THIRTY-SEVENTH ANNUAL
DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 21 – 778

Supreme Court of the United States

ALEXANDER KENSINGTON,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

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

- against -

ALEXANDER KENSINGTON,

Defendant.
----------X

I N D I C T M E N T
20-CR-1901(AH)

(T. 18, U.S.C. 844(f)(1), (i), (n), 924(c)(1)(B)(ii), 2, 3551 et seq.)

THE GRAND JURY CHARGES:

COUNT ONE

(Use of Explosive)

On or about September 20, 2019, within the District of Boerum, the defendant ALEXANDER KENSINGTON, together with others, did knowingly, intentionally, and maliciously damage and destroy, and attempt to damage and destroy, by means of fire and an explosive device, a vehicle and other personal and real property, to wit: a Boerum Police Department vehicle, in whole and in part owned and possessed by and leased to, an institution and organization receiving Federal financial assistance, to wit: the Boerum Police Department and Boerum City government, in violation of 18 U.S.C. Section 844(f)(1).

(Title 18, United States Code, Sections 844(f)(1), 2 and 3551 et seq.)

COUNT TWO

(Arson)

On or about and between September 13, 2019 and September 20, 2019, both dates being approximate and inclusive, within the District of Boerum, the defendant ALEXANDER

KENSINGTON, together with others, did knowingly and intentionally conspire to maliciously damage and destroy, and attempt to damage and destroy, by means of fire and an explosive device, a vehicle and other personal and real property used in interstate and foreign commerce and in an activity affecting interstate and foreign commerce, to wit: a Boerum Police Department vehicle, contrary to Title 18, United States Code, Section 844(i).

(Title 18, United States Code, Sections 844(n) and 3551 et seq.)

COUNT THREE

(Use of a Destructive Device)

On or about September 20, 2019, within the District of Boerum, the defendant ALEXANDER KENSINGTON, together with others, did knowingly and intentionally use and carry a firearm, to wit: an incendiary device, during and in relation to a crime of violence, to wit: the crime charged in Count One, and did knowingly and intentionally possess such destructive device in furtherance of said crime of violence.

(Title 18, United States Code, Sections 924(c)(1)(B)(ii), 2 and 3551 et seq.)

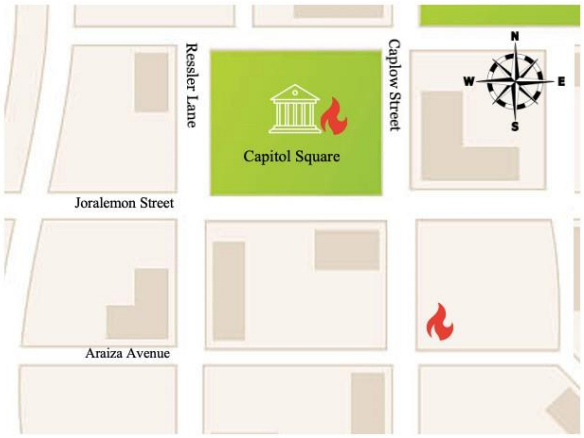
A True Bill

Gaby Sargissian
Foreperson

Jane Wilkerson
Jane Wilkerson
United States Attorney
District of Boerum
Dated: October 25, 2019

The Boerum Times

Explosions Rock Boerum State Capitol Building During Environmental Protest



A fire rages at the Boerum State Capitol Building as a masked protester celebrates the damage.
Alexa Hazeldean/ Boerum Times

By Horatio M. Beauchamp
September 20, 2019, 4:30 PM—Boerum City, Boerum

Two explosions rocked the Boerum Capitol District earlier today, as a climate change rally descended into chaos and pandemonium.

At around noon, protestors amassed at the Boerum Capitol Building. Boerum citizens of all political backgrounds held signs excoriating the state legislature for banning electric vehicles and clashed with law enforcement officers at the southern entrance to the Building. These protestors descended on the Capitol to protest State Bill 510, a sweeping repeal of Boerum's climate change-focused agenda and an embrace of non-renewable energy.

At around 2 p.m., protestors breached the line of officers. Shortly thereafter, an explosion rocked the south side of the Capitol Building. Protestors immediately scattered, running away from the Capitol Building. Before first responders could assess the damage, some sort of incendiary device was hurled at a Boerum Police Department vehicle on the corner of Araiza Avenue and Caplow Street, one block south of the Capitol Building. The patrol vehicle was stationary and acting as a roadblock at the time. Eyewitnesses at the scene of the vehicle explosion indicated the culprit was a white male in a black hoodie.

Thus far, no fatalities have been reported from either the explosion at the Capitol or the firebombing of the police vehicle. Firefighters and emergency medical technicians are responding to the scene. Boerum Police Department officers appear to be detaining protestors. The police are said to be investigating a person of interest described as a tall, slim, white male in his 30s or 40s.

FEDERAL BUREAU OF INVESTIGATION

Date of Interview: 09/25/2019

LILY HOLZER was interviewed on SEPTEMBER 25th, 2019 at the Special Counsel's Office at 245 Arato Place, Boerum City, Boerum 17648. Present at the interview were FBI Special Agents Ted Schermerhorn and Mary Montague. After being advised of the identity of the interviewing agents and the nature of the interview, HOLZER voluntarily provided the following information:

LILY HOLZER is an administrative assistant employed by the Boerum Department of Education, located in the Boerum Capitol Building complex at 2500 Joralemon Street.

On SEPTEMBER 20, 2019, HOLZER arrived to work at the Capitol at or around 9:00 a.m. Her day was routine: she paid invoices, scheduled team meetings, and filed administrative paperwork. At around 1:45 p.m., HOLZER developed a migraine and was unable to keep working. She notified her supervisor that she would be leaving early.

At or around 2:05 p.m., HOLZER left the Capitol Building for the Ressler Lane Subway Station. Upon leaving the building, she was surrounded by a crowd of chanting protestors. HOLZER made her way to the southern entrance of the gate surrounding Capitol Square, located about 30 yards away from the Capitol's front doors. Once outside of the gate, HOLZER felt the ground shudder and heard a loud explosion from the direction of the Capitol Building. She did not see the explosion. The air filled with smoke and within seconds, the protesters in Capitol Square were screaming and running away from the Capitol Building.

HOLZER ran east down Joralemon Street and turned south down Caplow Street. Approximately 30-45 seconds after the first explosion, HOLZER found herself at the southwest corner of Araiza Avenue and Caplow Street when she saw a man standing at the northeast corner of Araiza Avenue and Caplow Street, approximately 50 yards away. Holzer stated that despite smoke from the first explosion, she could clearly see the individual from where she was standing. The individual stood at the rear of a police vehicle that was parked blocking traffic from crossing the intersection, and was fumbling around in his backpack. HOLZER described the man as a thin, white man, about six feet, four inches tall, in his mid-30s or early 40s, with long,

bleached blonde hair in a ponytail. She stated that he was wearing a black hoodie with a yellow smiley face design, light blue jeans, and a green baseball hat on which was embroidered a burning planet and the words "Planeteers Uprising 1999."

As she watched, HOLZER saw the man run towards the front of the vehicle, trip, and fall. He rose and lit a Molotov cocktail, and limping slightly, ran towards the front of the vehicle and threw the explosive device into the front right-side window. HOLZER stated that she heard the man shout, "Fossil Fools!" HOLZER turned and ran, and heard the vehicle explode behind her. She says the rest of the afternoon was "fuzzy" and she does not remember how she got home.

A few days later, HOLZER read the September 20, 2019 BOERUM TIMES article describing the incident, in which the reporter noted that police were looking for a tall, slim-built white male in his 30s or 40s believed to be responsible for at least one of the explosions. HOLZER remembered that she had seen a man matching this description instigate the police vehicle explosion. She explained that she did not come forward earlier with her description because she had been ill following her migraine and the events she had witnessed.

Investigation on September 25, 2019 at Boerum City, Boerum.

File # 250-JL-35712-BJW-51-LILY HOLZER Date dictated September 25, 2019

by SA Ted Schermerhorn and SA Mary Montague.

FEDERAL BUREAU OF INVESTIGATION

Date of Interview: 10/05/2019

ANDREW (a/k/a/ "ANDY") GERBER was interviewed on October 5, 2019, at the Special Counsel's Office at 245 Arato Place, Boerum City, Boerum 17648. Present at the interview were FBI Special Agents Ted Schermerhorn and Mary Montague. After being advised of the identity of the interviewing agents and the nature of the interview, GERBER voluntarily provided the following information:

GERBER has been an associate attorney at the firm of Fried, Pearce, and Yap, located at 1901 Subotnick Avenue, since September 2010. GERBER has also been a member of the Planeteers, an environmental activist group, since he attended law school. Over the years, he has served on several committees in the organization, and has been instrumental in organizing membership drives and public protests. GERBER has done *pro bono* legal work for the Planeteers, reviewing EPA rules and providing legal advice to Planeteers members arrested at protests.

While GERBER considers himself to be a steadfast environmentalist, he subscribes to the moderate political stance that was formerly the Planeteers' hallmark approach. He was alarmed at the recent takeover of the organization by the far more radical Earth Warriors clique led by ALEXANDER KENSINGTON.

GERBER was heavily involved in the planning and execution of the protest that took place on September 20, 2019, around 12:00 noon. In the weeks leading up to the September 20 protest, he organized post-protest cleanup teams, ordered food supplies for protesters, appointed the protest marshals, and drafted press releases.

On the morning of the protest, GERBER arrived at the State Capitol Building at 11:30 a.m. to help oversee the protest. During the early afternoon, the atmosphere was heated but nonviolent. Protesters were passionate but marshals effectively kept crowds in line; there were few altercations with police.

Around 2:10 p.m., GERBER witnessed the aftermath of an explosion outside of the Capitol Building. He did not see it directly, but heard the noise and saw a smoke plume from where he was standing, about 50 yards south of the Capitol Building. Planeteers leadership officially called off the protest, but on

his way home, GERBER overheard other protesters discussing the destruction of a police cruiser on Araiza Avenue. Both rank-and-file members and cadres from the inner-circle Earth Warriors made statements implicating ALEXANDER KENSINGTON in the firebombing. In particular, GERBER heard an individual wearing an Earth Warriors t-shirt, whom GERBER had never seen before, praise KENSINGTON's "guts" for taking out the "pigs'" vehicle and speculating about whether KENSINGTON "planned the one outside the Capitol, too." Then, through both media reports and Planeteers word-of-mouth, GERBER learned of a law enforcement investigation into the firebombing incident of the police vehicle. GERBER believed the suspect's physical description matched that of KENSINGTON, who GERBER described as around six feet four inches tall, weighing approximately 180 pounds. He came forward to inform law enforcement of the rumors he had heard and what he viewed as troubling activities by KENSINGTON in the lead-up to the protest. GERBER stated that KENSINGTON drives a 2019 bright red stingray coupe and contacts Planeteers members orally and on social media using his silver Apple iPhone 8, telephone no. 711-555-6655.

GERBER has been acquainted with KENSINGTON for many years. He worked with KENSINGTON at Fried Pearce from 2010 until 2017, and has collaborated with KENSINGTON on Planeteers activities. Outside of work and environmental organizing, they know each other through social events, the environmental bar, and law school alumni events. GERBER is familiar with KENSINGTON's appearance, build, speech, and mannerisms. He candidly admitted that he and KENSINGTON have been at odds for several years, ever since a personal schism developed between them, dating back to KENSINGTON's days at Fried Pearce. GERBER felt that KENSINGTON never treated him with respect and looked down upon him because he subscribed to a more moderate form of environmentalism.

Investigation on October 5, 2019 at Boerum City, Boerum.

File # 250-JL-35712-BJW-56-ANDREW-GERBER Date dictated October 5, 2019

by SA Ted Schermerhorn and SA Mary Montague.

UNITED STATES DISTRICT COURT
DISTRICT OF BOERUM
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IN THE MATTER OF THE SEARCH OF THE CELLULAR TELEPHONE ASSIGNED CALL NUMBER 711-555-6655

Case No. 21 MC 1426

Filed Under Seal

AFFIDAVIT IN SUPPORT OF
AN APPLICATION FOR A SEARCH WARRANT

I, THEODORE SCHERMERHORN, being first duly sworn, hereby deposes and states as follows:

1. I make this affidavit in support of an application for a search warrant under Federal Rule of Criminal Procedure 41, authorizing the examination of the property known and described as a silver Apple iPhone 8 cellular telephone, belonging to ALEXANDER KENSINGTON, assigned call number 711-555-6655 (the "Target Cell Phone").

2. I have been a Special Agent with the Federal Bureau of Investigation ("FBI") since 2015. I have been participated in the investigation of numerous cases involving, among other things, environmental terrorism and the illegal use of explosive devices in furtherance of terrorist activities. During my tenure with the FBI, I have (a) conducted physical surveillance, (b) executed search warrants, and (c) reviewed numerous computer and cell phone records. I have also received training on the uses and capabilities of cellular telephones in connection with criminal activity.[1]

[1] The facts in this affidavit come from my training and experience, my participation in this investigation, witness interviews, and information obtained from other law enforcement officers involved in the investigation.

3. Based on the facts set forth in this affidavit, there is probable cause to believe that violations of 18 U.S.C. §§ 844(f)(1), 844(n), and 924(c)(1)(B)(ii) have been committed by ALEXANDER KENSINGTON and others. There is also probable cause to search the Target Cell Phone for evidence, instrumentalities, contraband, or fruits of these crimes.

4. On or about September 20, 2019, an environmental group, identifying themselves as the "Planeteers," organized a protest at the Boerum State Capitol Building. The September 20, 2019 protest was focused on the state's proposed legislation that would repeal previously-enacted climate protection laws.

5. During the protest, an explosive device was employed at the Boerum State Capitol Building, and several blocks away, at the intersection of Caplow Street and Araiza Avenue, a Molotov cocktail-like device was tossed into the front window of a Boerum Police Department ("BPD") vehicle, destroying the vehicle.

6. On or about September 25, 2019, Lily Holzer, an administrative assistant employed in the Boerum Capitol Building, contacted the FBI with information about the bombing of the BPD vehicle. Holzer stated that at around 2:05 p.m. on the day of the protest, she noticed a man fumbling in his backpack, close behind a BPD vehicle that was parked in the intersection of Caplow Street and Araiza Avenue. She described the man as white, thin, in his mid-30s or early 40s, approximately 6'4", with a bleached blonde ponytail, wearing a black hoodie with a yellow smiley face, light blue jeans, and a green baseball hat on which was embroidered a burning planet and the words "Planeteers Uprising 1999."

7. As she watched, Holzer saw the man run toward the front of the BPD vehicle, but then trip and fall. He got up and lit a Molotov cocktail, and limping slightly, again ran towards the front of the vehicle. He threw the explosive device into the front right-side window. As he

tossed the device into the vehicle, Holzer heard the man shout, "Fossil Fools." Holzer said that she was terrified and afraid there might be more explosions, so she ran home.

8. On October 5, 2019, a confidential informant for the FBI (CI-1) contacted the undersigned and stated that based on statements he overheard from Planeteers members present at the protest, he believes that ALEXANDER KENSINGTON may have been responsible for the bombing of the police vehicle. CI-1 stated that he knew KENSINGTON was a member of the radical sect of the Planeteers, known as "Earth Warriors," and that KENSINGTON was trying to turn the Planeteers into a more aggressive force for environmental change. CI-1 described KENSINGTON as a white male about 6'4", approximately 180 pounds, and stated that he was instrumental in organizing the September 20 protest.

9. CI-1 stated that KENSINGTON used a silver Apple iPhone 8 cellular telephone, and that his call number was 711-555-6655 (the Target Cell Phone). CI-1 stated that KENSINGTON used this cellular telephone to contact members of the Planeteers organization and that CI-1 had often observed KENSINGTON using his cell phone to access Instagram and to post photographs relating to environmental issues. CI-1 did not know KENSINGTON's address, but knew that he drove a 2019 bright red Corvette Stingray coupe.

10. Based on the information obtained from CI-1 and Holzer, the FBI established a social media task force to review the posts and photographs of members of the Planeteers in an effort to identify the individual described by Holzer as responsible for the bombing of the police vehicle.

11. A review of the Planeteers_UniteAndFight Instagram account revealed that on September 3, 2019, there was posted a photo of a green baseball cap bearing the logo of a planet on it which had the words "Planeteers Uprising 2019" with the comment: "New Hat! $5, DM to purchase." KENSINGTON commented on the post that he "liked the old hat better."

12. On or about September 9, 2019, the Planeteers_UniteAndFight Instagram account posted a photo with the text "It's time to show the Industrialists what we are here for. 9:00 at the Capitol. Be prepared to get smoked on and don't forget your masks!" KENSINGTON commented on that post moments later with: "Ready to unload" and "Could not be caught." In response to a second post on September 10, 2019 relating to the scheduled protest, KENSINGTON instructed users to "slide into his DMs as well because I'm the leader of this movement."

13. Based on the above-described facts, there is probable cause to believe that ALEXANDER KENSINGTON is responsible for the firebombing of the police vehicle on September 20, 2019, and that evidence of his involvement in this criminal activity will be found on KENSINGTON'S cell phone.

14. Based on the foregoing, I request that the Court issue the proposed search warrant, pursuant to Federal Rule of Criminal Procedure 41, authorizing agents of the Federal Bureau of Investigation to seize the Target Cell Phone and search for any evidence of violations of 18 U.S.C. §§ 844(f)(1), 844(n), and 924(c)(1)(B)(ii). I am aware, through publicly available materials published by device manufacturers, that many electronic devices, particularly cell phones, offer their users the ability to unlock the device through biometric features rather than with passwords. I further request that the Court authorize agents of the FBI to compel the fingerprints or other biometric features of ALEXANDER KENSINGTON in connection with any biometric recognition sensor-enabled digital devices falling within the scope of the search warrant. Law enforcement agents are not seeking authorization to compel ALEXANDER KENSINGTON to state or provide the password or any other means that may be used to unlock or access the Target Cell Phone.

Respectfully submitted,

Theodore Schermerhorn

THEODORE SCHERMERHORN
Special Agent Federal Bureau of Investigation

Subscribed and sworn to before me
October 8, 2019

Sharon Thomas

THE HONORABLE SHARON THOMAS
UNITED STATES MAGISTRATE JUDGE
DISTRICT OF BOERUM

UNITED STATES DISTRICT COURT

for the

District of Boerum

In the Matter of the Search of *a SILVER APPLE IPHONE 8 PLUS, BELONGING TO ALEXANDER KENSINGTON, ASSIGNED CALL NUMBER 711-555-6655*	)	Case No. 21-MC-1426

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the District of Boerum

(identify the person or describe the property to be searched and give its location):

A silver Apple iPhone 8 cellular telephone, belonging to ALEXANDER KENSINGTON, assigned call number 711-555-6655,

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal *(identify the person or describe the property to be seized)*:

evidence of violations of 18 U.S.C. §§ 844(f)(1), 844(n), and 924(c)(1)(B)(ii)

YOU ARE COMMANDED to execute this warrant on or before October 22, 2019 *(not to exceed 14 days)*

□ in the daytime 6:00 a.m. to 10:00 p.m. ☑ at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to the Duty Magistrate Judge.

(United States Magistrate Judge)

Date and time issued: October 8, 2019 at 4:15 p.m. Sharon Thomas

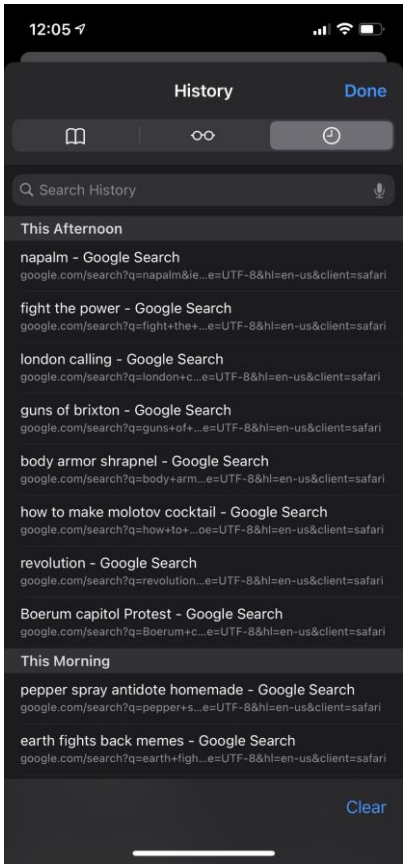
Judge's signature

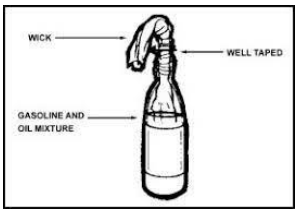
City and State: Boerum City, Boerum Hon. Sharon Thomas, U.S.M.J.

Printed Name and Title

Return		
Case No.: 21MC1426	Date and time warrant executed: October 9, 2019	Copy of warrant and inventory left with:
Inventory made in the presence of :		

Inventory of the property taken and name of any person(s) seized:





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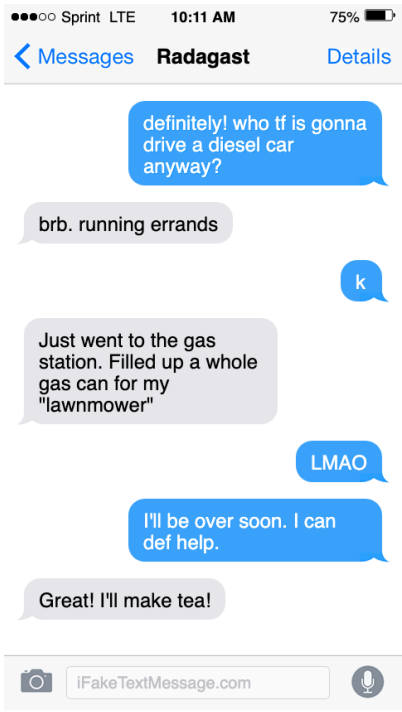

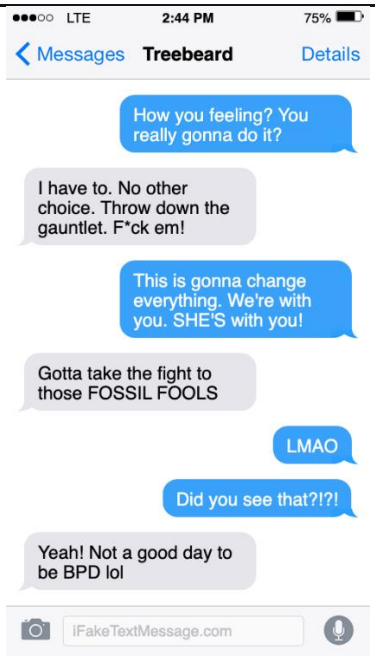

Email written to Planeteers_UniteAndFight Organization:

September 19, 2019:

To my fellow Planeteers:

It is time, we have not been heard, but as discussed tonight, that will change. Tomorrow at the Capitol we will show the industrialists that their assault on this planet will NO longer exist. My present is in the reusable bag and I will unload. Be safe and always remember that you are a Planeteer.

AK

September 23rd, 2019:

Hi all--

Just a reminder that we are a TEAM and in this together as planeteers. #snitchesgetstitches.

AK

Certification

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

Date: October 9, 2019

Manisa Korala

Executing officer's signature

SA Manisa Korala

Printed name and title

The Boerum Times

Lawyer Arrested in Molotov Cocktail Attack during Capitol Protests

By Horatio M. Beauchamp
October 10, 2019 –Boerum City, Boerum

A Boerum City corporate lawyer and environmentalist was taken into custody early Wednesday morning by Federal Bureau of Investigation (F.B.I.) agents in connection with a Molotov cocktail attack on a Boerum City Police Department patrol car.

During environmental protests opposing the state's repeal of climate-focused initiatives, explosions tore through the Boerum State Capitol Building and a Boerum Police Department patrol car was firebombed. Sources report that a Molotov cocktail was tossed into the patrol vehicle, setting it ablaze and completely destroying it. The individual involved in the police vehicle attack was identified by federal authorities as attorney Alexander Kensington, 41, a partner at the preeminent environmental law firm, Rios, Arluck, Esposito & Silverman (RAES) and newly-crowned President of the Planeteers, an environmental group with a recent militant bent.

Mr. Kensington was charged with destruction of government property, possession, manufacture and use of explosive materials, and inciting a riot. Authorities say he may also face charges of conspiracy to commit sedition. Mr. Kensington is expected to appear on Friday before a federal magistrate judge in the United States District Court in Boerum City. It could not be determined whether he will represent himself or seek representation. A relative of Mr. Kensington who declined to be identified said, "He's smarter than this. I don't know what would possess him to do such a thing. I'm pretty sure they have the wrong person."

From 2006 to 2010, Mr. Kensington was a staff attorney at the Environmental Protection Agency (EPA), Enforcement and Compliance Assurance Division, Region 11. In 2010, Mr. Kensington joined Fried, Pearce, and Yap, a corporate environmental defense firm. In 2014, Mr. Kensington became the youngest named partner in Fried Pearce's history.

Mr. Kensington leveraged his experience as counsel to some of the biggest industrial polluters in the country to become an environmental lobbyist and community organizer. After leaving Fried Pearce in 2017, Mr. Kensington traveled the United States, lobbying state legislators and organizing grassroots campaigns championing climate-change awareness, green initiatives, and regulatory reform. Mr. Kensington returned to practicing law in early 2019, joining RAES as a partner in one of the preeminent environmental law firms in the country.

Earlier this year, Mr. Kensington staged a coup of the Planeteers environmental group, becoming its President and marshalling a new era of extremism and demagoguery to an organization that was once a leading bulwark against industrial polluters. Mr. Kensington's descent into revolutionary militancy was speedier than his rise to the upper echelons of the environmental legal community. In a statement, RAES said that Mr. Kensington would be placed on administrative leave pending resolution of the criminal charges against him.

FEDERAL BUREAU OF INVESTIGATION

Date: 10/20/2019

On October 20, 2019, at approximately 2:00 p.m., eyewitness LILY HOLZER was brought into FBI headquarters at 124 Hoyt Street, Boerum City, Boerum 17648 and was shown a lineup. Present at the lineup were FBI Special Agents Ted Schermerhorn and Mary Montague.

HOLZER was shown a lineup of six white male individuals, each of whom was approximately six feet, four inches tall, and weighed about one hundred and eighty-five pounds. All suspects had bleached blonde hair that ranged from shoulder to waist length. Half of the suspects wore their hair in a ponytail and the other half wore their hair loose. HOLZER was asked if she recognized any of the individuals as the perpetrator.

After approximately three minutes of examining the six male suspects, HOLZER identified ALEXANDER KENSINGTON, who was marked as suspect number four, as the individual she claims to have seen throw a flaming Molotov cocktail into the front window of a police vehicle on September 20, 2019. HOLZER explained that she was "absolutely certain" that KENSINGTON was the person who committed the crime. The suspect was taken into custody following the identification.

Investigation on October 20, 2019 at Boerum City, Boerum.

File # 250-JL-54123-ID-51-LILY HOLZER Date dictated October 20, 2019

by SA Ted Schermerhorn and SA Mary Montague.

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

-against- 20-CR-1901 (AH)

ALEXANDER KENSINGTON,

Defendant.
----------X

TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS

BEFORE: THE HONORABLE Andrew Hicks

DATE: August 3, 2020

APPEARANCES:

For the United States of America: Alice Baer, AUSA
Office of the U.S. Attorney
District of Boerum

For Defendant Alexander Kensington: Taylor Lorimer, Esq.

Court Reporter: Tingjie Lei
District of Boerum
Court Reporter Services

CLERK: This is the United States against Alexander Kensington. Case number 20-CR-1901. Alice Baer appears for the Government. Taylor Lorimer appears for the defendant, Alexander Kensington.

COURT: Now we've spent the morning hearing from witnesses on this motion to suppress evidence obtained from the Defendant's phone. The evidence seized was obtained pursuant to a lawful search warrant issued by the Magistrate Judge. Defendant contends that the FBI agents violated his Fifth Amendment right against compelled statements when the agents forced Mr. Kensington to use his finger to unlock his cell phone using biometric data. Defendant's counsel, please proceed.

LORIMER: Good afternoon, Your Honor. On September 20, 2019, a bomb went off at the Boerum Capitol Building during an environmental protest and a few minutes later, a patrol vehicle was firebombed just down the street. FBI agents began investigating my client due to his notoriety as an environmental activist and president of the Planeteers organization. Armed with a hastily drawn search warrant, FBI agents stopped my client and searched his vehicle, recovering an iPhone in the passenger seat, and pressuring him to put his right index finger on the phone's home button. With a touch of the finger, officers

were able to access the contents of my client's phone: his thoughts, his beliefs, his emotions.

Your Honor, when the agents compelled my client to unlock his phone with his fingerprint, he was forced to make a testimonial statement in violation of his Fifth Amendment right against self-incrimination. This Court should find such an act testimonial because biometric data like my client's fingerprint, is analogous to prior technology, that if employed by law enforcement, would elicit testimonial statements. Additionally, the use of a fingerprint to unlock a cell phone in the presence of law enforcement implicates a level of control by the Defendant over the phone and its contents. Finally, an individual has dignity and privacy interests that should not take a back seat to law enforcement in a society where technology is rapidly evolving.

COURT: Mr. Lorimer. That was a lot to process. Can you take those points in turn and elaborate, please?

LORIMER: Certainly. In *Matter of Residence in Oakland, California*, the court denied a search warrant as being overbroad when it sought to compel any person on the premises to use their biometric data to unlock any cell phones found on the premises. The court explicitly found that using a fingerprint to unlock a cell phone was a physiological and nonverbal response that, like a polygraph test, could be used to determine guilt or innocence.

COURT: But how is supplying a fingerprint during the execution of a warrant any different than, say, an administrative fingerprinting that takes place whenever anyone is arrested?

LORIMER: While the purpose for taking a fingerprint in an administrative search is to record it in a database or use it to identify matching fingerprints from other crime scenes, unlocking a phone with a fingerprint demonstrates to officers that the person controls the phone and has a connection to the contents within.

In *United States v. Warrant*, the district court denied a search warrant that compelled the use of fingerprints to unlock a cell phone, reasoning that unlocking a phone with a fingerprint is the same as if the individual admitted to unlocking the phone before to install the biometric security setting and makes it more likely the individual put the material on the phone that was sought by the warrant. Moreover, in *United States v. Wright*, a Nevada district court found that compelling a Defendant to unlock a digital device with biometric data, in this case facial ID, was testimonial under the Fifth Amendment.

COURT: But it seems to me that putting your finger on a phone is a physical act.

LORIMER: What happened here denotes much more than just a physical act. A person compelled to unlock their phone and

reveal its contents is essentially being forced to reveal the details of their lives and their thought processes.

COURT: I find that reasoning a bit attenuated.

LORIMER: And that is natural. Technological developments confound constitutional principles. As the Supreme Court stated back in 1951 in *Hoffman v. United States*, the Fifth Amendment privilege "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." The Fifth Amendment's privilege against self-incrimination ensures dignity and privacy to the individual, even in our rapidly advancing technological world.

When agents descended on Mr. Kensington's car, he was forced to disclose the most private aspects of his life: his banking apps, his vitals and fitness regimen through health and exercise apps, and his deepest thoughts within his notes app. And federal agents did it all with a valid warrant. The scales of justice should not tip towards condoning this conduct.

For the foregoing reasons I ask this Court to grant Defendant's motion to suppress the evidence seized from Mr. Kensington's cell phone, and to find that biometric data is testimonial and protected by the Fifth Amendment.

COURT: Thank you, counselor. Does the Government have an argument?

BAER: Good afternoon, Your Honor. The FBI, pursuant to a search warrant, stopped Alexander Kensington's bright red Corvette, noticed Kensington's cell phone in the passenger seat, which was in plain view, and then compelled him to enable its "press-to-unlock" feature. The evidence seized from Defendant's phone is admissible because his fingerprint is a physical impression rather than an invasion into the Defendant's mental impressions or thought process.

In *State v. Diamond,* the Minnesota Supreme Court noted that providing a fingerprint to unlock a cell phone constitutes "physical evidence from [the defendant's] body, not evidence of his mind's thought processes." Moreover, in *Commonwealth v. Baust*, a Virginia state appeals court held that a defendant could be compelled to produce his fingerprint to provide access because it was more akin to surrendering a safe's key than its combination. Here, the police did not ask the Defendant to write down his four-digit passcode or to say *anything* whatsoever. In fact, the Defendant remained silent throughout the course of his interaction with the officers.

COURT: Defendant's counsel suggested, citing *Wright*, that compelling Defendant to unlock a phone using the biometric

feature is testimonial under the Fifth Amendment, and so it doesn't matter that the Defendant remained silent.

BAER: This issue has not yet been addressed by this Court or the Fourteenth Circuit. However, this Court should apply the approach taken by the *Diamond* court. The biometric feature is less invasive than providing a verbal password. iPhone users can choose whether or not to install the biometric authentication feature on their phones, and here, the Defendant did so. Moreover, providing a fingerprint is less invasive than a verbal recitation of a passcode because the fingerprint does not tell the officers what the passcode itself is. Therefore, Defendant should not be placed in the same bucket as a defendant who is forced to verbally provide a passcode to a police officer.

COURT: OK, but even assuming that the act is predominantly a physical impression rather than a mental thought, isn't there some overlap that can justify a finding that it's testimonial?

BAER: Sure, there may be some overlap. However, the court in *Matter of Search Warrant Application for Cellular Telephone in United States v. Barrera*, noted that "the biometric procedure is first and foremost a physical act" when it held that the government's conduct of compelling a defendant to implant their finger impression on a phone did not violate the defendant's Fifth Amendment rights. In fact, in *Matter of Search of [Redacted] Washington, D.C.*, the D.C. District Court noted that

the line between testimonial and nontestimonial communications is not clear. Here, Your Honor, Kensington was not required to say anything to the police while providing his fingerprint.

COURT: Doesn't the biometric feature show control over the phone? Isn't that testimonial?

BAER: No, Your Honor. Defense counsel contends that a suspect using their finger to unlock a phone is the equivalent of the suspect producing the contents on the phone, which therefore reveals a level of ownership. However, the government was aware that Kensington owned the cell phone at issue — the agents were acting pursuant to a search warrant for Kensington's phone, and they had evidence that Kensington used it to communicate with fellow members of the Earth Warriors movement. Therefore, the foregone conclusion doctrine applies.

Moreover, the phone in question was found in the Defendant's car passenger seat and no one else was in the vehicle at that time, so there was clearly probable cause to believe the cell phone belonged to Kensington. This is not a case in which there were multiple people in the car, or premises, and the agents used Kensington's fingerprints to determine if the phone in the passenger seat belonged to him.

COURT: I am still concerned about this privacy issue though. Are we saying that the government can now access any suspect's phone simply because they choose to take advantage of

the convenient biometric authentication features of a smartphone such as the Apple iPhone in question here?

BAER: No, Your Honor. Again, the officers here were acting pursuant to a search warrant that identified Kensington and gave them authority to search the contents of his phone. The Government's search warrant listed Kensington's phone as the particular item to be seized. Therefore, the Government asks this Court to deny Defendant's motion to suppress the evidence seized from Defendant's cell phone because the biometric data is not testimonial under the Fifth Amendment.

LORIMER: Your Honor, may I have a short rebuttal argument?

COURT: You may.

LORIMER: The Government contends that even if a testimonial statement was made, the foregone conclusion principle should apply. Even if it was a foregone conclusion that agents executing the warrant found the right phone, this shouldn't give them blanket access to the contents of my client's phone. They were able to peer into his financial records, his health data, and the most intimate thoughts he had. Airing the privacies of my client's life under the theory that somewhere in his phone there had to be incriminating evidence would justify searching a target's whole house for what they know is in a garage. Simply put, dignity should not surrender to an agent's foregone conclusion. These bedrock principles of dignity and privacy

should not fold, nor should they be put in the backseat in the face of technological advancements.

Nothing further at this time, Your Honor.

COURT: All right, thank you Counselors. After considering the arguments made by both sides, I agree with the arguments and authority presented by the Government. I find that the use of Defendant's biometric features to unlock the contents of his phone did not violate Defendant's right against self-incrimination under the Fifth Amendment. The Court hereby denies the motion to suppress evidence obtained from Defendant's cell phone.

Expert Report Pursuant to Fed. R. Crim. P. 16(b)(1)(C)

1. I am Jack B. Closeau, a member of Memory Fades Group, a nonprofit organization that trains experts to testify regarding the unreliability of eyewitness identifications. I have expertise in Clinical Psychology, Forensic Psychology, and Eyewitness Identifications. I have provided expert testimony in these areas in over 120 cases.

Assignment

2. I was retained by defendant Alexander Kensington to review the eyewitness identification of Lily Holzer and opine on its reliability in light of clinical and psychological research. Recent research demonstrates that there is a weak correlation between eyewitness confidence and accuracy, that stress and other aggravating circumstances have a detrimental effect on memory, that the presence of weapons and other dangerous instruments lead to unreliable identifications, that memory deteriorates rapidly, that eyewitnesses gain false confidence when supplied with post-event information that reaffirms their beliefs, that there are flaws in cross-racial identifications, and that unconscious transference commonly occurs when eyewitnesses incorrectly infer that a familiar foil and the defendant are the same person.

Summary of Opinion

3. It is my expert opinion that eyewitness Lily Holzer's identification in this case is fundamentally flawed and unreliable. The identification has been tainted by a multitude of the abovementioned factors.
4. I plan to testify that because the eyewitness was experiencing a high level of stress during memory perception and encoding, she was less likely to have formed an accurate identification. Additionally, because the witness saw a weapon, she was prone to "weapon focus."

5. I also plan to testify that the defendant's race may have affected the eyewitness's accuracy in identifying and recognizing the defendant. According to well-established research in the field, cross-racial eyewitness identifications are less accurate than intra-racial eyewitness identifications.
6. I will testify as to the effects of unconscious transference, or when an eyewitness mistakenly believes that an individual who the eyewitness saw at some point after the crime is the perpetrator. When a face looks familiar, even subconsciously, an eyewitness is more likely to identify that person as the individual who committed the crime.
7. Lastly, I will testify that there is a very weak relationship between an eyewitness's confidence and an eyewitness's accuracy. Even where an eyewitness is seemingly positive that a defendant is the person who committed the crime, research shows that this confidence does not increase a witness's accuracy in properly identifying the perpetrator. Moreover, in this case, there was a five day period between when the witness first saw the perpetrator commit the crime and when she first described the perpetrator to the authorities. Even worse, there was a period of thirty days between when the witness first saw the perpetrator and when she first identified him in a formal lineup.

Qualifications

8. I have a Ph.D. in Psychology from Northwestern University. I specialize in clinical and forensic psychology and research methods and statistics. From June 2009 to April 2010, I worked as a Research Fellow for the National Psychology Foundation at Boerum University, where I performed extensive research in the area of psychology and memory. From May 2010 to the present, I have been a member of Memory Fades Group, where I study the fallibility of eyewitness identifications and provide my expert opinion regarding their

unreliability. I have testified as a qualified expert in eyewitness identifications in over 120 cases. Since July 2012, I have served as Assistant Professor in the Department of Psychology at Boerum University, where I lead a research laboratory and mentor Ph.D. and post-doc students studying psychology and memory. I teach graduate courses in clinical psychology and undergraduate courses in clinical and forensic psychology.

9. I hold a license to practice psychology in the State of Boerum.

10. I have received numerous honors and awards for my work, including the 2010 American Psychological Association Early Career Achievement Award, the 2012 American Psych-Law Society Early Career Teaching and Mentoring Award, and the 2013 Society for the Psychological Study of Eyewitness Identifications Award.

11. I have published numerous articles on the unreliability of eyewitness identifications. For example, *see* Jack Closeau, *How Our Minds Fool Us*, 4 Association of Psychology Scholars 43 (2014); Jack Closeau, Jacob Clousieu, et al., *You've Got the Wrong Guy: An Analysis of Wrongful Convictions*, American Eyewitness Institution (2012); Jack Closeau, *The Impact of Stress on Memory*, 15 American Psychology-Law Review 334 (2010); Jack Closeau, *Now You See Me, Now You Don't*, Boerum Psychological Association (2009).

12. I am a member in good standing of the American Psychological Association, the American Psychology-Law Society, and the Law and Society Association.

13. I have been 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. *See, e.g.*, American College of Forensic Examiners Institute, 2012 (Springfield, MO): *The Tragedy of False Identifications*; American Psychology-Law Society

Annual Conference, 2010 (Vancouver, BC, Canada): *Preventing Injustice by Educating Others on the Unreliability of Eyewitness Identifications*.

14. I served as an Associate Editor of the *Journal of Psychology and Memory* from 2009 to 2020 and have served as an Editorial Board Member of the *Journal of Law and Human Behavior* since 2012.

15. I continue to review materials and documents related to this case and reserve the right to supplement this expert report based on any additional research that I may be asked to do.

Documents Reviewed

16. As part of my assignment, I have reviewed the Federal Bureau of Investigation's 302 form documenting Lily Holzer's description of the perpetrator. I have also reviewed the Federal Bureau of Investigation's 302 form documenting Lily Holzer's identification of the defendant from a six-person lineup.

UNITED STATES DISTRICT COURT
DISTRICT OF BOERUM
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UNITED STATES OF AMERICA,

20-CR-1901(AH)

-against-

ALEXANDER KENSINGTON,

Defendant.
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TRANSCRIPT OF HEARING ON MOTION IN LIMINE TO ADMIT EXPERT TESTIMONY

BEFORE: THE HONORABLE Andrew Hicks

DATE: August 27, 2020

APPEARANCES:

For the United States of America: Alice Baer, AUSA
Office of the U.S. Attorney
District of Boerum

For Defendant Alexander Kensington: Taylor Lorimer, Esq.

Court Reporter: Alex Botez
District of Boerum
Court Reporter Services

CLERK: This is the matter of the United States of America against Alexander Kensington, Case Number 20-CR-1901. Assistant United States Attorney, Alice Baer, appearing for the Government. Taylor Lorimer appearing for the defendant, Alexander Kensington.

COURT: Defendant seeks to admit expert testimony on the issue of eyewitness identification. Mr. Lorimer, you may begin.

LORIMER: Good evening, Your Honor. On September 20th, 2019, a protest took place at the Boerum Capitol Building. A woman named Lily Holzer claims to have seen an individual matching the description of my client, Alexander Kensington, light a Molotov cocktail and throw it into the front window of a police vehicle at around 2:05 in the afternoon or shortly thereafter.

A month later, on October 20, 2019, she first identified the defendant from a six-person lineup. The defendant seeks to offer the expert testimony of Dr. Jack Closeau, a clinical and forensic psychologist, who is an expert in the field of eyewitness identifications. Dr. Closeau plans to testify as to the general unreliability of eyewitness identifications, and specifically about the factors in this case which render the eyewitness's testimony inherently unreliable. The Court should admit his testimony under Rule 702 of the Federal Rules of

Evidence, because (1) his testimony is based on well-established scientific evidence, and (2) it would be helpful to the jury.

COURT: It is my understanding that courts have been reluctant to admit testimony of "eyewitness identification" experts. Why should I treat this case differently?

LORIMER: Well, Your Honor, recently, courts have been more receptive to the scientific underpinnings of such opinions and found such testimony helpful in assisting jurors when analyzing eyewitness testimony. For example, in *United States v. Brien*, the First Circuit noted the increased acceptance of eyewitness experts because "there is more expert literature on the subject, more experts pressing to testify, and possibly more skepticism about the reliability of eyewitnesses." Similarly, in *United States v. Rincon*, the Ninth Circuit noted that where the eyewitness identification expert's opinion is based on scientific knowledge and is helpful to the jury, the testimony should be admitted.

COURT: How will the expert testimony be helpful to the jury here?

LORIMER: While some courts have held that factors which render eyewitness identifications unreliable are within the common knowledge of the jury, research suggests otherwise. In *United States v. Smith*, an Alabama trial court allowed the expert to testify about the impact of perception, memory,

stress, cross-racial identification and post-event information on the reliability of eyewitness testimony, finding that the testimony would enhance the jury's evaluation of the identification made by the two main witnesses.

Here, Dr. Closeau should be permitted to testify to the many factors which could have contributed to an unreliable identification by Ms. Holzer. First, Ms. Holzer observed the defendant during a chaotic, stressful event, involving an explosion, that left the air clouded with smoke and hundreds of protestors fleeing the scene. Although Ms. Holzer observed the individual who tossed something into the police vehicle, her focus was primarily drawn to the flaming Molotov cocktail. She later told the FBI that she did not remember how she got home after the incident, indicating that her memory was significantly impaired. Further, she first identified my client after a significant lapse in time, thirty days after the event. Finally, the identification was cross-racial: the eyewitness is a black woman and the defendant a white man. Decades of studies have shown that cross-racial identifications are statistically less accurate than intra-racial identifications.

COURT: Well, what about cross-examination? Surely you will probe into the witness's credibility and point out these factors during cross-examination.

LORIMER: Matters concerning the fallibility of memory and perception, along with the inaccuracy of cross-racial identifications, cannot properly be articulated to the jury solely through cross-examination. While cross-examination seeks to expose lies, the issue with eyewitness identifications is the reality that the witness may be mistaken, and therefore, unreliable. Further, juries tend to give improper weight to eyewitness identifications.

COURT: Thank you, counsel. What is the Government's response?

BAER: Good afternoon, Your Honor. Based on all the information developed by the FBI, the Government has overwhelming evidence proving that Alexander Kensington caused the explosion of the BPD vehicle.

The Government submits that the Court should preclude the testimony of Dr. Closeau on eyewitness unreliability because (1) it will not assist the jury as required by *Daubert v. Merrell Dow Pharmaceuticals* and Rule 702 of the Federal Rules of Evidence; (2) under Rule 403 of the Federal Rules of Evidence, the probative value of the expert's testimony is substantially outweighed by its prejudicial effect; and (3) that the availability of jury instructions, cross-examination, and

jurors' common sense have traditionally been found sufficient to allow juries to evaluate such testimony.

Rule 702 and *Daubert* provide the governing test for the admissibility of expert witness opinion evidence in trial. Expert testimony must first be scientifically reliable and second, assist the trier of fact in understanding the evidence.

Dr. Closeau's testimony fails to qualify as scientific knowledge. Under *Daubert*, courts consider (1) whether the testimony is based on a theory or technique that can or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate for error; and (4) the particular degree of acceptance within the scientific community. Here, Dr. Closeau's expert report contains only conclusory statements about the scientific studies on which his theories are based, and it does not expand on the extent to which these theories have been tested, nor does it describe the particular methodologies used for testing. The report also fails to address whether his theories are accepted within the wider scientific community, and thus, the Court cannot properly ascertain whether the testimony qualifies as "scientific knowledge."

Further, expert testimony on the unreliability of witness identifications is simply not helpful to jurors. It is commonly known that eyewitness identifications may be unreliable. Indeed, historically, one of the jury's most vital roles was to assess witnesses for their credibility. In *United States v. Lumpkin*, the Second Circuit affirmed the exclusion of expert testimony on eyewitness unreliability, finding that it would usurp the jury's role in determining credibility. In *United States v. Kime*, the Eighth Circuit upheld the exclusion of expert testimony because the expert was "not merely going to offer testimony about eyewitness identification in particular, but specific, to the point, testimony regarding the inherently untrustworthy manner with which [the eyewitness identified [the defendant]." This is the very type of testimony that defendant proposes to offer here: specific, to the point, testimony as to why the jury should find Ms. Holzer's identification unreliable. This is the jury's role; allowing an expert to render an "expert" opinion on the reliability of the identification intrudes into the jury's domain and therefore is not helpful as required by Rule 702 and *Daubert*.

COURT: Wouldn't it be helpful for the expert to expand on those factors that the jury may not know, such as the fact that

a cross-racial eyewitness identification is less likely to be accurate?

BAER: Your Honor, this information can be introduced to the jury in a far less prejudicial manner. The probative value of this expert testimony is minimal at best and is far outweighed by the danger of juror confusion. In *United States v. Fosher*, the First Circuit upheld the exclusion of expert testimony under Rule 403, finding that the expert's testimony carries an "aura of special reliability and trustworthiness" and runs the risk of unfairly influencing the jury.

COURT: Okay. I take it that this is where cross-examination and jury instructions come in.

BAER: Yes, Your Honor. The court in *Fosher* held that issues concerning eyewitness reliability can be explicated more efficiently and less prejudicially through the defense's thorough cross-examination of the eyewitness and the court's comprehensive jury instructions. To the extent that the information contained in Dr. Closeau's report is helpful to jurors, the government submits that this information should be communicated to the jury by thorough jury instructions.

The admission of expert witness testimony in any context also runs the risk of compromising judicial efficiency. It may

distract the jurors and waste time while experts battle over their competing agendas.

COURT: Judicial efficiency notwithstanding, Mr. Lorimer has cited cases where courts have admitted expert witness testimony. Why shouldn't this Court follow the lead of these other courts?

BAER: Your Honor, though some courts do not categorically reject expert witness testimony, they admit this evidence only rarely, when the primary or sole inculpatory evidence before the jury is an unreliable eyewitness identification, and there is little-to-no additional evidence offered against the defendant. The case before this Court is better analogized to *United States v. Baylor*, in which the Fourth Circuit upheld the exclusion of expert testimony where there were multiple identifications of the same suspect and all witnesses were subject to vigorous cross-examination, and their identifications were corroborated by additional testimony and circumstantial evidence. Here, in addition to Ms. Holzer's testimony, there is considerable additional evidence, including the testimony of Andy Gerber and corroborating evidence in the form of the Defendant's prior statements and incriminating evidence seized from the Defendant's phone. Our case does not rest solely on Ms. Holzer's

testimony, so it is distinguishable from the cases cited by the defense.

COURT: All right. Thank you, counsel. The Court will render a decision on this motion shortly. We are now adjourned.

UNITED STATES DISTRICT COURT
DISTRICT OF BOERUM
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UNITED STATES OF AMERICA,

- against-

ALEXANDER KENSINGTON,

Defendant.
----------X

20-CR-1901 (AH)

ORDER DENYING DEFENDANT'S MOTION *IN LIMINE* TO ADMIT EXPERT TESTIMONY

BEFORE THE COURT is Defendant Alexander Kensington's motion *in limine* to admit into evidence the expert testimony of Dr. Jack Closeau regarding the unreliability of eyewitness identifications pursuant to Rule 702 of the Federal Rules of Evidence. After considering the parties' arguments, the Court hereby DENIES Defendant's motion to introduce this expert testimony.

DISCUSSION

Admission of expert witness testimony is governed by Rule 702, which allows a qualified witness to "testify in the form of an opinion or otherwise" if the testimony meets several conditions, principally "help[ing] the trier of fact to understand the evidence or determine a fact in issue." FED. R. EVID. 702. When ruling on the admissibility of expert witness testimony, courts consider whether the expert is qualified in the relevant field and the general acceptance of the methodology upon which the expert bases her opinion. *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). Even if deemed admissible subject to Rule 702, expert testimony may be excluded pursuant to Rule 403 if "its probative value is substantially outweighed by a danger of...unfair prejudice[.]" FED. R. EVID. 403. "Because there are areas of expertise, such as the social sciences in which the research, theories, and opinion cannot have the exactness of hard science

methodologies, trial judges are given broad discretion" to determine the reliability and helpfulness of such testimony in a particular case. *United States v. Simmons*, 470 F.3d 1115, 1123 (5th Cir. 2006) (citing *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997) (internal quotations omitted)).

Defendant argues that his expert witness, Dr. Jack Closeau, should be allowed to testify regarding the unreliability of eyewitness identifications pursuant to Rule 702 because recent research has exposed the inherent unreliability of eyewitness identifications, which can ultimately lead to mistaken identifications and false convictions. *See Young v. Conway*, 698 F.3d 69, 78–79 (2d Cir. 2012). The Government takes the position that the expert witness fails the Rule 702 requirements because (1) psychology is not a hard science of the type contemplated by Rule 702, and (2) admission of an expert to opine on credibility would usurp the role of the jury in evaluating witness credibility. The Government further argues, pursuant to Rule 403, that the probative value of expert testimony on eyewitness reliability is substantially outweighed by the prejudicial impact of the expert's views on the jury, and that admission of expert testimony would waste time, since the defendant can cross-examine the witness and this Court can provide detailed jury instructions. *See United States v. Curry*, 977 F.2d 1042 (7th Cir. 1992).

The Court has considered the arguments presented by both parties. The Court has also carefully reviewed the expert report, including the expert's credentials, experience, and opinion, and finds that allowing Dr. Jack Closeau to testify on the issues of eyewitness unreliability would not meaningfully assist the jury and that any juror assistance would be substantially outweighed by the prejudicial effect of Dr. Closeau's "aura of special reliability and trustworthiness." *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir**.** 1979). The Court agrees with the Government's

contention that eyewitness reliability issues may be adequately and less prejudicially addressed by use of cross-examination and jury instruction.

THEREFORE, IT IS ORDERED that Defendant's motion *in limine* is denied.

Dated: August 28, 2020

Andrew Hicks

Andrew Hicks
U.S. District Judge
District of Boerum

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

- against -

20-CR-1901 (AH)

ORDER OF WITNESS SEQUESTRATION

ALEXANDER KENSINGTON,

Defendant.
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Defendant Alexander Kensington moved this Court on August 25, 2020, for an Order pursuant to Rule 615 of the Federal Rules of Evidence to exclude the Government's witnesses from attending the trial of this case while other witnesses are testifying. In response, the Government cross-moved to similarly exclude Defendant's witnesses. The motions were heard before the Court today. The Court has duly considered the arguments of counsel, and finds that both motions should be granted.

THEREFORE, IT IS ORDERED that anyone designated as a witness in the Joint Pretrial Order of August 20, 2020, is excluded from the courtroom except when they are testifying or after they have been finally excused by the Court.

IT IS SO ORDERED.

Dated: August 25, 2020

Andrew Hicks

Andrew Hicks
U.S. District Judge
District of Boerum

UNITED STATES DISTRICT COURT

DISTRICT OF BOERUM
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UNITED STATES OF AMERICA,

-against-

20-CR-1901 (AH)

ALEXANDER KENSINGTON,

Defendant.
----------X

TRANSCRIPT OF WITNESS EXAMINATION AND MOTION FOR POST-CONVICTION RELIEF HEARING

BEFORE: THE HONORABLE Andrew Hicks

DATE: September 9, 2020

APPEARANCES:

For the United States of America: Alice Baer, AUSA
Office of the U.S. Attorney
District of Boerum

For Defendant Alexander Kensington: Taylor Lorimer, Esq.

Court Reporter: William Gelson
District of Boerum
Court Reporter Services

CLERK: This is the matter of the United States of America against Alexander Kensington, Docket Number 20-CR-1901. Counsel, please state your appearances for the record.

BAER: Assistant United States Attorney Alice Baer for the government, Your Honor.

LORIMER: Your Honor, Taylor Lorimer, appearing for the defendant, Alexander Kensington.

COURT: Counsel, what are we here for this morning?

LORIMER: Your Honor, following my client's conviction, the defense learned that a Government witness, Andy Gerber, was observed in the courtroom during a break reviewing the transcript of another witness's testimony. I submit that this violated your Rule 615 Order prohibiting witnesses from being in the courtroom during the testimony of other witnesses, and that after reviewing the transcript, Gerber tailored his testimony to conform with that of Lily Holzer. My client was deprived of his right to a fair trial and we seek a judgment of acquittal or, at the very least, a new trial at this time.

COURT: Ms. Baer, what's the Government's response?

BAER: We submit that the Rule 615 Order did not prohibit witnesses from reviewing transcripts of prior testimony and, even if it did, the testimony of the witness presented by defendant in support of his motion will show that it is not entirely clear that Gerber was looking at Holzer's testimony.

Finally, I submit that Gerber did not change or tailor his testimony in any way and that the Defendant's motion for a new trial or judgment of acquittal should be denied.

COURT: All right, counsel, let's hear from the witness.

GABRIELA STERLING

Witness is sworn in.

DIRECT EXAMINATION

LORIMER: Please state your name for the record.

STERLING: Gabriela Sterling.

Q: Ms. Sterling, how are you currently employed?

A: For the past decade, I have been the senior court reporter covering criminal trials for the Joralemon Journal.

Q: Now, directing your attention to the Alexander Kensington trial, were you present in the courtroom when Lily Holzer testified?

A: Yes, Holzer was an eyewitness to the events.

Q: Do you recall the specifics of Holzer's testimony?

A: I do. Holzer described the firebombing of the police car in detail. She described how the perpetrator fell and starting limping right before throwing a Molotov cocktail into the vehicle. She also testified that he yelled out "Fossil Fools" at that time.

Q: Did Andy Gerber testify the same day?

A: No, he testified the next day, in the afternoon.

Q: What did you witness during the lunch recess on the day Gerber testified?

A: After the recess was called, I saw Andy Gerber come into the courtroom. I overheard the prosecutor advising Gerber that he should be prepared to testify later that afternoon. The prosecutor also reminded him of the witness sequestration order and that he could not sit in the courtroom after the lunch recess until he was called.

Q: How did Gerber respond to those instructions?

A: Gerber said he understood, and I saw him nod.

Q: Did Gerber leave the courtroom during the lunch recess?

A: No. I realized that Gerber and I were the only ones left when I saw Gerber looking at documents on the government’s table.

Q: What exactly did he do?

A: Gerber was lingering at the government’s table, looking at some papers that were sitting on the corner of the table. Occasionally, he would look over his shoulder and around the courtroom.

Q: Did Gerber see you when he looked around?

A: Not initially. I was leaning over trying to get my pen off the floor, so I don’t think he saw me at first. He seemed completely distracted by what was in those papers.

Q: Could you see what he was looking at?

A: Well, my eyesight isn't what it was, but being only a few rows from the prosecutor's table, I could make out that he was reading a trial transcript.

Q: Could you see whose testimony it was?

A: Not then, but I checked after he left the courtroom.

Q: What did you do after Gerber left the courtroom?

A: I walked over to the prosecutor's table and confirmed that Holzer's transcript was on the table.

Q: Were the documents Gerber was looking at a copy of Holzer's trial testimony?

A: Yes.

Q: Were you present in the courtroom when Gerber testified?

A: Yes, and I noticed similarities in his testimony and Holzer's, including that Kensington used the slogan "Fossil Fools" and had a limp. Gerber could not have known this, since he testified that he had not seen Kensington since before the protest.

Q: What happened after the Kensington trial ended in a guilty verdict?

A: I spoke with my editor about what I had seen because I could not shake the feeling that there was something wrong going on. We spoke with the Journal's general counsel, and she wrote the Court a letter explaining the situation.

Q: No further questions.

CROSS-EXAMINATION

BAER: Ms. Sterling, how far away from Gerber were you when it was just you two in the courtroom during the lunch recess?

STERLING: Just a few feet.

Q: Isn't it true that your eyesight has diminished over time?

A: Yes, but I was wearing my glasses.

Q: Are you then sure about the distance between you and Gerber?

A: Yes. I was wearing my prescription glasses.

Q: Regarding Holzer's transcript, how can you be sure that Gerber was reading it instead of another document?

A: Because I kept my eye on the document, saw where he put it down and reviewed it after Gerber left the courtroom.

Q: Do you know which pages Gerber was reading before he left?

A: No.

Q: How, then, can you be certain that Gerber tailored his testimony?

A: I cannot.

Q: How long did you see Gerber reading Holzer's transcript?

A: A few minutes.

Q: Given that Holzer's transcript was more than 130 pages long, could Gerber possibly have read all of it during that time?

A: No.

Q: Nothing further at this time, Your Honor.

COURT: Thank you. The witness is excused.

HEARING ON MOTION FOR POST-CONVICTION RELIEF

COURT: Let me hear first from Defendant's counsel regarding your motion.

LORIMER: Your Honor, as you know, the Fourteenth Circuit has yet to rule on the issue of whether it is a violation of a Rule 615 order for one sequestered witness to view, hear, or in any other way review the testimony of another sequestered witness. Several Circuits, including the Fourth Circuit in *United States v. McMahon,* and the Ninth Circuit in *United States v. Robertson* have ruled that it is a violation of a 615 Order for one sequestered witness to read the testimony of another. In *Robertson*, the Ninth Circuit ruled that a sequestered trial witness who reads the testimony from the transcript of an earlier, related proceeding is functionally equivalent to a witness who listens to courtroom testimony. In *McMahon*, the Fourth Circuit held that a sequestered defendant, who received notes summarizing a witness's testimony during a proceeding, violated a Rule 615 order.

Andy Gerber impermissibly reviewed Lily Holzer's testimony, violating Rule 615 and the terms of the Court's sequestration Order. I submit to the Court that upon reviewing Holzer's testimony, he altered his own testimony to add details that he did not actually witness for the cynical purpose of incriminating the Defendant. At no point in his interview with

the FBI did Gerber inform the FBI of the suspect's alleged limp or use of the slogan "Fossil Fools!" By his own admission, Gerber had a motive for seeing Defendant convicted of these crimes. Gerber has been personally at odds with the Defendant and his goals for the Planeteers. While Rule 615 bars witnesses from "*hearing* other witnesses' testimony," accessing sequestered testimony clearly flouts the spirit of the Rule. By violating the Order, Gerber has cast doubt on the veracity of his entire testimony, which, crucially, strongly informed Defendant's conviction. Defendant therefore moves for a directed verdict or, in the alternative, for a new trial.

COURT: Thank you, counselor. Ms. Baer, for the Government?

BAER: Your Honor, Mr. Gerber's purported examination of Ms. Holzer's testimony transcript did not violate Rule 615 or this Court's Order. The plain language of Rule 615 does not forbid sequestered witnesses from reviewing trial transcripts. Rather, it merely requires that witnesses be sequestered outside the courtroom during the trial proceedings when they are not on the witness stand.

The First and Eighth Circuits have held that absent any specific witness restriction that trial courts add to 615 Orders, a basic sequestration order only bars witnesses from observing and hearing other witnesses' testimony in the courtroom itself while proceedings are ongoing. Further, these

Circuits require movants to request specific sequestration limitations beyond the language of the Rule. Defendant made no such requests and so should not be given the requested relief after the fact.

Also, Defendant does not address what harm he has suffered that would require the extreme remedy he has requested. The Sixth Circuit, for example, found in *United States v. Solorio* that the violation of a 615 Order does not automatically bar a witness's testimony, and there must be a showing of harm.

COURT: Thank you Counselors, I believe I have heard enough. After considering the testimony and oral arguments, I deny Defendant's motion in all respects.

Based on the testimony of the reporter Gabriela Sterling, the Court finds that Andrew Gerber read Lily Holzer's testimony during the Court's lunch recess on the day Gerber testified. However, I must agree with the Government that he did not violate Rule 615 or the terms of this Court's sequestration Order. I am not prepared to read further sequestration conditions into Rule 615 beyond what litigants specifically request.

For these reasons, Defendant's motion is denied.

In the United States Court of Appeals for the Fourteenth Circuit

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AUGUST TERM 2020

No. 20-1705

ALEXANDER KENSINGTON,

Defendant-Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court

For the District of Boerum

ARGUED: APRIL 14, 2021

DECIDED: JUNE 16, 2021

Before: CADMAN, ROGERS, and CLASSON, *Circuit Judges*.

OPINION OF THE COURT

CADMAN, *Circuit Judge.*

Defendant-Appellant Alexander Kensington ("Defendant") appeals from a judgment of conviction on August 31, 2020, and a sentence entered on October 8, 2020, by the United States District Court for the District of Boerum, in connection with the destruction of government property, and possession, manufacture, and use of explosive materials, in violation of 18 U.S.C. §§ 844(f)(1), 844(n), and 924(c)(1)(B)(ii). On appeal, Defendant raises three issues challenging his conviction and sentence. For the reasons set forth below, we affirm the rulings of the district court on all issues and hold 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.

Facts

On September 20, 2019, an environmentalist group called the "Planeteers" organized a protest that turned incendiary. During their demonstration at the Boerum Capitol Building, an unknown party detonated a bomb, injuring dozens. Moments later and several blocks away, at the intersection of Araiza Avenue and Caplow Street, a Molotov cocktail was thrown into the front seat of an unoccupied Boerum Police Department ("BPD") car, destroying the vehicle.

Several days after the protest, on September 25, 2019, Lily Holzer, an employee of the Boerum Department of Education, contacted the FBI and submitted to an interview. She told the FBI that on the date and location of the BPD vehicle destruction, she saw a thin white man, approximately 6'4" in height and with a bleached blonde ponytail, throw an incendiary device into a police vehicle. Holzer provided a brief description of the man and explained that she witnessed him fall onto the ground and get up, light a Molotov cocktail, throw the device into the vehicle, and run away limping. On October 5, 2019, Planeteers member Andrew Gerber approached the FBI and stated that based on his longstanding acquaintance with Defendant, the publicized description of the suspect, and rumors he heard through the organization, he believed Defendant was responsible for bombing the BPD vehicle.

On October 9, 2019, the FBI pulled over Defendant's vehicle pursuant to a traffic stop and executed a warrant for the cell phone believed to be used by Defendant. The FBI pressed Defendant's right index finger against the phone's home button, "unlocking" the contents of the cell phone. A forensic search of the cell 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. On October 20, 2019, Holzer identified Defendant from a lineup of six white males fitting the description she had given several weeks prior. Defendant was subsequently taken into custody and indicted.

Prior to the jury trial held before the Honorable Andrew Hicks, United States District Judge, District of Boerum, Defendant filed a motion to suppress the evidence obtained from the cell phone, and a motion *in limine* to admit the expert witness testimony of research psychologist Dr. Jack Closeau on the unreliability of eyewitness identifications and on Holzer's identification of Defendant. Both motions were denied following evidentiary hearings. On August 25, 2020, the Court entered an order of sequestration pursuant to Fed. R. Evid. 615, excluding witnesses from attending the trial except when called to testify.

At trial, the government presented the testimony of Holzer and Gerber, along with evidence seized from Defendant's cell phone, in support of its theory that Defendant threw the Molotov cocktail into the BPD vehicle in furtherance of his increasingly radical Planeteers agenda. At the conclusion of the jury trial, Defendant was convicted on all counts and sentenced to 15 years in prison.

After the conviction, Defendant filed a motion for directed verdict or a new trial, based on a reporter's claim that Gerber had violated the sequestration Order by reviewing Holzer's testimony. Following a hearing, the district court denied the motion. On appeal, Defendant contends that the trial court erred in denying: (1) his motion to suppress evidence taken from his cell phone; (2) his motion to admit the testimony of expert witness Dr. Closeau on the unreliability of eyewitness testimony; and (3) his motion for a directed verdict or new trial based on Gerber's violation of the sequestration order.

Discussion

A. Biometric Data as a Testimonial Statement

This case presents an issue of first impression in the Fourteenth Circuit: whether the Fifth Amendment privilege against self-incrimination prohibits the government from compelling an individual to provide a fingerprint to unlock a seized cell phone.

Defendant contends that the government's seizure of his biometric data to unlock his cell phone constitutes a compelled testimonial statement in violation of his Fifth Amendment right against self-incrimination. Defendant argues that unlocking a phone with a fingerprint is indistinguishable from verbally reciting a four-digit passcode. This argument is meritless.

The Fifth Amendment privilege against self-incrimination "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). The government contends that the biometric feature of a finger imprint is a physical act and is therefore not testimonial. *See Matter of Search Warrant Application for Cellular Telephone in United States v. Barrera*, 415 F. Supp. 3d 832, 839-41 (N.D. Ill. 2019) (holding that "the biometric procedure is first and foremost a physical act"); *accord Matter of White Google Pixel 3 XL Cellphone in a Black Incipio Cas*e, 398 F. Supp. 3d 785, 793 (D. Idaho 2019) ("The application of the fingerprint to the sensor is simply the seizure of a physical characteristic, and the fingerprint by itself does not communicate anything."). The government's position finds support in United States Supreme Court precedent, which has established that compelled

physical acts, such as voice exemplars, *see United States v. Dionisio,* 410 U.S. 1, 8 (1973), and non-consensual blood samples, *see Schmerber,* 384 U.S. at 765, are not testimonial. "The act of exhibiting such physical characteristics" through a compelled voice exemplar or blood sample "is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief." *United States v. Hubbell*, 530 U.S. 27, 34-35 (2000) (citing *Pennsylvania v. Muniz,* 496 U.S. 582, 594-598 (1990)).

In this case, the police stopped and searched Defendant's vehicle pursuant to a valid search warrant. The police found Defendant's cell phone on the car's passenger seat. Defendant argues that when the agents compelled him to place his finger on the phone to unlock it, the agents forced him to engage in a testimonial act because unlocking his phone revealed statements and information evincing his state of mind and thoughts. However, Defendant overlooks the fact that the officers' search of the phone's contents did not compel the *creation* of the information discovered on the phone, all of which was created at some earlier time. Thus, the officers' actions were not violative of the Fifth Amendment. *See Fisher v. United States,* 425 U.S. 391, 409–10 (1976) (holding that "the preparation of all of the papers sought in these cases was wholly voluntary, and [thus] they cannot be said to contain compelled testimonial evidence").

Moreover, unlike when a defendant is compelled to provide testimonial evidence, the procedures that the agents used to conduct the search did not require Defendant to put any thought into unlocking the phone and revealing its contents. In fact, the agents even selected the finger used to open the device. At no point was Defendant asked to say anything in response to questioning, and he was not required to reveal his four-digit passcode. "[P]roducing a fingerprint to unlock a phone, unlike the act of producing documents, is a display of the physical characteristics of the *body*, not of the mind, to the police," and is therefore not testimonial. *See State v. Diamond,* 905 N.W. 2d 870, 875 (Minn. 2018) (citing *Schmerber*, 384 U.S. at 763). Under these circumstances, the Court finds that the compelled use of biometric features is more "akin to the surrender of a safe's key than its combination." *Matter of Search of [Redacted] Washington, D.C.,* 317 F. Supp. 3d 523, 535 (D.D.C. 2018).

Defendant also argues that the compelled use of a fingerprint is incriminating in that it indicates a level of control by the Defendant over the device, and thus obviates the government's burden of proving that Defendant owns or controls the device. In this way, the search is tantamount to an admission of possession. The government responds that the foregone-conclusion exception to the Fifth Amendment articulated in *Fisher*, 425 U.S. at 411, applies in this case. Under this exception, an act of production is not testimonial, at least not to the degree that it is protected under the Fifth Amendment, where the compelled act "adds little or nothing to the sum total of the government's information." *United States v. Fridman*, 974 F.3d 163, 174 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2760 (2021) (citing *Fisher*, 425 U.S. at 411); *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019), *cert. denied sub nom. Pennsylvania v. Davis*, 141 S. Ct. 237 (2020). Here, it was a foregone conclusion that Defendant owned the cell phone. Defendant was alone in the vehicle where the police found the cell phone. In addition, the arresting agents had a warrant that identified Defendant's cell phone as the particular item to be searched. Since the government gained no new information concerning to whom the phone belonged by placing Defendant's finger on the device and unlocking it, the search falls within the

foregone conclusion exception and was not in violation of the Fifth Amendment. *See Fisher*, 425 U.S. at 411.[1]

This Court also rejects Defendant's contention that allowing compelled biometric data pursuant to a search warrant will degrade his dignity and constitutionally enshrined interest in privacy. Defendant chose to install the biometric feature application on the phone. Therefore, he was willing to use his biometric data in this way. In any event, providing a fingerprint is less invasive than a verbal recitation of a four-digit passcode.

The Court holds that the compelled use of a biometric fingerprint is not testimonial and therefore, the police action in question here did not violate the Fifth Amendment.

B. Expert Witness Opinion on Eyewitness Identifications

Defendant's second claim of error is based on the trial court's decision to preclude the testimony of Dr. Jack Closeau. The decision to admit or exclude expert witness testimony depends on "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993). The district court determined that the Defendant's proffered expert witness testimony was not based on scientific knowledge and would not assist the jury in its determination; it further cautioned that admission of such expert testimony would confuse the jury and repeat evidence better explicated through cross-examination and jury instruction. "The exclusion of expert testimony is a matter committed to the sound judicial discretion of the trial judge." *United States v. Kime*, 99 F.3d 870, 883 (8th Cir. 1996).

The *Daubert* analysis is the trial court's means of determining whether scientific expert testimony satisfies Rule 702 of the Federal Rules of Evidence, which provides that "a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

The first prong of the *Daubert* inquiry requires the Court to find that the expert is testifying on the basis of scientific knowledge. Other circuits vary in their determinations of the scientific credibility of experts testifying about eyewitness identifications. *Compare Kime*, 99 F.3d at 883-84 (upholding trial court's determination that the expert's proffered testimony on eyewitness unreliability failed to constitute "scientific knowledge"), *with United States v. Lumpkin*, 192 F.3d 280, 288-89 (2d Cir. 1999) (upholding trial court's determination that proffered expert witness was qualified).

[1] Jesse Coulon, Comment, *Privacy, Screened Out: Analyzing the Threat to Individual Privacy Rights and Fifth Amendment Protections in State v. Stahl*, 59 B.C.L. Rev. E. Supp. 225, 233 (2018), http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/13.

This circuit has not conclusively ruled that eyewitness identification testimony is "scientific," and we decline to hold so now. The trial court properly analyzed Dr. Closeau's expert testimony pursuant to the *Daubert* analysis, specifically inquiring as to (a) whether the 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. *See Daubert*, 509 U.S. at 591–95. Although the expert report, proffered by Defendant, contained references to "many studies" on the unreliability of expert testimony, the trial court could not determine whether the theory could be tested, its potential rate of error, or whether Dr. Closeau's theory was generally accepted by his colleagues.

The trial court also found that the expert's proffered testimony would not be helpful to the jury and thus failed to meet the second prong of the *Daubert* analysis. Assessing eyewitness credibility is the responsibility of the jury. Expert testimony on a topic properly in the ken of jurors is not only unhelpful to the jury, but also threatens to usurp the role of the jury as ultimate fact finders. *See, e.g.*, *Lumpkin*, 192 F.3d at 289.

Even assuming that the proffered testimony satisfied the requirements of Rule 702, the trial court properly determined that the probative value of the expert's testimony was substantially outweighed by its risk of confusing the jury and was therefore inadmissible under Rule 403 of the Federal Rules of Evidence. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595 (internal citations omitted).

Admission of expert testimony on eyewitness credibility risks confusing the jury about its role as the finder of fact. An expert's "aura of special reliability and trustworthiness," *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir**.** 1979), can be fatally suggestive to the average juror, who may replace her own opinion with that of the expert. *See, e.g.*, *Lumpkin*, 192 F.3d at 289; *Kime*, 99 F.3d at 884. Moreover, admission of expert testimony risks confusing the jury by disproportionately emphasizing the extent to which this case rests on a single eyewitness identification. *See, e.g.*, *United States v. Burrous*, 934 F. Supp. 525, 528 (E.D.N.Y. 1996). Here, the Defendant's culpability turns on more than a sole eyewitness identification; significant corroborating evidence also supports Defendant's conviction, the existence of which "buttress[es]" the trial court's decision to exclude such testimony on Rule 403 grounds. *United States v. Hall*, 165 F.3d 1095, 1105 (7th Cir. 1999).

Admission of Dr. Closeau's testimony is also duplicative. The issues that Defendant sought to admit through Dr. Closeau's expert testimony were sufficiently elaborated upon through Defendant's cross-examination of the witness and the trial judge's jury instructions. The expert testimony would simply reiterate, more suggestively and less thoroughly, what has already been articulated to the jury through traditional trial methods. *See, e.g.*, *United States v. Langan*, 263 F.3d 613, 624 (6th Cir. 2001).

Based on our analysis of the requirements of Rule 702, *Daubert*, and Rule 403, we find that the trial court did not abuse its discretion in precluding the expert testimony proffered by Defendant.

C. Scope of the Rule 615 Sequestration Order

On appeal, Defendant raises an issue of first impression in the Fourteenth Circuit: when does a sequestration order, issued pursuant to Fed. R. Evid. 615, extend beyond the exclusion of witnesses from the courtroom? Defendant contends that witness Andrew Gerber's review of another witness's trial transcript prior to Gerber's own testimony violates Rule 615. We hold that a sequestration order does not regulate witness behavior outside of courtroom proceedings unless specifically detailed in the order. Gerber's actions did not violate Rule 615, and in any event, there was no showing that his actions caused sufficient prejudice to warrant granting Defendant's motion for judgment of acquittal or a new trial. Additionally, numerous policy reasons weigh against expanding the default sequestration conditions beyond the language of Rule 615.

The chief obstacle to Defendant's legal argument is that the complained-of behavior does not violate a plain reading of Fed. R. Evid. 615. Rule 615 provides: "At the request of a party the court shall order witnesses excluded *so that they cannot hear the testimony of other witnesses*, and it may make the order of its own motion." Fed. R. Evid. 615 (emphasis added). Other circuits have held that "Rule 615 relates exclusively to the time testimony is being given by other witnesses. Its language is clear and unambiguous." *United States v. Brown*, 547 F.2d 36, 37 (3rd Cir. 1976); *see also United States v. Ali*, 991 F.3d 561, 567 (4th Cir. 2021) (holding that Rule 615 "governs the exclusion and sequestration of witnesses *at trial*") (emphasis added). Sequestration orders under Rule 615 do not forbid all forms of contact with all trial witnesses at all times, unless it is so specified by the trial court in a particular sequestration order. *United States v. Engelmann*, 701 F.3d 874, 877 (8th Cir. 2012). In this case, the trial court's order simply prohibited witnesses from attending trial proceedings "except when they are testifying."

As noted in *United States v. Sepulveda*, Rule 615 "demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires." 15 F.3d 1161, 1176 (1st Cir. 1993). In short, there is a "basic" or "default" form of a sequestration order that adheres to the wording of Rule 615, and reflects it accordingly. This is the type of order we have before us here. Trial courts have the flexibility to craft sequestration orders appropriate for the situation, but parties cannot just rely on Rule 615 to impose greater restrictions; they would have to specifically request the court to expand the scope of the "basic" sequestration order.

We agree with courts that have been loath to infer unspoken restrictions into Rule 615. In *United States v. Smith*, a non-testifying police officer took notes throughout the course of the trial and conveyed this information to sequestered government witnesses who had yet to testify. 578 F.2d 1227, 1236 (8th Cir. 1978). The court concluded that the order was limited to the exclusion of witnesses from the courtroom, particularly because the appellant had not requested that additional conditions be included in the sequestration order. *Id.*

Courts have also declined to find that general interactions between sequestered witnesses outside of the courtroom violate Rule 615. In *United States v. Collins*, 340 F.3d 672 (8th Cir. 2003), the Eighth Circuit concluded that confining sequestered witnesses to the same holding cell pre-testimony did not violate Rule 615. Placing sequestered witnesses in a cell together offers a significant potential for pre-testimony collaboration, far more so than Gerber's brief perusal of

Holzer's transcript. That such arrangements were held to be benign further bolsters our conclusion that no violation occurred here.

There is also the issue of harm. "When … complained-of conduct falls outside of the Rule's text …. [w]e have not presumed prejudice and have required a greater showing by the defendant that he was harmed by out-of-courtroom conversations between witnesses." *Ali*, 991 F.3d at 568. The "failure to request a broader sequestration order, coupled with the speculative nature of their claim of actual prejudice, renders it impossible to find an abuse of discretion[.]" *Sepulveda*, 15 F.3d at 1177.

To the extent that Gerber may have embellished his testimony to corroborate that of Holzer, the trial court found no prejudice to Defendant, and we agree. The decision of whether to find Gerber or Holzer's testimony credible was up to the jury. In *United States v. Womack*, witnesses sequestered under a "basic" Rule 615 framework admitted that while in the government's witness room, they discussed prior witness testimony and "prospective answers to anticipated questions." 654 F.2d 1034, 1040 (5th Cir. 1981). However, the Fifth Circuit found that Womack was not so prejudiced by the alleged Rule 615 violation so as to require a new trial, in part because the prosecution witnesses' testimony was not only corroborated by the other evidence but also went uncontradicted at trial. *Id.* at 1040–41. The same reasoning applies here. Even if the trial judge had granted the motion for post-conviction relief and ordered a new trial, Defendant would still need to contend with Holzer's testimony and the evidence from his phone.

Finally, we are uncomfortable with usurping the trial court's discretion to shape Rule 615 orders as it sees fit, because the great weight of case law grants significant latitude to trial courts in these situations. We fail to see how inserting unspecified conditions into the "default" Rule 615 order would improve judicial outcomes. Moving parties should simply articulate their witness sequestration requests with greater specificity, if the situation so warrants.

Conclusion

For the foregoing reasons, the rulings of the district court are affirmed.

Rogers, Circuit Judge, dissenting.

For the reasons stated below, I disagree with the majority and would reverse the district court's denial of Defendant's motions to suppress the biometric evidence and to admit the expert testimony, and the district court's denial of Defendant's post-trial motion for a directed verdict or a new trial.

A. Biometric Data as a Testimonial Statement

In holding that the compelled production of biometric data to unlock a cellular phone is not a testimonial statement and subject to the Fifth Amendment's privilege against self-incrimination, the majority relies on the formalist distinction of whether biometric data can be

classified as physical or mental. The majority misconstrues Supreme Court precedent that clearly establishes that certain physical acts aimed at obtaining evidence can elicit physiological responses that are testimonial, like lie detectors. *See Schmerber v. California*, 384 U.S. 757, 764 (1966). When faced with this very issue, district courts have analogized Touch ID technology with lie detector tests and found the compelled unlocking of a smartphone with biometric data to be a testimonial statement. *See United States v. Wright*, 431 F. Supp. 3d 1175, 1187 (D. Nev. 2020); *Matter of Residence in Oakland, California,* 354 F. Supp. 3d 1010, 1016 (N.D. Cal. 2019). Ending their analysis on the dichotomy between physical acts and mental thought processes, the majority fails to properly evaluate the implications of compelled production of biometric data to unlock a smartphone.

Compelled statements that force a person "to disclose the contents of his own mind" implicate the privilege against self-incrimination. *Doe v. United States*, 487 U.S. 201, 211 (1988) (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957)). Courts, when addressing the issue of compelling a suspect to unlock their cell phone through passcodes or biometric keys, have stated that it "bears a striking similarity to 'telling an inquisitor the combination to a wall safe.'" *United States v. Maffei*, No. 18-CR-00174-YGR-1, 2019 WL 1864712, at *6 (N.D. Cal. Apr. 25, 2019) (quoting *United States v. Hubbell*, 530 U.S. 27, 43 (2000)). Providing biometric data is no different than providing an alphanumeric passcode to law enforcement *See United States v. Warrant*, No. 19-MJ-71283-VKD-1, 2019 WL 4047615 (N.D. Cal. Aug. 26, 2019). Additionally, "an act of production can be testimonial when that act conveys some explicit or implicit statement of fact that certain materials exist, are in the subpoenaed individual's possession or control, or are authentic." *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1345 (11th Cir. 2012) (citing *United States v. Hubbell*, 530 U.S. at 36).

When the Defendant was stopped and seized by law enforcement, the agents compelled him to put his finger on his iPhone to activate the Touch ID feature. It was not just a physical act as the majority posits. Since this feature must be activated by the user and their unique fingerprint information, the successful unlocking of the phone simultaneously revealed the contents of the Defendant's mind (that he had previously set up the Touch ID), that he possessed or controlled the phone, and that he was responsible for the contents within. Because the Defendant has a constitutional right to not incriminate himself, evidence resulting from the unlocked iPhone should have been suppressed and not admitted at trial in the Government's case in chief.

In endorsing expansively broad and discretionary powers for law enforcement, the majority adopts the foregone conclusion exception without proper consideration. A more searching and frankly thoughtful analysis is in order before extending the foregone conclusion exception to the compelled unlocking of a smartphone. *See Seo v. State*, 148 N.E.3d 952, 958-62 (Ind. 2020) (declining to adopt the foregone conclusion in part because smartphones serve many other functions and "unbridled access" to applications that were potentially password protected and encountering cloud-based storage services would raise "complex questions[.]"). Additionally, law enforcement could use any number of other means to retrieve the information they sought for their investigation. What law enforcement should not be able to do, is have carte blanche and access to a seemingly infinite amount of information the moment a smartphone is unlocked.

"[T]he constitutional foundation underlying the 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). In *Carpenter v. United States*, Chief Justice Roberts stated, "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" 138 S. Ct. 2206, 2214 (2018) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). These privacy and dignitary interests must not fall to overreach by law enforcement.

Today, this Court has tipped the scales of justice against those who become targets of an investigation without adequately assessing the implications of its decision. Simultaneously, the Court has broadened police discretion by expanding the foregone conclusion exception and given federal prosecutors an ad hoc balancing test to apply in using what is clearly a testimonial statement against defendants. Despite the rapid advances in technology in our modern society, the majority would look to antiquated principles, simplifying a person's fingerprint to either a lock or a key, and deciding their rights thereafter.

B. Expert Witness Opinion on Eyewitness Identifications

I also take issue with the majority's holding on the second issue before the Court. "There is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says[,] 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original). Accordingly, despite their elevated level of unreliability, juries have consistently been persuaded by eyewitness identifications. Courts widely and increasingly recognize that eyewitness identifications are inherently unreliable, a trend supported by a growing body of research. *United States v. Wade*, 388 U.S. 218, 228 (1967) ("[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"). Nonetheless, the majority erroneously upheld the lower court's decision to exclude expert testimony on the unreliability of eyewitness identifications.

I am afraid that the circumstances of this case only amplify the concerns associated with eyewitness identifications. The majority holds that the testimony of an expert on eyewitness identifications fails to assist the jury as required by *Daubert* and Rule 702 of the Federal Rules of Evidence. However, this holding blatantly ignores the advancements of science and instead comports with the outdated, traditional rule of excluding such expert testimony.

The majority contends that admitting the testimony of Dr. Jack Closeau would usurp the role of the jury as ultimate fact finders. Although it is true that jurors are afforded the responsibility of determining a witness's credibility, such a determination cannot properly be made when lay persons are not aware of the "psychological factors which influence the memory process." *United States v. Smithers*, 212 F.3d 306, 311 (6th Cir. 2000). To make matters worse, "jurors tend to be unduly receptive to, rather than skeptical of, eyewitness testimony." *Id.* at 315–16.

It is therefore vital that an expert be permitted to describe to the jury the fallibility of memory, the relationship between human accuracy and confidence, the effects of cross-racial identifications, the likelihood of unconscious transference, the impact of weapons on an eyewitness's focus, and other related issues. Jurors are not scientists; for this reason, courts have increasingly recognized the value of expert testimony to a jury. *See Young v. Conway*, 698 F.3d 69, 78–79 (2d Cir. 2012).

Nearly all of the factors to which eyewitness identification experts routinely testify were present in this case. Eyewitness Lily Holzer was under significant stress at the time of the crime as she claims to have seen Defendant throw a flaming Molotov cocktail into a police vehicle only moments after a massive explosion took place nearby at the Capitol. Additionally, the witness and Defendant are of different races. *See United States v. Nolan*, 956 F.3d 71, 80 (2d Cir. 2020) ("It is well established that eyewitnesses are materially less accurate when identifying individuals of a different race … or a different ethnicity …"). Moreover, she first identified Defendant thirty days after the crime. In fact, immediately after Holzer claims to have witnessed Defendant, she described the rest of her afternoon as "fuzzy" and did not even remember how she got home.

The majority relies on the success of cross-examination and jury instructions to prevent a wrongful conviction. Although cross-examination is a powerful tool that can be used to undermine a witness's credibility, there are aspects of psychology and research that cannot be adequately reached through counsel's own questioning. Further, while cross-examination seeks to uncover the truth, the concern with eyewitness identifications is not the fact that a witness is lying, but rather, that the witness is mistaken, and thus, unreliable. *See United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009).

After erroneously concluding that the expert in this case would not have assisted the trier of fact, the majority holds that, even if such testimony were to be found relevant, it nonetheless should be excluded pursuant to Rule 403 of the Federal Rules of Evidence because the probative value of the testimony is substantially outweighed by its prejudicial effect. This ruling sacrifices justice in the interest of saving time. Failure to educate the jury on information they otherwise are not aware of, means that the jurors here were making a decision blindly. In the interest of justice, the trial court should have allowed expert witness Dr. Closeau to testify as to the particular matters set forth in his expert report.

C. Scope of the Rule 615 Sequestration Order

It remains an open question in our circuit as to whether Rule 615 of the Federal Rules of Evidence not only bars a sequestered witness from attending a trial or hearing, but also prohibits the witness from viewing transcripts of other witnesses' testimony. For the public policy reasons explained below, I would answer that question in the affirmative and hold that, in this case, Andrew Gerber's conduct constituted a violation of the witness sequestration order. Moreover, given the egregiousness of Gerber's conduct—reading a prior witness's testimony to potentially tailor his own—I believe the trial court abused its discretion by denying the Defendant's motion for post-conviction relief.

"The purpose of the sequestration rule 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). The Fifth Circuit has also recognized that a witness can tailor its testimony from reading a trial transcript just as easily as if the witness heard testimony in court. *Id.* Indeed, the harm to a fair trial from witnesses tailoring their testimony "may be even more pronounced" from reading a transcript than listening to testimony in court because they "need not rely on [their] memory" and can recall the transcript when tailoring their own testimony. *Id.* Moreover, given their above-stated purpose, sequestration orders would be meaningless if the witnesses subject to them could avoid violating them by just reading testimony they would otherwise be prevented from hearing in court. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018).

Gerber's conduct in this case is a textbook example of why this circuit should find on first impression that a witness who views a trial transcript of another witness's testimony violates a sequestration order under Rule 615. As the witness Gabriela Sterling testified, Gerber was aware of the sequestration order, acted furtively in the courtroom since he knew he should not have been reading Holzer's transcript, and his testimony improbably echoed that of Holzer. Given Gerber's soured relationship with Defendant after their falling out at the Planeteers, the risk of Gerber's conduct prejudicing the Defendant is evident.

It is true, as the majority notes, that under a plain reading of the witness sequestration order, Gerber was not barred from reviewing a transcript of another witness's testimony. However, the Rule's underlying purpose is to prevent collusion or tailored testimony, and the majority errs by sacrificing substance upon the altar of form. Under the majority's reasoning, it would have been a violation of the sequestration order for Gerber to have been in the courtroom while Holzer was testifying. Yet, because Gerber walked into that same courtroom—the day after Holzer testified—and read the transcript of her testimony during a lunch recess, he did not violate the order. This reasoning strains credulity and is poor public policy.

Moreover, the majority incorrectly ascribes harmless error to Gerber's conduct. Gerber's recounting of key facts from the night of the bombing suggests he shaped his testimony based on what he read from the transcript of Holzer's in-court testimony. Specifically, Gerber did not include these details in his prior statements to law enforcement and he would not have known about the fleeing suspect's limp or use of the "Fossil Fools" slogan had he not reviewed Holzer's transcript. Ultimately, Gerber's violation of the sequestration order prejudiced the Defendant by reinforcing Holzer's eyewitness account with testimony that was arguably tainted by the transcript reading.

For the above-mentioned reasons, I respectfully dissent.

No. 21 – 778

Supreme Court of the United States

ALEXANDER KENSINGTON,
Petitioner,

---against---

UNITED STATES OF AMERICA,
Respondent.

Date: November 15, 2021

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

I. Whether compelling the subject of a warrant to use their fingerprint to unlock a smartphone is a testimonial statement in violation of the Fifth Amendment privilege against self-incrimination.[1]

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

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

[1] Note to Competitors: Competitors are instructed not to address any Fourth Amendment arguments in connection with the First Certified Question.