Case No. 15-1789

In the Supreme Court for the United States of America

United States of America,
Petitioner,

v.

John Creed,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourteenth Circuit

Brief for Petitioner

11 P
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the Government's lawful acquisition of information related to a criminal defendant's public whereabouts that the criminal defendant voluntarily conveyed to a third party violates the Fourth Amendment's warrant requirement.

II. Whether a hearsay-excepted statement written in a properly authenticated "ancient document" that is discovered in a location where one would expect to find only a genuine document requires a showing of "additional indicia of reliability" prior to admittance.

III. Whether admitting dying declarations is required under the Sixth Amendment where courts have always treated these statements as an exception to the right of confrontation and admitting them is consistent with the Sixth Amendment's purpose of fully developing the issues before the fact-finder.

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STATEMENT OF THE CASE

On September 21, 2013, John Creed ("Respondent")—a Boerum City Police Officer and long-standing member of a "virulent anti-Latino" hate group known as the Brotherhood of the Knights of Boerum[1] ("the Brotherhood")—gunned down Mr. Angelo Ortiz ("Mr. Ortiz"), a defenseless Latino man, in an isolated alley during an immigrants' rights march. (R. 2, 14-15). Moments later, Respondent's partner, Officer Jesús Familia ("Officer Familia"), rushed into the alley and discovered Mr. Ortiz lying on the ground with blood pouring from his mouth and abdomen. (R. 8). He asked Mr. Ortiz what had happened. (R. 8). With bullet wounds in his stomach and chest, Mr. Ortiz "struggl[ed] to breathe," but mustered enough strength to respond: "That cop—he shot me. . . . [H]e told me I was a ***filthy wetback*** and I should ***go back where I came from***. . . . I can't believe . . . I'm going to go out this way." (R. 2-3) (emphasis added). Thereafter, Mr. Ortiz slipped into unconsciousness. (R. 8). He never woke up. (R. 8).

On the day of the killing, Respondent arrived to work around 12:15 p.m.—fifteen minutes late and in "an agitated state." (R. 7). Officer Familia asked Respondent about his tardiness, and Respondent snapped at him: "It's none of your business." (R. 7). Subsequently, Respondent learned that he and Officer Familia had been assigned to supervise the intersection of Cobble Road and Slope Place during an immigrants' rights march sponsored by Open the Gates, a "non-profit human rights organization with a stated mission of protecting and advocating for the rights of people of Latino ethnicity . . . ." (R. 4, 7). As supervisors, Respondent and Officer Familia's primary duty was to prevent confrontations between marchers and spectators. (R. 6). As such, Respondent changed into his uniform, grabbed his Block 9-millimeter handgun, and left for the demonstration. (R. 5, 7).

[1] The Brotherhood's "stated mission" is to "re-establish the white-Anglo domination of the United States." (R. 4).

When Respondent and Officer Familia arrived at their post, it was peaceful; however, a dispute arose at the intersection of Cobble Road and Slope Place when a group of hecklers gathered along Cobble Road began yelling "a number of ethnic slurs and obscenities" at the marchers and throwing objects at them. (R. 6, 7). Just as the tension between the hecklers and the demonstrators tightened to a breaking point, an "unidentified male wearing a dark-colored sweatshirt" threw a rock that nearly hit Respondent and Officer Familia. (R. 7).

Respondent snapped. He vaulted over the barricade between the hecklers and the demonstrators—leaving behind the violent dispute erupting at the intersection—and targeted Mr. Ortiz, who happened to be wearing a black hoodie. (R. 7). Respondent screamed at Mr. Ortiz, calling him "Paco" and a "wetback." (R. 5). Respondent then yelled: "get the fuck back where you and your people came from." (R. 7). Mr. Ortiz endured Respondent's verbal abuse without making "any threatening gestures towards [Respondent] or anyone else." (R. 7). Nonetheless, Respondent charged toward Mr. Ortiz. He chased Mr. Ortiz into an isolated alley and fired three bullets at him. (R. 7-8). Immediately thereafter, Respondent radioed Officer Familia, telling him that he "needed assistance" and that Mr. Ortiz was armed. (R. 8).

Moments later, Officer Familia entered the alley. (R. 8). There, he saw Respondent sitting against a wall holding his gun, "unharmed," and Mr. Ortiz—who was "bleeding severely from his mouth and abdomen"—lying on the ground about fifty-feet away. (R. 8). As Officer Familia approached Mr. Ortiz, Respondent claimed that Mr. Ortiz had a gun. (R. 8). However, Officer Familia immediately recognized that the "shiny metallic object" lying on the ground near Mr. Ortiz—which Respondent supposedly believed to be a gun—was "a small, partially shattered video recording device." (R. 8). Officer Familia "did not find a gun or any other weapons [at] the

scene." (R. 8). As such, Officer Familia sensed no threat to his safety; accordingly, he advanced toward Mr. Ortiz and asked him what had happened. (R. 8). Mr. Ortiz responded:

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

(R. 8). Paramedics transported Mr. Ortiz to the hospital; he was dead on arrival. (R. 8).

Thereafter, the Government investigated the circumstances surrounding the murder. (R. 2). As a starting point, the Government searched the crime scene. There, the Government found Mr. Ortiz's handheld video camera. (R. 2). The camera was "badly damaged" by Respondent's gunfire, and, as such, the Government could only view portions of the events Mr. Ortiz recorded. (R. 2). One portion of viewable video footage showed Respondent screaming insults and racial slurs at Mr. Ortiz. (R. 2). Moreover, the Government interviewed Officer Familia, who recited Mr. Ortiz's final words (quoted above). (R. 2-3). Based on this information, the Government suspected that Respondent murdered Mr. Ortiz "because of [his] . . . national origin . . . ." (R. 2); *See* 18 U.S.C. § 249(a)(1). As such, the Government launched a broader investigation in which it petitioned the District Court for the Eastern District of Boerum ("district court") for an order allowing it to recover geolocation records ("locational information") pertaining to Respondent's cell phone number. (R. 1). The district court issued the order. (R. 11).

The locational information established key facts related to Respondent's membership with the Brotherhood and the events of September 21, 2013. (R. 12-14). For instance, the information showed that Respondent frequented the White Knight Tavern—the Brotherhood's "habitual meeting place"—as well the homes of suspected Brotherhood members. (R. 13-15). Additionally, the information showed that Respondent left the White Knight Tavern at 12:00 p.m. on September 21, 2013—less than two hours before he murdered Mr. Ortiz. (R. 12).

Then, the Government obtained and executed a warrant to search the White Knight Tavern. (R. 14). During the search, the Government unearthed a letter written on July 4, 1993, and addressed to the Brotherhood. (R. 16). Martin Blythe Cole ("Cole")—the "esteemed founder" of the Brotherhood—wrote the letter. (R. 16). In it, Cole expressed his gratitude for Respondent "in particular" because Respondent "organized [the Brotherhood's] last rally." (R. 16). Cole then wrote: "In the future, I expect nothing but continued excellence from [Respondent]." (R. 16). As such, the letter proved that Respondent's hate for Latinos emerged more than twenty years before he killed Mr. Ortiz, as, by 1993, Respondent's dedication to white-supremacy had garnered the attention and respect of the Brotherhood's founder. (R. 16).

Further, the Government discovered evidence regarding Respondent's hatred toward Latinos via interviews with Respondent's co-workers. Specifically, Officer Familia reported that Respondent—in reference to Officer Familia's Latino ethnicity—told him that he was "one of the good ones, not like the rest of them," on at least a dozen different occasions within a six-month span. (R. 6). Additionally, Officer Familia informed the Government that Respondent kept a stack of flyers featuring Cole's image on the floor of his car. (R. 4, 9,10).

Based on this volume of evidence, on April 11, 2014, a grand jury in the United States District Court for the Eastern District of Boerum concluded that Respondent murdered Mr. Ortiz "because of [Mr. Ortiz's] . . . national origin," and, therefore, indicted Respondent under 18 U.S.C. § 249—the Hate Crimes Prevention Act. (R. 41). In pre-trial motions, Respondent moved to: (1) suppress his locational information under the Fourth Amendment; (2) exclude the Cole letter as hearsay; and (3) exclude Mr. Ortiz's dying declaration under the Sixth Amendment's Confrontation Clause. (R. 27). The district court erroneously granted each of these motions, claiming: (1) that Respondent had a reasonable expectation of privacy in his public locations; (2)

that Cole's letter could not be admitted absent an "additional" showing of its reliability; and (3) that admitting Mr. Ortiz's dying declaration violated the Confrontation Clause. (R. 42-45). The United States Court of Appeals for the Fourteenth Circuit upheld each ruling. (R. 48-55).

This Court granted certiorari. (R. 61).

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit's exclusion of Respondent's locational information, the Cole letter, and Mr. Ortiz's dying declaration is inconsistent with the Federal Rules of Evidence, this Court's precedent, and the Constitution of the United States. With all authority portrayed in the correct light—as it is in this brief—it is clear that: (1) locational information voluntarily conveyed to a third party is not protected by the Fourth Amendment; (2) properly authenticated "ancient documents" are equipped with sufficient safeguards against unreliability so as to render statements in such documents admissible absent any "additional indicia of reliability"; and (3) admitting dying declarations does not violate the Sixth Amendment's right to confrontation.

First, the Government acted consistently with the Fourth Amendment when it obtained Respondent's locational information without a warrant. Under the Fourth Amendment, a warrant is a prerequisite to Government action only if that action constitutes a search or a seizure. A search occurs when the Government invades a person's expectation of privacy and that expectation is subjectively and objectively reasonable. As such, in order for the Fourteenth Circuit's ruling to stand, it must be that Respondent has a subjectively and objectively reasonable expectation of privacy in his public whereabouts. He does not.

Information exposed to the public eye—such as one's whereabouts—receives no Fourth Amendment protection. Respondent's locational information is a set of data points that represent his public whereabouts, and, therefore, no single data point receives Fourth Amendment

protection. Contrary to what the Fourteenth Circuit thinks, "aggregating" individual episodes of Respondent's public position into one mass of information does not bring his public whereabouts within the Fourth Amendment's protection. Apart from being entirely foreign to Fourth Amendment jurisprudence, the "aggregation" approach obliterates this nation's police procedure and poses unsolvable problems when the supposed search combines Government and private party action. Thus, the Government's warrantless receipt of Respondent's locational information does not violate the Constitution, and the Fourteenth Circuit erred in ruling otherwise.

Moreover, under the third-party doctrine, information that is voluntarily conveyed to a third party receives no Fourth Amendment protection. When a person voluntarily conveys information to a third party, that person assumes the risk that the third party will expose that information to another, thereby removing any reasonable expectation of privacy the conveyer might have otherwise had in the information. As such, when Respondent voluntarily conveyed his locational information to AB&C Wireless—a third-party—he relinquished any reasonable expectation of privacy he might have had in that information.

Seemingly, the Fourteenth Circuit thought that Respondent's conveyance of his locational information was involuntary, as it claimed that Respondent needed to convey locational information to a third party to "exist in the modern world." But this assertion is nonsensical. Respondent chose to allow his cell phone to track his location. Additionally, contrary to the Fourteenth Circuit's claim, the third-party doctrine is crucial in the digital age to help preserve the Fourth Amendment's purpose of keeping a balance between security and privacy. Therefore, even if Respondent *could have* had a reasonable expectation of privacy in the "aggregation" of his locational information, he renounced that expectation when he voluntarily conveyed it to a third party. Thus, no search occurred; no warrant was necessary.

Second, statements in properly authenticated "ancient documents" are sufficiently safeguarded against unreliability. The rule against hearsay excludes out-of-court statements from evidence. The rationale behind the rule is that an out out-of-court statement's reliability cannot be safeguarded by cross-examination. However, certain out-of-court statements—like those in ancient documents—are remarkably useful at trial; as such, the Federal Rules of Evidence employ methods *other than* cross-examination to test the reliability of those statements: namely, the statement must satisfy the elements of Rule 803(16) prior to admittance. Thus, the Fourteenth Circuit's "additional indicia of reliability" requirement is improper unless the *current* elements of the rule do not sufficiently safeguard against unreliability.

The current elements of Rule 803(16) sufficiently safeguard against unreliability. The "age" requirement ensures that the statements in the document predate the controversy, which diminishes the possibility that the writer had a motive to lie. Moreover, the "age" requirement enhances the statement's reliability, as, between a statement contained in a twenty-year-old document and a person's testimony regarding an event he witnessed twenty years ago, the writing is not subject to faulty memory. Also, the "in writing" requirement eliminates the risk of second-hand misperception, as the declarant's statement is not presented in court via an eavesdropping bystander, but is instead introduced via the declarant's own writing. Therefore, the current elements of Rule 803(16) sufficiently test the reliability of statements contained in ancient documents; no "additional indicia of reliability" requirement is warranted.

Moreover, the policy behind the ancient documents exception to the rule against hearsay is that, twenty years after an event, it is unlikely that any witness to that event will be available to provide reliable testimony; as such, statements in ancient documents fulfill a void in evidentiary law. The Fourteenth Circuit ignored this reality when it imposed an "additional indicia of

reliability" requirement onto the rule: if "additional evidence" of a twenty-year-old event's occurrence were available, there would be no use for the exception. Therefore, the Fourteenth Circuit's interpretation of the rule defeats the rule's purpose; accordingly, it is wrong.

Third, courts have always excepted dying declarations from the right to confrontation. When a Bill of Rights provision codifies a common law right, the provision is applied in the manner that courts applied that common law right at the time of codification. As this Court has recognized, the Confrontation Clause codifies the common law right of confrontation. When applying the common law right of confrontation, English courts recognized an exception for dying declarations. Following the adoption of the Confrontation Clause, American courts continued to recognize an exception for dying declarations, demonstrating that the Amendment codified the common law right of confrontation and its established exceptions. It follows that the Confrontation Clause includes an exception for dying declarations.

Moreover, analyzing the Confrontation Clause in a manner that recognizes an exception for dying declarations is consistent with the purpose of the Sixth Amendment. Few rights are absolute. Indeed, rights are subject to exceptions when exceptions are necessary to enable the right to accomplish its purpose. The purpose of the Sixth Amendment is to ensure that trials are just and able to reach the correct result by providing procedures that fully develop the factual issue before the fact-finder. Admitting dying declarations furthers this purpose because such statements facilitate just and correct results at trial. Dying declarations are uniquely reliable because individuals have no incentive to lie in the grave, solemn circumstance of imminent death. Further, dying declarations are particularly necessary because there will rarely be another source of evidence as to the circumstances of the victim's death.

Therefore, the Fourteenth Circuit's misinterpretation—or complete rewrite—of the Federal Rules of Evidence, this Court's precedent, and the Constitution of the United States cannot stand. Accordingly, its rulings to exclude Respondent's locational information, the Cole letter, and Mr. Ortiz's dying declaration, must be reversed.

ARGUMENT

I. THE GOVERNMENT'S ACQUISITION OF RESPONDENT'S LOCATIONAL INFORMATION WAS CONSISTENT WITH THE FOURTH AMENDMENT.

Under the Fourth Amendment, a warrant is a prerequisite to Government action only if that action constitutes a search or seizure. U.S. Const. amend. IV; *Smith v. Maryland*, 442 U.S. 735, 738 (1979); *Davis v. United States*, 413 F.2d 1226, 1233 (5th Cir. 1969) ("Since no search occurred, no warrant was necessary . . . ."). A search occurs "when the government physical[ly] intru[des] [upon] . . . a constitutionally protected area in order to obtain information," *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)), or when the Government invades a person's "actual (subjective) expectation of privacy and, [that] expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring). It follows that the Government's lawful[2] receipt of Respondent's locational information—which he voluntarily conveyed to AB&C Wireless, a private, third party—only violates the Fourth Amendment's warrant requirement if Respondent has a reasonable expectation of privacy in his whereabouts.

In ruling that the Government conducted an unconstitutional search, the Fourteenth Circuit reached two erroneous conclusions—both of which disrupt the current state of Fourth Amendment law. First, the Fourteenth Circuit concluded that Respondent had a reasonable

[2] The Government lawfully obtained Respondent's locational information pursuant to the Stored Communications Act ("SCA"). 18 U.S.C. § 2703. Under the SCA, the Government must obtain a court order, which will not be issued unless the Government presents "specific and articulable facts showing that there are reasonable grounds to believe the [requested communication is] relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d).

expectation of privacy in the "aggregation" of his whereabouts. (R. 48-50). Second, in order to escape the dictates of the "third-party doctrine"—which eliminates Fourth Amendment protection for information voluntarily conveyed to third parties—the Fourteenth Circuit ruled that the doctrine is inapplicable in this case, and more broadly, "ill suited to the digital age." (R. 50) (quoting *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring)); *see Smith*, 442 U.S. at 744. However, the Fourteenth Circuit's "aggregation" theory entails impractical implications that, even if resolvable, would not bring Respondent's locational information within the Fourth Amendment's protection, as this information falls neatly within the third-party doctrine—a doctrine well suited to the digital age. Therefore, no search occurred; accordingly, no warrant was necessary. *Smith*, 442 U.S. at 738.

A. Respondent has no reasonable expectation of privacy in his whereabouts and adopting a rule declaring otherwise is nonviable.

Information exposed to the public—such as one's location and movements—cannot reasonably be expected to remain private. *California v. Greenwood*, 486 U.S. 35, 41 (1988) ("[P]olice cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) ("The Fourth Amendment simply does not require police traveling [in public] to obtain a warrant in order to observe what is visible to the naked eye."); *United States v. Knotts*, 460 U.S. 276, 281 (1983) ("A person traveling . . . on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). Therefore, the Fourth Amendment does not protect locational information, and the Government does not need a warrant to acquire it. *See Knotts*, 460 U.S. at 281; *Katz*, 389 U.S. at 360-62 (Harlan, J., concurring).

But according to the Fourteenth Circuit, the Fourth Amendment protects the "aggregation" of an individual's locational information.[3] (R. 49-51). Applying this "aggregative" approach to Respondent's case, the Fourteenth Circuit combined a number of actions—some of which did not involve the Government, none of which (on their own) amount to a search, but all of which revealed Respondent's public location at a particular time—and concluded that a "search" occurred. (R. 49-51). This analysis—foreign to both law and logic—is brimming with problems. Most notably, it stands for the logically untenable proposition that a number of zero-value parts can be added together to result in something *other* than zero. *Knotts*, 460 U.S. at 281; *see also United States v. Jones*, 625 F.3d 766, 769 (D.C. Cir. 2010) (Sentelle, C.J., dissenting from denial of rehearing en banc). But even if the "aggregation" approach could withstand the scrutiny of common sense, it has no place in Fourth Amendment jurisprudence because it deconstructs the manner by which the Fourth Amendment determines whether a search has occurred and causes more problems than it resolves. As such, Respondent's locations cannot be "aggregated," and, standing alone, Respondent has no reasonable expectation of privacy in his whereabouts; therefore, no "search" occurred in this case; no warrant was necessary. U.S. Const. amend. IV; *Knotts*, 460 U.S. at 281; *Katz*, 389 U.S. at 360-62 (Harlan, J., concurring).

First, the "aggregative" approach cuts against the grain of both this Court's jurisprudence and this nation's system of police procedure. "Fourth Amendment analysis is renownedly fact specific," and requires use of a "step-by-step" inquiry whereby each distinct action taken by the Government is independently analyzed to determine if that "step" is a "search." *See United States v. Beaudoin*, 362 F.3d 60, 70-71 (1st Cir. 2004); *see, e.g.*, *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (independently analyzing each of a police officer's actions to determine whether a

[3] The Fourteenth Circuit found a search without overruling *Knotts* and its progeny or departing from *Katz*; therefore, it must be the case that it believes that Respondent could have a reasonable expectation of privacy in the "aggregation" of his whereabouts. *See Knotts*, 460 U.S. at 281; *Katz*, 389 U.S. at 360-62 (Harlan, J., concurring).

search occurred); *Terry v. Ohio*, 392 U.S. 1, 27-30 (1968) (independently analyzing the observation, stop, and pat down of a suspect by a police officer). Since each "step" is analyzed separately, the hallmark of good police work is collecting just enough information through non-searches to reveal intimate details about a suspect's activities. Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 328 (2012). This information supplies "probable cause," with which the Government can obtain a warrant authorizing more invasive search techniques. *Id.* But if each pre-warrant "step" is "aggregated" into a search while each "step" individually is not a search, the Government would need a warrant to take an action that is not a search. While the Fourteenth Circuit may disagree, the Fourth Amendment does not protect warrantless "non-searches." *See* U.S. Const. amend IV.

Second, even if the "aggregative" approach could be employed without deconstructing Fourth Amendment approved police procedures, it is untenable in a number of other respects. For instance, one glaring problem evident in this case is that the "aggregation" of all events relevant to the collection and review of Respondent's locational information requires combining the acts of a private party (AB&C Wireless) with those of the Government. With so many actions—some subject to Fourth Amendment review and others not—it is impossible to determine when, if ever, an unreasonable search occurred. Quite obviously, AB&C Wireless—a private, non-governmental entity—did not perform a "search" when it collected Respondent's locational information. *United States v. Jacobsen*, 446 U.S. 109, 115 (1984). Similarly, the Government performed no "search" because Government review "of what a private party . . . [makes] available for [its] inspection [does] not violate the Fourth Amendment." *Id.* at 119 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971)). Moreover, as mentioned, it is preposterous to conclude that the "thing" revealed in this instance—locational information—is

something in which a person can have a reasonable expectation of privacy. *Knotts*, 460 U.S. at 281. But, nonetheless, the "aggregation" theory—as applied by the Fourteenth Circuit—holds that somewhere amidst these layers of Fourth Amendment approved conduct, a search appears.

Clearly then, the "aggregation" approach obliterates this Court's understanding of the Fourth Amendment and police procedure. Unless this Court is prepared to upend decades of precedent and reinterpret the Fourth Amendment from scratch, the current Fourth Amendment analysis applies to Respondent's locational information. Under this analysis, Respondent cannot reasonably expect his "movements" through Boerum to be kept private, as each movement occurred in public; therefore, the Fourth Amendment does not protect Respondent's locational information, and no warrant was necessary for the Government to obtain or review it. U.S. Const. amend. IV; *Knotts*, 460 U.S. at 281; *Katz*, 389 U.S. at 360-62 (Harlan, J., concurring).

B. Assuming arguendo that a person *could* have a reasonable expectation of privacy in locational information, no such expectation attaches to information voluntarily conveyed to a third party.

Even if this Court affords locational information Fourth Amendment protection under the Fourteenth Circuit's "aggregation" theory, no Government action taken in this case amounts to an "unreasonable search," and, therefore, no warrant was necessary. Under the third-party doctrine, when a citizen "reveal[s] his affairs to another," he assumes the risk "that the information will be revealed to the Government." *United States v. Miller*, 425 U.S. 435, 443 (1976) (refusing to find a search when the Government requested financial records from defendant's banker). As such, the Fourth Amendment does not protect a citizen's "misplaced belief" that information "voluntarily confide[d]" to a third-party will be kept private. *Hoffa v. United States*, 385 U.S. 293, 302 (1966). Accordingly, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S.

735, 743-44 (1979). It follows that Respondent's locational information—which he voluntarily conveyed to AB&C Wireless—falls within the third-party doctrine and receives no Fourth Amendment protection. *See Katz*, 389 U.S. at 360-62 (1967) (Harlan, J., concurring).

Nonetheless, the Fourteenth Circuit refused to apply the doctrine. (R. 50). In justifying its position, the Fourteenth Circuit submitted one faulty proposition: in the "digital age"—where an individual *must* convey locational information via smartphone applications in order to "exist"—the "notion of choice" that is "[i]mplicit in the concept of assumption of risk" is absent. (R. 49-50) (quoting *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) and *Smith*, 442 U.S. at 749-50 (Marshall, J., dissenting)). Based on this supposed absence of choice, the Fourteenth Circuit—perhaps unwittingly—concluded that Respondent did not "voluntarily" convey locational information to AB&C Wireless and suggested that information provided to a third party "in the course of carrying out mundane tasks" is *never* "voluntarily conveyed," thereby eviscerating the doctrine as applied to this class of information. (R. 50) (quoting *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring)). But the Fourteenth Circuit's proposition and the conclusions that flow from it are wrong; accordingly, under the third-party doctrine, Respondent's locational information receives no Fourth Amendment protection. *See Smith*, 442 U.S. at 743-44.

First, Respondent can "exist in modern society" *without* using location-tracking phone applications. (R. 49). Over 70% of phone applications function without tracking the user's location. *The Truth About Apps That Secretly Connect to User Tracking and Ad Sites*, Technology Review (May 1, 2015), http://www.technologyreview.com/view/537186/the-truth-about-smartphone-apps-that-secretly-connect-to-user-tracking-and-ad-sites/. Moreover, engineers designed an application that notifies its users when other "background" applications

are tracking location. *Android App Warns When You're Being Watched*, Technology Review (Jan. 30, 2015), http://www.technologyreview.com/news/523981/android-app-warns-when-youre-being-watched/. As such, it is nonsensical to characterize—as the Fourteenth Circuit did—Respondent's phone use options as being between an "electronic monitoring anklet" and a "glorified paperweight." (R. 50). Indeed, Respondent had a number of "realistic alternative[s]" for how to use his phone and *chose* to utilize location-tracking applications with full-knowledge[4] that such information would be "exposed" to AB&C Wireless. (R. 56 n.7); *see Smith*, 442 U.S. at 744. As such, Respondent "voluntarily conveyed" his locational information to AB&C Wireless and assumed the risk that this information would be exposed.

Second, the Fourteenth Circuit's proposition ignores the fact that this Court has applied the third-party doctrine in remarkably similar circumstances, and, in doing so, supported the doctrine's premise. For instance, in *Smith v. Maryland*, this Court ruled that when an individual uses a phone, he "voluntarily convey[s] numerical information to the telephone company," and, "[i]n doing so . . . assume[s] the risk that the company [will] reveal[] . . . the number he dialed" to the Government. 442 U.S. 735, 744 (1979). The logical conclusion from this ruling is that when Respondent "use[d] his phone" in a way that tracked his location, he "voluntarily conveyed [locational] information to" AB&C Wireless and "assumed the risk that" AB&C Wireless would reveal that information to the Government. (R. 11); *Smith*, 442 U.S. at 744. Therefore, Respondent's locational information receives no Fourth Amendment protection. *Id*.

Third, the Fourteenth Circuit's proposition suggests that, in the "digital age," information revealed via an electronic device "in the course of carrying out mundane tasks" is not subject to the third-party doctrine. (R. 50). But to eviscerate the third-party doctrine as to an entire class of

[4] AB&C Wireless's Privacy Policy—signed by Respondent—provides that AB&C Wireless collects "[s]ervice usage information . . . [regarding] . . . wireless location . . . ." (R. 11 n. 2).

information would disrupt the "*balance* between privacy and security" upon which the Fourth Amendment is based. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 574 (2009) (emphasis added). At times, this Court has recognized that Fourth Amendment balance is achieved by ensuring that privacy is not decreased as technology advances security techniques. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (restoring the balance between security and privacy by restricting the use of thermal-imaging cameras). It follows that, to preserve balance, the converse must be true: technological advancements cannot be used to shroud otherwise public information. *See* Kerr, *supra* at 579-81. As such, the third-party doctrine—which aims to maintain Fourth Amendment balance between security and privacy—must apply in the present case and in the "digital age." *Id.*

In sum, Respondent had a choice in whether he exposed his locational information to AB&C Wireless. When he decided to utilize phone applications that recorded and reported his location, he abandoned any "expectation of privacy" he might have otherwise had in his whereabouts. (R. 11); *see Smith*, 442 U.S. at 744. Therefore, in obtaining and reviewing this information, the Government took no action that constitutes a Fourth Amendment "search." *See Katz*, 389 U.S. at 360-62 (Harlan, J., concurring). To rule otherwise would disrupt the "balance between privacy and security" that the Fourth Amendment seeks to preserve. Kerr, *supra* at 579-81. Accordingly, no warrant was necessary.

II. AUTHENTICATED "ANCIENT DOCUMENTS" ARE ADMISSIBLE WITHOUT ADDITIONAL INDICIA OF RELIABILITY.

Federal courts consistently admit hearsay[5] "declaration[s] [that] come[] within a . . . [hearsay] exception" "without any preliminary finding of probable credibility by the judge . . . ."[6]

[5] Rule 802 states: "Hearsay is not admissible," unless certain authorities "provide[] otherwise," and Rule 801(c) defines hearsay as an out-of-court statement offered in court "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c); Fed. R. Evid. 802.

United States v. DiMaria, 727 F.2d 265, 272 (2d Cir. 1984); *see also United States v. Ruiz*, 249 F.3d 643, 647 (7th Cir. 2001); *United States v. Dinome*, 954 F.2d 839, 846 (2d Cir. 1992) (regarding appellant's argument that excepted hearsay needs "further indicia of reliability" as "misplaced" and ruling that additional indicia of reliability was "unnecessary"). The reasoning supporting this rule is simple: an excepted hearsay statement is equipped with sufficient safeguards against unreliability, and, therefore, the rule against hearsay does not bar the jury—which ultimately determines the credibility of the statement—from hearing it. *See* Fed. R. Evid. 803; *United States v. Clark*, 18 F.3d 1337, 1342 (6th Cir. 1994); *DiMaria*, 727 F.2d at 272 n.5. As such, it is not surprising that judges who exclude excepted hearsay statements under the rule against hearsay "because [they] do[] not believe it [are] described as 'altogether atypical, extraordinary.'" The Advisers' Introductory Note: The Hearsay Problem, 56 F.R.D. 183, 288-290 (1976) (quoting James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 Harv. L. Rev. 932, 947 (1962)).

Nonetheless, the "atypical" and "extraordinary" Fourteenth Circuit—apparently not satisfied with Congress's and multiple federal circuits' definition of "reliable"—circumvented the general rule prohibiting a judge from conditioning the admissibility of an excepted hearsay statement on a preliminary credibility determination by rewriting Rule 803(16)—the "ancient documents" exception. (R. 44, 51); *see* Fed. R. Evid. 803(16) (not requiring "additional indicia of reliability"); *see also United States v. Kalymon*, 541 F.3d 624, 632-33 (6th Cir. 2008) (holding that authenticated ancient documents are sufficiently reliable to be introduced for their truth); *United States v. Kairys*, 782 F.3d 1374, 1379 (7th Cir. 1986); *Threadgill v. Armstrong World*

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[6] If the hearsay declaration is admitted under a rule specifically calling for a judicial credibility determination—such as Rule 803(6)—the judge may require additional indicia of reliability. *See* Fed. R. Evid. 803(6)(E).

Indus., 928 F.2d 1366, 1376 (3d Cir. 1981). Under its new rule, which has not been approved by this Court or Congress, a judge may regard an authenticated ancient document containing hearsay-excepted declarations as inadmissible if the proponent does not offer "additional indicia" of the document's contents reliability. (R. 51). Using this rule, the Fourteenth Circuit erroneously held: "[a]lthough the ancient document at hand meets the Rule's facial requirements, it is not sufficiently reliable to be introduced for its truth." (R. 51).

Notwithstanding the fact that the Fourteenth Circuit's conduct is intolerable in that it rewrote a Federal Rule of Evidence—a task which it does not have the power to undertake[7]—so as to classify admissible evidence as inadmissible hearsay (a conclusion it could not have reached otherwise), the reasoning behind the Fourteenth Circuit's "additional indicia of reliability" requirement rests on erroneous assumptions regarding Rules 901(b)(8) and 803(16). Indeed, when the ancient documents exception is interpreted consistently with its plain language and general principles regarding the rule against hearsay, it is clear that an ancient document that meets the facial requirements of Rules 803(16) and 901(b)(8) bears more than sufficient indicia of reliability to be introduced for its truth. Moreover, the Fourteenth Circuit's concerns regarding the "potential for abuse" of the ancient documents exception are misguided, as any risk associated with admitting a seemingly unreliable statement can be cured with effective advocacy and a limiting instruction. Thus, even if the Fourteenth Circuit could impose an "additional indicia of reliability" requirement onto Rule 803(16), no such requirement is necessary.

A. Ancient documents that satisfy the plain language of Rules 803(16) and 901(b)(8)—such as letter in this case—are reliable and necessary.

"Once a document qualifies as an ancient document"—that is, once the document's authenticity is established and it is shown that the document is at least twenty years old—"it is

[7] Under the Rules Enabling Act, only this Court has authority to draft Federal Rules of Evidence, and, even then, proposed rules are subject to Congressional scrutiny. *See* 28 U.S.C. § 2072(a).

automatically excepted from the hearsay rule." *Threadgill*, 928 F.2d at 1375; *see also* Fed. R. Evid. 803(16); *United States v. Firishchak*, 468 F.3d 1015, 1022 (7th Cir. 2006); *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir. 2004). This is because, while all statements present "dangers" of unreliability, the reliability of and need for a statement written in a document authenticated under Rule 901(b)(8)—i.e., a statement contained in a twenty-year-old document that is found "in a condition that creates no suspicion about its authenticity" and "in a place where, if authentic, it would likely be"—is high, whereas any potential "danger" of unreliability is low. *See* Fed. R. Evid. 901(b)(8); *Ferrier v. Duckworth*, 902 F.2d 545, 547 (7th Cir. 1990) (explaining that the exceptions to the rule against hearsay were "designed . . . to permit . . . the admission of reliable hearsay"); 50 Am. Jur. 2d *Proof of Facts* § 1 (1988) (citing necessity and reliability as policy-justifications for Rule 803(16)). To understand why this is so, it is necessary to comprehend the purpose of the hearsay rule and the risks that accompany hearsay statements.

1. *Statements contained in properly authenticated ancient documents present few, if any, hearsay "dangers."*

"Seeking truth by paying heed to human assertions, whether in the form of hearsay or live testimony, entails risks . . . ." *United States v. Owens,* 789 F.2d 750, 756 (9th Cir.1986). These "risks" are insincerity, misperception, ambiguity, and faulty memory—all of which are believed to lessen a statement's reliability. *See generally*, Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177 (1948); *see also Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978). But "[l]ive testimony is considered [more] reliable [than hearsay] because . . . the witness is subject to cross-examination," which safeguards against unreliability by testing the statement's reliability. *Owens,* 789 F.2d at 756. When this safeguard cannot be implemented, other means for testing the statement's reliability—like satisfying the elements of a hearsay exception—replace it. *See Ferrier*, 902 F.2d at 547. In

this way, the operative question is whether the *current* elements of Rules 803(16) and 901(b)(8) provide sufficient safeguards against unreliability; undoubtedly, they do.

The requirement that the document containing the statement be twenty years old protects against the risk of insincerity and faulty memory. First, the age requirement protects against the risk of insincerity because "age affords assurance that the writing antedates the present controversy . . . ." *Hicks v. Charles Pfizer & Co.*, 466 F. Supp. 2d 799, 805 (E.D. Tex. 2005) (quoting *United States v. Stelmokas,* No. 92–3440, 1995 WL 464264, at *6 (E.D. Pa. Aug. 2, 1995), *aff'd,* 100 F.3d 302 (3d Cir.1996)); *see also* Fed. R. Evid. 803(16); Fed. R. Evid 901(b)(8). A statement that "antedates the present controversy," is "written before the . . . motive to fabricate [arises]," and, as such, "is more likely to be truthful" because, without a motive to fabricate, there is no sensible reason supporting the proposition that the declarant lied. *Hicks*, 466 F. Supp. 2d at 805. Second, the age requirement protects against the risk of "faulty memory." Indeed, a statement in a twenty-year-old document is "more likely to be accurate than the memory of a person after the passing of a lengthy period of time," meaning that calling the declarant to testify in lieu of the use of his previously recorded statement would ultimately lead to a *greater* risk of unreliability. *Id.*; *see also Dallas Cty. v. Commercial Union Assurance Co.*, 286 F.2d 388, 396-97 (5th Cir. 1961). The lower courts missed both of these well-reasoned conclusions when they concluded that "[t]he 20-year age limit . . . has no impact on whether . . . the document contains reliable information," (R. 44); thus, the lower court's premise is wrong.

Moreover, the risks of misperception and ambiguity are protected against by the "in writing" requirement.[8] Fed. R. Evid. 803(16). The fact that the statement is written eliminates

[8] Notably, while Rule 901(b)(8) offers a route to authentication for both "documents" and "data compilations," only statements "in a document" are excepted from the rule against hearsay. Fed. R. Evid. 803(16); Fed. R. Evid. 901(b)(8).

any risk of "inaccurate narration"—a component of "misperception." *See Hicks*, 466 F. Supp. 2d at 805; *Stelmokas,* 1995 WL 464264, at *6. This is because, when the statement is written, it is known with certainty what the declarant says he perceived. *See Hicks*, F. Supp. 2d at 805. Of course, the declarant of a statement in an ancient document may have misperceived the initial circumstances he later recorded; but this supposition alone does not render the statement unreliable, particularly when it is considered that cross-examination would not provide a better "safeguard" against unreliability. Indeed, the written statement is the most accurate narration of the declarant's perception, and is, in fact, the equivalent of what he would say in the present-day courtroom. If declarant were to repeat the statements he previously recorded in an ancient document in the courtroom, cross-examination would not expose any initial misperception because, as time induces a faded memory, the declarant will respond: "I cannot remember" to any inquiry attempting to solidify or discredit his testimony. As such, ancient documents provide a sufficient safeguard against misperception. *Id.*

Finally, when the document is properly authenticated under Rule 901(b)(8), it bears even greater likelihood of being genuine, which, in turn, increases the reliability of its contents.[9] Indeed, "an unsuspicious-looking document which is found in a place where it should have been found, and shown to be sufficiently old, is probably genuine," and a genuine document is more likely to be truthful. 50 Am. Jur. 2d *Proof of Facts* § 1 (1988). As such, when an ancient document is authenticated under Rule 901(b)(8)—as opposed to any other authentication rule—it *already* bears the "additional indicia of reliability" the Fourteenth Circuit demanded. As such, statements that satisfy the current elements of Rules 803(16) and 901(b)(8) are sufficiently safeguarded against any potential risk of unreliability and are therefore admissible for their truth.

[9] It should be noted that an ancient document need not be authenticated under Rule 901(b)(8) to be excepted from the rule against hearsay; Rule 803(16) merely requires the document's "authenticity be established," meaning that it can be authenticated under any rule of authentication. Fed. R. Evid. 803(16).

2. *Imposing an "additional indicia of reliability" requirement onto Rule 803(16) overlooks the need that litigants often have for statements in ancient documents.*

Aside from the fact that the elements of the ancient documents exception provide sufficient safeguards against unreliability, there is a particular *need* for statements contained in twenty-year-old documents. 50 Am. Jur. 2d *Proof of Facts* § 1 (1988). This need stems from the fact that "after a long lapse of time, ordinary evidence . . . is virtually unavailable," which means that an advocate would experience "great practical inconvenience" if he had to prove the occurrence of twenty-year-old events without the use of statements in ancient documents. *See Dallas Cty.*, 286 F.2d at 396-97 (quoting *United States v. Aluminum Co. of Am.*, 35 F. Supp. 820, 824 (S.D.N.Y. 1940). It follows that the best, *see supra* Part II.A.1—and most practically obtainable—evidence that an event did in fact occur must necessarily come from an account of that event written near the time it occurred. However, if a court could exclude statements contained in properly authenticated ancient documents simply because the proponent of the document could not provide any "additional indicia of reliability," the above-mentioned need would go unmet. Indeed, if an "additional layer of verification" were required prior to admitting statements in ancient documents for their truth, no such statement would ever be excepted from the rule against hearsay. This is because, since evidence surrounding the statements is "virtually unavailable," it will rarely be the case that an "additional layer of verification" exists twenty years after the statement is recorded. (R. 44); *see Dallas Cty.*, 286 F.2d at 396-97.

From this, and the fact that *other*[10] rules of evidence contain the functional equivalent of an "additional indicia of reliability" requirement, it can be inferred that Congress knows how to impose additional reliability requirements on rules of evidence and explicitly chose *not* to impose such a requirement on statements contained in ancient documents because doing so

[10] *See* Fed. R. Evid. 803(6)(E).

would defeat the rule's purpose. *See* Fed. R. Evid. 803(16) (containing no "additional indicia of reliability" requirement); *United States v. Ruiz*, 249 F.3d 643, 647 n.2 (7th Cir. 2001) (noting that, "when Congress wished to condition the admissibility of certain types of evidence on the presence of corroboration, it imposed that requirement explicitly . . . ."). Thus, the Fourteenth Circuit missed the mark when it gutted the long-standing and vital ancient documents exception.

B. To the extent that the ancient documents exception as written creates a "potential for abuse," safeguards exist within our adversarial system to ensure that such statements do not hinder the "truth finding" function of trial.

While it is true that the elements of Rules 803(16) and 901(b)(8) sufficiently safeguard against the admission of unreliable statements, unreliable and untrue statements may occasionally make their way into the courtroom. There is no way to entirely prevent this problem, and, as such, safeguards—like cross-examination or the satisfaction of hearsay exception elements—are meant to "manage and confine the risks" inherent in all "human assertions." Christopher B. Mueller et al., 4 Federal Evidence § 8:3 (4th ed. 2009); *see also Owens,* 789 F.2d at 756. However, the answer to this unsolvable problem is *not* to rewrite Rule 803(16) such that the rule is effectively abrogated, and likewise, the solution is *not* to place an immovable bar on the admission of such evidence. Instead, the solution is the same as it is for all other evidence: effective advocacy and proper jury instructions.

Indeed, effective advocacy on behalf of a statement's opponent can diminish that statement's reliability in the eyes of the jury. James A. George, *Hearsay: Recognizing It and Handling the Objection*, 10 Am. J. Trial Advoc. 489, 525 (1987) (explaining that a statement's opponent can attack the statement's reliability *even after* it has been admitted). As such, when the jury—which, armed with "common sense" is a "surer guaranty of justice than any . . . rule[] of evidence "—deliberates, it will accord little weight to that statement and reach a conclusion

that appropriately considers the reasons for doubting it. *See United States v. 25,406 Acres of Land*, 172 F.2d 990, 995 (5th Cir. 1949). All that is required to ensure a jury engages in this manner of deliberation is an instruction explaining that the admissibility of a hearsay statement is not dispositive of that statement's truth. George, *supra* at 525 (recognizing that a proper limiting instruction can frame the evidence differently than it may have initially appeared). Additionally, under the Federal Rules of Evidence, "[t]he credibility of the declarant of a hearsay statement . . . may be attacked as if the declarant had testified as a witness," meaning that effective advocacy on behalf of the statement's opponent can bring to light any non-facial reasons that could have motivated the declarant to lie. *Id*.; *see also* Fed. R. Evid. 806.

As such, admitting statements contained in properly authenticated ancient documents for their truth without showing that those statements exhibit "additional indicia of reliability" does not threaten the truth-finding function of a trial, but—as reasoned above—enhances it. *See supra*, Part II.A.1,2; *see also 25,406 Acres of Land*, 172 F.2d at 995 (explaining that denying the jury the ability to review "matters which men consider in their everyday lives hinder[s] rather than help[s] [the process of] arriving at a just result"). Therefore, no such requirement is necessary, and the Fourteenth Circuit erred in ruling otherwise.

III. ADMITTING MR. ORTIZ'S DYING DECLARATION IS CONSISTENT WITH THE CONFRONTATION CLAUSE, AS DYING DECLARATIONS ARE AN EXCEPTION TO THE CLAUSE'S BAR ON UNCONFRONTED STATEMENTS.

Dying declarations are an exception to the Confrontation Clause's ban on out-of-court testimonial statements. *See* U.S. Const. amend. VI; *Giles v. California*, 554 U.S. 353, 358 (2008). Admitting these statements is appropriate because they are inherently reliable due to being given in the face of imminent death and because they are critical to resolving a case considering that evidence regarding circumstances of death often cannot be obtained from any

other source. *See Kirby v. United States*, 174 U.S. 47, 61 (1899). As such, this Court has repeatedly concluded that dying declarations are an exception to the Sixth Amendment right of confrontation. *See Giles*, 554 U.S. at 358.

Heedless of the history requiring that dying declarations be admitted, the Fourteenth Circuit deviated from precedent when it refused to acknowledge dying declarations as an exception to the right of confrontation. (R. 54-55). Rather than upholding its departure from clearly established law, this Court must overturn the Fourteenth Circuit's decision and continue to recognize the exception for dying declarations for two reasons. First, the Constitution guarantees only those rights, and exceptions to those rights, that were intended at the time that the right was adopted. Because dying declarations were an exception to the right of confrontation at the time that the Confrontation Clause was adopted, the exception must remain in effect today. Second, admitting these statements is consistent with the Sixth Amendment's goal of ensuring fair trials because these statements are reliable and often contain otherwise unobtainable information that is crucial to the resolution of the case.

A. The Confrontation Clause does not prohibit the admission of dying declarations because the common law right of confrontation that the Clause codified always included an exception for these statements.

When a Bill of Rights provision codifies a common law right, that constitutional provision is applied as though it were the common law right that it codified. *See District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (noting the "historical reality that the Second Amendment . . . codified a right inherited from our English ancestors," and interpreting the constitutional right as mirroring that common law right.). Because the Confrontation Clause's right of confrontation is "most naturally read as a reference to the right of confrontation at common law," it is interpreted as codifying that right and any exceptions to it that existed at

common law. *Giles*, 554 U.S. at 358. It follows that the right of confrontation provided by the Confrontation Clause parallels the common law right of confrontation; therefore, it guarantees the right of confrontation and the exceptions to that right that were firmly established at the time of the founding. *See id*.; *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (noting that the Confrontation Clause codifies the common law right to confront one's accuser admits the common law exceptions "established at the time of the founding.").

The common law right of confrontation has always included an exception for dying declarations. *See* John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 1397, 1745-55 (1st ed. 1904) (discussing the history of the right of confrontation and asserting that it was "not a right devoid of exceptions"). English courts developed a right of confrontation, pursuant to which out-of-court statements were generally inadmissible if their declarant was not presented at trial for cross-examination—that is, if the defendant did not have the opportunity to confront the witnesses against him. *See King v. Dingler*, 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). From the time that the courts developed this right of confrontation, however, they routinely admitted dying declarations. *See* Wigmore, *supra*. As a result, dying declarations have always been treated as an exception to Confrontation Clause's bar on the admission of unconfronted testimonial statements. *See Crawford*, 541 U.S. at 56 n. 6 (citations omitted) (describing dying declarations as the "one deviation" from the general exclusion of unconfronted statements); *Giles*, 554 U.S. at 358 (explaining that dying declarations were "admitted at common law even though they were unconfronted" and acknowledging that these statements were a "historic exception").

American courts adopted the common law right of confrontation and, even after the Sixth Amendment was adopted, continued to admit dying declarations; this shows that courts have always treated the Confrontation Clause as codifying the common law right to confrontation and its exceptions. *See, e.g.*, *United States v. Veitch*, 28 F. Cas. 367, 367-68 (C.C.D.C. 1803); *United States v. McGurk*, 26 F. Cas. 1097 (C.C.D.C. 1802). In the first known case in which a defendant argued that admitting a dying declaration violated his state confrontation right—which, like the Sixth Amendment, guaranteed an accused the right to "be confronted by witnesses, face to face"— the state Supreme Court rejected the argument. *Anthony v. State*, 19 Tenn. 265, 277 (1838) (quoting Tenn. Const. art. I, § 9). In doing so, it acknowledged that the Bill of Rights was not intended to introduce new rights, but instead sought to "preserve and perpetuate" rights as they were understood at the time of the nation's founding—that is, the common law rights that the Bill of Rights codified. *Id*. Given this, the court applied the Confrontation Clause as it was applied at the time of its ratification—in the same manner as the common law right of confrontation—which admitted dying declarations. *Id*. at 277-78.

Given the nature of the common law right of confrontation and the way that early courts treated the Confrontation Clause, this Court has consistently concluded that dying declarations are an exception to the Confrontation Clause's bar on out-of-court statements. For example, in *Mattox v. United States (Mattox II)*, this Court noted that "from time immemorial [dying declarations] have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility." *Mattox II*, 156 U.S. 237, 243 (1895). Shortly thereafter, this Court made explicit its treatment of dying declarations as exempted from the general right of confrontation, stating that this "exception was well established before the Constitution, and was not intended to be abrogated." *Kirby v. United States*, 174 U.S. 47, 61 (1899); *see also Dowdell*

v. United States, 221 U.S. 325, 330 (1911) ("Dying declarations, although not made in the presence of the accused, are uniformly recognized as competent [evidence]."); *Carver v. United States*, 164 U.S. 694, 697 (1897) (describing dying declarations as "a marked exception to the general rule that hearsay testimony is not admissible"). More recently, this Court has described the exception for dying declarations as "one deviation" from the ban on hearsay, *Crawford*, 541 U.S. at 56 n.6, and a "historic exception," given that these statements were "admitted at common law even though they were unconfronted." *Giles*, 554 U.S. at 358-59.

Following this Court's guidance, nearly every state court has held that dying declarations are an exception to the Confrontation Clause's ban on the admission of out-of-court statements. For example, in *Bishop v. State* the court recognized that this Court's decision in *Giles* interpreted *Crawford* as standing for the proposition that the Confrontation Clause codified the common law right of confrontation and its exception for dying declarations. 40 N.E.3d 935, 945 (Ind. Ct. App. 2015). Similarly, another court ruled that *Giles* "left no doubt" that the Confrontation Clause does not apply to dying declarations, and adopted the exception after noting that "[t]here is no foundation for the assertion that the dying declaration exception was nonexistent at the time that the Bill of Rights was designed . . . it is irrefutable that dying declarations were admitted at common law before and after ratification of the Bill of Rights." *State v. Hailes*, 92 A.3d 544, 565-67 (Md. Ct. App. 2014); *see also Harking v. State*, 143 P.3d 706, 711 (Nev. 2006); *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004); *Grindle v. State*, 134 So.3d 330 (Miss. Ct. App. 2013); *People v. Graham*, 910 N.E.2d 1263, 1270-71 (Ill. App. Ct. 2009). Therefore, the Confrontation Clause must be interpreted in light of the common law right that it codified and, because the common law right of confrontation includes an exception

for dying declarations that was applied both before and after the Bill of Rights was ratified, the Sixth Amendment Confrontation Clause does not exclude dying declarations.

B. Admitting dying declarations is consistent with the Sixth Amendment's purpose of ensuring a fair trial because the statements are uniquely reliable and contain vital information that cannot be obtained from another source.

Not only does refusing to acknowledge the dying declarations exception cut against the clear history of the Confrontation Clause, it also impairs the Sixth Amendment's ability to guarantee fair trials that reach a just result. Most rights are subjected to exceptions when exceptions are consistent with and accomplish the right's general purpose. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (noting that both the First and Second Amendments contain rights which are subject to limitations and exceptions).

The purpose of the Sixth Amendment is to provide procedural safeguards that ensure a fair trial with fully developed issues, allowing the fact-finder to make a fully informed decision. *See Singer v. United States*, 380 U.S. 24, 36 (1965) ("The [Sixth Amendment] recognizes an adversary system as the proper method of determining guilt . . . .").[11] This Court has already concluded that the right of confrontation contains exceptions when necessary to ensure a fair trial. In *Illinois v. Allen*, this Court concluded that a defendant's Confrontation Clause right to be present in the courtroom was not absolute. 397 U.S. 337 (1970). In that case, the defendant disrupted the trial, and the court excluded him from the proceedings. *Id*. at 342. This Court concluded that excluding the defendant from the courtroom did not violate his Sixth Amendment rights because exclusion was necessary to achieve a fair trial. *Id*. at 343.

[11] In the context of the Sixth Amendment Right to Counsel, for example, this Court described the nature of the right as one designed to further "the ability of the adversarial system to produce just results": "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

Just as it did in *Allen*, this Court should continue to recognize an exception to the Confrontation Clause's right of confrontation for dying declarations because this exception enhances the Sixth Amendment's ability to ensure fair trials with fully-developed issues. First, as this Court has acknowledged from the time that it recognized the dying declarations exception, statements made in the face of certain death possess an earnestness that renders them as reliable as a statement made under oath: "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 (Mattox I)*, 146 U.S. 140, 152 (1892); *see also Kirby*, 174 U.S. at 61 ("[E]very motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth.").

Modern courts continue to profess the unique reliability of dying declarations and maintain the exception because it ensures competent evidence in contemporary trials. For example, one court recently stated that dying declarations continue to remain distinctly reliable because a declarant who believes that death is imminent "lacks any motive to lie." *Hailes v. State*, 113 A.3d 608, 618 (Md. Ct. App. 2015). Similarly, another court concluded that dying declarations are justifiably admissible in court because "one who realizes that death is inevitable . . . speaks with solemnity and will not resort to fabrication in order to unjustly punish another." *Hammon v. State*, 2 S.W.3d 50, 53 (Ark. 1999). Further, the Advisory Committee for the Federal Rules of Evidence cites the gravity of impending death as rendering these statements inherently reliable, noting that the "powerful psychological pressures" attendant to the solemn setting strip a declarant of any motive to lie. Fed. R. Evid. 804(b) advisory committee's comment.

Additionally, dying declarations serve the Sixth Amendment's goal of ensuring fair trials because these statements are critical to developing the issues before the fact-finder. As this Court

has noted, dying declarations must be admitted "to prevent an entire failure of justice" because they often contain crucial information that cannot be obtained from any other source, "as it frequently happens that no other witnesses to the homicide are present." *Carver*, 164 U.S. at 67; *see also Cobb v. State*, 16 So.3d 207, 211 (Fla. Ct. App. 2009) (explaining that dying declarations are "admitted out of necessity to prevent manifest injustice").

It will often be the case in a murder trial that the only individual available to testify as to the circumstances of the victim's death will be the individual who caused the death—an individual who has an incontestable incentive to lie, an incentive that is noticeably absent for an individual who is facing certain death and does not stand to gain anything from a falsehood. So, refusing to admit dying declarations works a serious injustice because it allows the unopposed testimony of an individual whose testimony is inherently suspect. Therefore, dying declarations must be admitted so as to counter the criminal actor's self-interested and uncontested statements.

The circumstances of this case demonstrate the importance of recognizing an exception for dying declarations. Here, as is often the case, the incident occurred in a secluded alley in which the only individuals present were Respondent and the victim, Mr. Ortiz, who is no longer able to testify. (R. 7). Instead, the only evidence available as to the reason that Respondent murdered Mr. Ortiz is Mr. Ortiz's own dying declaration to Officer Familia: "That cop—he shot me. . . . [H]e told me I was a filthy wetback and I should go back to where I came from. And then he shot me." (R. 8). Unless this dying declaration is admitted, the only individual available to testify as to the circumstances of Mr. Ortiz's death is Respondent, whose testimony will be tainted by an incentive to lie to avoid criminal liability.

Constitutional rights must be applied so as to accomplish their designed purpose and exceptions must be recognized where necessary to accomplish this purpose. The Sixth

Amendment's purpose is to ensure fair trials in which the issue before the fact-finder is fully developed. An exception for dying declarations supports this purpose because dying declarations are inherently reliable statements that contain crucial information that is necessary to determine the truth and to counter a defendant's self-interested and inherently suspect testimony, but which cannot be obtained elsewhere. For these reasons, this Court must maintain its recognition of an exception for dying declarations.

CONCLUSION

In light of the foregoing, the Government respectfully requests that this Court follow the path of its own precedent and rule that: (1) locational information voluntarily conveyed to a third party receives no Fourth Amendment protection; (2) statements in properly authenticated ancient documents are admissible for their truth without any "additional indicia of reliability"; (3) and admitting testimonial dying declarations does not violate the Sixth Amendment.

Respectfully submitted.

Team 11 P
Counsel for Petitioner

Appendix A

1. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

2. The Sixth Amendment to the Unites States Constitution provides:

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

Appendix B

1. Article I, § 9 of the Tennessee Constitution provides:

That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

Appendix C

1. 18 U.S.C. § 249 provides in pertinent part:

Hate Crime Acts

(a) In general.

(1) Offenses involving actual or perceived race, color, religion, or national origin. Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person--

2. 18 U.S.C. § 2510 provides in pertinent part:

Definitions

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(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

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3. 18 U.S.C. § 2703 provides in pertinent part:

Required disclosure of customer communications or records

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(c) Records concerning electronic communication service or remote computing service.

(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

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(B) obtains a court order for such disclosure under subsection (d) of this section;

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(d) Requirements for court order. A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and 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. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

4. 28 U.S.C. § 2072 provides in pertinent part:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates [magistrate judges] thereof) and courts of appeals.

Appendix D

1. Federal Rule of Evidence 801 provides in pertinent part:

Definitions That Apply to This Article; Exclusions From Hearsay

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

2. Federal Rule of Evidence 802 provides in pertinent part:

The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

3. Federal Rule of Evidence 803 provides in pertinent part:

Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

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(6) *Records of a Regularly Conducted Activity*. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
(C) making the record was a regular practice of that activity;
(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute

permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

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(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

4. Federal Rule of Evidence 901 provides in pertinent part:

Authenticating of Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:

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(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;
(B) was in a place where, if authentic, it would likely be; and
(C) is at least 20 years old when offered.

5. Federal Rule of Evidence 806 provides:

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.