THIRTY-FIRST ANNUAL

DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 15-1789

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

--against--

JOHN CREED,

Respondent.

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

TABLE OF CONTENTS

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

IN RE APPLICATION OF THE	**TO BE FILED UNDER SEAL**
UNITED STATES OF AMERICA	
FOR AN ORDER PURSUANT TO	
18 U.S.C. § 2703(d)	**Misc. No. 14-03**

----------X

APPLICATION OF THE UNITED STATES
FOR AN ORDER PURSUANT TO 18 U.S.C. § 2703(d)

The United States of America, moving by and through its undersigned counsel, respectfully submits under seal this *ex parte* application for an Order pursuant to 18 U.S.C. § 2703(d), the Stored Communications Act. The proposed Order would require AB&C Wireless, Inc., a cellular service provider located in Agrestic, Boerum, to disclose geolocation records[1] pertaining to the cellular telephone assigned call number (007) 555-5646, registered to John Creed, for the period of time spanning from July 24, 2013, to September 21, 2013.

LEGAL BACKGROUND

1. AB&C Wireless, Inc. ("AB&C Wireless") is a provider of an electronic communication service, as defined in 18 U.S.C. § 2510(15). Accordingly, the United States may use a court order issued under § 2703(d) to require AB&C Wireless to disclose the geolocation records described above, as these records pertain to a subscriber of an electronic communication service and do not contain the contents of such communications. *See* 18 U.S.C. § 2703(c)(1).

2. A court order under § 2703(d) "shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Accordingly, the next section of this application sets forth specific and articulable facts showing that there are reasonable grounds to believe that the records and other information sought herein are relevant and material to an ongoing criminal investigation.

[1] In particular, the Government seeks information regarding GPS location-tracking data and cell site location information obtained from the cell towers and satellites through which communications were sent or received during the relevant period. *(Throughout the Prince Competition Record on Appeal, the terms "geolocation records," "geolocation data," and "location-tracking information" are used interchangeably to refer to both GPS and cell site location information ("CSLI").)*

THE RELEVANT FACTS

3. The United States is investigating the circumstances surrounding the death of Angelo Ortiz ("Ortiz"), a resident of Boerum City. On September 21, 2013, Ortiz, a man of Italian and Ecuadorian descent, was shot and killed by Boerum City Police Officer John Creed ("Officer Creed"). The investigation thus far indicates that Officer Creed may have killed Ortiz because of the latter's actual or perceived national origin, in violation of, *inter alia*, 18 U.S.C. § 249(a)(1).

4. On September 21, 2013, at approximately 12:15 p.m., Officer Creed reported for duty. He was assigned to patrol the Open the Gates immigrants' rights demonstration in Boerum City, Boerum (the "OTG Demonstration").

5. At all times relevant to this application, Open the Gates was a non-profit human rights organization with a stated mission of protecting and advocating for the rights of people of Latino ethnicity and encouraging their participation in the civil, social, political, and cultural fabric of the United States. The OTG Demonstration, which had an estimated 5,000 people in attendance, consisted of a march down Cobble Road that culminated in a rally in Prospector Heights Park. Ortiz attended the march.

6. At approximately 1:30 p.m., near the intersection of Cobble Road and Slope Place, a confrontation erupted between some of the participants in the demonstration and several spectators. During the course of the confrontation, Officer Creed is alleged to have fired three shots at Ortiz in an alleyway. Emergency response personnel subsequently pronounced Ortiz dead on arrival at Pitler Memorial Hospital.

7. Upon information and belief, Officer Creed's shooting of Ortiz was motivated by Officer Creed's animus towards people of actual or perceived Latino origin. Evidence recovered at the scene included Ortiz's handheld camera. Although the device was badly damaged, investigators from the Federal Bureau of Investigation ("FBI") were able to recover a portion of the recording, which captured the beginning of the confrontation. In the video recording, Officer Creed is shown standing in the middle of Cobble Road yelling in the direction of Ortiz and several of the demonstrators: "Hey Paco, get the fuck back where you and your people came from" and "Stay behind the fence."

8. In addition to the video recording obtained from Ortiz's camera, Officer Creed's partner in the Boerum City Police Department, Officer Jesús Familia ("Officer Familia"), has supplied further evidence demonstrating Officer Creed's animus towards people of Latino origin. In an interview with FBI agents, Officer Familia stated that Officer Creed arrived late to work on September 21, 2013—as he had on other occasions—and appeared heated and agitated, but refused to discuss why he was late.

9. During his FBI interview, Officer Familia stated that when he encountered Ortiz in the alleyway, Ortiz made the following statements before slipping into unconsciousness: "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."

10. Officer Familia further stated that when Officer Creed had given him a ride home from work a month earlier, Officer Familia saw a stack of brightly colored flyers on the floor of the car's backseat. One flyer was visible and contained an image of a man, whom Officer Familia recognized as Martin Blythe Cole ("Cole"). Upon information and belief, Cole, who died in prison in September 2003, was a well-known white-Anglo-supremacist leader and founder of the Brotherhood of the Knights of Boerum. In his FBI interview, Officer Familia also stated that Officer Creed had frequently referred to Officer Familia as "one of the good ones." Officer Familia indicated that he understood this statement to refer to his Latino ethnicity.

11. Upon information and belief, and based on upon facts recounted in paragraphs 3-10, above, geolocation records from Officer Creed's cellular phone are relevant and material to determining Officer Creed's intent when he shot Ortiz on September 21, 2013.

REQUEST FOR ORDER

12. The facts set forth in the previous section show that there are reasonable grounds to believe that the records and other information sought herein are relevant and material to an ongoing criminal investigation. Specifically, these items will help the United States determine the nature and scope of the activities of Officer Creed, the individual responsible for the events described above. Accordingly, the United States requests that AB&C Wireless be directed to produce the geolocation records described above.

13. The United States further requests that the Court order this application and any resulting order be sealed until further order of the Court. As explained above, these documents discuss an ongoing criminal investigation that is neither public nor known to all of the targets of the investigation. Accordingly, there is good cause to seal these documents because their premature disclosure may seriously jeopardize this investigation.

Dated: New Pawnee, Boerum
January 3, 2014

/s/ Loretta Z. Barnes
Loretta Z. Barnes
Assistant U.S. Attorney
291 Montague Square
New Pawnee, Boerum 40317

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
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UNITED STATES OF AMERICA

Cr. No. 14-92
-against- **INDICTMENT**

JOHN CREED, **18 U.S.C. § 249**

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

THE GRAND JURY CHARGES:

INTRODUCTION

1. At all times relevant to this Indictment, Defendant John Creed ("Creed") was a police officer in the Boerum City Police Department.

2. At all times relevant to this Indictment, the Brotherhood of the Knights of Boerum (the "Brotherhood" or "BKB") was a hate group based in the State of Boerum with a stated mission to re-establish white-Anglo domination of the United States.

3. At all times relevant to this Indictment, Creed was a member of the BKB. Creed attended a Brotherhood meeting on the morning of September 21, 2013, at the White Knight Tavern, located at 1003 Remsen Boulevard, Boerum City, Boerum 42192, the meeting place of the BKB. Creed then reported to work at about 12:15 p.m.

4. At all times relevant to this Indictment, Open the Gates was a non-profit human rights organization with a stated mission to protect and advocate for the rights of people of Latino ethnicity and encourage their participation in the civil, social, political, and cultural fabric of the United States.

OPEN THE GATES MARCH

5. Open the Gates coordinated a march in Boerum City on September 21, 2013, to promote paths to citizenship for undocumented workers. The march began at 1:00 p.m. at the intersection of Shack Street and Cobble Road and proceeded northbound on Cobble Road toward a planned rally in Prospector Heights Park. Around 5,000 people participated in the event.

6. Defendant Creed was one of 300 police officers assigned by the Boerum City Police Department to patrol the march. Creed was stationed at the intersection of Cobble Road and Slope Place, along with nine other officers, to supervise the crowd as the march passed that particular intersection.

7. One of the marchers, Angelo Ortiz ("Ortiz"), was present at the intersection of Cobble Road and Slope Place when a confrontation erupted between several spectators and marchers. As the situation escalated, Ortiz jumped over a police barricade and headed towards a nearby alley.

8. Defendant Creed pursued Ortiz over the barricade and directed obscenities and ethnic slurs at him, calling him "Paco" and "wetback," and telling him to "get the fuck back where you and your people came from" and "stay behind the fence."

9. In the alley, Defendant Creed shot Ortiz with his police-issued Block 9-millimeter handgun, hitting him once in the stomach and once in the chest. A third bullet struck the small video recording device that Ortiz was holding at the time. Emergency response personnel later pronounced Ortiz dead on arrival at Pitler Memorial Hospital.

10. The State of Boerum has requested that the Federal Government assume jurisdiction over this case pursuant to 18 U.S.C. § 249(b)(1)(B). United States Attorney General Kima Perlman has certified this request.

COUNT ONE
Hate Crimes Prevention Act
(In Violation of 18 U.S.C. § 249)

11. The allegations contained in Paragraphs 1 through 10 are re-alleged and incorporated as fully set forth herein.

12. On or about September 21, 2013, within the District of Boerum, Defendant John Creed, through the use of a firearm, did willfully cause bodily injury to a person, to wit, Angelo Ortiz, resulting in the person's death, because of the actual or perceived national origin of the person, in violation of Title 18, United States Code, Section 249(a)(1).

A TRUE BILL

/s/ Miguel H. Scott
FOREPERSON

/s/ Cyril Beecher
CYRIL BEECHER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF BOERUM

EXHIBIT A

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

-against-

JOHN CREED,

Defendant.

----------X

AFFIDAVIT OF JESÚS FAMILIA IN OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE AND TO SUPPRESS EVIDENCE

Cr. No. 14-92

STATE OF BOERUM)
:SS:
COUNTY OF BOERUM)

I, Jesús Familia, do hereby declare as follows under penalty of perjury:

1. I submit this affidavit in support of the Government's opposition to Defendant Creed's motions in limine and to suppress evidence.

2. My name is Jesús Familia.

3. I am a Detective with the Boerum City Police Department and have been employed by the Department since March 2005.

4. John Creed ("Officer Creed") was my partner in the Boerum City Police Department, Precinct 24, from February 2013 until September 21, 2013, when Officer Creed was placed on restricted duty. While we worked together, we each held the rank of Patrol Officer. During this time, Officer Creed performed his duties in a professional manner and to my knowledge was never the subject of a civilian or coworker complaint.

5. On September 20, 2013, Officer Creed and I learned that the following day we were assigned to patrol a demonstration march sponsored by Open the Gates. The march was scheduled to begin at 1:00 p.m. and was to proceed northbound along Cobble Road ("Cobble") towards Prospector Heights Park, where it was scheduled to culminate in a rally. We were instructed to expect roughly 5,000 participants at the event.

6. Officer Creed and I, along with several other officers, were assigned to patrol the intersection of Cobble and Slope Place ("Slope"), to ensure that no confrontations ensued between the marchers and any spectators in our general vicinity.

7. Barricades were erected at various intersections along the march route to block traffic. Metal barriers were also placed along the curbs on each side of Cobble, separating the participants on the street from spectators on the sidewalks.

8. On September 21, 2013, I arrived at the precinct at 11:45 a.m. Officer Creed was late to work that day. He arrived in an agitated state at or around 12:15 p.m. When I inquired as to his whereabouts and his late arrival, he snapped, "It's none of your business," and then quickly changed into his patrol uniform. Once he was ready, we entered our patrol car and proceeded to our assigned location along the march route.

9. Over the previous six months, Officer Creed had occasionally been late in reporting for our 12:00 – 8:00 p.m. shift. When I would ask why, Officer Creed would try to change the subject, often telling me "not to worry about it."

10. At or around 12:45 p.m. on September 21, 2013, Officer Creed and I arrived at the intersection of Cobble and Slope and stationed ourselves by the barricades separating the participants from the spectators on the sidewalk.

11. At or around 1:15 p.m., the participants started passing our barricade. The crowd was loud but peaceful for the next ten to fifteen minutes.

12. At or around 1:25 p.m., a large contingent of spectators started to gather on the sidewalks along Cobble Road. Some of the spectators began yelling at the participants and directing a number of ethnic slurs and obscenities towards them.

13. At or around 1:30 p.m., I heard the sound of shattering glass, followed by a scream. I looked into the crowd and saw a participant crying and holding her head in her hands. I then saw several other objects being thrown by spectators towards the participants in an effort to heckle them. I could not identify any of the assailants.

14. I then observed an unidentified male participant wearing a dark-colored sweatshirt throw a rock, which narrowly missed us.

15. I then observed Officer Creed vault over the barricade from the spectator side and onto Cobble Road. Creed rushed into the crowd of participants. I followed suit. The crowd immediately began to scatter, with some people jumping over the barricades and onto the sidewalks to flee the commotion.

16. I then observed Officer Creed farther down the street pursuing a male dressed in a black hooded sweatshirt and blue jeans. I did not see any objects in the individual's hands, nor did I see him make any threatening gestures towards Officer Creed or anyone else.

17. Before I could catch up with Officer Creed, I was shoved and knocked down by a fleeing participant. I momentarily lost track of Officer Creed's precise whereabouts, though I noticed that he had turned down an alleyway.

18. Immediately thereafter, I heard what sounded like three gunshots fired in rapid succession from the direction of the alleyway. Almost instantaneously, I received a radio transmission from Officer Creed saying, "Shots fired, suspect down, officer in need of assistance, in alley southeast of Cobble and Slope! Suspect is armed! I repeat, suspect is armed!" I promptly ran towards the location described by Officer Creed.

19. I arrived to see Officer Creed sitting against a wall at the mouth of a blind alley. He was holding his gun in his hands and appeared dazed but unharmed. I immediately drew my service weapon and turned down the alley in search of the suspect.

20. My attention was then drawn farther down the alley by a loud groan. About fifty feet into the alley, I saw a male in his mid-thirties, later identified as Angelo Ortiz ("Ortiz"), lying on the ground. I recognized the victim as the man in the black hooded sweatshirt and blue jeans whom Officer Creed had been pursuing.

21. From where I stood, I could not see whether Ortiz was holding a weapon, so I approached him with my gun drawn and ordered him to raise his hands. Ortiz did not respond.

22. Officer Creed then yelled to me, "Jesús, he's the guy I was chasing. He's got a gun." I noticed a shiny metallic object about five feet away from the victim and continued to proceed towards him with caution.

23. The victim was bleeding severely from his mouth and abdomen and was struggling to breathe. I assessed that he was no longer a threat to either my or Officer Creed's personal safety and holstered my firearm. I then immediately radioed for medical assistance. Upon closer examination, I noticed that the victim had two gunshot wounds: one to the stomach and one to the upper left chest. I then turned my attention to the shiny metallic object lying on the ground nearby, and I immediately recognized the object to be a small, partially shattered video recording device. I did not find a gun or any other weapons on the scene.

24. The victim motioned with his left hand for me to come closer to him. I crouched next to him and asked him what happened. He replied, "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." The victim then slipped into unconsciousness.

25. Shortly thereafter, paramedics arrived and transported the victim to Pitler Memorial Hospital, where, I later learned, he was pronounced dead on arrival.

26. I also learned later that aside from the gunshot wounds, Ortiz's autopsy revealed no wounds or bruises consistent with a physical altercation.

27. Since the shooting, I have reflected on several strange interactions I had with Officer Creed in the weeks and months prior to the Open the Gates demonstration. On one occasion, I found Officer Creed's cell phone on a bench in the locker room after he had left the station.

On my way home, I stopped by Officer Creed's house to return it to him. When I arrived at his house, he thanked me profusely and said, "Jesús, you're one of the good ones, not like the rest of them." Officer Creed repeated this remark, which I understood to be a reference to my Latino ethnicity, about a dozen times while we were partners on the force.

28. About one month before the shooting, when my car was in the shop being repaired, Officer Creed gave me a ride home from the station. As I climbed into the car, I noticed a stack of brightly colored flyers on the floor in the rear of the vehicle. One of the flyers was visible, and it contained a picture of a man whom I recognized to be Martin Blythe Cole, the well-known white-Anglo-supremacist leader and founder of the Brotherhood of the Knights of Boerum.

29. When I asked Officer Creed about the flyers, he said "I grabbed them from a junkie who was handing them out on the street, don't worry about it." We did not discuss the matter further.

Dated: June 16, 2014

/s/ Jesús Familia
Detective Jesús Familia
Boerum City, Boerum

Sworn to before me this 16th day
of June, 2014

/s/ Christopher Traeger
Notary Public

EXHIBIT B

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

UNITED STATES OF AMERICA

-against-

JOHN CREED,

Defendant.

----------X

AFFIDAVIT OF PETER QUINN IN OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE AND TO SUPPRESS EVIDENCE

Cr. No. 14-92

STATE OF BOERUM)
:SS:
COUNTY OF BOERUM)

I, Peter Quinn, being duly sworn, declare under penalty of perjury:

1. I submit this affidavit in support of the Government's opposition to Defendant John Creed's motions to suppress evidence obtained from AB&C Wireless, Inc. ("AB&C Wireless") and to preclude introduction of a document obtained from the files of the Brotherhood of the Knights of Boerum ("the Brotherhood").

2. My name is Peter Quinn.

3. I am a Special Agent in the Federal Bureau of Investigation ("FBI") and have been assigned to the Civil Rights Division for the last fifteen years. As a Special Agent, I investigate alleged violations of federal civil rights statutes and occasionally assist state and local authorities with their investigations into certain matters. Since I joined the Civil Rights Division, I have primarily investigated hate crimes motivated by bias against characteristics such as race, religion, national origin, and sexual orientation. As such, I have become very familiar with various hate groups in the United States.

4. Based on my fifteen years of training and experience, and upon information and belief, the Brotherhood is one of the oldest and most virulent anti-Latino groups in the State of Boerum. The founder of the Brotherhood was Martin Blythe Cole ("Cole"), a well-known white-Anglo-supremacist leader.

5. Established in the early 1950s, in its founding charter, the Brotherhood explicitly calls for "restoring America to white-Anglo-Saxon rule." Its membership has decreased in size from its heyday in the 1980s, but it still has a significant presence in Boerum. The group has ramped up its activities in the last several years, coincident with a sharp increase in Boerum's

Latino population, an increase that has been attributed to an influx of immigrants from Mexico. Among other activities, the Brotherhood has been known to engage in counter-demonstrations at pro-immigrants' rights rallies.

6. As a Special Agent in the FBI's Civil Rights Division, I also oversee requests for cell phone records under the Stored Communications Act ("SCA"). In addition to filing affidavits in support of applications for court orders under the SCA, I work with the United States Attorney's Office to interpret the location-tracking information and create maps of the cell phone user's movements based on Cell Site Location Information ("CSLI") and GPS data.

7. In connection with the FBI's investigation into the death of Angelo Ortiz, and pursuant to the SCA, I, together with Assistant United States Attorney Loretta Z. Barnes, applied to United States Magistrate Judge Chamberlain Haller, Jr., for an order pursuant to 18 U.S.C. § 2703(d), directing AB&C Wireless to disclose, among other records, geolocation records pertaining to the cellular telephone assigned call number (007) 555-5646 for the sixty-day period leading up to Ortiz's death, to wit, from July 24, 2013, to September 21, 2013.[2] The Order was granted on January 6, 2014, and the geolocation records obtained from AB&C Wireless is summarized below in paragraph 11.

8. Records obtained from AB&C Wireless confirm that the cell phone assigned to number (007) 555-5646 is registered to and owned by Defendant John Creed ("Creed").

9. The results of the SCA application contain location-tracking information for Creed's cell phone from July 24, 2013, to September 21, 2013. The records obtained from AB&C Wireless are drawn from signal transmissions and other communications between Creed's cell phone and various cell site towers and GPS satellites.

10. While Creed disabled the "location operations" function on his cell phone, which ordinarily would permit the cell phone to emit regular and continuous signals to cell site towers and GPS satellites so long as his phone was on, Creed failed to prevent applications from gathering location information in the "background."[3] Accordingly, several applications, among them the Weather App that came pre-installed on his cell phone, operated in the "background" and transmitted signals to cell site towers and GPS satellites on a regular and continuous basis.

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[2] AB&C Wireless's Privacy Policy states, in part:

> We collect information when you communicate with us and when you use our products, services and sites. This includes information you provide, such as name and contact information, images, the reason for contacting us, driver's license number, Social Security Number, and payment information. Service usage information we collect includes call records, websites visited, wireless location, application and feature usage, network traffic data, product and device-specific information and identifiers, service options you choose, mobile and device numbers, video streaming, and other similar information.

http://abcwireless.com/legal/privacy.html (last visited June 2, 2014).

[3] "Location operations" refers to the location services provided on most smartphones. A cell phone user has the option to enable or disable these services. "Background" refers to any applications a cell phone user has downloaded (or uses) which gather location data in order to function. Many of these applications run continuously in the background of the user's phone (i.e., the user need not actively use the application in order for it to collect data).

11. The following data were obtained from AB&C Wireless and indicate that Creed visited the following locations with the following frequencies over the sixty-day period.[4]

	LOCATION	TIME	FREQUENCY
a.	John Creed's Residence 252 Henry Street, Apartment 5 Boerum City, Boerum 42192	All other relevant times	Nearly every day
b.	Boerum City Police Department 24th Precinct 200 Tillary Street Boerum City, Boerum 42192	Roll call at start of shift; miscellaneous other times	Five days a week
c.	The White Knight Tavern 1003 Remsen Boulevard Boerum City, Boerum 42192	At night after work; on Saturday mornings, notably among them, the morning of September 21, 2013, 9:00 a.m. – 12:00 p.m.	Three days a week
d.	Residence of Avery and Audrey Bonde 718 Hickory Lane Boerum City, Boerum 42192	Late nights when Officer Avery Bonde is reportedly working the overnight shift at the 24th precinct	Two nights a week
e.	Supreme Court of the State of Boerum 977 Court Street Boerum City, Boerum 42192	Court hours	Twice a month
f.	Credit Union of Boerum 847 3rd Street Boerum City, Boerum 42192	Monday evening	Once a week
g.	The Law Offices of Grobowski & Meyers [Matrimonial Attorneys] 958 1st Street, Suite 2 Boerum City, Boerum 42192	10:00 a.m.	Twice in 60 days
h.	Residence of Jerry Johnson [Suspected member of the Brotherhood] 433 Henry Street Boerum City, Boerum 42192	8:00 p.m.	Once a week
i.	Residence of Matt Jones [Suspected member of the Brotherhood] 898 Hunts Lane Boerum City, Boerum 42192	8:00 p.m.	Once a week
j.	Boerum Grocers 677 3rd Street Boerum City, Boerum 42192	2:00 p.m.	Once a week
k.	Boerum Liquors 678 3rd Street Boerum City, Boerum 42192	1:00 p.m.	Once a week
l.	CVS Pharmacy 287 5th Street Boerum City, Boerum 42192	Miscellaneous	Five times

[4] This chart reflects the summary of geolocation records obtained from AB&C Wireless, pursuant to the Order, dated January 6, 2014, as well as information supplied by the subsequent investigation by FBI agents.

	LOCATION	TIME	FREQUENCY
m.	Dunkin Donuts 386 Court Street Boerum City, Boerum 42192	7:00 a.m.	Four days a week
n.	Boerum Barber 227 Main St. Boerum City, Boerum 42192	6:00 p.m.	Three times
o.	Planet Fitness 73 Arnold Lane Boerum City, Boerum 42192	8:00 p.m.	Three days a week
p.	Victoria's Secret 89 Main Street Boerum City, Boerum 42192	4:00 p.m.	Three times
q.	Pitler Memorial Hospital, Pediatric Wing 262 Main Street Boerum City, Boerum 42192	2:00 – 5:00 p.m.	Every other Sunday
r.	Boerum Free Clinic 64 Smith Street Boerum City, Boerum 42192	10:00 a.m.	Twice
s.	Church of St. Luke 126 Gospel Boulevard Boerum City, Boerum 42192	11:00 a.m.	Sundays
t.	Miss Anna's Salon 24 Main Street Boerum City, Boerum 42192		Once every two weeks
u.	Boerum Dry Cleaners 68 Main Street Boerum City, Boerum 42192		Once a month
v.	Express [Clothing Store] 489 6th Street Boerum City, Boerum 42192		Once
w.	Boerum Cigars and Tobacco 87 5th Street Boerum City, Boerum 42192		Once a month
x.	Residence of Nora and John Creed [John Creed's Parents] 47 Garden Lane Boerum City, Boerum 42192		Once every two weeks
y.	Boerum Cinemas 1 Main Street Boerum City, Boerum 42192	8:00 p.m.	Three times
z.	Boerum Hunting and Fishing 57 Main Street Boerum City, Boerum 42192		Three times
aa.	Lloyd's Steakhouse 48 12th Avenue Boerum City, Boerum 42192	7:00 p.m.	Four times

	LOCATION	TIME	FREQUENCY
bb.	Residence of Amy and Ashley Creed [John Creed's ex-wife and daughter] 965 9th Street Boerum City, Boerum 42192	Friday evening pick up, Sunday evening drop off	Every other weekend
cc.	BCPD Gun Range 222 Tillary Street Boerum City, Boerum 42192	Two hours at a time	Every two weeks
dd.	Boerum City Park [Softball field 3]	7:00 p.m.	Every Tuesday
ee.	Boerum Shores Beach	9:00 a.m. – 6:00 p.m.	Twice
ff.	The Royal Flush Casino 777 Kings Boulevard Boerum City, Boerum 42192	Weeknights	Four times
gg.	The Boerum Marina 1 Dockside Lane Boerum City, Boerum 42192	4:00 a.m. – 2:00 p.m.	Twice
hh.	LEO's Ale House [Bar frequented by officers of the 24th Precinct] 250 Tillary Street Boerum City, Boerum 42192	Evenings	Twice a week
ii.	Chuck E. Cheese's 648 8th Street Boerum City, Boerum 42192	1:00 – 5:00 p.m.	One Sunday
jj.	Our Lee Motel 696 John Lane Boerum City, Boerum 42192	11 p.m. – 2:00 a.m.	Three times

12. Upon information and belief, the White Knight Tavern, located at 1003 Remsen Boulevard, Boerum City, Boerum 42192, is the regular and habitual meeting place for the Brotherhood of the Knights of Boerum and has been for the last twelve years.

13. Upon information and belief, Creed was a member of the Brotherhood, and he regularly attended its Saturday morning meetings, as evidenced by his frequent visits to the White Knight Tavern.

14. Based upon the information revealed in the geolocation records obtained from AB&C Wireless, the FBI obtained and executed a warrant to search the White Knight Tavern. During the course of the search, investigators discovered a document in a file cabinet that appeared to be a letter from Martin Blythe Cole to the Brotherhood of the Knights of

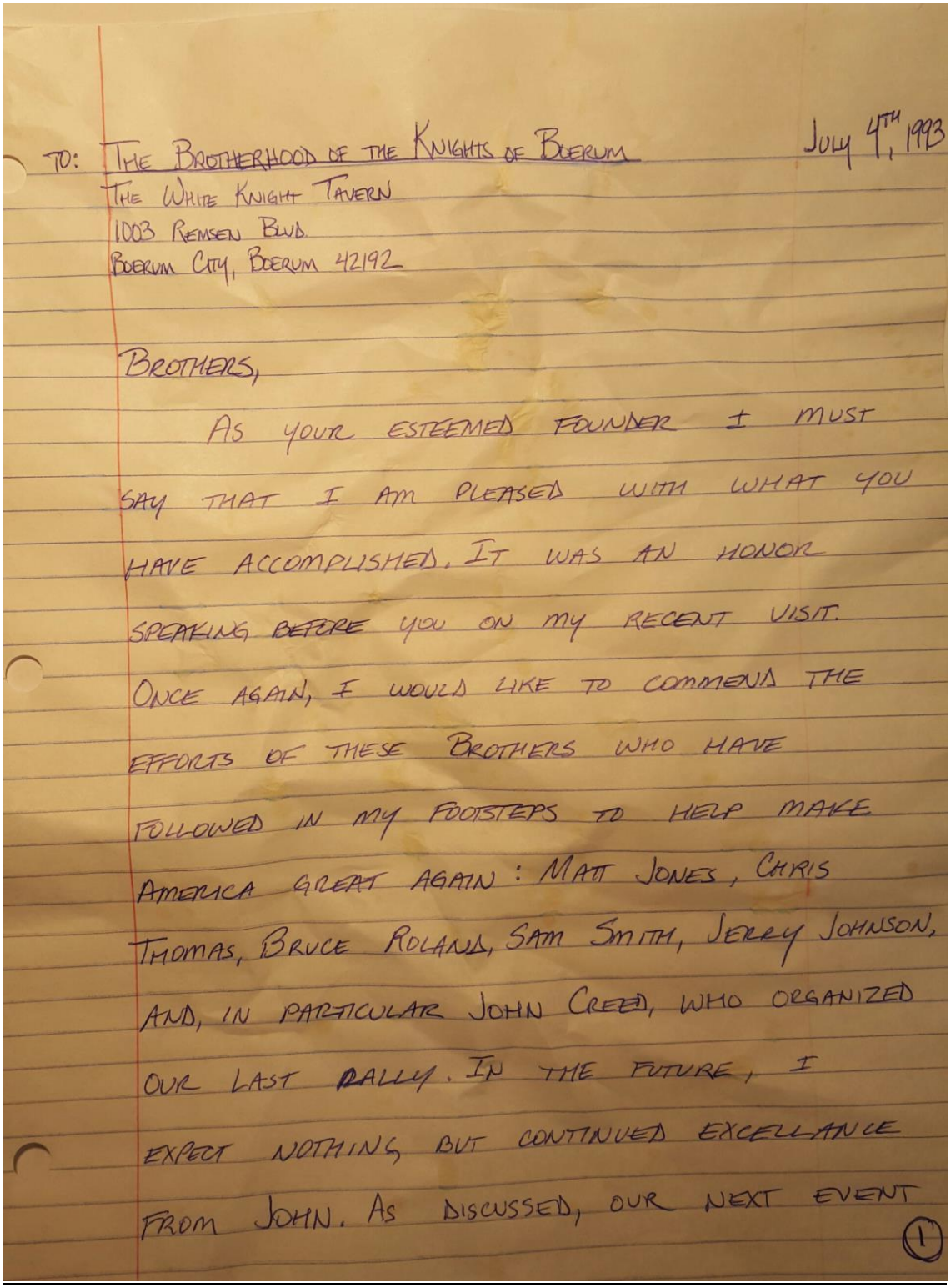
Boerum, dated July 4, 1993, extolling the Brotherhood's recent activities, and in particular, Creed's activities. A copy of the letter is attached hereto as Exhibit 1.

/s/ Peter Quinn
Peter Quinn
Boerum City, Boerum

Sworn to me and subscribed before me
this 16th day of June, 2014

/s/ Annabelle Perkins
Notary Public

EXHIBIT 1



TO: THE BROTHERHOOD OF THE KNIGHTS OF BOERUM
THE WHITE KNIGHT TAVERN
1003 REMSEN BLVD.
BOERUM CITY, BOERUM 42192

JULY 4TH, 1993

BROTHERS,

AS YOUR ESTEEMED FOUNDER I MUST SAY THAT I AM PLEASED WITH WHAT YOU HAVE ACCOMPLISHED. IT WAS AN HONOR SPEAKING BEFORE YOU ON MY RECENT VISIT. ONCE AGAIN, I WOULD LIKE TO COMMEND THE EFFORTS OF THESE BROTHERS WHO HAVE FOLLOWED IN MY FOOTSTEPS TO HELP MAKE AMERICA GREAT AGAIN: MATT JONES, CHRIS THOMAS, BRUCE ROLAND, SAM SMITH, JERRY JOHNSON, AND, IN PARTICULAR JOHN CREED, WHO ORGANIZED OUR LAST RALLY. IN THE FUTURE, I EXPECT NOTHING BUT CONTINUED EXCELLANCE FROM JOHN. AS DISCUSSED, OUR NEXT EVENT

(1)

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

Cr. No. 14-92

-against-

JOHN CREED,

Defendant.
----------X
July 24, 2014

TRANSCRIPT OF HEARING ON PRE-TRIAL MOTIONS

Before: The Honorable Margaret H. Silvers, District Judge, United States District Court

APPEARANCES:

For the United States of America:	Loretta Z. Barnes Assistant United States Attorney 291 Montague Square New Pawnee, Boerum 40317
For Defendant John Creed:	Gerald V. Callo Diaz, Gambini & Howle LLP 178 Park Avenue Boerum City, Boerum 42190
Court Reporter:	Selena P. Malloy Eastern District Reporter Services 305 Montague Square New Pawnee, Boerum 40317

CLERK: United States of America versus John Creed. Counsel, please note your appearances for the record.

MS. BARNES: Loretta Barnes, for the United States. Good morning, your honor.

MR. CALLO: Gerald Callo of Diaz, Gambini & Howle, for the Defendant, John Creed. Good morning, your honor.

THE COURT: Good morning counsel. I understand we are here to discuss Mr. Creed's motion to suppress and his two motions in limine. But before we get there, Ms. Barnes, why don't you briefly summarize for the record where we are in this case.

MS. BARNES: Certainly, your honor. This case arises out of the investigation by the Federal Bureau of Investigation into an alleged hate crime perpetrated by the Defendant, John Creed, at a demonstration organized by Open the Gates in Boerum City late last year. During the course of the march down Cobble Road, a small group of spectators got into a scuffle with several marchers. During this confrontation, multiple projectiles were thrown, striking several marchers. Several witnesses saw an unidentified male marcher in a dark hooded sweatshirt throw a rock in response that narrowly missed several police officers.

Further violence and panic ensued, and several marchers, including the victim, Angelo Ortiz, a man of Ecuadorian and Italian descent who fit the description of the marcher who threw the rock, jumped over a barricade lining Cobble Road and ran

down a nearby blind alley. The Defendant pursued Mr. Ortiz down the alley and proceeded to fire three shots from his service weapon. Mr. Ortiz was struck once in the stomach and once in the chest, and the third bullet hit a small video recording device that Mr. Ortiz was holding at the time. Although the bullet largely destroyed the device and its contents, a small portion of the video showing the first few seconds of the encounter between the Defendant and Mr. Ortiz survived. The video shows the Defendant standing in the middle of Cobble Road among the marchers, yelling in the direction of the camera. Creed is heard on the video shouting with an expletive that I will omit, your honor, "Hey Paco, get back where you and your people came from!" and "Stay behind the fence." The remainder of the recording was destroyed, and though the parties dispute what happened next, we know for a fact that the Defendant ended up shooting and killing Angelo Ortiz.

After the shots were fired, the Defendant radioed for backup, and Officer Jesús Familia, Officer Creed's partner on the force, promptly responded to the scene. There, Officer Familia found the Defendant sitting against the wall, dazed but unharmed. Mr. Ortiz was on the ground about fifty feet farther down the alley from the Defendant and was bleeding profusely from the mouth and abdomen. Officer Familia has provided sworn testimony that he knelt beside Mr. Ortiz and asked Mr. Ortiz

what had happened, and in response, Mr. Ortiz stated: "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." Mr. Ortiz then slipped into unconsciousness and was later pronounced dead on arrival at Pitler Memorial Hospital. A detailed account of the march and shooting is contained in Officer Familia's affidavit, attached to our papers as Exhibit A.

During the lengthy investigation that followed, the FBI learned that the Defendant was a long-time member of the Brotherhood of the Knights of Boerum, a notorious white-Anglo-supremacist hate group dedicated to restoring white-Anglo dominance in America. Further details concerning the Defendant's association with the Brotherhood can be found in Special Agent Quinn's affidavit, attached to our papers as Exhibit B. As a result of the investigation, the Defendant, whose employment with the Boerum City Police Department has since been terminated, was indicted on one count of violating the Hate Crimes Prevention Act, pursuant to Title 18 of the United States Code, Section 249, for the death of Angelo Ortiz. Trial is set for September 15, and as the Court correctly indicated, we are here today to discuss the defense's motions.

THE COURT: Thank you very much, counselor. Mr. Callo, let us now turn to your motions. The floor is yours, whenever you are ready to proceed.

MR. CALLO: Thank you, your honor. My client, Officer John Creed, stands before this Court accused of a most heinous crime. We maintain that Officer Creed's use of force was justified and lawful. He observed Mr. Ortiz throw a projectile at the police and took off after Mr. Ortiz to place him under arrest. Officer Creed then saw what he believed to be a weapon in Mr. Ortiz's hand and had every reason to believe that Mr. Ortiz was armed and dangerous. My client was acting in self-defense, and we know this because he radioed for assistance in dealing with an armed suspect and because he told Officer Familia in the alley that Ortiz had a gun on him--

THE COURT: Counselor, I am going to have to ask you to please proceed with your motions.

MR. CALLO: Your honor, I have the right to present my client's full defense before the Court today and to respond to the Government's biased description of the events of September 21, 2013. And the fact remains, your honor, that my client was simply doing his job and protecting the people of Boerum City. He was alone in a blind alley with a suspect that he had every reason to believe was armed and dangerous, and when that suspect

would not respond to simple commands to drop what my client believed to be a deadly weapon, he acted in self-defense by--

THE COURT: Counselor, I've already asked you once to move on. There will be no grandstanding in my courtroom. We are here to discuss your motions, and nothing more. Please move on.

MR. CALLO: I apologize, your honor. We understand that the events of the day in question are a matter for another day. We just needed to clarify for the record that we dispute the Government's characterization of the events in question. What we are here for today, your honor, is to ask this Court to exclude and suppress evidence that was obtained in violation of the Federal Rules of Evidence and the United States Constitution.

Our first motion concerns the Government's attempt to introduce into evidence records obtained from AB&C Wireless, Inc. under the Stored Communications Act, 18 U.S.C. Section 2703(d). As we explain at length in our written submissions, the Government relies on subsection (d) of Section 2703 of the SCA, which provides an avenue for the Government to compel wireless service providers to turn over records, including location-tracking information from cell site towers and GPS satellites, upon a finding of specific and articulable facts showing that there are reasonable grounds to believe that the records sought are relevant and material to an ongoing criminal

investigation. But to allow the Government to use the SCA to obtain two months of detailed location data would violate my client's Fourth Amendment rights. Significantly, your honor, under the statute, no probable cause is needed to obtain a court order for such records from the cell phone companies nor is there any independent requirement for a warrant before such records are to be turned over to the Government. We contend that by obtaining location-tracking information without first procuring a warrant supported by probable cause, the Government violated Officer Creed's Fourth Amendment rights to be free from unreasonable search and seizure. To the extent that the SCA can be read to permit the Government to obtain this information without a warrant, the statute is unconstitutional. We therefore move to suppress any and all records obtained from AB&C Wireless in this case.

THE COURT: Ms. Barnes?

MS. BARNES: Your honor, the constitutionality of using cell phone records obtained under the Stored Communications Act is well settled and has its origins in the firmly established third party doctrine. In this case, the Government filed an application pursuant to 18 U.S.C. Section 2703(d) to compel AB&C Wireless to turn over location-tracking information based on GPS and cell site location information collected from the Defendant's cell phone. Magistrate Judge Haller granted that

Order on January 6, 2014. While we are prepared to stipulate, your honor, that the facts presented in the 2703(d) application do not rise to the level of probable cause, the law clearly indicates that probable cause is not necessary to obtain these types of records from companies like AB&C.

Pursuant to the third party doctrine, requesting this type of data is not a search at all, and therefore the safeguards of the Fourth Amendment do not apply. The Supreme Court has held that if you disclose information voluntarily to third parties, it is understood that those third parties may disclose the information to the Government. Cell phone users are perfectly aware that they transmit signals to cell towers within range, and therefore, when making or receiving calls--or simply by leaving their phones on--the users are necessarily conveying their location to the service provider. Cell phone users are also aware of the fact that cell phone companies make records of cell-tower usage. As the Third Circuit made clear in In re the Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government, your honor, there is no legitimate expectation of privacy in such records. AB&C Wireless even includes a provision in its service contracts informing users that it collects and maintains such records. Therefore, by requiring the Government to make a showing of "specific and

articulable facts," the SCA adds a safeguard--it does not eviscerate one.

MR. CALLO: Your honor, the third party doctrine is simply not applicable to location-tracking information, and in light of the recent decisions by the Supreme Court in Jones and by the Eleventh Circuit in United States v. Davis, both of which are cited in our papers, the tide is turning against allowing the SCA to circumvent the Fourth Amendment.

THE COURT: Let me briefly cut you off, counselor. Let's just back up one second. What kind of evidence are we talking about here? Without getting into too much detail, can you explain the technology at issue? How were the records produced, and Ms. Barnes, how exactly do you intend to use them?

MS. BARNES: Certainly, your honor. Special Agent Quinn's affidavit includes the information the Government intends to offer into evidence at trial. In his affidavit, Special Agent Quinn explained how the technology works in a bit more detail, but what we're talking about here is essentially data that were collected from communications between the Defendant's cell phone and various cell site towers and GPS satellites. While the Defendant evidently turned off the "location operations" function on his phone, there were several applications that continued to gather location-tracking information while running in the "background." One such application, for example, is the

Weather App, which typically comes preloaded on the cell phone. Even when the cell phone user is not actively using the app, the Weather App continuously emits signals, or pings, to nearby cell site towers and GPS satellites every few seconds to gather location information so that it can accurately display weather information to the user when such information is requested. These apps are designed to provide greater functionality to cell phone users, and one way that they are able to do this is by transmitting location-tracking information even when the apps are working in the "background" of the phone's interface.

THE COURT: Okay, and assuming I will admit it, what does the Government intend to do with this evidence? What will it be used for?

MS. BARNES: Your honor, the geolocation records are being used to prove that the Defendant shot and killed Angelo Ortiz because of Ortiz's national origin--that is, because the Defendant believed Ortiz to be Mexican. As summarized in Exhibit B, the evidence will show that the Defendant visited the White Knight Tavern, the known meeting place of the Brotherhood of the Knights of Boerum, on multiple occasions, including on the morning the Defendant shot and killed Mr. Ortiz. The evidence will further show that the Defendant visited the homes of at least two other known members of the Brotherhood in the weeks prior to the shooting of Mr. Ortiz. The totality of the

evidence establishes that the Defendant, as a member of the Brotherhood, possessed an animus towards people he believed to be Mexican.

THE COURT: This seems like prior bad acts evidence, counselor.

MS. BARNES: There's no Rule 404 problem, your honor, because the Defendant's motive is an element that the Government must prove in a hate crime prosecution, and, as indicated in our papers, courts routinely admit such evidence to prove the defendant's bias and motive.

THE COURT: Okay, thank you very much, Ms. Barnes. Mr. Callo, your response? And before you respond on the law, let me ask you this: do you concede that the location-tracking information obtained from AB&C Wireless is correct? In other words, is it your argument that the technology is not reliable or is somehow inaccurate, or is your argument limited to the Fourth Amendment issue?

MR. CALLO: The latter, your honor. We take issue not with the accuracy or reliability of the data, but only with the fact that it was obtained without a warrant. Furthermore, your honor, the problem with this evidence is not that it violates Federal Rule of Evidence 404. We concede that it does not. The fatal defect with this evidence is the unavoidable conclusion that it was collected in the absence of a warrant supported by probable cause.

Officer Creed's Fourth Amendment rights were blatantly violated, and the evidence ought to be excluded on those grounds. Not only does the location-tracking information purport to show what Officer Creed has done in his free time and what he does when exercising his First Amendment right to freely associate with various civic and social organizations, but it also represents a gross expansion of the Government's ability to learn the most intimate details of Officer Creed's private life over a period of months. As is reflected in the Quinn Affidavit, the Government has learned what Officer Creed does and where he has been, thus revealing details that are among the most private and sensitive of a person's life. Your honor, no warrant was obtained here, and no warrant could have issued because no probable cause was demonstrated--something the Government concedes--before AB&C Wireless was compelled to turn over comprehensive data sets, revealing the movements of my client, 24/7, over a period of sixty days. The geolocation records should therefore be suppressed.

THE COURT: Thank you, counsel. I have your arguments and your memoranda. Let's turn to your second motion. Mr. Callo, I have reviewed both parties' submissions and understand that the defense moves to exclude a document on hearsay grounds.

MR. CALLO: Yes, your honor. Our second motion concerns the Government's attempt to introduce into evidence a document

obtained from an FBI search of the White Knight Tavern. During the search, agents located a document that allegedly identifies Officer Creed as a member of the Brotherhood. This document, however, is rank hearsay and should be excluded.

MS. BARNES: Your honor, while this evidence may be hearsay, it is admissible under the ancient documents exception to Rule 803.

THE COURT: Hold on just a moment, what exactly is this document that you are referring to?

MS. BARNES: Your honor, during the FBI search of the White Knight, agents located a file cabinet containing a number of financial records, as well as a letter believed to be written by Martin Blythe Cole to the Brotherhood in 1993. The letter concerned his visit to the Brotherhood's headquarters at the White Knight Tavern and specifically mentioned Defendant Creed's involvement with the Brotherhood.

THE COURT: And why is this relevant?

MS. BARNES: Your honor, Martin Blythe Cole is the founder of the Brotherhood, and in this letter, Cole spoke highly of Creed and his organization of a Brotherhood-led rally. Cole further went on to say that he expected continued excellence from Creed. Your honor, this document proves that the Defendant was not only an active member of the Brotherhood, as shown by the GPS data, but that he was a long-standing member who actively and eagerly took part in the group's hate-inspired activities.

MR. CALLO: Your honor, these hearsay statements must be excluded. The entire document is hearsay. Under Rule 802, they are out-of-court statements purportedly made by Martin Blythe Cole, and the Government is trying to introduce them for the truth of the matter asserted therein, namely that Officer Creed was a member of this group. There is no way to know that this document was even written by Mr. Cole. Additionally, this document is not a business record within the meaning of the Federal Rules of Evidence.

THE COURT: Ms. Barnes, what's the Government's position on this?

MS. BARNES: Your honor, while this document may be hearsay, and we concede that it is not admissible as a business record, it is nevertheless admissible under the ancient documents exception. The document is older than the 20-year time limit imposed by Rule 803(16) and satisfies the authentication requirements of Rule 901, as the document was found in a place where it would be expected to be found--in a file cabinet in the Brotherhood's meeting place. As long as documents meet these requirements, courts have nearly always admitted them, as in Brumley, Gupta, and other cases.

MR. CALLO: Your honor, this document is inadmissible. If this document were not admitted under the ancient documents exception, it certainly would not be admissible under the residual exception, or any other. There is no reason to accept

such an unreliable document that bears no particular relevance to the case at hand.

THE COURT: Ms. Barnes?

MS. BARNES: Your honor, this evidence will be necessary to show that the Defendant has been a member of some standing in the Brotherhood for many years. This tends to show that he holds the group's anti-Latino beliefs near and dear to his heart and provides the motivation for this terrible killing. This document also shows that the Defendant had garnered the respect of the man who started this hate group. Without this document, there is no other way for us to show the Defendant holds his racist beliefs so closely, or that he has held them for such an extended period of time. This is exactly what the ancient documents exception is intended to remedy--the unavailability of evidence due to an extended lapse of time. The case law shows that as long as the technical requirements of the rule are met, the document should be admitted.

THE COURT: Mr. Callo, how do you respond to that?

MR. CALLO: Your honor, let me start by saying that this evidence is not relevant. If it were as compelling as the Government asserts, then it would be admissible under the residual exception, and the Government would not have to rely on the outdated ancient documents exception. The Government is relying on other evidence, including the geolocation records acquired

through an invasion of my client's Fourth Amendment rights, to make an argument that Officer Creed possesses animus towards Latinos.

The 20-year cutoff does nothing to ensure that this document is reliable. If this document were only 19 years old, there would be no argument that the Government could make to have it admitted into evidence, and this arbitrary 20-year cutoff should not allow its admission. The Government has not provided any evidence corroborating that Martin Blythe Cole ever visited this chapter of the Brotherhood or that Officer Creed planned or participated in any Brotherhood events. The Government asks this Court to accept on the basis of an unsigned document that these events took place. Your honor, in light of these grave concerns about the document's reliability, I submit that the ancient document should be excluded as hearsay.

MS. BARNES: But your honor, that is the way that the rule is written, and we are bound by the Rules of Evidence. Nothing beyond the plain text of the rule is required. We don't have, nor do we need, any additional corroborating circumstantial evidence regarding this document. The document meets the requirements of Rule 901: it looks like a 20-year-old handwritten document should, it was found in the Brotherhood's headquarters, and it is over 20 years old.

THE COURT: Ms. Barnes, let me just say that while I understand that those documents meeting the technical requirements of the rule tend to enjoy automatic admission into evidence, I am not overly comfortable ruling that way. As Mr. Callo pointed out, the 20-year time limit does nothing to ensure that the contents of the document are actually reliable. In no universe would I ever want to be forced to admit a 21-year old tabloid article for its veracity, which, under your theory of the rule, I would be bound to do. I recognize and understand the purpose behind the rule, but I must say that I am not overly comfortable with it.

However, I am equally uncomfortable with completely gutting such a long-standing rule of evidence, which is what Mr. Callo suggests in having the Court ignore the plain meaning of Rule 803(16). Instead of holding the evidence inadmissible, I am leaning towards admitting it, but only upon a showing that this evidence is reliable. I would think that the Government could meet this burden with circumstantial evidence of the document's and its contents' reliability. I believe that a compromise of this sort would allow the Court to preserve the rule while also upholding the integrity and central purpose of the hearsay rules in keeping out unreliable evidence. Mr. Callo, let's move on to your third and final motion.

MR. CALLO: Thank you, your honor. Our final motion is to exclude Mr. Ortiz's statement made just prior to his death. Admitting Mr. Ortiz's statement as a dying declaration under Federal Rule of Evidence 804(b)(2) would violate Officer Creed's Sixth Amendment right to be confronted with adverse witnesses. The Supreme Court's jurisprudence since Crawford establishes that testimonial, out of court statements made by an unavailable declarant are only admissible when the defendant had a prior opportunity to cross-examine the declarant about the statement at issue. Here, obviously, my client had no opportunity to cross-examine Mr. Ortiz.

THE COURT: Let me understand you, counselor. Is it your argument that, assuming Mr. Ortiz's statement is a dying declaration under Federal Rule 804, which creates an exception for otherwise inadmissible hearsay when a declarant is unavailable, this Court should exclude the statement because admitting it would violate the Defendant's Sixth Amendment rights?

MR. CALLO: Yes, your honor, because--

THE COURT: Excuse me, counselor, but isn't the first question for this court whether or not this statement is testimonial? Isn't that the starting point for determining whether the Confrontation Clause is implicated by the admission of certain

evidence? Why do you contend that this statement is testimonial?

MR. CALLO: Your honor, our objection is based on the constitutional argument that to admit such a statement, even if it otherwise fits a recognized exception to the bar on hearsay, would violate Officer Creed's Sixth Amendment confrontation right. And yes, your honor, the first question is whether the statement is testimonial.

The Supreme Court has made clear in Bullcoming v. New Mexico that only testimonial statements, that is, those statements made with the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution, implicate the Sixth Amendment's Confrontation Clause. Here, we contend that the victim's statement is testimonial because first of all, the statement was made to a police officer and was in response to that police officer's questioning about the shooting. Second, the statement was not made in the course of an ongoing emergency. Officer Creed was clearly identified as the shooter, the shooting had stopped, and the shooter no longer posed a threat. And furthermore, the declarant suggested to the officer that there might be video evidence of the shooting. As the Court has stated in numerous cases, including Crawford v. Washington, Hammon and Davis, and

Michigan v. Bryant, testimonial statements of this nature must be excluded under the Sixth Amendment.

THE COURT: Ms. Barnes?

MS. BARNES: The Government does not disagree with defense counsel's characterization of the Court's Crawford jurisprudence or even that the statement is testimonial, but--

THE COURT: I see. So we are all in agreement that the statement in this case is testimonial and that this is not an issue for the court?

MR. CALLO: Yes, your honor.

MS. BARNES: Yes, your honor, that's correct, but that is only one prong of a test that defense counsel has greatly oversimplified. Defense counsel has failed to mention that the Supreme Court has repeatedly indicated--in many of the cases cited by defense counsel--that the exception for dying declarations has particular historical significance and represents an exception to the Confrontation Clause's bar on testimonial, out of court statements, even when those statements are not subject to cross-examination, so long as the statements fall within the scope of the exception as it was recognized at the time the Bill of Rights was adopted. As the Court stated in Giles v. California, dying declarations were admitted at common law even though they were unconfronted. Accordingly, there

exists an historical exception for the admission of dying declarations.

MR. CALLO: Your honor, the Supreme Court has only addressed the historical exception for dying declarations in dicta. The Court in Crawford indicated that were the dying declaration exception recognized as an historical exception to the right of Confrontation, it would be sui generis. There is no case law from the Supreme Court holding that this historical exception is valid, and the Government is relying on dicta to support its argument. It is clear that the Court has yet to resolve this issue.

MS. BARNES: While it may be true that the Court has not spoken definitively on the exception, the fact remains that nearly every court, both federal and state, to encounter a dying declaration since Crawford has relied on historical context and Supreme Court dicta in order to find that the admission of a testimonial dying declaration does not violate a defendant's Sixth Amendment confrontation right.

MR. CALLO: Your honor, as we discuss at length in our written submissions, the inquiry does come down to a historical analysis of the exception for dying declarations, particularly because that was how the Supreme Court handled a similar question in Giles v. California.

A survey of the history of the exception at the time of the drafting of the Confrontation Clause indicates that dying declarations were thought to be particularly reliable because as the dying faced "their maker," they were more apt to be truthful for fear of eternal damnation. Further, people near death were thought to be as reliable as people under oath. We contend that there are significant policy reasons for departing from this line of reasoning as a justification for an exception to the constitutional right to confront witnesses, particularly as our ideas about religion and reckoning have shifted. Where members of our society now hold such a variety of religious convictions, we can no longer rely on the assumptions that underpinned the historical exception. The justifications for the exception that existed at common law are simply not present here, and we ask the Court to find Mr. Ortiz's statement inadmissible.

MS. BARNES: Your honor, defense counsel is asking this Court to depart from the well-settled precedent of the vast majority of state and federal courts, as well as the Supreme Court's firm acknowledgement of the exception, in order to exclude a statement that nearly any other court at any point in history would have admitted. The defense has simply not met its burden in showing enough of a departure from the historical exception to justify this Court's exclusion of this dying declaration.

THE COURT: Before we leave this issue, Mr. Callo, in addition to conceding that Mr. Ortiz's statement is testimonial, would you also concede that the statement meets the requirements for a dying declaration under Rule 804(b)(2)?

MR. CALLO: Yes, your honor. Our objection is based solely on the Confrontation Clause.

THE COURT: All right, thank you, counsel. I think that should cover it for today. I now have your arguments and your written submissions, and my clerk will inform you when I have reached a decision on the motions.

MS. BARNES: Thank you, your honor.

MR. CALLO: Yes, thank you, your honor.

* * * *

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

Cr. No. 14-92

-against-

JOHN CREED,

Defendant.
----------X
August 27, 2014

TRANSCRIPT OF DECISION ON PRE-TRIAL MOTIONS

BEFORE: The Honorable Margaret H. Silvers, District Judge, United States District Court

APPEARANCES:

For the United States of America: Loretta Z. Barnes
Assistant United States Attorney
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New Pawnee, Boerum 40317

For Defendant John Creed: Gerald V. Callo
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178 Park Avenue
Boerum City, Boerum 42190

Court Reporter: Selena P. Malloy
Eastern District Reporter Services
305 Montague Square
New Pawnee, Boerum 40317

CLERK: United States of America versus John Creed. Counsel, please note your appearances for the record.

MS. BARNES: Loretta Barnes, for the United States. Good morning, your honor.

MR. CALLO: Gerald Callo of Diaz, Gambini & Howle, for the Defendant, John Creed. Good morning, your honor.

THE COURT: Good morning, counsel. I have reached a decision on the Defendant's motions. So long as there are no objections, I will be ruling from the bench.

MS. BARNES: No objections.

MR. CALLO: No objections, your honor.

THE COURT: For the sake of the record, I'll briefly review the procedural history leading up to the present motions. On April 11, 2014, Mr. Creed was indicted under the Hate Crimes Prevention Act for the murder of Angelo Ortiz. In three pre-trial motions, Defendant moved, first, to suppress evidence obtained from AB&C Wireless pursuant to an order granted under the Stored Communications Act; second, to exclude a document concerning Mr. Creed's involvement with the Brotherhood of the Knights of Boerum since at least 1993; and third, to exclude Mr. Ortiz's dying declaration. A hearing was held on July 24, 2014, in which the Court heard arguments on the Defendant's three pre-trial motions. Upon reviewing the memoranda submitted by each

side and after hearing oral arguments, the Defendant's motions are hereby granted in all respects.

The Fourth Amendment right to be free from unreasonable search and seizure applies with the same force in the twenty-first century as it did when it was ratified in 1791. As the Eleventh Circuit recently held in United States v. Davis,[1] the Government's warrantless gathering of location-tracking information violates a defendant's reasonable expectation of privacy. This Court finds persuasive the Eleventh Circuit's reasoning in Davis that when a user's cell phone transmits location-tracking information to GPS satellites and cell site towers, the user is in no way voluntarily or knowingly conveying that information in any meaningful way to the cell phone provider.

Given the duration of time and extensive scope of the cell phone records obtained by the Government in this case under the Stored Communications Act, this Court is further persuaded by the rationale in Justice Sotomayor's concurrence in United States v. Jones. As she wrote, "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age,

[1] NOTE TO JUDGES and BRIEF GRADERS: The court refers here to *United States v. Davis*, 754 F.3d 1205 (11th Cir. June 11, 2014). Nine months later, sitting en banc, the Eleventh Circuit vacated the panel's decision and held that compelled disclosure of historical cell site information did not violate the Fourth Amendment. *United States v. Davis*, 785 F.3d 498 (11th Cir. May 5, 2015) *cert. denied*, 136 S.Ct. 479 (2015).

in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." This Court thus finds the third party doctrine inapplicable, at least with respect to contemporary location-tracking technologies, and holds Section 2703(d) of the SCA unconstitutional as applied to the facts presented in this case. By obtaining a "substantial quantum of intimate information," in the absence of a warrant supported by probable cause, the Government violated the Defendant's reasonable expectation of privacy and thus his Fourth Amendment rights. The Court therefore grants the Defendant's motion to suppress the cell site and GPS location information under the exclusionary rule.

Next, we turn to the Defendant's motion to exclude the ancient document that the Government is attempting to introduce under Rule 803(16). Ms. Barnes, I agree that the cases of Brumley and Gupta do tend to show that once a document meets the requirements of the ancient documents exception, the document is automatically admissible, without regard to reliability. However, although this document does appear to meet the technical requirements of the rule, I have grave concerns about the potential for abuse that a literal application of this rule poses. A primary concern of the Federal Rules of Evidence is reliability, and so in the spirit of the Rules, I am going to

read FRE 803(16) to require evidence that is not only authenticated but is reliable, as well.

Here, we have a document whose age can only be proven by the date on the document itself, the document is unsigned, and the Government has been unable to provide other evidence containing indicia of reliability. Without an additional layer of verification, the ancient documents exception may be prone to abuse, and I worry about how it may be used in the future. The 20-year age limit is arbitrary and has no impact on whether or not the document contains reliable information. The Court therefore grants the defense motion to exclude the 1993 document.

Finally, the Defendant's motion to exclude Angelo Ortiz's dying declaration is granted. As a threshold matter, both parties agree that the statement at issue is indeed testimonial and meets the requirements for a dying declaration under Federal Rule of Evidence 804(b)(2). The only issue before the Court, therefore, is whether the dying declaration exception to the ban on hearsay permits this Court to admit the statement without violating the Defendant's Sixth Amendment right to be confronted with adverse witnesses.

This Court concludes that it does not. In the absence of a Supreme Court ruling on the validity of the historical exception to the right of confrontation for dying declarations, the

Confrontation Clause bars the admission of a testimonial statement made by an unavailable declarant who was not subject to cross-examination on the contents of the out-of-court statement. The Government contends that the well-established recognition of this historical exception should compel the Court to admit the statement, but the Court is not persuaded that the history and policy of the exception can withstand the scrutiny applied to out of court, unconfronted statements in the wake of Crawford v. Washington. Furthermore, to admit this evidence on the basis of a historical belief that a statement made by a declarant on his deathbed is per se reliable fails to account for the diversity of religious belief in this country. Accordingly, the Court hereby grants the defense's three pre-trial motions in their entirety. Thank you, counsel.

MR. CALLO: Thank you, your honor.

MS. BARNES: Yes, thank you, your honor.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

-against-

JOHN CREED,

Defendant-Appellee. **Cr. No. 14-92**

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February 9, 2015

Before: CAEPERS, KAPLOW, and LANDSMENN, Circuit Judges:

OPINION OF THE COURT

CAEPERS, Circuit Judge.

This interlocutory appeal, brought by Appellant United States pursuant to 18 U.S.C. § 3731, arises directly from the District Court's rulings against the government on three pretrial evidentiary motions presenting three questions of first impression in this Circuit. The issues before us are: (1) whether the Fourth Amendment requires that, to obtain 60 days of geolocation date 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); (2) whether, as a matter of law, evidence that qualifies as an authenticated "ancient document" under Federal Rules of Evidence 803(16) and 901(b)(8) may nevertheless be excluded if it lacks additional indicia of reliability beyond that inherent in its age and authenticity; and (3) whether the admission of a testimonial, unconfronted dying declaration under Federal Rule of Evidence 804(b)(2) violates a defendant's Sixth Amendment right of confrontation under *Crawford v. Washington*. Based on our review of these issues, we affirm the District Court's rulings that (1) the Government's use of Section 2703(d) of the Stored Communications Act to obtain 60 days of geolocation information pertaining to a criminal defendant's cell phone is unconstitutional in the absence of a warrant supported by probable cause; (2) as a matter of law, a document that meets the age and authenticity requirements for admission under the Federal Rules of Evidence may nevertheless be excluded for lack of additional indicia of reliability; and (3) the admission of a testimonial, unconfronted dying declaration violates a criminal defendant's Sixth Amendment right of confrontation under *Crawford* and its progeny.

Procedural Background

The Defendant-Appellee, then-Officer John Creed of the Boerum City Police Department ("the Defendant"), was indicted on one count of violating the Hate Crime Prevention Act, 18 U.S.C. § 249, for the September 21, 2013 shooting death of Angelo Ortiz. The Defendant made one suppression motion and two motions *in limine* to exclude (1) geolocation data records showing, *inter alia*, attendance at meetings of the Brotherhood of the Knights of Boerum, a white-Anglo-supremacist hate group, during the 60 days preceding the shooting; (2) a twenty-year-old document evidencing the Defendant's long-standing, active membership in that organization; and (3) a statement made by Ortiz after he had been shot and shortly before his death, in which he incriminated the Defendant. The District Court granted all three motions, and the Government now appeals those rulings.

Factual Background

The Government's theory is that the Defendant committed a hate crime when he shot and killed Angelo Ortiz following an altercation at an immigrants' rights rally in the fall of 2013. At trial, the Government proposes to show that the Defendant had a long history of animus towards Mexican nationals and people of Mexican descent and that he shot and killed Ortiz because of what the Defendant perceived to be Ortiz's national origin. The Defendant is expected to argue at trial that he acted in self-defense.

It is undisputed that on the afternoon of September 21, 2013, the Defendant was stationed along with his partner, Officer Jesús Familia, at the intersection of Cobble Road and Slope Place in order to patrol a march sponsored by "Open the Gates," an immigrants' rights organization. Metal barriers were spaced along the curbs on each side of Cobble Road, separating the participants on the street from spectators on the sidewalks. Although the march was initially peaceful, a confrontation later erupted between spectators and marchers near the corner where the Defendant was patrolling. A number of ethnic slurs were directed at the passing participants, and multiple projectiles were thrown into the crowd of participants, striking at least one participant in the head. A participant in a dark hooded sweatshirt then threw a rock in the direction of the police, narrowly missing the officers. In response, the Defendant vaulted over the barricade onto Cobble Road in order to subdue the hooded participant.

The Defendant pursued Ortiz, who matched the description of the participant who had thrown the rock, down a nearby blind alley away from the crowd and the other police officers. Shortly thereafter, Familia heard three shots fired in quick succession from the direction of the alley. The Defendant radioed for assistance, and Familia was the first to respond. When Familia arrived on the scene, he saw the Defendant dazed but unharmed near the entrance to the alley. He told Familia, "Jesús, he's the guy I was chasing. He's got a gun."

About fifty feet down the alley, Familia found Ortiz on the ground with gunshot wounds to the chest and abdomen. Familia also spotted a small, metallic video recording device that appeared to be damaged by the gunfire, lying about five feet from Ortiz. Ortiz was bleeding profusely from his abdomen and mouth, and was having great difficulty breathing. Concluding that Ortiz clearly did not pose a threat to either officer's safety, Famila radioed for medical

assistance and attempted to assist Ortiz. Familia asked Ortiz what had happened, and Ortiz replied, "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." The victim then slipped into unconsciousness. Shortly thereafter, paramedics arrived and transported the victim to nearby Pitler Memorial Hospital, where he was pronounced dead on arrival.

Though the video recording device found by Familia was greatly damaged, FBI investigators were able to recover a segment of the recording, which showed the initial confrontation between the Defendant and Ortiz. In the recording, the Defendant is seen standing on Cobble Road, among the participants, yelling in the direction of the camera, saying "Hey Paco, get the fuck back where you and your people came from," and "Stay behind the fence." The video then cuts out. In an interview with FBI investigators, Officer Familia provided further evidence of the Defendant's animus towards Mexican nationals and people of Mexican origin. He reported that the Defendant had frequently referred to him as "one of the good ones," which Familia had understood as referring to his Latino ethnicity. In addition, Familia recounted a particular occasion where he had seen a stack of flyers containing the image of Martin Blythe Cole, the infamous white-Anglo-supremacist founder of the Brotherhood of the Knights of Boerum, on the floor of the Defendant's car.

Using the evidence obtained from the video camera and Familia, the Government requested and received a court order under 18 U.S.C. § 2703(d), the Stored Communications Act ("SCA"), commanding AB&C Wireless to disclose geolocation records pertaining to the Defendant's cell phone for the 60 days prior to the shooting. The geolocation data showed that the Defendant had regularly visited the White Knight Tavern, a known meeting place of the Brotherhood, including on the morning of the shooting. It also showed that the Defendant had visited the homes of two other known members of the Brotherhood on a weekly basis during the months before the shooting. Using this geolocation evidence in conjunction with Familia's interview and the video evidence found on Ortiz, FBI investigators concluded that the Defendant was a member of the Brotherhood.

FBI investigators then executed a search warrant at the Brotherhood's headquarters, during which they discovered a handwritten letter dated July 4, 1993. The letter appears to have been authored by Martin Blythe Cole and refers in particular to the Defendant's participation in the organization.

The Defendant was subsequently indicted on one count of violating the Hate Crime Prevention Act, pursuant to 18 U.S.C. § 249, for killing Ortiz because of the victim's perceived Mexican origin.

Analysis

A. Admissibility of the Geolocation Data

The Government's appeal raises a Fourth Amendment issue of first impression in this Circuit. The Government obtained geolocation records[5] from Defendant's cell phone service provider, AB&C Wireless, Inc., pursuant to an order granted under the Stored Communications Act ("SCA"). Such an order requires that the Government offer only "specific and articulable facts showing that there are reasonable grounds to believe that the contents of . . . the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). The question presented by this appeal is whether, given the facts and circumstances of this case, this showing is sufficient to satisfy the guarantees of the Fourth Amendment. We hold that it is not.

The Fourth Amendment provides "[t]he 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The question presented by the Government's appeal is whether obtaining geolocation data constitutes a search. "In determining whether a particular form of Government-initiated electronic surveillance is a 'search' within the meaning of the Fourth Amendment," the Supreme Court's "lodestar is *Katz v. United States*, 389 U.S. 347 (1967)." *Smith v. Maryland*, 442 U.S. 735, 739-40 (1979). *Katz* teaches that a Fourth Amendment search occurs when the Government violates a subjective expectation of privacy that society recognizes as reasonable. 389 U.S. 347 (1967) (Harlan, J., concurring).

This Court holds that the Government did conduct a search when it obtained the Defendant's geolocation data and that the Government's use of an order issued pursuant to Section 2703(d) of Title 18, rather than a search warrant issued upon probable cause, deprived the Defendant of his constitutional right to be free of unreasonable searches. Not only did the Defendant exhibit an actual, subjective expectation of privacy as to the geolocation records obtained from his wireless service provider, but his expectation of privacy was objectively reasonable.

Citizens may have a reasonable expectation of privacy in their cell phone location information. Our dissenting colleague focuses on the oft-cited "third party doctrine," which provides that a "person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U.S. at 740. The doctrine holds that a citizen assumes the risk, "in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* In its simplest, most traditional applications, the doctrine makes sense: defendants should not be heard to complain when their literal partners-in-crime "rat" them out to the authorities in order to benefit from a cooperation agreement.

[5] There are two types of geolocation information in this case—cell site location information ("CSLI") and global positioning system ("GPS") data. For the purposes of our analysis, we treat the two as equivalent.

But a different logic applies to third parties to whom we routinely disclose countless intimate details simply to exist in the modern world; "[t]hose who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes." *Smith*, 442 U.S. at 749 (Marshall, J., dissenting). As Justice Sotomayor noted in *United States v. Jones*, "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

We accept Justice Sotomayor's invitation to reconsider the premise of the third party doctrine and reject its application to third party business records, or at least those records so detailed and revealing as the geolocation data at issue here. As Justice Marshall recognized as early as 1979, "[i]mplicit in the concept of assumption of risk is some notion of choice. . . . It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative." *Smith*, 442 U.S. at 749-50 (Marshall, J., dissenting).

Our dissenting colleague reminds us that as for cell phones, we can simply "shut the darn things off." While our neighboring opera aficionados may appreciate our powering off our cell phones during a performance of "Don Carlo," the practical reality is that this may be one of the few occasions our cell phones actually *are* off, at least by choice and aside from the few occasions when the battery dies. It is hardly reasonable to expect that people will treat the modern technological marvel that is a cell phone as if it were a glorified paperweight simply to prevent the Government from turning it into an electronic monitoring anklet. Mobile phones are supposed to be just that—*mobile*. The dissent would require cell phones to be used either as landlines or potential tracking devices. We do not accept that approach.

We now return to whether Defendant Creed exhibited a subjective expectation of privacy. We are persuaded by the fact that Creed turned off the "location services" function on his cell phone. Although doing so is not sufficient to render one's location "untraceable," an individual need not maintain complete secrecy and privacy in order to exhibit a subjective *expectation* of privacy. "Privacy is not a discrete commodity, possessed absolutely or not at all." *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) (internal citation omitted).

Consumers may be aware (assuming they actually read their service contracts) that their service providers collect data indicating the location of their mobile devices, but it does not follow that they expect their providers to turn over sixty full days of their GPS coordinates to an inquisitive Government agent. Accordingly, the Defendant's attempt to disable location services on his phone sufficiently indicates his actual expectation of privacy in his geolocation information.

We therefore conclude that the Government's use of Section 2703(d) of the SCA to obtain 60 days of geolocation records pertaining to Defendant Creed's cell phone, in the absence of a warrant supported by probable cause, was unconstitutional. Finally, because the Government failed to preserve the argument that it acted in good faith when it sought an order

pursuant to the SCA, it is waived.[6] Accordingly, we hold that these records are inadmissible in Creed's criminal trial.

B. Admissibility of the Ancient Document

The Government also seeks to offer at trial a handwritten document that appears to be a letter written by Martin Blythe Cole to the Brotherhood in 1993. The Government argues that the document is admissible hearsay because it falls within the exception for ancient documents in Federal Rule of Evidence 803(16). Rule 803(16) provides that "[a] statement in a document that is at least 20 years old and whose authenticity is established" is not excluded by the rule against hearsay. Rule 901(b)(8) provides the authenticity requirements, which are that the document be "in a condition that creates no suspicion about its authenticity," be found in a place where it would likely have been found, and be at least 20 years old.

The District Court held that, while "ancient" within the literal strictures of those two Rules, the document was inadmissible because the Government presented no additional circumstantial evidence of its reliability. By reading a reliability requirement into the ancient documents Rule, the court correctly recognized that this exception should be viewed as a "narrow crevice" and not a "wide open doorway." *Rehm v. Ford Motor Co.*, 365 S.W.3d 570, 579 (Ky. Ct. App. 2011) (Caperton, J., concurring in part and dissenting in part). Read literally, the ancient documents exception is an obsolete rule that threatens to inundate the courts with unnecessary and unreliable hearsay. Because we see the District Court's ruling as a step in the right direction for a problematic rule, we affirm.

Although the ancient document at hand meets the Rule's facial requirements, it is not sufficiently reliable to be introduced for its truth. The document is unsigned, and while it seems to have been written by Martin Blythe Cole, there is no way to know for sure. The Government has not presented any evidence corroborating the document's contents. Even the determination that the document meets the "ancient" age requirement leaves much to be desired, as it rests solely on a scribbled date in the document's upper corner. Yet, the Government urges the court to allow this document in evidence based on blind faith in the tenets of the exception.

On its own, the ancient documents exception does little to protect against the admission of unreliable evidence. The Rule presumes that, because a document is old, the information in it is likely to be accurate. But the 20-year age limit does nothing to ensure that only reliable evidence is being admitted under the exception; this Court discerns no correlation between the age of a document and the likelihood that what it says is true. For example, "a twenty-year-old National Enquirer, kept in an archivist's study, will be found authentic--but should that mean that every single statement in the Enquirer about Michael Jackson, or alien invasions, should be admissible for its truth?" Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 YALE J. L. & TECH. 1, 10 (2015).

[6] *Therefore, arguments concerning the good faith exception to the exclusionary rule are not cognizable and should not be made by competitors in the Prince Competition.*

Moreover, the Rule presents vast potential for misuse, exacerbated by the massive volume of electronically stored documents that are nearly 20 years old and would, if the Government's position were adopted, be admissible without further inquiry. *Id.* The District Court's additional circumstantial evidence test helps to overcome the fallacy in the logic behind the Rule. Without such an added test as a safeguard, there is nothing to prevent a tidal wave of documents that are more than 20 years old from flooding the courts, regardless of their reliability.

Finally, even the practical considerations underlying the rule do not apply to this case. "The rationale behind the 'ancient documents' exception is [that]: after a long lapse of time, ordinary evidence regarding signatures or handwriting is virtually unavailable, and it is therefore permissible to resort to circumstantial evidence." *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 396 (5th Cir. 1961). However, this is not what is at play in the instant case. Here, the Government has other evidence of the Defendant's alleged racist views and need not resort to this potentially unreliable document.

The dissent cites to the Rule's infrequent utilization. True, the ancient documents exception is rarely invoked, and it has as a result received far less judicial scrutiny than other exceptions, such as the one for business records, that are more frequently relied upon. If this demonstrates anything, however, it is that the Rule itself is unnecessary. Indeed, the Advisory Committee on Evidence Rules has recently begun considering whether the Rule merits amendment, or even abrogation. Hon. William K. Sessions, *Advisory Committee on Evidence Rules, Report of the Advisory Committee on Evidence Rules* (Nov. 15, 2014).

The Government's interpretation of the Rule denies courts discretion to bar unreliable evidence from admission. This Court's view is that the inherent dangers of the Rule's misuse must be mitigated by judicial gatekeeping. While at least one respected treatise contends that a judge may exclude an ancient document only if a motive for misrepresentation existed at the time of its creation, *see* 5-803 Weinstein's Federal Evidence § 803.18, we find this insufficient. The district court's requirement of a showing of reliability helps address our concerns and preserve the Rule's validity and integrity.

C. Admissibility of the Dying Declaration

Finally, the Government argues that the District Court erred when it excluded Mr. Ortiz's dying declaration and held that its admission would violate the Confrontation Clause. The Government contends that the deceased declarant's statement, while concededly testimonial and not subjected to cross-examination, is nevertheless admissible under Federal Rule of Evidence 804(b)(2). The Government argues that the admission of this dying declaration would not run afoul of the Supreme Court's evolving Confrontation Clause jurisprudence because the exception to the right of confrontation for dying declarations existed at the time of the Founding. *See, e.g.*, 3 *Legal Papers of John Adams* 212-14, 307-08 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). We disagree with the Government that Mr. Ortiz's dying declaration is admissible in the wake of *Crawford v. Washington*, 541 U.S. 36 (2005), and affirm the decision of the District Court.

Federal Rule of Evidence 804 sets forth exceptions to the general rule against hearsay for statements made by unavailable declarants. Under Rule 804(b)(2), an unavailable declarant's statement is admissible "[i]n a prosecution for homicide" provided that the statement is one "that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."

But whether such a statement is admissible does not turn solely on the requirements of the Federal Rules of Evidence; the Constitution presents another hurdle. The Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." Accordingly, the confrontation right may preclude the admission of certain evidence notwithstanding its admissibility under the Federal Rules of Evidence. And since the Court's seminal holding in *Crawford v. Washington*, a new test has emerged for determining whether the Sixth Amendment bars the admission of evidence otherwise excepted from the rule against hearsay.

Crawford holds that the Confrontation Clause bars the admission of a testimonial statement made by a declarant who is not present at trial, unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant about the statement's contents. 541 U.S. at 68. A statement is testimonial if made under circumstances that objectively indicate that there was no ongoing emergency and when the primary purpose of the statement or interrogation that prompted it was to establish or prove past events potentially relevant to later criminal prosecution. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)).

Just before Mr. Ortiz succumbed to his injuries, he allegedly made a statement about the cause and circumstances of what he believed to be his imminent death. The parties agree both that this statement falls within the parameters of Federal Rule of Evidence 804(b)(2) and that it is testimonial. The sole question for this court, therefore, is whether *Crawford* and its progeny bar the admission of Mr. Ortiz's statement in light of the longstanding historical exception to the right of confrontation for dying declarations.

Whether the historical exception for dying declarations survives the Court's *Crawford* jurisprudence is a matter of first impression in this Circuit and is a question that the Supreme Court has yet to resolve. In *Crawford*, the Court noted that:

> [t]he one deviation [from the general rule that historically, hearsay exceptions were not invoked to admit testimonial statements] we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. . . . We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

541 U.S. at 56 n.6 (citations omitted). And although the Court has refined its Confrontation Clause jurisprudence since *Crawford* and narrowed the grounds on which unconfronted hearsay

statements are admissible in criminal trials, the Court has still not spoken definitively on whether the historical exception for dying declarations survives. *See Michigan v. Bryant*, 562 U.S. 344, 395-96 (2011) (Ginsburg, J., dissenting); *Giles v. California*, 554 U.S. 353, 358 (2008).

The Government argues that, because the Supreme Court has acknowledged the existence of the dying declaration exception in dicta, and because the exception existed at common law at the time of the Founding, the exception survives *Crawford* and renders Mr. Ortiz's statement admissible. We are unpersuaded and find that the historical evidence on which the Government relies actually reveals the exception's weak foundations.

The Government points to early American case law, including *State v. Moody*, in which a North Carolina court acknowledged that "the solemnity of the occasion [of a declarant near death] is a good security for his speaking the truth, as much so as if he were under the obligation of an oath." 3 N.C. 31, 31 (N.C. Super. L. & Eq. 1798). The Supreme Court adopted this logic in 1892 in finding that "the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose." *Mattox v. United States*, 146 U.S. 140, 152 (1892). And again, as recently as 1990, the Supreme Court quoted a British court's statement 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) (internal quotation marks omitted)).

While these holdings may offer some support for the Government's position, even early American courts expressed skepticism of the reliability of dying declarations. For instance, in 1897, the Supreme Court noted that "[a] dying declaration by no means imports absolute verity" and observed that the "history of criminal trials is replete with instances where witnesses, even in the agonies of death, have through malice, misapprehension or weakness of mind made declarations that were inconsistent with the actual facts." *Carver v. United States*, 164 U.S. 694, 697 (1897). In 1908, an Oklahoma appellate court stated: "Experience teaches us that men do not always speak the truth in the presence of certain death. There may be, and often is, premeditation in connection with a dying declaration. This opens the way to fabrication." *Price v. State*, 98 P. 447, 454 (Okla. Crim. App. 1908). So while the exception has indeed been invoked since the time of the Founding, it has also been subject to criticism and skepticism throughout our history.

To the extent that courts have generally accepted the exception to the right of confrontation for dying declarations, they have failed to justify the exception's continued vitality after *Crawford*. Indeed, the religious solemnity of the moment before death is an ill-suited justification for the continued application of the exception in modern society. *See* 5-804 Weinstein's Federal Evidence § 804.05 (footnotes omitted). A rule that is based on notions of Christian religious reckoning is no longer meaningful when people hold a wide variety of religious convictions, including, in many instances, no religious convictions at all. As one scholar has aptly stated, "One need not posit a godless modern society to maintain that the concrete medieval notions of divine judgment and eternal damnation on which the dying declaration exception is based do not figure prominently in modern secular society." Aviva

Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1460 n.9 (2010).

There is simply no rationale in *Crawford* for treating dying declarations any differently than other testimonial statements. This is particularly true because, as we have shown, courts have long questioned the reliability of dying declarations. Even if we were to conclude that dying declarations are reliable, that is no longer the relevant inquiry. *Crawford* explicitly rejected the notion that an unconfronted statement might be admissible if it possesses sufficient indicia of reliability and struck down its prior decisions so holding—most notably *Ohio v. Roberts*, 448 U.S. 56 (1980)—as incompatible with the Sixth Amendment. *Crawford*, 541 U.S. at 62 (stating that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty"); *see also United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *3 (D. Colo. Mar. 3, 2005) (finding that "there is no rationale in Crawford or otherwise under which dying declarations should be treated differently than any other testimonial statement. This is so especially since the historical underpinnings of the exception fail to justify it.").

In the absence of guidance from the Supreme Court about whether the exception for dying declarations survives *Crawford* and its progeny and in light of the Sixth Amendment right of confrontation, this Court finds little to justify admitting unconfronted, testimonial dying declarations. The District Court's exclusion of Mr. Ortiz's dying declaration is accordingly affirmed.

KAPLOW, Circuit Judge, dissenting.

A. Admissibility of the Geolocation Data

The District Court held that the Government violated the Defendant's Fourth Amendment rights by obtaining a court order, pursuant to the Stored Communications Act, compelling a wireless service provider to disclose historical geolocation records over a two-month span based merely on a showing of "specific and articulable facts." It therefore suppressed evidence, wrongfully in my view, of the Defendant's cell site and GPS geolocation data obtained from AB&C Wireless. Today, the majority affirms, concluding that the Government violated the Defendant's rights under the Fourth Amendment when it obtained his historical geolocation data via court order pursuant to 18 U.S.C. § 2703(d), rather than a warrant supported by probable cause. Because that holding flies in the face of the Supreme Court's well-established third party doctrine articulated in *United States v. Miller*, 425 U.S. 435 (1976), and its progeny, I dissent.

As the majority recognizes, the central questions before the Court on this issue are whether the Defendant manifested a subjective expectation of privacy in the geolocation records obtained from AB&C Wireless and whether that expectation of privacy is one that society recognizes as reasonable. *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

In finding that the Defendant manifested a subjective expectation of privacy in the records obtained from AB&C Wireless, the majority is persuaded by the fact that the Defendant disabled, or at least *thought* he disabled, the location-services functions on his cell phone. It is clear, however, that the Defendant could not have sincerely believed his cell phone was not

gathering location-tracking information on a regular and continuous basis. In an age where "there's an app for that," it should be self-evident that our cell phones, and by extension, our wireless carriers, know where we are at all times.

Suppose, for example, that you were to open the *Weather App* on your phone. Whether you are at home in Brooklyn, New York, at work in Hoboken, New Jersey, or visiting your great aunt in Scranton, Pennsylvania, you would likely find that your cell phone, as if by some dark, voodoo magic, is capable of telling you what the weather is like outside. Or if you were to open your *Yelp* application, your cell phone would seamlessly point you to a list of top-rated restaurants, barbers, and coffee shops in the local neighborhood. Open the *Maps* application and you will see a bright blue dot showing where you are and precisely where you are going. Or just open your *Photos* application so you can post something on social media, and your cell phone will tell you where and when the photos were snapped. And so on and so forth.

The point is that many, if not all, mobile applications collect and transmit location-tracking information while operating in the "background" in order to provide the user with greater functionality. It is common sense that, just as we obviously realize that we have to convey phone numbers to the telephone company so it can complete a call, the mini-supercomputers we carry around in our pockets could not possibly do all the things they do without constantly conveying data about our location to our wireless service provider. In any event, AB&C Wireless's Privacy Policy makes it eminently clear that location-tracking information is among the countless forms of "private" data that individuals voluntarily (and in light of the policy, knowingly) convey to cell phone companies.[7] Thus, in my view, the Defendant did not manifest a subjective expectation of privacy in the geolocation records obtained from AB&C Wireless.

Assuming *arguendo* that the Defendant had a subjective expectation of privacy in the geolocation records, as the majority naïvely does, that expectation is neither justifiable nor objectively reasonable in light of the well-established third party doctrine. While the question of whether that doctrine applies to geolocation data collected by a cell service provider may be one of first impression in this Circuit, it is not altogether novel. A majority of courts in our sister circuits that have been presented with the issue have concluded that the acquisition of historical location-tracking data pursuant to the Stored Communications Act's "specific and articulable facts" standard does *not* implicate the Fourth Amendment. *See, e.g.*, *In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *United States v. Skinner*, 690 F.3d 772, 781 (6th Cir. 2012). These decisions rely primarily on a line of Supreme Court cases, beginning with *Miller*, 425 U.S. 435, and *Smith v. Maryland*, 442 U.S. 735 (1979), construing the scope of Fourth Amendment rights relating to business records held by third parties and conclude that

[7] AB&C Wireless's Privacy Policy states in pertinent part:

> We collect information when you communicate with us and when you use our products, services and sites. This includes information you provide such as name and contact information, images, the reason for contacting us, driver's license number, Social Security Number, and payment information. Service usage information we collect includes call records, websites visited, *wireless location*, application and feature usage, network traffic data, product and device-specific information and identifiers, service options you choose, mobile and device numbers, video streaming, and other similar information.

http://abcwireless.com/legal/privacy.html (last visited Jan. 23, 2015) (emphasis added).

people relinquish any expectation of privacy in their cell site location data when they reveal it to their cellular service providers.

Like the bank records at issue in *Miller*, the historical geolocation records in this case are not the "private papers" of the Defendant—instead, they are the "business records" of the cellular providers. Federal law does not mandate that cellular providers create or maintain these types of records. Moreover, like the financial records at issue in *Miller*, the historical location-tracking information in this case was voluntarily conveyed to AB&C Wireless and was exposed to their employees in the ordinary course of business. "[I]n revealing his affairs to another," the Defendant took the risk "that the information [would] be conveyed by that person to the government." 425 U.S. at 443. Under the reasoning of *Miller*, therefore, historical geolocation data are the provider's business records, and are manifestly *not* protected by the Fourth Amendment.

In short, the majority seeks to bury the third party doctrine, to which it barely pays lip service, because, by using computers and mobile phones, we expose a great deal of information to third parties. Surely, third parties know much more about us now than they did in the days before we texted, tweeted, posted, and Googled. But this change does not alter the fundamental fact that we surrender privacy over details of our lives when we choose to expose them, even if that choice is motivated by our understandable desire to enjoy the benefits of modern technology. The Fourth Amendment protects us only from *unreasonable* searches and seizures, and the Founders must have understood that this limitation would render the scope of the protected right dependent on context. And today's context is radically different. As we elect to share more private information with third parties, our right to contend that a search is "unreasonable" must inevitably narrow. I am, therefore, unable to discern any Fourth Amendment violation in the Government's use of an order obtained pursuant to the SCA to obtain the location-tracking information about the Defendant at issue here.

In addition to throwing forty years of firmly rooted precedent out the window, the majority misguidedly lends credence to the mosaic theory of the Fourth Amendment, which the Supreme Court decidedly *did not* adopt in *Jones*. As courts and scholars alike have counseled, "[i]t is entirely unclear what the implications would be of an interpretation of the Fourth Amendment that protects 'cumulative' data collected by law enforcement." *United States v. Graham*, 846 F. Supp. 2d 384, 401-02 (D. Md. 2012); *see also* Orin S. Kerr, *D.C. Circuit Introduces "Mosaic Theory" of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search*, The Volokh Conspiracy (Aug. 6, 2010, 2:46 PM), http://volokh.com/2010/08/06/.[8]

For these reasons, I would hold that the Defendant in this case did not have a subjective expectation of privacy or a legitimate expectation of privacy that society would find reasonable

[8] The majority's reliance on Justice Sotomayor's concurrence in *Jones* is also deeply misplaced. The GPS surveillance in *Jones* was conducted without any judicial oversight whatsoever, much less a valid warrant. In the present case, however, the geolocation records were obtained through an order issued pursuant to § 2703(d) of the Stored Communications Act, which interposes a neutral and detached magistrate between the citizen and law enforcement to "curb arbitrary exercises of police power." *Jones*, 565 U.S.—, 132 S. Ct. at 956.

in the historical geolocation records acquired by the Government, and therefore, no Fourth Amendment search occurred.

I would also note that the Defendant should, and very well could, have done what other users would do if they wanted to prevent their phone from conveying their location-tracking information—either disable *all* location services functions, even in the "background," or rely on that little, often underutilized button on the top of the device to power it down. The contemporary cellular phone, though it has been hyperbolically termed "an important feature of human anatomy," *Riley v. California*, 567 U.S.—, 134 S. Ct. 2473, 2484 (2014), need not be an electronic monitoring bracelet. If you would like greater privacy in the digital age, the solution is exceedingly simple: use your cell phone's apps at your own peril, or do as I do when I visit the opera and just shut the darn thing off.

B. Admissibility of the Ancient Document

The District Court also held that the ancient document the Government seeks to introduce is inadmissible because it does not meet a heightened reliability standard above and beyond that already inherent in the ancient documents exception, Federal Rule of Evidence 803(16). The District Court fashioned a test requiring an additional showing of the document's reliability. The majority affirms, determining that this added layer is necessary to preserve the integrity of the rule and to keep out unreliable evidence. By affirming, the majority sanctions the rewriting of a Federal Rule of Evidence to include a requirement that the rule itself clearly does not impose. Moreover, the majority undertakes this redrafting to provide a "safeguard" of reliability that the drafters of the rule believed unnecessary. I dissent because I cannot agree with a decision that flies so clearly in the face of the Rule's explicit text. Federal Rules of Evidence 803(16) and 901(b)(8) provide all that is necessary to determine whether an ancient document is reliable. Any additional test is superfluous and beyond the authority of this Court to require.

The rationale for the ancient documents exception remains just as applicable and relevant as it did at the Rule's creation. That the document at hand was found in plausible condition within the Brotherhood's alleged meeting place and is dated outside of the 20-year time limit is all that the rule requires for its admission. The very fact that this document was retained for as long as it was is indicative of its importance and thus its reliability. While the majority may argue that the 20-year time limit is arbitrary and does not protect against the admissibility of untrustworthy documents, any cutoff is by its nature arbitrary, and the 20-year limit is sufficient.

Courts have traditionally held that a document that meets the plain requirements of the ancient documents rule is automatically received in evidence. To preclude admission, suspicion surrounding the document must relate to whether the document is what it purports to be, not suspicion regarding the veracity of the information contained in the document. Any remaining concerns about the reliability of the document are "a matter of evidentiary weight left to the sole discretion of the trier of fact." *United States v. Kalymon*, 541 F.3d 624, 633 (6th Cir. 2008); 5-803 Weinstein's Federal Evidence § 803.18. While courts determine whether to admit evidence, they do so by applying the Federal Rules of Evidence, not by rewriting them whenever they disagree with their premises.

The majority warns against allowing the rule to remain as it stands due to a fear of a deluge of unreliable evidence being admitted into evidence. If this were the case, however, it would have happened already. Admission under the ancient documents exception has been sought in fewer than 100 recorded cases. Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 Yale J. L. & Tech. 1, 12 (2015). Even if the majority's concern were valid, it would not be within this Court's province to rewrite the Federal Rules of Evidence to create a heightened reliability standard for ancient documents. Any such changes may properly originate only from the Advisory Committee on Evidence Rules, if they are to come at all.

C. Admissibility of the Dying Declaration

Finally, the majority holds that the Sixth Amendment requires exclusion of a victim's dying declaration. In light of the Supreme Court's repeated acknowledgement of the historical roots of the exception to the right of confrontation for dying declarations and lower courts' continued application of the exception even after *Crawford*, I must respectfully dissent.

The majority today rejects a centuries-old exception to the Sixth Amendment right of confrontation—an exception that is as old as the Amendment itself and one that continues to be applied by lower courts even as our understanding of the Confrontation Clause has shifted post-*Crawford*. Yet the majority provides little if any basis for its departure from such an established rule of evidence and the practice of nearly every court to encounter the rule since the Founding.

The majority suggests that the historical justifications for the exception are problematic for two reasons. First, these justifications connect the reliability of a dying declaration to a degree of religious conviction that can no longer be assumed in modern, secular society. Second, says the majority, the reliability inquiry itself is precluded by *Crawford* and its progeny, and in particular *Crawford*'s rejection of the "firmly rooted hearsay exception" holding in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). But by relying on the nature of religious beliefs in modern society and recent developments in the case law, the majority's analysis confuses the issue. The controlling question is what the Founders had in mind when they crafted the Sixth Amendment right of confrontation. This is the inquiry that informed *Crawford*, and it is the inquiry that should guide this Court's determination of whether admitting a dying declaration violates the Sixth Amendment.

Our analysis, in other words, must begin by acknowledging that, at common law and in American jurisprudence, dying declarations were recognized as excepted from the right of confrontation and were understood to be admissible at the time the Sixth Amendment was drafted. *See King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791); *Thomas John's Case*, 1 East 357, 358 (P.C. 1790); *Welbourn's Case*, 1 East 358, 360 (P.C. 1792).[9] Indeed, dying declarations were readily admitted without objection at the Boston Massacre Trial (*Rex v. Wemms*) in 1770, as evidenced by the court's instructions to the jury. *See* 3 *Legal Papers of John Adams* 212-14, 307-08 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). And although the

[9] *For purposes of the Prince Competition, competitors may cite to any English law cited in the Circuit Court opinion, but competitors are otherwise limited to American case law.*

majority correctly observes that the Supreme Court has not had the opportunity to consider the exception since it decided *Crawford*, the Court has acknowledged the existence of the exception for dying declarations at common law numerous times in dicta, in *Crawford* itself and thereafter. *See Crawford*, 541 U.S. at 56, n.6 (2004); *Giles v. California*, 554 U.S. 353, 358 (2008). Additionally, state court decisions since *Crawford* have nearly unanimously upheld the exception. *See, e.g.*, *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004); *People v. Graham*, 392 Ill. App. 3d 1001, 1008, (2009); *Harkins v. State*, 143 P.3d 706, 711 (Nev. 2006).

The majority is quick to dispense with the exception for dying declarations on the basis of what "little" the majority finds to justify the exception in light of modern society's diversity of religious convictions. But one need not subscribe to any particular set of religious beliefs in order to recognize the solemnity of the moment of death or the care with which a person is likely to choose her dying words. *See* Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. Ill. L. Rev. 1411, 1427-30 (2010); *see also* Fed. R. Evid. 804(b)(2) advisory committee's note ("While the original religious justification for the [dying declaration] exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present."). To exclude such statements would mean a windfall for criminal defendants and would serve only to incentivize quick action to ensure that a dying declarant meets her full demise. The reliability of dying declarations, coupled with the necessity of the evidence they present, provides a strong moral justification for protecting the historical exception.

I cannot join the majority's bold abandonment of the historical exception for dying declarations or its departure from our long-acknowledged obligation to interpret the Constitution as it was understood at the time of the Founding. Mr. Ortiz's statement should be admitted under the historical exception to the right of confrontation for dying declarations. Trial courts sitting when the Sixth Amendment was written would have admitted the statement, and therefore, it would not violate the Confrontation Clause to do so now. The majority's decision muddies the post-*Crawford* jurisprudential waters and flies in the face of both the Confrontation Clause and well-settled precedent.

For these reasons, I respectfully dissent.

No. 15-1789

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

--against--

JOHN CREED,

Respondent.

Date: October 15, 2015

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

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, evidence that qualifies as an authenticated "ancient document" under Federal Rules of Evidence 803(16) and 901(b)(8) may nevertheless be excluded if it lacks additional indicia of reliability beyond that inherent in its age and authenticity.

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.*