R3

No. 15-1789

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN CREED,

Respondent.

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

BRIEF FOR RESPONDENT

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether the Fourth Amendment requires that, to obtain 60 days of geolocation data pertaining to a criminal defendant's cellular phone from a wireless service provider, the Government must secure a warrant issued upon probable cause and not merely an order pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d).

II. Whether, as a matter of law, the court in its role as the gate keeper of unreliable hearsay may bar the admission of evidence under Federal Rule of Evidence 803(16) when it lacked additional indicia of reliability so that the document is in a condition that creates no suspicion about its authenticity, under Federal Rule of Evidence 901(b)(8).

III. Whether admitting a testimonial, unconfronted dying declaration under Federal Rule of Evidence 804(b)(2) violates a criminal defendant's Sixth Amendment right of confrontation under *Crawford v. Washington*.

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OPINIONS BELOW

The Fourteenth Circuit's opinion, regarding Appellant's interlocutory appeal, is unpublished, but is reproduced on the Record on pages 46 through 60. The accompanying order number is Cr. No. 14-92. The District Court's oral ruling on John Creed's motion to suppress evidence, obtained in violation of his Fourth Amendment rights from AB&C Wireless, and motions to exclude unreliable evidence is similarly unpublished. It is reproduced on the Record on pages 40 through 45, and is order number 14-92.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

This case concerns an unlawful search of Respondent's historical cell site location information obtained without a warrant based upon probable cause, and the exclusion of an out of court testimonial statement. Accordingly, this case involves discussion of the Fourth and Sixth Amendments. The relevant provisions are as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

This case also involves the Secured Communications Act of 2009, codified at 18 U.S.C. § 2703. In submitting its request to Judge Margaret Silvers, in this case, the government did not seek to obtain a warrant under section 2703(c)(1)(A). Rather, the government sought a court order under section 2703(d). The relevant provisions are as follows: "A governmental entity may require a provider of electronic communication service . . . to disclose a record or other information pertaining to a subscriber to or customer of such service . . . only when the governmental entity (A) obtains a warrant . . . by a court of competent jurisdiction or (B) obtains

a court order for such disclosure under subsection (d) of this section . . . .” 18 U.S.C. § 2703(c). Subsection (d) of 18 U.S.C. § 2703 provides: “A court order for disclosure under subsection [] (c) may be issued . . . only if the governmental entity offers specific and articulable facts.” 18 U.S.C. § 2703(d).

Finally, this case involves Federal Rules of Evidence 803(16) and 901(b)(8). The text of these Rules is as follows: “A statement in a document that is at least 20 years old and whose authenticity is established.” Fed. R. Evid. 803(16). “For a document or data compilation, evidence that it: (A) is in a condition that creates no suspicion about its authenticity; (B) was in a place where, if authentic, it would likely be; and (C) is at least 20 years old when offered.” Fed. R. Evid. 901(b)(8).

STATEMENT OF THE CASE

A. Pre-indictment

On September 21, 2013, Respondent, Officer John Creed (“Officer Creed”) along with 300 other peace officers, reported for duty on a routine assignment of keeping the peace during a 5,000 participant event. Record (“R.”) at 4-6. Intended as a peaceful protest, on this day, Officer Creed was forced to use his service-weapon in self-defense and in the defense of others. *Id*. On this day, violence erupted when protestors and spectators collided, and people’s lives were put in jeopardy. R. at 7.

Officer Creed and his partner Officer Jesus Familia (“Familia”) were assigned to patrol a march sponsored by the Open the Gates (“OTG”) organization. R. at 6. The march was scheduled to start at 1:00 p.m., but less than an hour into the event violence erupted. R. at 7. To keep the spectators and participants safe police officers setup barricades to keep them apart, but both started to throw bottles and rocks. *Id*. One participant (prior to the shooting), Angelo Ortiz (“Decedent”), was suspected of assaulting the police officers, including Officers Creed and

Familia, because decedent matched the description of a suspect who threw a rock that narrowly missed the peace officers. *Id*. After his suspected attempt to assault the peace officers, decedent jumped over one of the police barricades in an attempt to evade a lawful arrest. *Id*. Officers Creed and Familia attempted to apprehend decedent; Officer Creed was able to chase decedent into a blind alley, but another protestor, from this now violent dispersing crowd, knocked down Officer Familia. R. at 7. Officer Familia momentarily lost track of Officer Creed, who was in hot pursuit of their assailant. *Id.* As Officer Creed and decedent disappeared from view, Officer Creed could be heard giving decedent a lawful order to "[S]tay behind the [barricade]," but decedent ignored this lawful order. R. at 5.

After being shoved to the ground, Officer Familia heard three gunshots fired in rapid succession from the direction of Officer Creed and their assailant. R. at 8. Almost instantaneously, Officer Creed could be heard over the radio saying, "Shots fired, suspect down, officer in need of assistance . . . Suspect is armed! I repeat, suspect is armed!" *Id*.

Officer Familia finally caught up with Officer Creed; he found Officer Creed sitting against a wall at the mouth of the alley. *Id*. He noted Officer Creed appeared dazed; Officer Familia saw the assailant lying on the ground, fifty feet down the alley. *Id.* Not knowing what to expect, Officer Familia drew his service weapon. *Id.* Officer Familia cautiously approached the decedent and noticed that he had been hit twice, once in the abdomen and once in the upper chest. *Id.* Decedent informed Officer Familia:

> That cop – he shot me. I didn't do anything! I told him I was just filming. I was just filming! And he told me I was a filthy wetback and I should go back to where I came from. And then he shot me. Check the camera – it's all on the camera! I can't believe this is it, that I'm going to go out this way.

R. at 8. Decedent died later that day upon arrival to the hospital. *Id*. Officer Familia did find a camera, which he described as a "shiny metallic object," an object Officer Creed believed was a gun. *Id*.

B. The Court Order

On January 6, 2014, Magistrate Judge Chamberlain Haller, Jr., granted the Government's request for 60 days of historical Cell Cite Location Information ("geolocation data") made pursuant to 18 U.S.C. § 2703(d), which only requires specific or articulable facts. R. at 11. In support of this request, the Government submitted an affidavit authored by Officer Familia. *Id*. In his affidavit, Officer Familia detailed his personal observations of Officer Creed, expressed support of the Government's theory that Officer Creed may have committed a hate crime, but also added "[Officer Creed] performed his duties in a professional manner and to my knowledge was never the subject of a civilian or coworker complaint." R. at 6. During oral argument, counsel for the Government stipulated "that the facts presented in the 2703(d) application did not rise to the level of probable cause." R. at 24.

AB&C wireless complied with this order, and Special Agent Peter Quinn ("Quinn") created a detailed map that indicated not only the locations, date and time, but also the frequency of each visit. R. at 11-14. Moreover, this information revealed explicit details about Officer Creed's private life, social life, social visits with friends and acquaintances, medical office visits, and religious affiliation. *Id*. This allowed the Government to track Officer Creed's movements with such accuracy that it permitted Quinn to distinguish between neighboring businesses (eg: Boerum Grocers at 677 3rd Street and Boerum Liquors at 678 3rd Street). R. at 12.

C. Discovery of the Piece of Lined Paper

Relying on the information the Government acquired from the historical geolocation maps that Quinn created, the Government acquired a warrant to search a local hangout

frequented by members of the local chapter of the Knights of Boerum. R. at 14. During the search, agents discovered a hand written note on a piece of lined paper ("Note"), which the Government contends is a hand-written letter, authored by the Founder of the Knights of Boerum detailing events that purportedly occurred more than 20 years ago. See Quinn Aff. Ex. 1, R. at 16.

D. Procedural History

This is an interlocutory appeal based on three pre-trial motions. R. at 46. Respondent-Appellee former Officer Creed was indicted on one count of violating the Hate Crime Prevention Act, 18 U.S.C. § 249 following the September 21, 2013 shooting of decedent. *Id*. Prior to trial the Respondent made a timely motion to suppress the 60 days of geolocation data in violation of the Fourth Amendment. R. at 47. Further, *in limine*, Officer Creed moved to exclude a 20-year-old piece of lined paper that was found in a bar that is allegedly frequented by members of the local chapter of the Knights of Boerum. *Id*. Also, Officer Creed moved to exclude the statement made by decedent to Officer Familia as a violation of Officer Creed's Sixth Amendment right to confrontation. *Id*.

On July 24, 2014, oral arguments were heard at the District Court regarding these three motions. R. at 17. Counsel for Respondent argued that the Government's reliance on the (18 U.S.C. § 2703(d)) requirement of specific and articulable facts for 60 days of geolocation data violated respondents Fourth Amendment rights because the standard is lower than the warrant requirement. R. at 22-23. The Government stipulated that it did not have enough evidence to meet probable cause but on the other hand argued that this statute, through the third party doctrine, allowed for the search anyway. R. at 23-24. On the second issue, Officer Creed argued that the Note found was hearsay and not an ancient document because it was not reliable but for it having a 20-year-old handwritten date. R. at 32. The Government's argument was that the

document fit the technical requirements under Federal Rule of Evidence 803(16). *Id*. Lastly, counsel for Respondent argued that the statement made by decedent was a testimonial dying declaration and because Officer Creed has not had an opportunity to cross-examine the declarant it should be inadmissible. R. at 35. The Government conceded that the statement was testimonial but countered that the historical significance of the dying declaration exception warrants admissibility around the right to confrontation. R. at 36.

On August 27, 2014, Judge Silvers ruled that the information obtained without a warrant violated Officer Creed's Fourth Amendment rights. R. at 42-43. Judge Silvers found, the duration and the extensive scope of the information violated Officer Creed's reasonable expectation of privacy. *Id.* Further, the court stated that the Note, being unsigned and lacking any evidence to demonstrate its age, was excluded because the document contained no indicia of reliability. R. at 44. Lastly, the statement made by decedent should be excluded as a violation of the Sixth Amendment right to confrontation because the court was not persuaded that the history nor the policy of the exception could withstand the scrutiny of the right to confrontation. *Id.* The Government appealed but the Fourteenth Circuit Court of Appeals affirmed the trial court. R. at 46.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fourteenth Circuit correctly held that (1) it was proper to exclude historical geolocation data; (2) that a court may exclude a document that lacked additional indicia of reliability; (3) the exclusion of a testimonial unconfronted dying declaration does violate a criminal defendant's Sixth Amendment right to confrontation.

First, this Court should affirm the holding of the Court of Appeals for the Fourteenth Circuit that the Fourth Amendment requires the Government must obtain a warrant based upon

probable cause to obtain 60 days of geolocation data. This Court's recent opinion in *United State v. Jones* makes it clear the Government needs a warrant for this type of search. Even in the absence of a physical trespass, under this Court's opinion in *Katz v. United States*, a cell phone user has a reasonable expectation of privacy in geolocation data stored by a third party that society finds reasonable. But, the third party doctrine created by this Court, in *United States v. Miller* and *Smith v. Maryland,* fails as an exception to the Fourth Amendment warrant requirement. The third party doctrine requires an affirmative and voluntary act in the creation of the disclosed records, and not the mere passive transmission of geolocation information. From the plain construction of the Secured Communications Act, the district judge has the discretion to require a warrant depending on the type of information the Government was seeking. The legislative history makes it clear the legislature never contemplated geolocation data when it created the lower standard of specific and articulable facts. This is further evidenced by the current proposed amendments to the statute; amendment's that require a warrant to obtain geolocation data.

Second, this Court should affirm the holding of the Court of Appeals for the Fourteenth Circuit that merely meeting the technical requirements of Federal Rule of Evidence 803(16) does not authenticate a document. The additional requirement that a proffered piece of evidence must also have indicia of reliability was consistent with the general rubric of Federal Rule of Evidence 901(b)(8) because the contents of the document may not authenticate it. Also, the Government failed to present neither circumstantial evidence to show the document was what it purports to be nor that it was in fact more than 20-years-old.

Lastly, this Court should affirm the holding of the Court of Appeals for the Fourteenth Circuit excluding the testimonial dying declaration because it was in violation of Officer Creed's

Sixth Amendment right to confrontation. This statement does not meet the procedural test established by *Crawford v. Washington* and allowing for an exception to the test based on history and tradition that existed in 1791 is not relevant today. Further, this Court, in light of these changes should require a trial court to make an additional inquiry into the statement's reliability in order to test the crucible of cross-examination. In looking at this statement, there are inherent biases and misstatements that would only be revealed though cross-examination and without that opportunity the court properly excluded the statement. Therefore, adding an additional inquiry for a trial court would be consistent with *Crawford* and its progeny. This Court should affirm the holding of the Fourteenth Circuit.

STANDARDS OF REVIEW

As to Judge Silvers's conclusions that (1) the Government must secure a search warrant on a showing of probable cause to obtain historical geolocation data and (2) the constitutional right to confrontation, which bars dying declarations, this Court reviews those legal determinations *de novo*. The Court reviews *de novo* a District Judge's legal conclusions and reviews any underlying factual findings for clear error. *Pierce v. Underwood*, 487 U.S. 522, 558 (1988).

As to Judge Silvers's exclusion of the hand-written note this Court reviews that determination for abuse of discretion. A "district court's ruling regarding the admissibility of documents [is] for an abuse of discretion." *United States v. Kalymon*, 541 F.3d 624 (6th Cir. 2008).

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ARGUMENT

I. THE FORTH AMENDMENT DEMANDS THAT THE GOVERNMENT MUST SECURE A SEARCH WARRANT, UNDER SECTION 2703(C) OF THE SECURED COMMUNICATIONS ACT, BECAUASE CELL PHONE USERS HAVE A REASONABLE EXPECTATION OF PRIVACY IN 60 DAYS OF HISTORICAL GEOLOCATION DATA STORED BY A THIRD PARTY

This Court should affirm the Fourteenth Circuit's ruling because the District Court of Boerum properly held that obtaining 60 days of historical geolocation data was a search and thus *per se* unreasonable without a warrant.

This Court should specifically affirm the Fourteenth Circuit because: (1) Under *United States v. Jones*, a prolonged electronic search is *per se* unreasonable and the government must obtain a warrant based upon probable cause, (2) under *Katz v. United States*, Officer Creed had a reasonable expectation of privacy that society is willing to accept as reasonable, (3) the warrant requirement does not place an undue burden on the Government, (4) the third party doctrine fails as an exception to the protections afforded under the Fourth Amendment, and (5) this search order was unconstitutional because the Government did not adhere to the warrant requirement explicitly provided for in the Stored Communications Act ("SCA"). *United States v. Jones*, 132 S. Ct. 945 (2012); *Katz v. United States*, 389 U.S. 347 (1967). Therefore, the evidence obtained in violation of Creed's constitutional rights to privacy was properly excluded.

A. Five Supreme Court Justices, in United States v. Jones, Held that Unwarranted Prolonged Electronic Surveillance Would Violate the Fourth Amendment.

The only relevant fact to this inquiry is the extended nature of the search. Justice Sotomayor, in *United States v. Jones*, agreed with Justice Alito's concurrence, along with three more of her colleagues, that prolonged electronic surveillance would violate the Fourth

Amendment. *Jones*, 132 S. Ct. at 955.[1] Thus, obtaining 60 days of historical geolocation data under section 2703(d) of the SCA is *per se* unreasonable because the "specific and articulable facts" standard requires a showing that is less than probable cause. *See, e.g., United States v. Davis*, 785 F.3d 498, 505 (11th Cir. 2015); *In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 606 (5th Cir. 2013); *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 315 (3d Cir. 2010) (explaining that section 2703(d)'s standard is "less stringent than probable cause").

In *Jones*, the government placed a Global-Positioning-System ("GPS") on defendant's vehicle, using an expired warrant, in the wrong jurisdiction. *Jones*, 132 S. Ct. at 948. This Court held the search was unconstitutional based on a theory of trespass. *Id*. Moreover, this Court provided, in Justice Sotomayer's concurring opinion, that an extended electronic search is unconstitutional without a warrant. *Id.* at 955 (Sotomayer, J., concurring). But, if this Court finds that *Jones* is not controlling, because the facts in *Jones* are distinguishable from the facts in this case where there was no physical trespass, then this Court's analysis under the reasonable expectation of privacy test established in *Katz v. United States* is still controlling. *Id*. at 954 ("in some [] case where a classic trespassory search is not involved [] resort must be had to [the] *Katz* analysis . . . ."). (majority opinion)

B. Applying Katz v. United States, People Have a Reasonable Expectation of Privacy in Historical Geolocation Data Stored by a Third Party.

The Fourteenth Circuit applied the reasonable expectation of privacy test established in *Katz* and held: (1) the Government did conduct a search when it obtained Officer Creed's

[1] Justice Sotomayor added in her own concurrence that "even short-term monitoring" raises concerns under *Katz v. United States*, 389 U.S. 347 (1967) because Global-Positioning-System "monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 132 S. Ct. at 955 (Justice Sotomayor also agreed with the majority's trespass-based holding, however, because there is no physical trespass in this case that holding may not apply. *Id.* at 954).

geolocation data, (2) Officer Creed had a reasonable expectation of privacy in the geolocation data, and (3) Officer Creed's expectation of privacy was objectively reasonable. The Fourteenth Circuit properly concluded, "*Katz* teaches that a Fourth Amendment search occurs when the Government violates a subjective expectation of privacy that society recognizes as reasonable." R. at 49 (*see Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring)).

i. Officer Creed exhibited a subjective expectation of privacy when he turned off the "location services" function on his cell phone.

Under *Katz*, a court follows a "two-part inquiry." *California v. Ciraolo*, 476 U.S. 207, 211 (1986). First, a court asks whether there existed a "subjective expectation of privacy in the object of the challenged search." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). Second, a court asks whether "society [is] willing to recognize that expectation as reasonable." *Id*.

Here, Officer Creed is challenging the search of 60 days of historical geolocation data because he turned off the geolocation services function on his cell phone. Officer Creed, like most other individuals, was not necessarily aware that his cell phones pings (communicates its location) with cell towers on a continuous basis when the phone is *not in use*. There is no evidence that his geolocation information was ever seen on a bill, unlike the number of minutes used or texts sent, which are routinely listed in a bill of service. Therefore, Officer Creed was never on notice that this information was being collected.

It is perfectly reasonable that when one makes a phone call, sends or receives a text, or uses an application that their phone would necessarily communicate with a cell tower for service. In fact, the AB&C service contract specifically states "[w]e collect information when you *communicate* with us and when you *use* our products, services and sites." R. at 11 n.2. (emphasis added). Thus, by turning off or disabling his geolocation functions, and merely having his cell phone in his pocket, implies non-use and no collection of data.

Moreover, the AB&C Privacy Policy uses terms such as "when you communicate with us," "when you use our products," "information you provide," "usage information," "websites visited," "application and feature usage," and "service options you choose." All of these terms imply an affirmative use or some voluntary conveyance. *Id.* Thus, it is reasonable that non-use, or disabling the geolocation service would imply that no such communication or information transfer is occurring.

It is important to note, the inquiry is not whether "an individual has a reasonable expectation of privacy in his [or her] location and movements over time." *United State v. Graham*, 796 F.3d 332, 379 (4th Cir. 2015). Rather, the question is whether an individual has a reasonable expectation of privacy in a third party's ability to collect that information. *Id.* Separate and apart from the third party doctrine, the issue is did Officer Creed have a reasonable expectation of privacy when he turned off his geolocation services but the cell phone continued to transmit this information to AB&C wireless, and the Fourteenth Circuit properly held he did. An "individual need not maintain complete secrecy and privacy in order to exhibit a subjective *expectation* of privacy." R. at 50. "Privacy is not a discrete commodity, possessed absolutely or not at all." *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) (internal citations omitted).

The "mere fact that historical [geolocation data] is a record maintained by a cellular service provider, and not kept by the user, does not defeat the user's expectation of privacy in what that information reveals – namely, the user's location at any moment." *In re Tel. Info. Needed for a Crim. Investigation*, No. 15-XR-90304-HRL-1(LHK), 2015 U.S. Dist. LEXIS 99871 (N.D. Cal. July 29, 2015) (holding citizens have a reasonable expectation of privacy in historical geolocation data held by a third party) ("*In re Tel. Info.*"). As explained by the Ninth Circuit, "it is clear that neither ownership nor possession is necessary or sufficient determinant of

the legitimacy of one's expectation of privacy." *Id.* (*quoting DeMassa v. Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985)). Citizen's rights against unreasonable search and seizure are personal rights and a third party's possession of that information should not trump those personal rights. *Ferguson v. City of Charleston*, 532 U.S. 67, 76-78 (2001).

In *Ferguson*, this Court held that the Government needed a warrant to obtain drug testing results from the urine of pregnant women, even though the results were stored by a third party hospital. *Id*. This is because neither ownership of the records, nor possession of them, is relevant to Officer Creed's subjective belief that turning off the geolocation services will render him safe from unreasonable intrusion by the Government.

ii. A majority of American adults consider details of their physical location as sensitive and private information.

A 2013 survey conducted on behalf of the internet company TRUSTe revealed that "smartphone users are more concerned about their privacy than the brand, camera, weight or screen size" of their mobile device. *TRUSTe Study Reveals Smartphone Users More Concerned About Mobile Privacy Than Brand or Screen Size*, TRUSTe Blog, at *1 ("*TRUSTe Study*") (Sept. 5, 2013) (http://www.truste.com/blog/2013/09/05/truste-study-reveals-smartphone-users-more-concerned-about-mobile-privacy-than-brand-or-screen-size/); see *Riley v. California*, 134 S. Ct. 2473, 2490 (2014) (this Court relied on survey data to demonstrate the "pervasiveness" cell phones have in our society); see Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013). The TRUSTe study further revealed 43% of smartphone users are "not prepared to share any information about themselves with a company in exchange for a free or lower cost mobile app." *TRUSTe Study* at *1. Moreover, the study provides that when it comes to "tracking" 69% of Americans "do not like the idea of [their cell phones] being tracked . . . which is considerably higher than on desktops where [only] 52% . . . expressed concerns." *Id*.

Many smartphones, like the one Officer Creed used, include a location privacy setting that, when used, gives the appearance that geolocation tracking is disabled. But this has no impact upon the cell service provider's ability to track the cell phone user. This means, "even though a user may demonstrate a subjective expectation of privacy by disabling an [application's] location identification feature, that user's cell phone will still generate" geolocation data even when the phone is not in use. *In re Tel. Info.*, at *34. However, this technical nature of cell phones does not mean society submits and forfeits their expectation of privacy. On the contrary, "society's expectation of privacy in historical [geolocation data] is evidenced by the myriad state statutes and cases suggesting that cell phone users 'can claim a justifiable, a reasonable, or a legitimate expectation of privacy' in this kind of information." *Id*. at *35 (quoting *United States v. Knotts*, 460 U.S. 276, 280 (1983) (holding the Government may use a beeper to track defendant because defendant did not have a reasonable expectation of privacy on public roadways)).

To date, six states – Colorado, Maine, Minnesota, Montana, Tennessee, and Utah have legislated privacy protections for historical geolocation data. *See* 16 M.R.S. § 648; 46-5-110, MCA; Colo. Rev. Stat. § 16-3-303.5(2); Minn. Stat. § 626A.28; Minn. Stat. § 626A.42; Tenn. Code Ann. § 39-13-610; Utah Code Ann. § 77-23c-102. Moreover, six additional states – Illinois, Indiana, Maryland, Virginia, Washington, and Wisconsin, have enacted laws requiring police obtain a search warrant to track cell phones in real time. *See* 725 Ill. Comp. Stat. 168/10; Burns Ind. Code § 35-33-5-12; Md. Crim. Proc. Code Ann. § 1-203.1; Rev. Code Wash. (ARCW) § 9.73.260; Va. Code Ann. § 19.2-56.2; Wis. Stat. § 968.373.

In February 2015, Congress recognized this trend among the states in its recent proposed amendment to the SCA when it added proposed section 3: Geolocation Information Protection.

See Online Communications and Geolocation Protection Act: Hearing on H.R. 656 Before the H. Comm. on the Judiciary, 114th Cong. (2015) (statement of Zoe Lofgren, Representative, Cal. 19th Cong. Dist.). In that section, Congress proposed exclusive means of obtaining geolocation information, in part providing the Government "may [not] obtain geolocation information of a person . . . except pursuant to a warrant . . . ." *Id.* This is because Congress has recognized that in instances such as this case a search of this nature, unlike in *Knotts* where it was limited to public highways, also tracked Officer Creed while he was in a constitutionally protected area – his home. Based on the aforementioned survey, and the increasing number of states regulating this type of information, it is evident society is willing to accept Officer Creed's subjective belief that turning off the geolocation features should keep him secure from an unlawful warrantless search.

iii. The nature and type of information historical geolocation data reveals requires a judicial warrant based upon probable cause.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Cell phones plainly qualify as 'effects' under the meaning of the Fourth Amendment." *In re Tel. Info.* at *19-20 (*citing Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984)). A plain reading of the amendment provides, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley,* 134 S. Ct. at 2484 (quoting *Brignham City v. Stuart*, 547 U.S. 398, 403 (2006)). "[R]easonabless generally requires the obtaining of a judicial warrant." *Riley*, 134 S. Ct. at 2484. In the absence of a warrant, the United States Supreme Court has held "a search is reasonable only if it falls within a specific exception to the warrant requirement." *Id.* As the following discussion will reveal, there were no viable exceptions to the warrant requirement in the instant case.

C. *The Third Party Doctrine is Inapplicable Because Cell Phone Users make no Affirmative-Voluntary Acts in Transmitting Geolocation Data to a Cellular Provider.*

The third party doctrine fails when applied to historical geolocation data generated through passive non-use. The Fourteenth Circuit properly rejected the Government's argument that the third party doctrine destroyed a cell phone user's reasonable expectation of privacy.

Once it is established that a warrant is required under the Fourth Amendment, the only remedy is exclusion of the tainted evidence, unless an exception is applicable. As the Fourteenth Circuit pointed out, the Government in this case has waived the "good faith" exception on appeal. R. at 50 n.6. Therefore, the only inquiry is whether the third party doctrine established by this Court in *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979) are applicable. This Court should find they do not apply to historical geolocation data because there was no voluntary conveyance.

In *Miller*, this Court held that an individual making a deposit at a bank had no expectation of privacy in records of transactions generated by the bank. *Miller*, 425 U.S. at 437. This Court explained neither possession or control of the records were at issue, but there is no reasonable expectation of privacy when the defendant "voluntarily conveyed" the information to the bank and its employees. *Id*. Hence, even the subjective belief that the bank would use this information for a limited purpose, that of tracking defendant's financial transactions, did not protect against the voluntary conveyance of that information to a third party. *Id*. at 443.

Similarly, in *Smith*, this Court affirmed *Miller's* holding, and stated the Government's use of a pen register, over a period of three days to capture the numbers dialed from a home landline, was not a search under the Fourth Amendment. *Smith*, 442 U.S. at 737, 742. This Court, again, explained telephone users had no objective reasonable expectation of privacy in

information voluntarily conveyed to third parties, when they dial numbers from their phones, because of the affirmative-voluntary act of dialing the number.

In the instant case there was no voluntary conveyance of any kind. Here, Special Agent Quinn explained in his affidavit Officer "Creed disabled the 'location operations' function on his cell phone" but "*pre-installed* [applications] on his cell phone, operated in the '*background*.'" R. at 11. (emphasis added). This means the only voluntary act Officer Creed took was disabling the geolocation services. Unlike in *Smith* and *Miller*, Officer Creed's only voluntary act was an attempt at preventing the conveyance of information. Even the application that transmitted information in the background was pre-installed, meaning Officer Creed did not install the application and did not take any voluntary act in conveying the information the application transmitted in the background, without his knowledge.

The only scenario where *Miller* could apply would be if the facts in *Miller* demonstrated passive transmission of information. Meaning, the defendant in *Miller* would "ping" his location every time he walked by a bank or an Automated-Teller-Machine ("ATM") by merely having his ATM card in his pocket. Only under those circumstances would the holding in *Miller* control. But this is not what happened in *Miller*. The defendant in *Miller* took an affirmative and voluntary act by going into the bank, communicating with its employees, and using their services. None of these facts are present in this case. The only affirmative act Officer Creed took was turning off his geolocation services, an act that renders the third party doctrine inapplicable to this case.

The Fourteenth Circuit's rejection of the third party doctrine does not imply *Smith* or *Miller* are no longer good law, only this Court may hold so. However, without a voluntary conveyance, this exception to the Fourth Amendment's warrant requirement simply fails.

D. The Secured Communications Act, by Design, Provides a District Court Discretion to Require a Search Warrant for Information Such as Historical Geolocation Data.

In short, the Government has two basic options for obtaining information such as historical geolocation data under the provisions of the SCA. 18 U.S.C. §§ 2703(c)(1)(d). Those options are (1) a search warrant supported by probable cause or (2) a court order based on specific and articulable facts. The Fourteenth Circuit properly concluded the Government must secure a warrant under Section 2703(c)(1) to obtain 60 days of historical geolocation data.

This Court should hold that Section 2703(d) provides "magistrate judges with discretion to require a warrant on a showing of probable cause . . . ." *In re Tel. Info.*, at *80. The lesser showing "of specific and articulable facts may well be sufficient to obtain stored electronic information under [section] 2703(d) that, unlike historical [geolocation data], does not raise constitutional privacy concerns," such as the bank records in *Miller*. *Id*. at *81. Here, like in *In re Tel. Info.*, the information sought is historical geolocation data, therefore, a warrant supported by probable cause is required. In fact, the current amendment included in House Bill 283 clarifies the only "[i]nformation to be [d]isclosed" include the: name, address, local and long distance telephone connection records, length of service, types of service used, telephone or instrument number, and means of payment. *Electronics Communication Privacy Act Amendments Act of 2015: Hearing on H.R. 283 Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Matt J. Salmon, Representative, Arizona 5th Congressional District). Finally, the standard of specific and articulable facts is completely omitted from the proposed Act, leaving only the constitutionally mandated warrant requirement. *Id.*

In conclusion, it is worth noting that the Government stipulated in oral arguments that the facts of this case, the facts used by Special Agent Quinn to obtain the court order, "do not rise to

the level of probable cause." R. at 24. This means, the lower court properly exercised its discretion when it excluded the 60 days of geolocation data obtained from the warrantless search.

II. THE FOURTEENTH CIRCUIT PROPERLY EXCLUDED THE HAND WRITTEN DOCUMENT, WRITTEN ON A PIECE OF LINED PAPER, FINDING IT UNRELIABLE UNDER 803(16) BECAUSE IT IS NOT FREE FROM SUSPCISION

The Fourteenth Circuit properly affirmed the District Court because Judge Silvers did not abuse her discretion when she excluded the hand written note, written on a sheet of lined paper, finding it unreliable. This Court should also affirm the District Court because "satisfying the mere procedural requirements of the [ancient document] exception does not ensure *trustworthiness or reliability*." *People v. McCullough*, 38 NE.3d 1, 29 (Ill. App. Ct. 2d Dist. 2015) (emphasis added). "Reliability as an ancient document [is] required by Fed. R. Evid. 901(b)(8)." *United States v. Demjanjuk*, 367 F.3d 623, 629 (6th Cir. 2004). ("*Demjanuk I*")

The dangers of "allowing rank hearsay . . . without any means of testing its veracity . . . are legitimate reasons to exclude evidence." *Id*. Moreover, the ancient document exception is "not a wide open door but a narrow crevice." *McCullough* at 29 (quoting *Rehm v. Ford Motor Co.*, 365 S.W.3d 570, 579 (Ky. Ct. App. 2011) (Caperton, J., concurring in part and dissenting in part)). Therefore, Judge Silvers did not err in determining that the Note was "not reliable evidence." *Mathin v. Kerry*, 782 F.3d 804, 813 (7th Cir. 2015) (holding a handwritten document not *per se* admissible even though the document met the procedural requirements of the rule).

A. *The District Court did not err in Requiring Reliability Under the General Rubric of Federal Rule of Evidence 901(b)(8) Because the Document's Contents may not Authenticate it.*

In the instant case, the lower court did commit a harmless error when it found the document was authentic because only "circumstantial evidence" may authenticate it and not its content. *United States v. Balt. Museum of Art*, 991 F.Supp. 2d 740, 746 (E.D. Va. 2014). The

only error the court did commit was accepting the Government's contentions that the Note met all the elements of Rule 901(8) from the content of the document. "The requirement that the document be free of suspicion relates *not to the content of the document*, but rather to whether the document is what it purports to be, and the issue falls within the trial court's discretion." *United States v. Firishchak*, 468 F.3d 1015, 1021 (7th Cir. 2006); *United States v. Kairys*, 782 F.2d 1374, 1379 (7th Cir. 1986); *United States v. Kalymon*, 541 F.3d 624, 632-33 (6th Cir. 2008). "[T]he mere *recitation of the contents of documents does not authenticate* them or provide for their admissibility." *Mathin*, 782 F.3d at 812, (quoting *Firishchak*, 468 F.3d at 1021) (emphasis added).

i. Mere recitation of the contents does not authenticate the document.

In *Baltimore Museum of Art*, a case about a 1879 oil painting by Pierre-Auguste Renoir ("Painting"), and who was its lawful owner. *Id*. at 741. An interpleader action had brought several claimants, one was the Baltimore Museum of Art ("BMA"). *Id*. BMA had reported the painting stolen in 1951, claiming its value at $2,500. *Id*. Another claimant was Marcia Fuqua who discovered the Painting in 2008, at a flea market in West Virginia, and bought it for $7 dollars. *Id*. at 742.

In support of its claim, BMA presented: (1) hand written letters from the Painting's original owner detailing the promise to loan the Painting and demanding BMA insure the Painting; (2) BMA's own internal receipt of the art; (3) BMA's alpha-numeric tracking designation; (3) minutes of an Executive Board meeting describing its theft; and (4) a BMA financial ledger detailing the insurance payment made from the claim. *Id*. The District Court found "the internal records are exactly what they purport to be." *Id*. at 746.

The court explained, "[t]he available circumstantial evidence supports the conclusion that the records were created contemporaneously with the decades-old transactions and events they describe." *Id*. However, the Note, which the Government claims is authentic, lacks any of the circumstantial evidence to authenticate it that BMA was able to produce. Here, the Government failed to present any letters or records of the events described in the Note, no evidence the alleged author ever visited Boerum in July of 1993, and the only proof offered is that it was found in a local hangout.

Further, the hand written letters in *Baltimore Museum of Art* were written with the intent of expressing a want to donate the art with the condition the museum insure the painting. However, unlike in *Baltimore Museum of Art*, the intent of the author of the Note in this case is not only vague but absent. There was no purpose that may be gleaned from the circumstances surrounding its creation. Moreover, the documents offered by BMA were business records created for the purpose of reporting the painting's theft and subsequent receipt of the insurance claim payment. None of this circumstantial evidence is present in the instant case because this Note was not a business record.

The Government asserted the Note purported to be a letter from the Founder of the Brotherhood from statements within the document. But the Government failed to provide any evidence to show the handwriting in this letter was the Founder's handwriting. The Government simply relied on the content of the letter and that is not permissible under the rule.

Federal Rule of Evidence 803 provides "exceptions" to the hearsay rule for certain out-of-court statements that are otherwise considered reliable evidence, including authenticated ancient documents. *Baltimore Museum of Art*, 991 F.Supp. 2d at 746. However, there are no indicia of

reliability here. Thus, the lower court properly excluded this Note because a party may not authenticate an ancient document from its statements alone.

ii. The government failed to present any evidence to establish the document is more than 20-years-old.

The Government erroneously asserted the Note met the 20-year element of Rule 901(b)(8) from the content of the document (when it pointed to the handwritten date). Once again, failing to present any circumstantial or direct evidence to prove the documents age. *Demjanuk I*, 367 F.3d at 632 (finding a service pass was "sufficiently authenticated by supporting circumstantial evidence showing that the document in question is what it was purported to be," a war record in existence 20 years or more at the time it was offered).

In *United States v. Demjanjuk*, CASE NO. 1:99CV1193, 2002 U.S. Dist. LEXIS 6999 (N.D. Ohio Feb. 21, 2002) ("*Demjanjuk II*"), the District Court listed 294 findings it used to determine whether certain wartime records were admissible as ancient documents. *Id*. Examples from the extensive list are: (1) the paper used was consistent with paper that existed in the early 1940s, (2) the printing ink used was consistent with ink used in the early 1940s, (3) the typewriter used was available in Europe in the early 1940s, (4) the ink used matched the color of the watermark used by the Government in similar wartime records, and (5) the signature on the documents matched the signature on other authenticated documents. *Id*. at 7-8, 16, 25-26. *See also United States v. Kairys*, 782 F.2d 1374, 1380 (1986) (finding a document's "paper fiber was consistent with that of documents more than 20 years old.").

In the instant case, the Government has failed to present any evidence of carbon dating, fiber analysis, or ink matching to establish the age of the Note. Nevertheless, it was a harmless error for the District Court to accept the Government's assertions because it properly excluded the document as rank hearsay.

III. ADMITTING AN UNCONFRONTED TESTIMONIAL DYING DECLARATION WOULD VIOLATE A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THEIR ACCUSER BECAUSE THE CRUCIBLE OF CROSS-EXAMINATION HAS NOT BEEN TESTED WHEN THERE ARE UNRELIABLE STATEMENTS MADE BY THE SUSPECT WITHIN THIS PROFERED DYING DECLARATION

Allowing testimonial unconfronted dying declarations would undermine the policy behind the right to confrontation and would be in conflict with the recent interpretation of the Sixth Amendment right to confrontation. U.S. Const. amend. VI. This Court in *Crawford v. Washington* created a new test under the Sixth Amendment of the United States Constitution. *Crawford v. Washington*, 541 U.S. 36 (2004). For years courts followed the test under *Ohio v. Roberts*, which called for an analysis based on either firmly rooted hearsay exceptions or statements that bore particularized guarantees of trustworthiness. *Ohio v. Roberts*, 488 U.S. 56, 66 (1980). In 2004, Justice Scalia writing for the majority in *Crawford*, stated that the Court in *Roberts* did not interpret the historical significance of the confrontation clause that is encompassed under the Sixth Amendment. *Crawford*, 541 U.S. at 43.

The *Crawford* Court created a two-part test. *Id*. at 59. The first step, to determine if the confrontation clause applies, is to determine if the statement made was testimonial. *Id*. Second, if it is testimonial, and where the declarant is unavailable, did the criminal defendant have a prior opportunity to cross-examine him or her. *Id*. In dicta, Justice Scalia entertained whether a dying declaration would be admissible, historically, but opted not answer that specific issue in *Crawford*. *Id*. at 55 n.6. The *Crawford* test acknowledged that the *Ohio v. Roberts* test was too broad because its rule applied the same mode of analysis whether or not the statement contained *ex parte* testimony. *Id*. at 59. Further, the *Ohio v. Roberts* test was also too narrow because it admitted statements that did consist of *ex parte* testimony based on an overly simple test of reliability. *Id*.

The Supreme Court should not automatically admit testimonial dying declarations without an additional inquiry into the statement's reliability. An inquiry that looks beyond the question of whether the declarant believed they were going to meet their maker. Dying declarations are not *per se* reliable because modernly the historical reliability of a dying declaration is no longer present. Lastly, adding an additional step to the *Crawford* framework for dying declarations would not be inconsistent given the Supreme Court's recent policy in *Giles v. California*. (*See Giles v. California*, 554 U.S. 353 (2008) (holding out of court statements are admissible if the defendant killed the declarant with the intent of preventing him or her from testifying against the defendant in court)).

A. *The Reasoning Behind Automatic Reliability of Dying Declarations, Present at our Country's Founding, is no Longer Prevalent in Modern Society.*

The historical *per se* reliability of dying declarations is not prevalent in the modern legal age. Dying declarations were admitted historically because:

> [T]he party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administrated in a court of justice.

King v. Woodcock, 168 Eng. Rep. 353 (1789). Further, in a later case the court recognized that "No person, who is immediately going into the presence of his maker, will do so with a lie upon his lips . . . ." *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (quoting *Queen v. Osman*, 15 Cox. Crim Cas. 1, 3 (Eng. N. Wales Cir. 1881)).

First, God fearing statements should not be considered as trust worthy in our secular age. Moreover, dying declarations are not as reliable when the person is in shock and is experiencing trauma; something old historical courts were not aware of.

At common law, in both England and the United States, there was a requirement that a witness believe in a supreme being in order to be deemed competent to testify. Peter Nicolas, *'I'm Dying to Tell you what Happened': The admissibility of Testimonial Dying Declarations Post-Crawford*, 37 Hastings Const. L. Q. 487, 540 n. 289 (2010). Even in the United States, as late as 1929, courts have excluded testimony and dying declarations of a witness due to the witness's religious non-belief. *Marshall v. State*, 219 Ala. 83 (1929). Similarly, in England, if a witness was a convicted felon his or her dying declaration made at execution was also excluded because, as felons and wrongdoers, they would have not been deemed competent to take the witness stand. *Rex v. Drummond*, 1 Leach, C.C. 337 (1784), (See also, R.A. Fisher Esq., *A Digest of the Reported Cases from 1756 to 1870, Inclusive Relating to Criminal Law* 378 (San Francisco Sumner Whitney & Co. 1871).

There are also reports authored during the British colonial period that dying declarations were not admitted in Papua New Guinea because the peoples' religious beliefs could not be confirmed. Richard Eggleston, *Evidence, Proof and Probability* 48-49 (Butterworths Law, 2nd ed. 1978). Similarly, the United States has case law as late as 1982 that references an impeachment of such statements by bringing to light the declarant "[D]id not believe in a future state of rewards or punishment." *State v. Quintana*, 644 P.2d 531, 535 (Sup. Ct. N.M. 1982). Lastly from 2007-2014 the number of religiously unaffiliated adults in the United States has increased from 19 million to 56 million accounting for an estimated 22.8% of the population, who no longer believe in a higher power. *America's Changing Religious Landscape, Christians Decline Sharply as Share of Population; Unaffiliated and Other Faiths Continue to Grow*, PEW RESEARCH CENTER. (May 12, 2015), (http://www.pewforum.org/2015/05/12/americas-

changing-religious-landscape/). This means the reliability of dying declarations has eroded (and will continue to do so) and a test of their veracity is warranted prior to their admission.

Dying declarations, historically, were admitted at the time of the ratification of the Constitution because they were considered as reliable as live testimony. That is not as significant today. The role of religion is 1791 was much more significant and as noted was required by most courts to even be able to testify. The modern age has phased out these beliefs because the power of the First Amendment and a person's freedom of religion conflicts with some of these principles. Because the modern age has changed the approach to the admission of dying declarations, away from a religious principle, it would be unfounded to *per se* admit these declarations simply because the Founders allowed them. At the time of our country's founding a person's religious belief was a powerful tool for courts because it meant the statement would be made in fear of God. Because this religious reverence is not prevalent in a modern age courts need to make a more modern inquiry into reliability outside of a religious framework.

Secondary to the fact that the victim would soon meet their maker was this belief that due to the traumatic condition of dying the person should have no motive to lie. In an early case from 1798 the State Court of North Carolina stated:

> [O]f one so near his end that no hope of life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath . . . if at the time of making the declaration he has reasonable prospects and hope of life, such declarations ought not to be received; for there is room to apprehend he may be actuated by motives of revenge and an irritated mind, to declare what possibly may not be true.

State v. Moody, 3 N.C. (2 Hayw.) 50 (1798). The psychology behind many of these statements has shown them to be not as reliable as the Founders might have thought:

> The history of criminal trials is replete with instances where witnesses even in the agonies of death, have through malice, minus apprehension or weakness of mind made declarations that were inconsistent with the actual facts; and it

> would be a great hardship to the defendant, who is deprived of the benefit of cross-examination, to hold that he could not explain them.

Carver v. United States, 164 U.S. 694, 697 (1987). In *Falletto*, the declarant had been stabbed around the neck. *People v. Falletto*, 96 N.E. 355, 356 (1911). As the victim was in the hospital he made a statement to his family accounting the attack and a description of the attacker. *Id*. at 357. The court, in analyzing the admissibly of such statements, opined that dying declarations were dangerous because they were not made under oath without the fear of perjury. *Id*. Further, "fear of punishment after death is not now regarded as so strong a safeguard against falsehood as it was when the rule admitting such declarations was first laid down". *Id*. This is "especially [true] if the declaration is made in response to suggestive questions, or those calling for the answer of 'Yes' or 'No.'" Lastly, some men have the need to self-exonerate so much so as to blame someone else for a wrong, even in a dying declaration. *Id*. at 358.

What the court in *Falletto* points out is that even in dying declarations there have been cases where the motives that any witness might have to lie still exist even near death. Even in their dying breaths humans make statements that are to their benefit over the truth. Because of this, courts need to be especially protective of defendants. In our case we have a similar situation. In this case, the decedent was being chased as a suspect to a crime and his declaration against the officer chasing him could be viewed as a form of self-preservation. This is the concern the court in *Falletto* was warning about. Dying declarants do not always speak the truth if there is a motive to destroy their enemy or a motive to make a self-serving statement like the situation present in the instant case.

History is important, but it needs to be taken in context before a court allows the *per se* reliability and admissibility of a testimonial unconfronted statement. The basis for dying

declarations and their admissibility are not as prevalent in a more secular age and further, the psychology behind their admission is questioned when the declarant had motives to lie.

B. *An Additional Determination of the Dying Declaration's Reliability Would be Consistent with Crawford v. Washington and this Dying Declaration is not Reliable Because in Looking at the Surrounding Circumstances there are Motives to Lie as well as Misstatements in the Declaration.*

If this Court intends to make an exception to the procedural test set out in *Crawford* then this Court should add an additional inquiry into the statement to determine its reliability. In 2004, *Crawford* recognized that the confrontation clause required a more procedural test to determine the constitutionality of an uncross-examined statement. *Id*. at 61. Further, the Constitution "[C]ommands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id*. at 61. The procedural test is the crucible of cross-examination. *Crawford* recognized that the old test was too broad. *Id*. at 59. Under the *Ohio v. Roberts* test dying declarations were automatically trustworthy and admitted as a firmly rooted hearsay exception, but *Crawford* overruled it. *Idaho v. Wright*, 497 U.S. at 820.

The *Crawford* Court was right; the old test was too broad because the Court's analysis on whether something was trustworthy to the extent that cross-examination would not be needed was solely based on the significance of the hearsay rule itself. But, before this Court undermines the procedural test in *Crawford* by automatically admitting a dying declaration that would otherwise be inadmissible, the Court should test the statement's guarantees of trustworthiness.

The Court should make an inquiry into the surrounding circumstances of the statement and not from subsequent corroboration of the criminal act. *See Lee v. Illinois*, 476 U.S. 530, 544 (1986) (holding that the determination of reliability needs to be made by looking at the surrounding circumstances); *see also State v. Ryan*, 103 Wash. 2d 165, 174 (1984) (allowing for

evidence subsequent to the criminal act should not be admitted). The presumption is the statement should not be admitted and the State would need to establish that the statement is reliable to the point that cross-examination would not be fruitful. *Lee*, 476 U.S. at 543.

In *Lee*, the defendant was convicted of murder based partly on a statement made by a co-conspirator, which matched the statement made by the defendant. *Id*. at 539. This Court determined that a co-conspirator confession was not reliable. *Id*. at 546. The Court reasoned that based on the presumption that in situations where one declarant stands to gain by inculpating another, the accusation is presumptively suspect. *Id*. at 541. (Citing *Douglas v. Alabama*, 380 U.S. 415 (1965)). The State argued that because (1) the surrounding circumstances the statement was taken in do not indicate unreliability and (2) that the stories interlocked, which also show their accuracy. *Id*. at 544-45. This Court rejected both of these arguments and did not admit the statement because based on the circumstances there was no indicia of reliability that allowed for an uncross-examined statement. *Id*. at 546.

In this case, the decedent was suspected of assaulting police officers. Officer Familia stated that the suspect, in a black sweatshirt, threw a rock at the officers during the march and Officer Creed chased a suspect with a black sweatshirt. Only after Officer Creed pursued the suspect into an alley were the shots fired. The suspect pointing a metallic object at Officer Creed led Officer Creed to fire because he believed the camera was a gun pointed at him. Then, following the shots, the suspect stated to Officer Familia:

> That cop—he shot me. I didn't do anything! I told him I was just filming. I was just filming! And he told me I was a filthy wetback and I should go back where I came from. And then he shot me. Check the camera—it's all on the camera! I can't believe this is it, that I'm going to go out this way.

R. at 8. This statement was made following a suspected altercation based on the uncontested facts in the record. Here, the decedent matched the description of the officer's assailant, he then

fled the scene (jumping over barricades), and resisted a lawful order to stop. This Court can infer that this person may have been involved in a crime shortly before his statement.

Here, decedent had a motive to lie because he had just committed a crime. Officer Creed's recollection would likely indict him for it. Because of this motive, the statement must be tested by cross-examination. This Court recognized this in *Douglas* that statements made by a declarant who stands to gain from another is inherently unreliable. This altercation would come down to whom should we believe, the suspect or Officer Creed. A statement made by a suspected criminal that expressly implicates the officer who was pursuing him is inherently biased due to the motive of protecting oneself from criminal prosecution. In order for a fact finder to determine the reliability of a witness the witness would need to be in court, for his or her statement to reach the jury, and the statements should be made under cross examination for the fact finder to truly determine if they believe this witness over the other.

Although the decedent expired due to his injuries, this does not cure the statement's inherent bias and unreliability. The decedent stated, "I didn't do anything!" which based on the surrounding circumstances is not true. Decedent attempted to assault the police and then ran from the police. Decedent fit the description of someone who possibly was involved in the riot that occurred. At a minimum, the decedent did do something unlawful, he ran from the police and ignored a lawful order to stop, and this is a crime in most states. The crucible of cross-examination has not been tested when there are inherent falsities in the statement and the motive to lie is present by the suspect declarant. This Court can infer this bias and lack of reliability based on the totality of the circumstances.

This Court in *Lee* recognized that the presumption was that the statement was not reliable and it was the State's duty to show that this statement was reliable. Here, there are statements,

which when looking at the surrounding circumstances, were not true. Because these are statements that may or may not be true they must be tested under cross-examination. Further a suspect, shortly after being pursued by an officer, has an inherent motive to lie and fabricate in order to protect his interests, hence a defendant should be allowed to cross-examine the declarant.

C. *An additional inquiry outside of the procedural structure of the Crawford test would be consistent with recent Supreme Court precedent.*

There has only been one Supreme Court case, since *Crawford* came down in 2004, that recognized an exception to the Sixth Amendment right to confrontation. *Giles,* 554 U.S. at 353. This exception is forfeiture by wrongdoing. *Id*.

In *Giles*, the defendant Dwayne Giles ("Giles") shot his girlfriend outside of his grandmother's house. *Id*. at 356. There were no witnesses to the shooting but Giles's niece was heard yelling from inside the home. *Id*. Three weeks before the shooting the victim made statements to the police about a domestic-violence investigation where she accused Giles of beating her and pulling a knife on her while threating to kill her if she were to cheat on Giles. *Id*. at 357. The lower court in California admitted the statement under legislation enacted to protect victims of domestic violence. *Id*. On appeal, the California Supreme Court applied the recent *Crawford* test and upheld the admission of the statements because of the intentional criminal act that made the victim unable to testify. *Id*. This Court granted certiorari and held that in order to apply the forfeiture by wrong doing exception the State had to show that the defendant intentionally killed the victim to prevent her from testifying in court. *Id*. at 377. After a long historical analysis of common law, this Court determined that the policy behind this historical exception was rooted in the notion that the wrong doer should not benefit from his unlawful actions. *Id*. at 359.

This Court in *Giles* added an additional inquiry that a lower court must do in order for the statement to be admitted without the right to confrontation. Like the analysis in *Giles*, this Court should require a lower court to make an additional inquiry when it comes to dying declarations. This inquiry should be a test of reliability similar to the test done by courts prior to *Crawford* for statements that did not fall within a firmly rooted hearsay exception.

This additional step would help insure that the statement was reliable. Dying declarations were admitted historically because courts believed that a religious person would not lie and further the traumatic conditions would not provide a motive to lie. But this argument fails because courts no longer follow this belief. Because the common law determinations of reliability are no longer present for dying declarations this Court must create an additional inquiry. Courts should add an additional step similar to the steps in forfeiture by wrong-doing. This would be consistent with the procedural *Crawford* analysis. A lower courts inquiry should look at the totality of the surrounding circumstances to show that the statement is reliable. When looking at the totality of the circumstances in this case, it is evident the District Court and the Fourteenth Circuit properly excluded the statement from Officer Creed and Officer Familia's assailant.

CONCLUSION

This court should affirm the Court of Appeals for the Fourteenth circuit because the Fourth Amendment demands a warrant to obtain 60 days of historical geolocation data. Second, the rules of hearsay prevent unreliable evidence, like the hand written note, from reaching a jury. Lastly, the untested statement made in this case should be excluded because of the Sixth Amendment right to confrontation.

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Date: February 12, 2016

Respectfully Submitted,

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JOHN CREED