this Court's holding in *Hubbell*, the evidence obtained in connection with this Fifth Amendment violation must be excluded. *Hubbell*, 530 U.S. at 42–43 (holding that documents are inadmissible after a Fifth Amendment violation and cannot be admitted as though they "appear[ed] in the

prosecutor's office like 'manna from heaven'"). Thus, this Court should reverse the decision of the Fourteenth Circuit because the police action in question violated the Fifth Amendment.

ii. Privacy and dignitary interests do not support extending the foregone conclusion exception to the compelled production of an unlocked smartphone.

Extending the foregone conclusion doctrine to the compelled production of an unlocked smartphone would be contrary to public policy, as it would give law enforcement access to a seemingly infinite amount of information without the proper consideration for an individual's dignitary and constitutional privacy interests.

The Supreme Court of Indiana analyzed the foregone conclusion doctrine in relation to a defendant being required to unlock a cellphone for the police. *Seo v. State*, 148 N.E.3d 952, 954 (Ind. 2020). The court noted that surrendering the unlocked phone would communicate that the defendant knew the password; the files on the device exist; and the defendant possessed those files. *Id.* at 957. Compelling the defendant to unlock her phone for the police would therefore communicate certain facts, the production of which would be nontestimonial, only under the foregone conclusion doctrine. *Id.* at 958. The foregone conclusion doctrine did not apply because the defendant's act of producing the *unlocked* phone would provide the Government with more information that it did not already know. *Id.* (emphasis added). To hold that the foregone conclusion doctrine applies to unlocking a cellphone would sound "the death knell for a constitutional protection against compelled self-incrimination in the digital age." *Id.* (quoting *Commonwealth v. James*, 117 N.E.3d 702, 724 (Mass. 2019)).

As a matter of public policy, the Fourteenth Circuit erred in applying the foregone conclusion doctrine to the search of Kensington's cellphone. As the Supreme Court of Indiana cautioned, applying the foregone conclusion doctrine to the unlocking of a cellphone

impermissibly expands the doctrine because the act of producing the unlocked phone provides the Government with more information that it did not already know. Allowing the police to compel a suspect to unlock a phone in this situation has grave implications for other cases. First and foremost, the foregone conclusion doctrine may prove to be unworkable in the context of smartphones, because they can contain "the combined footprint of what has been occurring socially, economically, personally, psychologically, spiritually and sometimes even sexually, in the owner's life." *United States v. Djibo*, 151 F. Supp. 3d 297, 310 (E.D.N.Y. 2015). Unlike the subpoenas in cases like *Fisher* and *Doe*, unlocking a smartphone for law enforcement provides the Government access to everything on the device. *See In re Application for a Search Warrant*, 236 F. Supp. 3d 1066, 1068 (N.D. Ill. 2017) (determining that the Government, prior to compelling a suspect to unlock their smartphone, must specifically identify the files it seeks with reasonable particularity). Such unbridled access to potential evidence raises complex questions if a suspect has other password protected applications on their phone, or certain files that are stored in cloud-storage services. The foregone conclusion exception is not the proper tool to answer these complex questions given the privacy implications that would surely follow.

Given that the foregone conclusion doctrine does not apply to the facts of this case, and the greater public policy concerns that would follow from its adoption in this context, this Court should reverse the decision of the Fourteenth Circuit.

II. Expert testimony on eyewitness identifications is admissible, under Federal Rules of Evidence 702 and 403, when it is helpful to the jury, presented by a qualified expert, and relevant to proceedings.

The Fourteenth Circuit's decision should be reversed because it ignored this Court's decision in *Kumho Tire* and prevented valuable expert testimony from being admitted on a subject of essential concern to the courts: the reliability of eyewitness testimony. A district court's role in

admitting expert testimony is that of a "gatekeeper." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). The trial judge should make a preliminary determination of admissibility of an expert, but "conventional devices"—such as "[v]igorous cross-examination, [the] presentation of contrary evidence, and [the] careful instruction on the burden of proof"—"rather than wholesale exclusion[—]. . . are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." *Daubert*, 508 U.S. at 596. The Fourteenth Circuit misapplied Rule 702 by failing to consider this Court's precedent in *Kumho Tire*, erred by applying a rigid reliability analysis instead of the flexible analysis required by this Court in *Daubert*, and misapplied the helpfulness prong of the *Daubert* analysis. Additionally, the Fourteenth Circuit erred when conducting a Rule 403 analysis by failing to properly consider the probative value of the evidence and by failing to apply the substantially outweigh standard.

A. The Fourteenth Circuit misapplied *Daubert* by ignoring *Kumho Tire*'s holding, applied dispositive weight to inapplicable reliability factors, and misinterpreted the requirements of "helpful to the jury."

The Fourteenth Circuit ignored *Kumho Tire's* holding when it asserted that non-scientific evidence did not qualify under *Daubert*, applied dispositive weight to inapplicable reliability factors (which contravenes this Court's flexible analysis requirement in *Daubert*), and looked to the wrong standard in determining whether the expert witness would be "helpful to the jury." Therefore, the decision of the Fourteenth Circuit should be reversed, and the case remanded for a new trial.

Expert testimony must be offered by a qualified expert. *See Daubert*, 508 U.S. at 588 (citing Fed. R. Evid. 702); *see also Kumho Tire*, 526 U.S. at 141) (extending *Daubert* to qualified experts that provide "testimony based on 'technical' and 'other specialized' knowledge"). The testimony must be helpful to the jury, and must be based on sufficient facts or data. Fed. R. Evid.

702(a), 702(b), 703. The expert's testimony must also be a product of reliable methods and principles—and those principles and methods must be applied in a reliable way. Fed. R. Evid. 702(c).

Here, the Fourteenth Circuit erred as a matter of law when it predicated its holding on the fact that Dr. Closeau's testimony was not scientific—this Court, under *Kumho Tire*, expanded *Daubert* beyond purely scientific expertise. Additionally, the Fourteenth Circuit applied the wrong standard for assessing reliability, under *Daubert*, by confining its inquiry and applying dispositive weight to whether Dr. Closeau's theory "was generally accepted by his colleagues," had a "known or potential error rate," or whether the "technique could be tested." (R. 60.) Further, the Fourteenth Circuit misapplied the helpfulness standard because it conflated an expert opinion on a witness's psychological ability to observe, recall, and identify with assessing "credibility."

i. An expert may be qualified in a non-scientific field.

The Fourteenth Circuit erred when it excluded Dr. Closeau's testimony on the basis of it not being "scientific" by bypassing this Court's holding in *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). Pursuant to that decision, experts may be qualified based on "'technical' and 'other specialized' knowledge." *Kumho Tire*, 526 U.S. at 141.

Here, Dr. Closeau is a forensic psychologist—a scientist with a Ph.D. in Psychology from Northwestern, (R. 29)—and can be qualified as a scientist.[3] But even if this Court finds that Dr. Closeau's expertise was not scientific, as the Fourteenth Circuit did, that does not exclude Dr. Closeau from testifying as an expert in the field of forensic psychology due to his specialized knowledge regarding witness memory, trauma, and identification.

[3] Richard E. Redding, *Psychology and the Law: How Common-Sense Psychology Can Inform Law and Psycholegal Research*, 5 U. CHI. L. SCH. ROUNDTABLE 107, 123 (1998) ("Historically psychology has been a discipline of theoretically based laboratory research asking 'questions suited to scientific method rather than those suggested by social problems.'").

The holding and analysis presented by this Court in *Daubert* has been extended to encompass experts in non-scientific areas of expertise. *See Kumho Tire*, 526 U.S. at 141. In *Kumho Tire*, the Eleventh Circuit reversed a district court's decision, finding that "*Daubert* explicitly limited its holding to cover only the scientific context, adding that a *Daubert* analysis applies only where an expert relies on the application of scientific principles." *Kumho Tire*, 526 U.S. at 146 (quoting *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1435–36 (11th Cir. 1997)) (internal quotations omitted). The *Kumho* Court reversed the Eleventh Circuit, holding that "[t]he Rules grant that latitude to all experts, not just to 'scientific' ones." *Kumho Tire*, 526 U.S. at 148, 158.

The Fourteenth Circuit below based its decision on the erroneous conclusion that "[t]he first prong of the *Daubert* inquiry requires the Court to find that the expert is testifying on the basis of scientific knowledge." (R. 59.) But just like in *Kumho Tire*, where this Court found that the Eleventh Circuit improperly limited *Daubert*'s holding to "the scientific context," here, the Fourteenth Circuit has committed the same error, wrongly limiting *Daubert*'s holding. Thus, under *Kumho Tire*, a full *Daubert* analysis should apply in order to determine whether Dr. Closeau can provide expert testimony.

Dr. Closeau is a qualified expert in the field of forensic psychology. Dr. Closeau was a research fellow for the National Psychology Foundation, performing "extensive research in the area of psychology and memory." (R. 29.) Dr. Closeau has qualified as an "expert in eyewitness identifications in over 120 cases." (R. 30.) Dr. Closeau has won numerous prestigious awards for his work in this field and published more than four articles on the subject. (R. 30.) Dr. Closeau is, under Rule 702, qualified to be an expert witness.

ii. Daubert eschews the requirement of a formulaic analysis that compels a "generally accepted practice" in favor of "a flexible" approach to assess reliability.

The Fourteenth Circuit was incorrect to limit its inquiry to "(a) whether a technique is or can be tested, (b) its known or potential rate of error, and (c) the degree of acceptance for the technique within the scientific community," (R. 62), because *Daubert* dispenses with a formulaic analysis in favor of "a flexible" approach to assess reliability. "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one." *Daubert*, 509 U.S. at 594. In determining whether an expert's testimony is reliable, a court "must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." *Kumho Tire*, 526 U.S. at 149.

This Court has found that "there are many different kinds of experts, and many different kinds of expertise," which is why "*Daubert* makes clear that the factors it mentions do *not* constitute a 'definitive checklist or test.'" *Kumho Tire*, 526 U.S. at 150 (citing *Daubert*, 509 U.S. at 593). "It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been subject of peer review." *Id.* The inquiry at hand "must be tied to the facts of a particular case." *Id.* (internal quotations omitted). And a "pertinent consideration is whether the theory or technique has been subjected to . . . publication." *Daubert*, 509 U.S. at 593.

But here, the Fourteenth Circuit failed to analyze the type of expertise before it in order to determine which flexible factors must be used to analyze reliability. The Fourteenth Circuit failed to consider whether Dr. Closeau and his techniques had been subjected to peer review or publication. Dr. Closeau has been published in a multitude of articles and "invited to lecture at numerous academic institutions, professional associations, and academic and professional conferences, on the use of eyewitness identifications in criminal and civil cases." (R. 30.) But both the District Court and the Fourteenth Circuit failed to consider this "pertinent consideration;" instead, the Fourteenth Circuit looked, first, to "whether a technique is or can be tested." (R. 62.)

In doing so, the Fourteenth Circuit failed to note that Dr. Closeau runs a research laboratory that studies psychology and memory. (R. 30.)

The second factor the Fourteenth Circuit looked to was "its known or potential rate of error." (R. 62.) The assessment that Dr. Closeau made was subjective, and not rooted in binary data points. In finding that Dr. Closeau was not qualified because there was no ascertainable error rate, the Fourteenth Circuit failed to take notice of the fact that, because the error rate was indeterminable, that may be indicative that this is not the sort of factor that is applicable in this instance. The Fourteenth Circuit, instead, held that by not being ascertainable, it was determinative. This Court has required courts to look to the error rate, but not that the lack of one is dispositive. This is counter to this Court's holdings in *Daubert* and *Kumho*, requiring flexible, fact and circumstance-based inquiries.

In determining that Dr. Closeau's testimony was not admissible, the third factor the Fourteenth Circuit looked to was "the degree of acceptance for the technique within the scientific community." (R.62.) This Court, in *Daubert*, held that "a known technique which has been able to attract only minimal support . . . may properly be viewed with skepticism." But here, neither the Fourteenth Circuit nor the District Court found that Dr. Closeau's expertise applied a "known technique" with "only minimal support"—those courts, once more, could not reach a determination on this factor. And counter to this Court's holding in *Daubert*, the Fourteenth Circuit assumed that finding nothing discredited the expert, rather than discrediting the court's chosen test. This was a fatal mistake in the Fourteenth Circuit's analysis.

Here, Dr. Closeau's status in the community as a professor, his research at the University of Boerum, countless published works, awards, and numerous lectures establish the reliability of

his methods and principles. Thus, this meets the requirements of *Daubert* and Rule 702 for reliability.

iii. Expert testimony is helpful to the jury when it presents "a valid scientific connection to the pertinent inquiry."

The Fourteenth Circuit failed to apply the correct "helpfulness" standard by conflating an expert opinion on a witness's psychological state with the determination of credibility. The foregoing standard is that the expert testimony must have "a valid . . . connection to the pertinent inquiry." *Daubert*, 509 U.S. at 591–92. The term helpfulness "goes primarily to relevance"; whether or not the expertise "fits" the fact in dispute. *Daubert*, 509 U.S. at 591.

It is true that the jury must determine if the witness is credible. But credibility is "the quality or power of inspiring belief," not an estimation of the brain's ability to contort visual-based memory. *Credibility*, *Merriam-Webster Dictionary*. A witness may wholeheartedly believe her testimony, and the jury may believe her—but still, due to the science of the human brain, the witness may be mistaken in her (convincing) belief. Dr. Closeau is not challenging the witness's truthfulness, conviction, or ability to inspire belief—these are clearly the providence of the jury. Dr. Closeau would provide background research, data, and ultimately an opinion, on the efficacy of a witness's eyewitness testimony under a very specific, and stressful, combination of events. Unless jurors have, themselves, studied the science of memory, been exposed to explosions, or experienced memory loss, they are not properly armed with the knowledge and experience required to assess the physiologic limits of the witness's memory. Thus, Dr. Closeau's testimony is helpful to the jury to understand the clinical results that frame the witness's ability to recall visual information under specific conditions. Then, once armed with the scientific underpinnings of memory-recall, jurors can use that information as a lens in which to process the eyewitness's testimony, ultimately, enabling them to reach a determination of credibility.

Ultimately, Dr. Closeau meets all prongs of *Daubert* and *Kumho*: (1) Dr. Closeau is a highly qualified expert in the field of forensic psychology, having conducted research in the field, been published in the field, awarded in the field, and routinely invited to lecture in the field; (2) Dr. Closeau's opinion will provide a scientific basis for the jury to interpret the physiological limitations of an eyewitness's testimony under the extreme, unique, and specific events in this case; (3) Dr. Closeau's testimony is based on the specific facts from this case relevant to this determination; (4) Dr. Closeau's testimony is a product of reliable methods and principles, which have been subject to awards by his peers, publication, and laboratory research; and (5) Dr. Closeau has reliably applied these principles to the facts of this case. All of the requirements of *Daubert* are met, and under the flexible analysis that this Court has lauded in *Daubert* and *Kumho*, Dr. Closeau should be admitted as an expert witness under Rule 702.

B. Rule 403 does not preclude Dr. Closeau's testimony because his testimony has a high probative value and does not unduly prejudice the prosecution.

The Fourteenth Circuit and the District Court below committed legal error by misinterpreting the requirements of a Rule 403 analysis. Specifically, the court below failed to properly assess the probative value of the testimony, and by not requiring the probative value to be *substantially outweighed* by the undue prejudice—the court below only looked to determine if it was outweighed rather than *substantially* outweighed. "Rule 403 permits the exclusion of relevant evidence 'if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Daubert*, 509 U.S. at 595 (citing Fed. R. Evid. 403). Probative value is "calculated by comparing evidentiary alternatives." *Old Chief v. United States*, 519 U.S. 172, 184 (1997). Here, there is no other evidence discussing the psychological implications of severe stress and memory loss on the ability to make an

identification. Therefore, the probative value of Dr. Closeau's testimony is high, as there is no substitute in the record.

The Fourteenth Circuit and the District Court found that there was a possibility of jury misuse, but neither court found that such misuse would substantially outweigh the probative value. This is an error as a matter of law. And, to sharpen the point, that is because the mild potential for misuse would not substantially outweigh, or outweigh at all, the probative value. Dr. Closeau's purpose is to provide a scientific backing to the manner in which the human brain is capable of processing and storing information. It is still the jury's task to apply that information against the testimony of the witness and reach a determination. A Rule 105 jury instruction is more than sufficient to focus the jury on their task, separate and apart from the eyewitness testimony. *See* Fed. R. Evid. 105 (stating that a judge may "instruct the jury to only use the evidence in its proper scope"). This situation is no different from a medical expert testifying that a surgeon violated the standard of care—a jury must still interpret that expert opinion and apply their own final determination on the facts.

Allowing Rule 403 to casually cast aside vital expert witness testimony is counter to public policy because eyewitness identifications are inherently unreliable—which this Court has taken notice of for years—and foregoing the opportunity to allow experts to frame potentially questionable witness identifications runs the risk of placing more innocent people in prison. Since the sixties, this Court has recognized that eyewitness identifications can be inherently unreliable. *United States v. Wade*, 388 U.S. 218, 228 (1967).

In some instances, expert testimony may not be required. But in instances—like here—where the witness was under significant stress and had an extended period of memory loss immediately after the alleged identification, (R. 5), there are significant factors at work—

physiological factors regarding the human brain—that require more than just the commonsense intuition of the typical jury member. This is comparable to a hypothetical case where a jury member can know that it was wrong for a surgeon to leave a pair of scissors inside a patient without an expert, but when a brain surgeon takes too long to reconnect particular tissue, an expert is required to explain the standard of care. Similarly an eyewitness that saw someone enter a bank—and that is it—is a witness that can be easily cross-examined and her experience compared, realistically, to that of an everyday juror. But here, where there is an eyewitness who witnessed a Molotov cocktail explosion and then lost her memory for hours, that witness presents particular medical issues that can be appropriately addressed and explained by a qualified expert. Therefore, we request that this Court reverse the Fourteenth Circuit and remand this case for a new trial in which the Defendant is permitted to bring expert testimony on the issue of the eyewitness's physiological and psychological limitations in identifying the Defendant due to extreme circumstances.

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

This Court should reverse the decision of the Fourteenth Circuit and adopt an expansive reading of Federal Rule of Evidence 615 that forbids sequestered witnesses from learning of each other's testimony while outside of courtroom proceedings. This Court should adopt the expansive approach to Rule 615 to broadly preclude witnesses' access to each other's testimony, because the expansive approach supports the Rule's fundamental purpose to discourage fabrication, inaccuracy, and collusion. Furthermore, this Court should reverse the Fourteenth Circuit's decision because Gerber's testimony, which incorporated specific details of Holzer's testimony, prejudiced Kensington.

Rule 615 states that "at a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." Fed. R. Evid. 615. Some courts limit Rule 615 to its plain meaning and interpret sequestration orders only to prohibit witnesses from remaining physically present in the courtroom during the testimony of other witnesses. *See, e.g.*, *United States v. Sepulveda*, 15 F.3d 1161, 1176 (1st Cir. 1993). The majority of circuits interpret Rule 615 more expansively to limit witness interaction and access to testimony outside of the courtroom. *See, e.g.*, *United States v. Robertson*, 895 F.3d 1206, 1215–16 (9th Cir. 2018). The expansive interpretation of Rule 615 gives effect to the legislative intent and fundamental purpose of the Rule.

The practice of sequestering witnesses has long been recognized "as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Fed. R. Evid. 615 (Notes of Advisory Committee on 1972 Proposed Rules). In *Geders v. United States*, this Court observed that witness sequestration serves two purposes: (1) to exercise a restraint on witnesses tailoring their testimony to that of earlier witnesses; and (2) to aid in detecting testimony that is less than candid. 425 U.S. 80, 87 (1976). The purpose of Rule 615 is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373 (5th Cir. 1981).

A. <u>This Court should adopt a purposive reading of the rule instead of a textual approach.</u>

A purposive reading of Rule 615, as a majority of circuit courts have adopted, limits witness interaction and access to testimony beyond physically being present in the courtroom. *See generally United States v. Friedman*, 854 F.2d 535, 568 (2d Cir. 1988) (emphasizing that the reading of trial transcripts outside of the courtroom could amount to a violation of Rule 615); *see also United States v. Jimenez*, 780 F.2d 975, 980 (11th Cir. 1986) (holding that a witness violated a sequestration order by reading the prior testimony of another witness). The expansive reading of

Rule 615 emphasizes the rule's fundamental purpose, namely, to prevent witnesses from coordinating their testimony in violation of the truth-seeking process. *United States v. Robertson*, 895 F.3d 1206 (9th Cir. 2018).

Several circuits have adopted a textualist approach to Rule 615 that only enforces the physical exclusion of prospective witnesses from the courtroom. *See United States v. Brown*, 547 F.2d 36, 37 (3d Cir. 1976). Witness exclusion from trial proceedings utterly fails, however, to provide a safeguard against testimonial tailoring if prospective witnesses are still permitted to access trial testimony outside of the courtroom.

In *United States v. Robertson*, the district court entered an order sequestering witnesses, pursuant to Rule 615, prior to trial. *Robertson*, 895 F.3d at 1215. On appeal, Robinson argued that the district court erred by allowing two witnesses to review a transcript of an agent's testimony prior to testifying. *Id.* The Ninth Circuit adopted the expansive view of Rule 615, determining that there is no difference between reading and hearing testimony for the purpose of the rule. *Id.* The Ninth Circuit commented that interpreting Rule 615 to distinguish between hearing another witness give testimony in the courtroom, and reading a transcript of a witness's testimony, runs counter to the core purpose of the Rule. *Id.* The danger that earlier testimony could improperly shape later testimony is equivalent whether the witness physically hears the testimony in court or reads the testimony from a transcript. *Id.* The court held that a "trial witness who reads testimony from the transcript of an earlier, related proceeding violated a Rule 615 exclusion order just as though he sat in the courtroom and listened to the testimony himself." *Id.* at 1216.

In *Miller v. Universal City Studios, Inc.*, before trial the district court entered a general sequestration order applicable to all witnesses under Rule 615. 650 F.2d 1365, 1373 (11th Cir. 2012)). An expert witness for the defendant, although sequestered, received transcripts of portions

of the plaintiff's testimony. *Id.* The Fifth Circuit held that it was a violation of the sequestration order for the expert to read transcripts of another's testimony. *Id.* The court articulated that the danger of shaping testimony is as great when a witness reads a trial transcript as when a witness hears the testimony in open court. *Id.* The court thereafter stated "the harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony." *Id.*

An expansive reading of Rule 615 is required as protection from witnesses coordinating their testimony, as evidenced by the conduct of Andrew Gerber and his adaptation of testimony from Lily Holzer. The District Court for the District of Boerum found that Andrew Gerber read Lily Holzer's testimony during the court's lunch recess on the day that Gerber testified. (R. 54.) Gerber's conduct is a perfect example as to why this Court should adopt the expansive approach of Rule 615 to protect against testimonial tailoring.

The District Court for the District of Boerum, just as the district court in *Robinson*, entered an order sequestering witnesses prior to trial. (R. 45.) Analogous to the witness in *Robertson*, Andrew Gerber reviewed the transcript of another witness prior to testifying. (R. 54.) The Ninth Circuit in *Robertson* cautioned that reading a transcript of earlier testimony could improperly shape a witness' later testimony in violation of Rule 615. *Robertson*, 895 F.3d at 1215. Gerber's testimony at trial unequivocally mirrored statements made by Lily Holzer in her testimony before the District Court. (R. 52.) Gerber added details into his own testimony that he did not actually witness, including that Kensington allegedly used the slogan "Fossil Fools" and had a limp. (R. 50.) In his interview with the FBI, Gerber did not mention these details and conversely stated that he had not seen Kensington since before the protest. (R. 6–7, 50.) Gerber's access to the

sequestered testimony of Lily Holzer violates a Rule 615 exclusion order, because reading Holzer's transcript is just as though he sat in the courtroom and listened to her testimony himself.

The Fifth Circuit articulated in *Miller* that the harm of reading a transcript of another witness may be even more pronounced than hearing testimony in open court, because the witness can review and study the transcript in formulating testimony. *Miller*, 650 F.2d at 1373. As evidenced by Gerber's inclusion of specific phrases and details from Holzer's testimony, the harm of reviewing a trial transcript is as great as if Gerber had listened to Holzer's testimony in open court. (R. 53.) Gerber cast doubt on the veracity of his testimony, and allowing his testimony to stand violates the purpose of Rule 615 to prevent fabrication and collusion. (R. 53.) This Court should hold that reviewing the transcripts of another's testimony is a violation of a Rule 615 sequestration order because of the blatant disregard of the purpose of the Rule that results and the evident harms that follow.

B. Allowing Andrew Gerber's testimony, in violation of the sequestration order, prejudices the Petitioner because it impermissibly reinforced Holzer's eyewitness testimony.

This Court should reverse the Fourteenth Circuit's decision because the trial court erred in denying Petitioner's motion for a directed verdict or a new trial based on Gerber's violation of the sequestration order. A district court has discretion to allow the testimony of a witness who violated a sequestration order, and its decision to do so is reviewed for an abuse of discretion. *United States v. Womack*, 654 F.2d 1034 (5th Cir. 1981). In evaluating whether an abuse of discretion has occurred, the focus is whether the witness's out-of-court conversations concerned substantive aspects of the trial and whether the court allowed the defense fully to explore the conversation during cross-examination. *United States v. Wylie*, 919 F.2d 969, 976 (5th Cir. 1990).

In *State v. Breaux*, the trial court found that a witness for the defendant was present in court for the testimony of another witness, in violation of the court's sequestration order. 110 So. 3d 281, 284 (4th Cir. 2013). The trial court held, and the Fourth Circuit upheld, that defendant's witness was properly excluded from testifying because he committed a violation of the sequestration order and listened to the testimony of another witness. *Id.* at 285; *see also United States v. Calhoun*, 510 F.2d 861, 868 (7th Cir. 1975) (holding that the trial court did not abuse its discretion in ruling that two witnesses who violated the sequestration order were not permitted to later testify at trial).

Gerber's violation of the sequestration order prejudiced Kensington, and therefore Kensington's motion for a directed verdict or a new trial should have been granted by the District Court. Gerber added specific details into his own testimony that he did not actually witness, which prejudicially reinforced Holzer's eyewitness account. (R. 50.) Gerber notably did not mention these specific facts in his interview with the FBI, and he would not have known about the fleeing suspect's use of "Fossil Fools" or limp without reviewing Holzer's transcript. (R. 6–7.) Gerber did admit in his interview with law enforcement that he had personally been at odds with Petitioner and his goals for the Planeteers. (R. 7.) By violating the sequestration order, Gerber cast doubt on the veracity of his testimony, which strongly informed Defendant's conviction. (R. 53.) Furthermore, the defense did not learn of Gerber's violation until after Kensington's conviction, and therefore could not correct for any prejudicial statements on cross-examination. (R. 47.) Given the sufficient prejudice to Kensington of Gerber's tainted testimony, this Court should reverse the decision of the Fourteenth Circuit.

CONCLUSION

Ultimately, the evidence gained from the phone is inadmissible because Kensington's act of unlocking the phone was testimonial in nature, due to the implied assertions of fact underlying the unlocking, and the police's compulsion of that action is violative of Kensington's Fifth Amendment privilege against self-incrimination. Additionally, Dr. Closeau was wrongly prevented from testifying due to errors the District Court made in interpreting the *Daubert* standard, Rule 702, and Rule 403. Finally, the District Court wrongly permitted Gerber's testimony to stand after Gerber violated the sequestration order under Rule 615. Therefore, we respectfully request that this Court reverse the Fourteenth Circuit's decision and remand this case to the trial court for a retrial with instructions to (1) strike all evidence discovered on Kensington's phone, (2) admit the expert testimony of Dr. Closeau, and (3) bar Gerber's testimony.

Respectfully Submitted,
/s/ Team 8P
Attorneys for Petitioner