SUPREME COURT OF THE UNITED STATES

BENJAMIN BLAND,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether petitioner's Sixth Amendment right to confront witnesses against him was violated where a spreadsheet (Government's Exhibit MD-3B) created by the Social Security Administration ("SSA") at the request of the lead government agent solely for use at petitioner's trial was introduced into evidence without presenting a witness from the SSA or otherwise subjecting a witness from the SSA to cross-examination and where the spreadsheet supplied an integral part of the government's proof and, therefore, was not harmless beyond a reasonable doubt.

LIST OF PARTIES

Petitioner, Benjamin Bland, is a natural person. Respondent is the United States of America.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

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United States v. Benjamin Bland, United States Court of Appeals for the Fourth Circuit, No. 17-4525, April 3, 2018 (per curiam) (unpublished). Petition for Rehearing *en banc* denied May 14, 2018.

BASIS OF JURISDICTION

The judgment of the United States District Court for the District of Maryland was affirmed by the United States Court of Appeals for the Fourth Circuit on April 3, 2018. A Petition for Rehearing *en banc* was denied on May 14, 2018.

Jurisdiction of this case is grounded on 28 U.S.C. sec. 1254(1) and Article III, Section 3, Clause 1 of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

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

U.S. Const., Amend. VI.

STATEMENT OF THE CASE

On November 6, 2013, a sealed indictment was filed in the United States District Court for the District of Maryland, charging Michael Westbrook with nine counts of social security fraud and eight counts of aggravated identity theft. *J.A., 13.*[1] On January 28, 2014, a sealed superseding indictment was filed charging Westbrook, Donneltric Johnson, and Anthony Simpson with conspiracy to commit wire fraud and three counts of wire fraud. *Id.* The superseding indictment also charged Westbrook with two counts of aggravated identity theft and Johnson and Simpson each with one count of aggravated identity theft. *Id.* Westbrook solely was charged with five counts of social security fraud and five counts of aggravated identity theft. *Id.* Westbrook, Simpson and Johnson were also named in a forfeiture count. *Id.*

On August 5, 2014, Johnson pled guilty to the conspiracy count. *J.A., 17.* The remaining counts against him were dismissed. *Id.*

On October 14, 2014, a sealed second superseding indictment was filed charging Westbrook, Simpson, and petitioner with one count of conspiracy to commit wire fraud, four counts of wire fraud. and one count of aggravated identity

[1] J.A. refers to the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit.

theft. *Id.* Westbrook and petitioner were additionally charged with six counts of aggravated identity theft and five counts of social security fraud. *Id.* A forfeiture count named all three defendants. *Id.*[2]

On January 4, 2016, Westbrook pled guilty to the conspiracy count and one count of aggravated identity theft. *J.A., 17.5.* The remaining charges against Westbrook were dismissed. *Id.* Westbrook then testified at petitioner's trial pursuant to a cooperation agreement. *J.A., 172.*

On July 11, 2016, Simpson pled guilty to the conspiracy count. *J.A., 17.8.* The remaining charges against Simpson were dismissed. *Id.*

On August 31, 2016, a third superseding indictment was filed. *J.A., 17.10.* It omitted Johnson and Simpson and charged petitioner with one count of conspiracy to commit wire fraud, three counts of wire fraud, five counts of social security fraud, and one count of aggravated identity theft. *Id.* It also included a forfeiture allegation. *Id.*

In a pretrial motion in limine, the government requested admission at trial without the presence of a live witness of a spreadsheet created by the SSA at the

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[2] On July 27, 2016, the district court granted the government's motion to amend the second superseding indictment to correct clerical mistakes. *J.A., 17.8.* The substantive charges remained the same. The amended second superseding indictment was filed the same day. *Id.*

request of its lead agent, Department of Homeland Security ("DHS") Special Agent Marc DiPaola, which contained Social Security Numbers ("SSNs"), names of persons to whom the SSNs were assigned, dates of birth of those persons, the dates the SSNs were established, and a "replacement date". *J.A., 17.12, 727-740.* The defense filed a written opposition raising a Confrontation Clause objection. *J.A., 17.13, 33-35.* After hearing oral argument, the district court granted the government's motion. *J.A., 38-41.* The spreadsheet was admitted into evidence as Government's Exhibits MD-3B. *J.A., 709, 891-901.* In addition, information contained in Government's Exhibit MD-3B was used to create a second spreadsheet, Government's Exhibit MD-12, which was also introduced into evidence. *J.A., 706, 709, 912-916, 1437-1440.*

Jury trial commenced before the Honorable District Judge J. Frederick Motz on April 17, 2017. *J.A., 17.13.* On April 21, 2017, the jury returned guilty verdicts on the conspiracy, wire fraud, and social security fraud counts, but was unable to reach a verdict on the aggravated identity theft count. *J.A., 17.14.*

On August 4, 2017, petitioner was sentenced to concurrent terms of incarceration of 66 months on the conspiracy and wire fraud counts and 60 months on the social security fraud counts. *J.A., 17.16, 720-725.* A three-year term of supervised release was also imposed. *Id.* An assessment of $900.00 was assessed. *Id.* No restitution was ordered. *Id.* The aggravated identity theft count was

dismissed on government motion. *J.A., 17.16.* Judgment was entered on August 8, 2017. *Id.* An appeal to the Fourth Circuit was timely noted on August 20, 2017. *J.A., 17.17, 726.*

The United States Court of Appeals for the Fourth Circuit affirmed petitioner's conviction in an unpublished opinion on April 3, 2018. A petition for rehearing and rehearing *en banc* was denied on May 14, 2018.

STATEMENT OF FACTS

Petitioner operated a company, New Credit History, which offered credit repair services to persons with bad credit. *J.A., 463-467.* For a fee, petitioner would accept applications from persons with bad credit and issue a secondary credit number ("SCN"). *Id.* Petitioner would then instruct his customers on how to use the SCN in place of an SSN in order to create a new credit history. *Id.*

The government alleged that the SCNs were actually SSNs belonging to persons other than petitioner's customers, hence the counts of social security fraud and wire fraud. *J.A., 3.* In order to prove the government's allegations at trial, the lead agent, DHS special agent Marc DiPaola submitted to the SSA SCNs recovered from Westbrook's email account. *J.A., 353-354.* The SSA responded by creating a spreadsheet containing SSNs corresponding to the SCNs, the date of birth of that person to whom each SSN was assigned, the date the SSN was issued, and a "replacement date. *J.A., 354, 891-901.*

DiPaola also submitted to the SSA SCNs purchased by an undercover DHS agent from Westbrook and those numbers appearing on the cards recovered during the execution of a search warrant at petitioner's home office. *J.A., 355-356.* The SSA included these numbers on spreadsheet as well. *J.A., 356, 891-901.* The spreadsheet was introduced into evidence as Government's Exhibit MD-3B

without the benefit of the testimony of the person who created it. *J.A., 709, 891-901.* Government's Exhibit MD-3B is included in the appendix to this Petition.

DiPaola then took a sample of numbers (140 out of 1,500) from Westbrook's email account and sent those numbers to Capital One Bank. *J.A. 367, 407.* With the response DiPaola received from Capital One Bank combined with the response he received from the SSA relating to the SCNs, DiPaola prepared a second spreadsheet, Government's Exhibit MD-12. *J.A., 367-368, 417-418, 912-916.* The first column of Government's Exhibit MD-12 contained numbers provided to the undercover agent by Westbrook. *J.A., 368.* The second column contained either the name of the person who purchased the SCN or the name of the person associated with the SCN. *Id.* The third column is the "true owner" of the SSN as supplied by the SSA. *Id.* The fourth column is the "true owner's" date of birth as supplied by the SSA. *Id.* The fifth column is the date the SSN was established with the SSA. *Id.* The sixth column contained the "corresponding email date from New Credit History", and the last column indicated whether a Capital One account was opened. *Id.*

The first four lines of Exhibit MD-12 correspond to the numbers purchased by the informant from Westbrook. *J.A. 369-370.* The next two lines correspond to the numbers sold by Westbrook to Simpson and Johnson. *J.A., 370-371.* The next five lines correspond to the SCNs purchased by the undercover agent from

Westbrook. *Id.* They correspond to the numbers listed in Count 9 of the third superseding indictment.

Government's Exhibits MD-3B and MD-12 were introduced into evidence at petitioner's trial. *J.A., 706, 709.* Exhibit MD-3B was introduced into evidence without the benefit of the testimony of the person who prepared the document. *J.A., 41, 709.* Exhibit MD-12 was prepared with data generated from Exhibit MD-3B. *J.A., 367-368, 417-418, 912-916.* The government conceded that these documents "formed an integral part of the government's case", and that any error was, therefore, "not harmless". *Gov. Br., p. 19, n. 2.*

REASONS FOR GRANTING THE PETITION.

I. This Case Is Worthy of This Court's Review.

This case is important to the administration of criminal trials in federal courts. Many federal criminal cases are document intensive. Documents are frequently admitted without live testimony of the person who created the documents. In these cases, a conviction or an acquittal often depends on documentary evidence which, in turn, depends on whether the Sixth Amendment's Confrontation Clause has been satisfied.

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) sets out parameters of when, consistent with the Confrontation Clause, documents can be introduced into evidence as business records without the sponsorship of a live witness to be cross-examined. The dichotomy set forth in *Melendez-Diaz* is this: a record is a business record if it is kept in the regular course of the business of the administrative agency, but it is not a business record (and hence its admission violates the Confrontation Clause) if it is *created* for the purpose of introduction into evidence at a criminal trial. Thus, whether the admission of a record violates the Confrontation Clause centers around the verb *create.*

In its Motion in Limine the government disingenuously states that Government's Exhibit MD-3B was "extracted" from the records of the SSA. This

is not so. Government's Exhibit MD-3B was not "extracted" whole from the mass of records contained at the SSA. Even a cursory inspection of Government's Exhibit MD-3B, reproduced in the appendix, shows that it is not a record regularly kept in the records of the SSA. Rather, it appears to be cobbled together, that is, *created* from various sources at the request of the lead government agent for the sole purpose of use at petitioner's trial. As the government concedes, Government's Exhibit MD-3B was an "integral" part of its case against petitioner and, therefore, not harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).[3]

If the government is permitted to manipulate its data into forms not kept in the regular course of business and introduce the newly created record as a business record, in document intensive cases, the Confrontation Clause will be eviscerated and many criminal defendants will be convicted in violation of the Confrontation Clause.

[3] The issue was fully briefed and argued in the District Court. Therefore, review is *de novo. Chapman, supra.*

II. The Decision of the United States Court of Appeals for the Fourth Circuit Is Wrong Because It Conflicts with This Court's Decisions in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

A. The *Melendez-Diaz* Two Part Test.

The Sixth Amendment guarantees a criminal defendant the right to confront witnesses against him. *U.S. Const., Amend. VI.* The primary purpose of this right is to guard against testimonial hearsay. *Crawford v. Washington,* 541 U.S. 36, 53 (2004). Testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant has had the opportunity to cross-examine the declarant. *Id., p. 54.* A statement is testimonial if it is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact". *Id., p. 51, citing N. Webster, An American Dictionary of the English Language (1828).*

Affidavits, whether denominated as such or termed "certificates", when made under circumstances which would lead an objective witness to reasonably believe that they will be available for use at trial fall within the core class of statements deemed "testimonial". *Melendez-Diaz at 310. Melendez-Diaz* holds that introduction into evidence of certain, but not all, business records is permissible notwithstanding the Sixth Amendment's Confrontation Clause. To be admissible under *Melendez-Diaz*, the record sought to be introduced must (1) be a business record, that is, kept in the regular course of business and not created for

use at trial, and (2) be non-testimonial, that is, not intended or reasonably expected for use at trial. Neither prong is met in this case.[4]

Documents regularly kept in the ordinary course of business may be admissible notwithstanding their status as hearsay, but not when the regular course of business is production of evidence for use at trial. *Id., p. 321.* A clerk or other custodian may certify a regularly kept record as accurate, but the clerk may not *create* a record for use at trial. *Id., pp. 322-323.* The distinction between truly business records and testimonial statements is that the former are created for an administrative purpose related to the entity's affairs, not for use at a criminal trial. *Id., p. 324.* Thus, the dichotomy set forth in *Melendez-Diaz* is whether the records at issue are pre-existing agency records or were created for the purpose of use at trial. The exhibits at issue in this case were not pre-existing records of the SSA. Rather, they were *created* solely for use at petitioner's trial at the request of the lead agent. It is undisputed that Government's Exhibit MD-3B did not exist prior to petitioner's trial; that it was prepared at the request of the lead government agent; and that its sole purpose was for use at petitioner's trial. Its admission into

[4] Petitioner recognizes that to an extent these two prongs may overlap in certain circumstances. A record created solely for use at trial and non-existent otherwise would not be kept in the regular course of business.

evidence without the benefit of cross-examination violated the Confrontation Clause as established by *Melendez-Diaz.*

B. Government's Exhibit MD-3B Is Not a Business Record Because It Was Created at the Request of the Lead Government Agent for Use at Petitioner's Trial.

In this case, Government's Exhibit MD-3B was created solely at the request of Special Agent DiPaola for use at petitioner's trial to prove the government's allegations. The SSA responded to DiPaola's request by creating a spreadsheet, Government's Exhibit MD-3B, containing the information requested by DiPaola. DiPaola then took the information received by the SSA and created a second spreadsheet and then added information similarly obtained from Capital One. The resulting spreadsheet, Government's Exhibit MD-12, was also admitted at trial.

The spreadsheet created by the SSA was not kept in the regular course of business of the SSA. It was created to respond to DiPaola's request for information to be used at trial. That the certification accompanying the spreadsheet states that the information contained in the spreadsheet is accurate does not transform the spreadsheet into non-testimonial information. Indeed, the certification states that the spreadsheet is a "true extract" from the SSA records. Thus, it is not a record kept in the regular course of SSA business. It was created

as an "extract" for the purpose of proving an element of the government's case at trial.

It strains credulity to suggest that there exists in the regularly kept records of the SSA a document which contains precisely the information needed by the government to convict petitioner and nothing else. It further strains belief that the record would be in an easily understood format which would allow prosecutors to focus a jury's attention on exactly what was needed for conviction exactly in the same matter as Government's Exhibit MD-3B. Indeed, one page of Government's Exhibit MD-3B contains the case caption "United States v. Benjamin Bland" on the very top of the page, a certain indication that it was prepared for litigation and not kept in the regular course of the SSA's business.

Petitioner respectfully submits that a person could go to SSA headquarters outside of Baltimore and review each of the millions of records kept by the SSA and research every bit, byte, kilobyte, megabyte, gigabyte, and terabyte of electronically stored information contained in databases stored at SSA and that person would not find Government's Exhibit MD-3B. Government's Exhibit MD-3B exists in one place and one place only, the record of petitioner's trial. It did not exist prior to the government's indictment of petitioner, and its relevance ended at the conclusion of petitioner's trial. It is not, therefore, a business record; it has no administrative purpose; it was created solely for use at petitioner's trial at the

request of the lead agent in the case. It, therefore, fails the first prong of the *Melendez-Diaz* test.

Likewise, a search of SSA records would not reveal a record of which Government's Exhibit MD-3B would be a subset. Relying on *United States v. Keita,* 742 F.3d 184 (4th Cir. 2014), *United States v. Mallory,* 461 F. App'x. 352 (4th Cir. 2012) (unpublished), *United States v. Cabrera-Baltran,* 660 F.3d 742 (4th Cir. 2011), *United States v. Berry,* 683 F.3d 1015 (9th Cir. 2012), and *United States v. Yeley-Davis,* 632 F.3d 673 (10th Cir. 2011) the government in the Circuit Court argued that Government's Exhibit MD-3B was admissible as a subset of SSA records. The government's reliance is grossly misplaced. In each of the cases cited by the government the record that was admitted into evidence was, in fact, a business record, albeit a subset of all of a certain type of business records kept by the agency or company.

For example, in *Keita,* American Express common point of purchase reports were properly admitted over Confrontation Clause objection. Not every common point of purchase report maintained by American Express was admitted into evidence, but the relevant subset that was introduced into evidence consisted of actual business records maintained by American Express for an administrative purpose unrelated to the defendant's trial. No manipulation or alteration of the records was done. No new record was created. The records as they had existed at

American Express prior to commencement of the litigation were introduced into evidence.

Similarly, the FedEx tracking records admitted in *Mallory,* the TECS records admitted in *Cabrera-Baltran,* the SSA applications admitted in *Berry,* and the cell phone records admitted in *Yeley-Davis* were all business records and subsets of the universe of business records kept by the subject entity. It was unnecessary to admit all the American Express common point of purchase reports, all FedEx tracking records, all TECS records, all SSA applications, or all cell phone records, but those that were admitted were pre-existing business records. A portion of those pre-existing records, presumably that portion that was relevant to an issue at trial, sufficed for admission so long as the records actually admitted were, in fact, business records not created for the purpose of introduction as evidence at a criminal trial.

In contrast, Government's Exhibit MD-3B is a subset of nothing except perhaps a subset of the government's trial exhibits. It was created by assembling information from various sources, manipulating that information, and creating a new document solely for use at petitioner's trial. The exhibit has no administrative purpose whatsoever.

C. Government's Exhibit MD-3B Is Testimonial.

The second part of the *Melendez-Diaz* test is that, in order to be admissible over Confrontation Clause objection, the business record must be non-testimonial. A business record is testimonial if it is created for the sole purpose of producing evidence against a defendant. *Melendez-Diaz, at 323.*

Government's Exhibit MD-3B was created solely for the purpose of producing evidence against petitioner. Special Agent DiPaola requested information from the SSA. The SSA responded with the spreadsheet that is Government's Exhibit MD-3B. It sole purpose and use was as evidence against petitioner.

The act of "extracting" in order to create a new document for the purpose of creating evidence for introduction at a criminal trial renders the spreadsheet testimonial. Thus, the SSA's spreadsheet constituted testimonial hearsay under *Melendez-Diaz.* Incorporating the information contained in the SSA's spreadsheet into the second spreadsheet created by DiPaola, Government's Exhibit MD-12, only furthered the Sixth Amendment Confrontation Clause violation.

The fact that DiPaola was available for cross-examination regarding his spreadsheet does not vitiate or in any way mitigate the Confrontation Clause violation as it relates to the SSA's spreadsheet. Because the person who created

the SSA's spreadsheet did not testify at trial and because that information was used at trial without the benefit of confrontation, admission of the information contained in that spreadsheet violated the Confrontation Clause. *Crawford, supra.*

D. Government's Exhibit MD-3B Lacks the Reliability[5] upon Which Both the Business Records Exception to the Hearsay Rule and the Confrontation Clause Are Based. Therefore, Cross-Examination of the Exhibit's Creator Is Essential.

It is difficult to imagine how Government's Exhibit MD-3B would be of any use to the SSA once this litigation is concluded. Unlike the American Express common point of purchase reports, the FedEx tracking reports, the TECS records, the SSA applications, and the cell phone records noted in the cited cases, Government's Exhibit MD-3B will not be returned to the SSA for further administrative use. Its purpose has been achieved and is exhausted.

Because it has no administrative use, the reliability on which the business records exception to the hearsay rule and the Confrontation Clause depend is absent. There is no need for Government's Exhibit MD-3B to be reliable or

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[5] Petitioner acknowledges that *Crawford* overruled the reliability test used in *Ohio v. Roberts,* 448 U.S. 56 (1980). Nevertheless, *Crawford* and *Melendez-Diaz* continue to recognize and, indeed, emphasize that cross-examination as espoused in the Confrontation Clause is the one Constitutionally mandated means of assuring evidentiary reliability and that cross-examination cannot be conducted without the presence of a live witness.

accurate because it is not to be used for the business of the SSA. Furthermore, because Government's Exhibit MD-3B is not a business record, it is unlikely that any errors would be discovered in the ordinary course of business and corrected. Cross-examination of the creator of the document is essential to assure its accuracy.

Cross-examination of the SSA personnel who prepared Government's Exhibit MD-3B would have exposed any bias or favoritism toward the government that was prosecuting alleged misuse of SSA numbers. It would have also exposed any errors in transcription or transference from the raw data to the exhibit and the transposing any of the thousands of numbers that this case involved.

III. The Decision of the United States Court of Appeals for the Fourth Circuit Conflicts with the Decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011).

The Fourth Circuit's decision in this case conflicts with the holding of the District of Columbia Circuit in an analogous case, *United States v. Smith,* 640 F.3d 358 (D.C. Cir. 2011). In *Smith,* the District of Columbia Circuit held that a Confrontation Clause violation occurred where, in a felon-in-possession case, the government introduced a certified letter from the clerk of the Supreme Court of New York, Queens County, attesting that the court records reveal that the

defendant had a felony conviction. The clerk did not certify and produce the court's official record of conviction. Instead, he created a new record that was not kept in the regular course of the court's business and certified that newly created record as accurate. The District of Columbia Circuit found a Confrontation Clause violation and reversed the felon-in-possession conviction.

Like the certified letter in *Smith,* the certified spreadsheet (Government's Exhibit MD-3B) sent by the SSA in response to DiPaola's request and used by DiPaola to develop the second spreadsheet (Government's Exhibit MD-12) was not kept in the regular course of the business of the SSA. Like the certification in *Smith,* it was created in response to the government's request solely for use at trial. Therefore, it was testimonial hearsay and its admission violative of the Confrontation Clause.

IV. The Decision of the United States Court of Appeals for the Fourth Circuit Conflicts with Other Fourth Circuit Precedent.

The Fourth Circuit's decision in this case conflicts with two other cases from the Fourth Circuit: *United States v. Keita, supra* and *United States v. Cabrera-Beltran, supra.* In *Keita,* the Fourth Circuit found that "common point of purchase reports" generated daily by American Express for the purpose of identifying fraud were non-testimonial under *Melendez-Diaz* because their purpose was

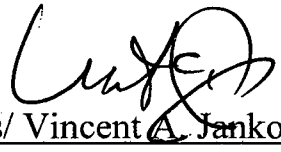
administrative related to the affairs of American Express. The reports were not created for use at trial. In *Cabrera-Beltran,* the Fourth Circuit held that Treasury Enforcement Communication Systems ("TEC") records generated by the Department of Homeland Security to monitor who was entering the country were non-testimonial because their purpose related to the affairs of the agency and were not generated for use at the defendant's criminal trial. In the present case, like *Smith,* and in contrast to *Keita* and *Cabrera-Beltran,* the SSA spreadsheet was created for the purpose of responding to DiPaola's request for evidence at trial.

V. THE GOVERNMENT'S POSITION WOULD EVISCERATE THE CONFRONTATION CLAUSE.

In conclusion, the government's position would eviscerate the Confrontation Clause. If the government's position was accepted, the government could take information from various sources within an agency's records or from the records of multiple agencies, manipulate the information into a format that suits it prosecutorial purposes at trial, create a new record that no one at any agency has ever or will ever rely upon for an administrative purpose, introduce the new record into evidence without the benefit of the testimony of the creator of the record, and claim exemption from the Confrontation Clause thereby precluding cross-examination into whether the manipulation and creation was correctly done. This should not be.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.



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