NO. 12-2548

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

HARRY KATZIN, MICHAEL KATZIN, and MARK KATZIN,
Appellees

APPEAL FROM ORDER SUPPRESSING EVIDENCE
IN CRIMINAL NO. 11-226 IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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STATEMENT OF SUBJECT MATTER JURISDICTION

Because the defendants were charged in an indictment with violations of federal criminal law, the district court had subject matter jurisdiction over the case pursuant to 18 U.S.C. § 3231.

STATEMENT OF APPELLATE JURISDICTION

Based upon the timely filing of a notice of appeal from the order granting the defendants' motion to suppress evidence entered on May 10, 2012, this Court has jurisdiction over this matter under 18 U.S.C. § 3731.

STATEMENT OF ISSUES

1. Was the warrantless installation and monitoring of the GPS device on defendant/appellant Harry Katzin's vehicle permissible when supported by reasonable suspicion or probable cause?

2. If a warrant was required for installation and monitoring of the GPS device, did the district court err in excluding the evidence when, at the time of the events in this case, the agents had reasonably relied in good faith on a consensus in the case law that a warrant was not required for short-term GPS monitoring of a vehicle?

3. Did defendants Michael Katzin and Mark Katzin lack standing to challenge the installation and monitoring of a GPS device on a vehicle registered to Harry Katzin?

Preservation of issues: The government preserved all of the issues for review in its responses to the defendants' motions to suppress evidence and at the motion hearings.

STATEMENT OF THE CASE

On April 13, 2011, a grand jury in the Eastern District of Pennsylvania returned an indictment charging Harry Katzin, Michael Katzin, and Mark Katzin with one count of burglary of a pharmacy, in violation of 18 U.S.C. § 2118(b)(1), and one count of possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). All three defendants moved to suppress physical evidence located as a result of the installation of a Global Positioning System (GPS) device on a vehicle registered to Harry Katzin. The district court held evidentiary hearings on the motions to suppress on September 15, 2011, and April 24, 2012.

On May 9, 2012, the district court issued an order and opinion granting the defendants' motions to suppress evidence. The order was entered on May 10, 2012. On May 29, 2012, the government filed a timely notice of appeal.

STATEMENT OF FACTS

A. The GPS Monitoring and Defendants' Arrest.

In 2009 and 2010, the FBI and local law enforcement were investigating a string of pharmacy burglaries in the greater Philadelphia area, including pharmacies in Delaware, Maryland, and New Jersey. App. 43-44, 66. Many of the burglarized pharmacies were Rite Aid drugstores, because the alarm systems used by Rite Aid were easier to defeat. App. 43-44, 67. In most of the burglaries, large quantities of prescription narcotics were stolen. App. 50.

In May 2010, FBI Special Agent Steven McQueen learned that defendant/appellant Harry Katzin had been caught burglarizing a Rite Aid pharmacy in Egg Harbor City, New Jersey. App. 45. Katzin, who lived in Philadelphia, was an electrician by trade. App. 47, 55-56. Katzin and his two brothers had criminal histories that included arrests for burglary and theft. App. 45-46, 102-03.

McQueen learned of similar incidents. Specifically, on October 23, 2010, between 1:00 and 3:00 a.m., police in Lansdowne, Pennsylvania, responded to a

report of a suspicious man crouching behind bushes near a Rite Aid pharmacy. App. 54-55. They found Harry Katzin. Katzin gave inconsistent responses to the officers' questions about why he was there, saying first that he was looking for bars, and then that he was looking for a friend's house. App. 55. Police observed that Katzin had cuts on his hands and tools in a pickup truck. Katzin was not arrested. The next day, police determined that the phone lines had been cut in back of the Rite Aid where Katzin was found. Id. On the same night, there were attempts to break into two other Rite Aid stores in that area. Id.

Next, on November 18, 2010, a police officer saw a dark colored Dodge Caravan parked behind a shopping center in Lower Southampton Township, Pennsylvania. The shopping plaza contained a Rite Aid pharmacy. App. 46. The vehicle was registered to Harry Katzin and was occupied by three men, who were identified as Katzin, his twin brother Michael Katzin, and another man. App. 46-47.

Harry Katzin consented to a search of the van, which proved to contain numerous tools, several pairs of

work gloves, and ski masks. App. 47. When the officer asked Harry Katzin about these items, Katzin replied that he was an electrician. Id. The Katzin brothers and their associate were released without charges. Later that day, the FBI learned that the telephone lines in the rear of the Rite Aid had been cut.[1] App. 49.

On November 26, 2010, at approximately 7:00 a.m., employees at a Rite Aid pharmacy in Gibbstown, New Jersey, discovered that the store had been burglarized. The electrical lines had been cut. The pharmacy's Schedule II drugs had been stolen, and the surveillance digital video recorder had been removed from the manager's office. App. 49-51.

Video from a surveillance camera located at an adjacent supermarket showed a minivan similar in shape and color to Harry Katzin's Dodge Caravan pulling into the parking lot across the street from the Rite Aid. App. 51-52. The videotape showed two men sitting in the van for

[1] This Rite Aid had been burglarized approximately one year before this incident. When interviewed, the manager speculated that the wires may have been cut during the earlier burglary. App. 49.

over an hour facing the direction of the Rite Aid. The FBI believed that the men were waiting for any police response after cutting power to the store's alarm system. App. 51.

After learning of these incidents, and after consultation with the U.S. Attorney's Office, Agent McQueen made arrangements to affix a GPS tracking device on Harry Katzin's Dodge Caravan. App. 151. Between 1:30 a.m. and 3:30 a.m. on December 14, 2010, FBI personnel applied the GPS device to the exterior of the Dodge Caravan when it was parked on a public street. App. 111-15, 126-50. The device was a "slap-on" type, which attached to the exterior of the vehicle by magnets. App. 61, 95, 109-10. It was battery operated, and was not wired to or powered by the vehicle. App. 98-99. When activated, the device sent a signal every two minutes to a computer monitored by Agent McQueen. App. 64-65, 82.

Less than 48 hours after the installation, at approximately 10:45 p.m. on December 15, 2010, the signal from the GPS unit showed that the van had left Philadelphia. App. 65-66, 146-47. The van traveled to Hamburg, Pennsylvania. App. 72, 144-45. At approximately 11:49

p.m., the van arrived in the immediate vicinity of a Rite Aid pharmacy, located at 807 South 4th Street in Hamburg, Pennsylvania.[2] App. 72, 78-79, 145. The van drove around that area until approximately 12:20, when it stopped and remained stationary for over two hours. App. 79-80, 144-45.

Agent McQueen notified Pennsylvania state police, who maintained a presence in the area of the van. To avoid alerting the occupants of the van, the troopers did not try to conduct visual surveillance of the van. Agent McQueen continued to monitor the GPS signal, and alerted the troopers when the Dodge Caravan left the vicinity of the Rite Aid, at approximately 2:40 a.m. on December 16, 2010. App. 82-83, 144.

Troopers followed the van onto Interstate 78 eastbound (towards Philadelphia), while Hamburg Police Department officers went to the Rite Aid. App. 83-84, 144. Police saw that the pharmacy had been burglarized.[3]

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[2] Agent McQueen's computer contained software showing the locations of all Rite Aid stores in the greater Philadelphia area. App. 67.

[3] It was later determined that the store's phone lines had been cut. App. 107-08.

App. 84-85. They relayed this information to the troopers following the Dodge Caravan.[4] App. 85.

Troopers stopped the van on I-78. The driver of the van was Harry Katzin. His brothers Michael Katzin and Mark Katzin were passengers. App. 85. From his position outside the van, a trooper was able to see that the van contained items that appeared to be from the burglarized Rite Aid, including merchandise, pill bottles, and Rite Aid plastic storage bins. Also in plain view within the Caravan were tools, a duffel bag, and a surveillance system recordable hard drive unit that had its wires cut from the rear. App. 86-87. The Caravan was seized as evidence pending a search and seizure warrant. App. 87. The three Katzin brothers were placed in custody and transported to the state police barracks. The state police later executed a locally obtained search warrant on the Caravan and

[4] When officers entered the Rite Aid store, they found that most of the pharmacy's Schedule II drugs had been stolen, along with other products including electronic devices, electric toothbrushes, and razor blades. App. 90-91.

recovered numerous items that had been taken from the Hamburg Rite Aid pharmacy. App. 91.

B. The Motion to Suppress Evidence.

After having been indicted federally, all three Katzin brothers filed motions to suppress the evidence from the van asserting, among other arguments, that the warrantless installation and monitoring of the GPS device violated the Fourth Amendment. The government responded that a warrant was not required and that both reasonable suspicion and probable cause supported the use of the GPS device. The government further argued that Michael Katzin and Mark Katzin, who were merely passengers in Harry Katzin's van, did not have standing to challenge the use of the GPS. An evidentiary hearing was held on September 15, 2011. After the Supreme Court decided United States v. Jones, 132 S. Ct. 945 (2012), the parties submitted supplemental memoranda. On April 24, 2012, the district court held another evidentiary hearing, at which time Michael and Mark Katzin asserted that they were co-owners of the van. App. 116-19. The government presented additional

evidence establishing when the GPS unit was installed. App. 127-42.

On May 9, 2012, the district court granted the motions to suppress. The district court held that a warrant was required to place a GPS device. In rejecting the government's argument that the situation was analogous to an investigatory stop under Terry v. Ohio, 392 U.S. 1 (1968), for which a showing of reasonable suspicion would suffice, the district court held that the government had failed to show "that in this case it had 'special needs, beyond the normal need for law enforcement' which would have made 'the warrant and probable-cause requirement impracticable.'" App. 15, quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment). The district court rejected the alternative argument that probable cause supported the warrantless use of the GPS device, finding that "[t]here simply was no exigency requiring quick action." App. 17.

Although acknowledging that the law enforcement personnel had not acted culpably and could well have been surprised by the Supreme Court's decision in Jones, App. 23

n.15, the district court declined to apply the good faith exception to the exclusionary rule. In the district court's view, unless agents or officers can show that they relied on binding appellate precedent approving a course of action, a finding that they acted in good faith would "sharpen[] the instruments that can effectively eviscerate the exclusionary rule entirely." App. 21.

Finally, the district court held that Michael and Mark Katzin had standing to challenge the "search" occasioned by placement of the GPS device because they were subject to an illegal seizure when the vehicle in which they were passengers was stopped. App. 25. The district court found it unnecessary to resolve the Katzin brothers' claim that they co-owned the Caravan, although only Harry Katzin's name appeared on the title. App. 24.

STATEMENT OF RELATED CASES

Legal issues substantially identical to those in this case are presented in United States v. Ortiz, which is pending before this Court as No. 12-3225.

The government is not aware of any other related case or proceeding that is completed, pending, or about to be presented before this Court or any other court or agency, state or federal.

SUMMARY OF ARGUMENT

1. A warrant was not required for placing the GPS device on Harry Katzin's vehicle and monitoring the device for the short period of time in this case. Although the Supreme Court held that placing a GPS on the exterior of a vehicle was a trespass that constituted a Fourth Amendment search, the Court did not discuss whether a warrant was required. Balancing the minimal intrusion occasioned by use of the GPS device against the important law enforcement interests to be served, it is clear that this situation requires only a showing of reasonable suspicion, which was present in this case. Even if probable cause is required, a sufficient showing was made in this case. Further, as in cases applying the vehicle exception to the warrant requirement, the inherent mobility of the vehicle and the reduced expectation of privacy in a vehicle dictate that no warrant is required.

2. Even if a warrant was required, the district court erred in applying the exclusionary rule and suppressing the evidence derived from use of the GPS device. Before the Supreme Court's decision in United States v.

Jones, 132 S. Ct. 945 (2012), all but one of the courts of appeals to have addressed the issue had approved the warrantless installation and monitoring of a GPS device on a vehicle. The one court of appeals that had ruled otherwise rested its decision on the extended duration of the monitoring, a factor not present in this case. Because the agents' reliance on this body of case law was objectively reasonable, despite the absence of binding precedent in this circuit, the district court should have applied the good faith rule and denied the motion to suppress.

3. The district court erred in finding that Michael and Mark Katzin have standing to challenge the use of the GPS device. Under Jones, the search occurred when the GPS device was placed on the vehicle. Michael and Mark Katzin were not in the vehicle when the device was placed, and they are not registered owners of the vehicle. Their presence in the vehicle when it was stopped does not convey on them standing to challenge the trespass occasioned by placing the GPS. If this Court finds that there was a Fourth Amendment violation in this case and that the good faith rule does not apply, the Court should remand the case

to the district court for a finding of fact regarding Michael and Mark Katzin's claim that they were part-owners of the van.

ARGUMENT

I. THE WARRANTLESS USE OF THE GPS DEVICE IN THIS CASE DID NOT VIOLATE THE FOURTH AMENDMENT.

Standard of Review

This Court reviews the district court's decision on a motion to suppress for clear error as to the underlying factual findings and exercises plenary review of the district court's application of the law to those facts. United States v. Perez, 280 F.3d 318, 336 (3d Cir. 2002). Here, the government presents legal issues for review.

Discussion

Interpreting the Supreme Court's recent decision in United States v. Jones, 132 S. Ct. 945 (2012), the district court held that the Fourth Amendment requires a warrant for the application and monitoring of a GPS device to a vehicle. That holding was erroneous. On balancing the limited intrusion occasioned by placing a GPS device against the important law enforcement interests to be served, it is apparent that a showing of reasonable suspicion should suffice. Moreover, at the very least, because placing a GPS on a vehicle implicates the same concerns motivating the

automobile exception to the warrant requirement, a warrant should not be required if officers have probable cause to believe that the vehicle is involved in criminal activity. Under either standard, the warrantless use of the GPS in this case was justified.

A. The Supreme Court's Decision in United States v. Jones.

In Jones, the Supreme Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the meaning of the Fourth Amendment. 132 S. Ct. at 949 (footnote omitted). In Jones, the government had installed a GPS tracking device on the undercarriage of Jones' vehicle without a valid warrant and had then monitored the vehicle's location by means of satellite signals over the course of 28 days. Applying the reasonable expectation of privacy test established in Katz v. United States, 389 U.S. 347 (1967), the Court of Appeals for the District of Columbia Circuit affirmed suppression of the evidence resulting from the use of the GPS. United States v. Maynard, 615 F.3d 544, 555-66 (D.C. Cir. 2010). In affirming the suppression, however, the Supreme Court

relied on a different theory, grounded in common-law trespass, holding that a Fourth Amendment search takes place when, "as here, the Government obtains information by physically intruding on a constitutionally protected area . . . ." Jones, 132 S. Ct. at 951 n.3. Noting that prior to Katz, "Fourth Amendment jurisprudence was tied to common-law trespass," id. at 949, the Jones majority held that the Katz reasonable expectation of privacy test "has been added to, not substituted for, the common-law trespassory test." Id. at 952 (emphasis in original). Katz thus "did not erode the principle 'that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'" Id. at 951, quoting United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring).[5]

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[5] In an opinion concurring in the judgment, Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, disagreed that the trespassory search doctrine had any validity after Katz. In the view of the concurring justices, "Katz . . . finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation." Jones, 132 S. Ct. at 959 (Alito, J., concurring in the judgment). Applying the Katz

(continued...)

The Jones Court concluded that by attaching the GPS device to the vehicle, "officers encroached on a protected area." Jones, 132 S. Ct. at 952. The vehicle is an "effect," and "[t]he Fourth Amendment protects against trespassory searches . . . with regard to those items ('persons, houses, papers, and effects') that it enumerates." Id. at 953 & n.8.

Significantly, although the Jones Court held that attaching the GPS device to the vehicle was a search, the Court did not decide whether a warrant was required. The Court declined to consider the government's argument that reasonable suspicion could have supported the search, because the government had not raised that argument in the court of appeals. Id. at 954. The Court also did not

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[5](...continued)
test, Justice Alito opined that while short-term monitoring of a person's movements on public streets accords with reasonable expectations of privacy, the month-long monitoring that occurred in Jones constituted a search under the Fourth Amendment that required the suppression of the evidence obtained. Id. at 964. Justice Sotomayor, who joined the majority opinion adopting the trespassory test, wrote an additional concurring opinion in which she also agreed with Justice Alito's conclusion that the duration of the monitoring in Jones violated the reasonable expectation of privacy test. Id. at 954-57.

consider whether warrantless application of a GPS to a vehicle is permissible when there is probable cause to believe that it will produce evidence of criminal activity. In the present case, the use of the GPS was justified under either a reasonable suspicion or a probable cause standard.

B. Reasonable Suspicion Supported the Installation and Use of the GPS Device.

Jones held that the installation of a GPS unit on a vehicle is a Fourth Amendment search. However, not every Fourth Amendment intrusion requires a warrant or probable cause. To the contrary, the general test is one of reasonableness. The Supreme Court "examine[s] the totality of the circumstances" to determine whether a search or seizure is reasonable under the Fourth Amendment. Samson v. California, 547 U.S. 843, 848 (2006) (internal marks and citation omitted). Under that analysis, the reasonableness of a search or seizure is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Id. (internal quotation mark omitted); see Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

Since Terry v. Ohio, 392 U.S. 1 (1968), the Court has identified various law enforcement actions that qualify as Fourth Amendment searches or seizures, but that may nevertheless be conducted without a warrant or probable cause. See, e.g., Samson, 547 U.S. at 847 (individualized suspicion not required for search of parolee's home or person); United States v. Flores-Montano, 541 U.S. 149, 155 (2004) (no reasonable suspicion required to remove, disassemble, and reassemble a vehicle's fuel tank during a border search); United States v. Knights, 534 U.S. 112, 118-21 (2001) (upholding search of probationer's home based on reasonable suspicion); Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 654-66 (1995) (random, suspicionless urinalysis drug testing of student-athletes permissible); Maryland v. Buie, 494 U.S. 325, 334 (1990) (upholding limited protective sweep in conjunction with in-home arrest when officers possess reasonable belief that area to be swept harbors individual posing danger to those on arrest scene); New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (upholding search of public school student based on reasonable suspicion); United States v. Place, 462 U.S. 696,

706 (1983) (upholding seizure of traveler's luggage on reasonable suspicion that it contains narcotics); United States v. Martinez-Fuerte, 428 U.S. 543, 554-55 (1976) (upholding suspicionless vehicle stops at fixed border patrol checkpoints). Although the contexts of these cases vary, the underlying principles strongly support a finding that the application of a GPS to a vehicle falls within the category of Fourth Amendment intrusions that do not require a warrant and probable cause.

In applying the Supreme Court's balancing test to GPS tracking of vehicles on public roads, it is apparent that neither a warrant nor probable cause should be required. See United States v. Marquez, 605 F.3d 604, 610 (8th Cir. 2010) (upholding installation and use of GPS device on vehicle based on reasonable suspicion); United States v. Michael, 645 F.2d 252, 257-59 (5th Cir. 1981) (en banc) (reasonable suspicion justified installation of beeper tracking device on vehicle, given lesser expectation of privacy in motor vehicles and relatively non-intrusive nature of device's installation and use). Installing a tracking device like the one used in this case requires only

a minimal intrusion on a vehicle.[6] The device, which is referred to as a "slap-on," is held to the exterior of the vehicle by magnets. No part of the vehicle is penetrated, damaged, or removed. The device requires no wiring, and runs on its own battery power. Installation takes a matter of moments, and is much less intrusive than the typical stop and frisk of a person, which the Supreme Court has held may be performed without a warrant, on a showing of reasonable suspicion.

With respect to the monitoring, the effect on a privacy interest is minimal.[7] In this case, unlike Jones, the period of time for which the GPS device was monitored was limited. The device was installed during the early hours of December 14, 2012, and was monitored until the van was stopped at approximately 2:30 a.m. on December 16, 2012, a period of approximately 48 hours. App. 126-50. The

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[6] **Other types of devices, which require wiring into a vehicle's electrical system, may present different issues that are not before this Court in the present case.**

[7] **Monitoring of a GPS device, once the device has been installed, involves no physical trespass. After that point, only the reasonable expectation of privacy test should apply.**

nature of the monitoring -- that is, the information that was made available through use of a GPS device -- was also very limited. A GPS tracking device conducts neither a visual nor an aural search of the item to which it is attached. Cf. Smith v. Maryland, 442 U.S. 735, 741-42 (1979) (noting that pen register records only the numbers dialed from a phone and not the contents of any conversation). The device, by itself, does not reveal who is in the car as driver or passenger, what the occupants are doing, or what they do when they arrive at their destination. Unless combined with other information, it provides information only about the vehicle's location. The information that the tracking device reveals about the vehicle's location could also be obtained (albeit less efficiently) by means of visual surveillance. The Supreme Court "has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." United States v. Chadwick, 433 U.S. 1, 12

(1977); see also Cardwell v. Lewis, 417 U.S. 583, 590 (1974); South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

On the other hand, the minimal protection of an individual's privacy from obtaining a warrant before installing a tracking device on a vehicle would come at great expense to law enforcement investigations. Requiring a warrant and probable cause before officers may attach a GPS device to a vehicle, which is inherently mobile and may no longer be at the location observed when the warrant is obtained, would seriously impede the government's ability to investigate drug trafficking, terrorism, and other crimes. Law enforcement officers could not use GPS devices to gather information to establish probable cause, which is often the most productive use of such devices. Thus, the balancing of law enforcement interests with the minimally intrusive nature of GPS installation and monitoring makes clear that a showing of reasonable suspicion suffices to permit use of a "slap-on" device like that used in this case. Just as this balancing allows a stop and frisk of a person in the Terry context, to follow up on investigative leads and assure the safety of officers, so too only reasonable suspicion is

needed for the minimally invasive act of following a vehicle through use of a GPS device.

In this case, the FBI had ample reasonable suspicion to support the application of the GPS device to Harry Katzin's Dodge Caravan. "Reasonable suspicion" is defined as "a particularized and objective basis for suspecting that the particular person" is involved in criminal activity, based upon the totality of the circumstances. United States v. Nelson, 284 F.3d 472, 478 (3d Cir. 2002), quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981). In formulating reasonable suspicion, the officers' "experience and specialized training may allow them to make inferences and deductions from information that 'might well elude an untrained person.'" United States v. Arvizu, 534 U.S. 266, 273 (2002). The Supreme Court has held that "reasonable suspicion" is a standard under which "the likelihood of criminal activity need not rise to the level required for probable cause," and is one that "falls considerably short of satisfying a preponderance of the evidence standard." Id. at 273-74, quoting United States v.

Sokolow, 490 U.S. 1, 7 (1989); see also United States v. Valentine, 232 F.3d 350, 353 (3d Cir. 2000).

The FBI possessed reasonable suspicion (indeed, as discussed later, probable cause) that Katzin was using the minivan to commit pharmacy burglaries. The FBI was aware of at least four previous incidents where Harry Katzin was likely engaged in either burglarizing or attempting to burglarize a Rite Aid pharmacy in 2010. In April 2010, local police in New Jersey arrested Katzin and another man after they were caught breaking into a Rite Aid pharmacy. After his New Jersey arrest, but before the GPS unit was installed, on three separate occasions police found Katzin in the vicinity of Rite Aid stores under suspicious circumstances. On October 23, 2010, police in Lansdowne, Pennsylvania, caught Katzin prowling behind the rear of a Rite Aid store in the early morning hours. Katzin, who had burglary tools in his possession and cuts on his hands, gave varying explanations for his presence. Later that day, police discovered that telephone lines in the rear of that Rite Aid had been cut.

In November 2010, police in Feasterville, Pennsylvania, found Katzin in his Dodge Caravan in a parking lot near a Rite Aid in the early morning hours. Katzin was with his brother Michael and another man, both of whom had been arrested previously on multiple occasions and convicted of burglary. The vehicle contained burglary tools, gloves, and ski masks. Police later discovered that telephone wires near the Rite Aid had been cut.

On November 26, 2010, the FBI learned that a Rite Aid store in Gibbstown, New Jersey, had been burglarized. Videotapes from a surveillance camera on a nearby store showed a van remarkably similar to Harry Katzin's Dodge Caravan parked in the Rite Aid parking lot during the early morning hours on the day of the burglary. The van was occupied by two men who were facing the Rite Aid.

Harry Katzin's criminal record includes an arrest for burglary. Katzin is also a trained electrician, which was significant because the burglars gained entry to the Rite Aid pharmacies by disabling their alarm systems.

Given this evidence, combined with the agent's law enforcement experience, Agent McQueen had at least "a

particularized and objective basis for suspecting" that Harry Katzin was engaging in a pattern of "criminal activity" that involved the burglarizing of Rite Aid pharmacies. The evidence was sufficient to constitute not merely reasonable suspicion but also probable cause that Katzin was burglarizing Rite Aid pharmacies and using his Dodge Caravan to do so. Thus, there was ample legal justification for the minimal intrusion on privacy occasioned by the GPS device on his vehicle.

In rejecting the government's reasonable suspicion argument, the district court did not dispute that the facts produced reasonable suspicion (or probable cause). Rather, the court rejected application of a reasonable suspicion standard entirely. It stated:

> What the Government has failed to show, however, is that in this case it had "special needs, beyond the normal need for law enforcement" which would have made "the warrant and probable-cause requirement impracticable." See New Jersey v. T.L.O., 469 U.S. 325, 351 (1985).

App. ____ (emphasis in original). The court then said that the government had no particular reason to believe that another burglary was imminent at the time the device was installed, such that it could not obtain a warrant. Id.

This analysis is flawed. The language on which the district court relies is not from the Court's opinion in New Jersey v. T.L.O., but from Justice Blackmun's opinion concurring in the judgment, and is in fact the very point on which Justice Blackmun differed from the Court's holding. In his concurrence, Justice Blackmun argued that the T.L.O. majority "omit[ted] a crucial step in its analysis" by failing to require a showing of "a special law enforcement need." Thus, T.L.O. does not support the district court's position that a warrant is always required absent a showing of a special need apart from law enforcement. And in fact, while situations in which the Supreme Court has recognized the propriety of a reasonable suspicion threshold include those presenting "special needs, beyond the normal need for law enforcement" (like maintenance of the national border or oversight of school students)), the Supreme Court has explicitly stated that it has "never held that these are the only limited circumstances in which searches absent individualized suspicion could be 'reasonable' under the Fourth Amendment." Samson, 547 U.S. at 848, 855 n.4 (2006). A Terry search is the paradigmatic example of a law

enforcement action, absent "special needs" like supervision of students or probationers, in which the balancing of law enforcement interests and privacy rights yields a standard less than probable cause. The use of a GPS device for limited monitoring purposes qualifies as well, for the reasons stated earlier.

Moreover, the law does not support the district court's insistence that the balancing test be performed on the facts of each particular case. While certainly the individual's and the government's interests must be weighed in determining the applicability of the warrant requirement, the Supreme Court has never held that this assessment is made on a case-by-case basis, as the district court required here. The Court has never, for instance, required that each investigatory stop within the scope of Terry v. Ohio be analyzed to determine whether relaxation of the warrant requirement is appropriate in each particular instance. To the contrary, while balancing individual interests in privacy against the state's interest in law enforcement, the Court has consistently focused on the situation presented as

a class rather than the circumstances of the particular case. The Court explained:

> **The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." . . . On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.**

New Jersey v. T.L.O., 469 U.S. at 337 (emphasis added), quoting Camera v. Municipal Court, 387 U.S. 523, 536-37 (1967). Accord United States v. Place, 462 U.S. 696, 703 (1983) ("The exception to the probable-cause requirement for limited seizures of the person recognized in Terry and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of 'the Fourth Amendment's general proscription against unreasonable searches and seizures.'") (emphasis added), quoting Terry, 392 U.S. at 20.[8]

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[8] **Thus, for instance, in Samson v. California, 547 U.S. 843 (2006), the Court discussed at great length the interests and expectations of a typical parolee, and the state's considerable interest in supervising parolees, before concluding that a state may condition parole on a provision that parolees may be searched without any suspicion at all. The Court said nothing about the**

(continued...)

When applying this approach to various circumstances in the cases described above, involving situations such as searches of school students, parolees, travelers, and at a border crossing, the Court has said nothing about the exigencies of the particular search at issue. For all of the reasons that the government articulated earlier, the required balancing of interests dictates that the minimal intrusion occasioned by the installation of a GPS device is allowed without a warrant. The privacy interests of a particular defendant are protected not by a new balancing assessment in each case, but by application of the reasonable suspicion requirement, demanding that the government establish based on articulable facts a justified suspicion of criminal activity warranting the intrusion. Here, the district court erred as a matter of law in not applying the reasonable suspicion test to the use of a GPS device, and its decision suppressing the evidence should be reversed.

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[8](...continued)
exigencies of the particular search at issue. The same is true in all of the other cases cited above in which the Supreme Court has applied a standard less than probable cause.

C. Because the Use of the GPS Device on the Vehicle Was Supported by Probable Cause, No Warrant Was Required.

The same facts that show that the agents had reasonable suspicion also show that the GPS monitoring was supported by probable cause. Thus, even if the district court's ruling rejecting application of the reasonable suspicion test stands (or this Court elects not to reach the issue given the showing of probable cause), the suppression of evidence must be reversed. The Fourth Amendment explicitly permits a search on the basis of probable cause, and that standard was amply met here.

Probable cause to conduct a search exists "when, viewing the totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001), citing Illinois v. Gates, 462 U.S. 213, 238 (1983). When the FBI placed the GPS device, the FBI had substantial evidence that Harry Katzin was using the van to burglarize Rite Aid pharmacies in the Philadelphia area.

The district court did not disagree. Rather, it held that the government's position foundered because no warrant was obtained. The court was mistaken. Under the automobile exception to the warrant requirement, because the object of the search was a motor vehicle, the FBI was not obligated to obtain a warrant before placing and monitoring the GPS device. See New York v. Class, 475 U.S. 106, 117-19 (1986). In Class, the Supreme Court held that an officer's momentary reaching into the interior of a vehicle to expose the vehicle identification number was reasonable where the officer had "some probable cause focusing suspicion on the individual affected by the search." Id. at 117-18. Like Class, the search in the present case -- the placement of the GPS device, which the Jones Court held to be a search -- involved a minimal intrusion of a vehicle.[9] Accordingly, the probable cause existing in this case justified that minimal warrantless intrusion.

The automobile exception to the warrant requirement permits law enforcement officers to stop and search an

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[9] **Arguably, the intrusion in this case is even less than that in Class, because the conduct in this case affected only the exterior of the vehicle.**

automobile without a warrant if "probable cause exists to believe it contains contraband." Pennsylvania v. Labron, 518 U.S. 938, 940 (1996). Under this exception, "where there [is] probable cause to search a vehicle, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." Maryland v. Dyson, 527 U.S. 465, 467 (1999) (internal quotations and citation omitted). The vehicle exception is not limited to searches for contraband; authorities may search a vehicle when they have probable cause to believe that it contains evidence of the commission of a crime. "If there is probable cause to believe a vehicle contains evidence of criminal activity, United States v. Ross, 456 U.S. 798, 820–821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found." Arizona v. Gant, 556 U.S. 332, 347 (2009). See also California v. Acevedo, 500 U.S. 565, 580 (1991) (police may search container found in vehicle when they have probable cause to believe that it contains contraband or evidence). The exception "allows warrantless searches of any part of a vehicle that may conceal evidence . . . where

there is probable cause to believe that the vehicle contains evidence of a crime." Karnes v. Skrutski, 62 F.3d 485, 498 (3d Cir. 1995), quoting United States v. McGlory, 968 F.2d 309, 343 (3d Cir. 1992); see also United States v. Salmon, 944 F.2d 1106, 1123 (3d Cir. 1991) (noting the automobile exception permits warrantless searches of any part of vehicle, including containers, if there is probable cause to believe the vehicle contains evidence of a crime).

The rationale of the automobile exception was stated by the Supreme Court long ago, and applies with full force to the present case:

> **[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.**

Carroll v. United States, 267 U.S. 132, 153 (1925). The exception allows a warrantless search even of a vehicle which has been stopped or seized by the police, and evidently cannot move until the search is completed. See,

e.g., Ross, 456 U.S. at 807 n.9 (summarizing cases). The Court's decisions in this regard are "based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests." Id.

Accordingly, the use of a GPS device, both to install the device at the opportune time and then track a moving vehicle, does not require a warrant. At most, if the argument presented above concerning reasonable suspicion is inaccurate, it requires a showing of probable cause, which was abundantly present in this case.

In this case, while not disputing the probable cause supporting the use of the GPS device, the district court nevertheless denied the government's argument on two grounds: first, because the government did not present probable cause that contraband was contained in the vehicle at the time of the installation; and second, because there was no exigency at the time of the installation. App. 16-17.

As established above, however, just as the automobile exception allows actual warrantless entry to the

vehicle to search for evidence or contraband upon a showing of probable cause, similarly the "search" at issue here was reasonable without a warrant, because there was probable cause that the vehicle would be used in criminal activity. The district court focused too narrowly on the fact that many of the Supreme Court's cases involve searches for contraband, without paying sufficient heed to the underlying rationale for the automobile exception, which removes any requirement for a warrant to search for evidence because of the inherent mobility of vehicles.[10] The district court's approach would produce a truly odd result, in which officers are allowed without a warrant to break into a car and rummage through every part of it in a search for evidence, but cannot without a warrant take the markedly less intrusive step of affixing a device to the exterior of the car to monitor its movements. The court's application of

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[10] **The Supreme Court has expressly rejected the "dubious logic . . . that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it," and has instructed courts to determine the reasonableness of each warrantless search by applying the "general Fourth Amendment approach of 'examining the totality of the circumstances.'" United States v. Knights, 534 U.S. 112, 117-18 (2001).**

the automobile exception was incorrect; no warrant was required.

Once that result is accepted, the district court's second explanation falls as well. Contrary to the district court's reasoning, there is no requirement of a showing of exigent circumstances for a warrantless probable cause search of a vehicle. The exigency exists in the mobile nature of vehicles themselves. Under Supreme Court precedent, the district court committed a clear error of law in stating that the automobile exception could not apply because "in this case, there was more than ample time for the Government to have obtained a warrant before employing the GPS device on the Katzin Caravan." App. 17. In Maryland v. Dyson, 527 U.S. 465 (1999) (per curiam), the Supreme Court summarily reversed a similar decision, stating:

> **[U]nder our established precedent, the "automobile exception" has no separate exigency requirement. . . . [In] Pennsylvania v. Labron, 518 U.S. 938 [] (1996) (per curiam), we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." Id., at 940 . . . .**

Dyson, 527 U.S. at 466-67. Accordingly, the district court erred in not denying suppression on the basis of the government's showing of probable cause.[11]

[11] **Arguably, the district court's conclusion that there was no particular exigency in this case is clearly erroneous. Harry Katzin's van was fully mobile, it was the middle of the night, and the FBI had substantial evidence that Katzin regularly used the Caravan to travel throughout the region (including across state lines) committing robberies or attempted robberies, surreptitiously and often late at night. This observation is besides the point, however, as there is no exigency requirement for application of the automobile exception to the warrant requirement.**

II. BECAUSE THE AGENTS ACTED IN GOOD FAITH, THE DISTRICT COURT ERRED IN EXCLUDING THE EVIDENCE.

Standard of Review

Same as above.

Discussion

Even if the warrantless use of the GPS device was not justified by reasonable suspicion or probable cause, because the agents acted in good faith reliance on the basis of existing law, the district court erred in suppressing the evidence.

In a series of recent decisions, the Supreme Court has emphasized and reinforced the principle that "[t]he fact that a Fourth Amendment violation occurred - i.e., that a search or arrest was unreasonable - does not necessarily mean that the exclusionary rule applies. Indeed, exclusion 'has always been our last resort, not our first impulse,' and our precedents establish important principles that constrain application of the exclusionary rule." Herring v. United States, 555 U.S. 135, 140 (2009). The Court continued: "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable

deterrence.' We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." Id. at 141 (citations omitted).

In part, the Supreme Court reaffirmed, "the benefits of deterrence must outweigh the costs. 'We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.' '[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.'" Id. (citations omitted). "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free . . . ." Id.[12]

Thus, Herring concluded, "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent

[12] The decision in Hudson v. Michigan, 547 U.S. 586 (2006), made the same points, at considerable length. There, the Supreme Court concluded that the exclusionary rule never applies to a violation of the knock-and-announce rule.

conduct, or in some circumstances recurring or systemic negligence." Id. at 144. Otherwise, the cost of applying the exclusionary rule considerably outweighs any deterrent effect to be had from punishing merely negligent or entirely blameless conduct.

Notably, the Court has enforced these principles in denying suppression where an officer relied in objective good faith on statutory or case law that later changed. In such a situation, the officer has not committed any error, let alone act in a grossly negligent fashion. The officer simply obeyed the then-binding rule of the legislature or the courts, and any deterrent purpose of sanctioning such conduct is plainly absent.

Most recently, in Davis v. United States, 131 S. Ct. 2419 (2011), the Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Id. at 2423-24. In Davis, the defendant presented a motion to suppress on the basis of Gant, which narrowed the circumstances in which police may search a vehicle incident to the arrest of its driver, and overruled the earlier, more

permissive ruling in New York v. Belton, 453 U.S. 454 (1980). The Davis Court held that the exclusionary rule did not apply to the conduct of an officer who acted in good faith reliance on Belton before Gant was decided. The Court held that "suppression would do nothing to deter police misconduct in these circumstances," and unacceptably "would come at a high cost to both the truth and the public safety . . . ." Davis, 131 S. Ct. at 2423.

Davis is consistent with other Supreme Court rulings declining to apply the exclusionary rule where the mistakes at issue are those of legislators or judges, rather than the officers themselves. See, e.g., United States v. Leon, 468 U.S. 897, 920-21 (1984) (exclusionary rule does not apply where an officer relies in good faith on the magistrate's assessment of probable cause in issuing a warrant; "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."); Massachusetts v. Shepard, 468 U.S. 981, 987-88 (1984) (same); Illinois v. Krull, 480 U.S. 340, 349-50 (1987) (applying the good faith exception to searches conducted in

reasonable reliance on subsequently invalidated statutes; "legislators, like judicial officers, are not the focus of the rule"); Arizona v. Evans, 514 U.S. 1, 14 (1995) (good faith reliance on erroneous information concerning an arrest warrant in a database maintained by judicial employees).[13]

In short, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way." Davis, 131 S. Ct. at 2427-28 (internal citations and quotation marks omitted). That is the situation here.

Before Jones, every court of appeals to consider the question -- with the exception of the D.C. Circuit's decision in the case affirmed by the Supreme Court in Jones -- had concluded that, in light of the Supreme Court's decision in United States v. Knotts, 460 U.S. 276 (1983),

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[13] In Herring, the Court extended the exception to apply in a case where the erroneous record-keeping was the product of negligence of police employees. The Court held that "isolated," "nonrecurring" police negligence is not sufficient to warrant the harsh sanction of exclusion. See 555 U.S. at 137, 144.

police did not need to obtain a warrant to install a GPS tracking device on the exterior of a vehicle or to use that device to monitor the vehicle's movements on public roads. In Knotts, the Supreme Court held that the use of an electronic beeper (which had been placed in a chemical drum with the consent of its owner) to track a vehicle on public streets "was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment." Id. at 285. A number of courts of appeals understandably relied on Knotts to hold that the installation and monitoring of a tracking device (including a slap-on GPS device) on a vehicle is not a "search" or "seizure" subject to the Fourth Amendment's warrant requirement. See United States v. Cuevas-Perez, 640 F.3d 272, 275-76 (7th Cir. 2011); United States v. Garcia, 474 F.3d 994, 996-98 (7th Cir. 2007); United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010); United States v. McIver, 186 F.3d 1119, 1127 (9th Cir. 1999).[14] Other

[14] After the events in the present case, but before Jones, the Court of Appeals for the Fifth Circuit held that the monitoring of a vehicle by means of a "slap-on" GPS device was not a search or seizure under the Fourth Amendment. United States v. Hernandez, 647 F.3d 216, 221 (5th Cir. 2011). Separately, Hernandez held that the (continued...)

courts of appeals held that the use of tracking devices required reasonable suspicion but not a warrant based on a judicial finding of probable cause, a threshold easily met in this case. See Marquez, 605 F.3d at 610 (GPS); Michael, 645 F.2d at 257-59 (5th Cir. 1981) (en banc) (beeper tracking device).[15]

In light of the consensus among these courts that a warrant was not required to conduct GPS surveillance, before Jones a reasonable police officer would have believed that the Fourth Amendment's warrant requirement did not apply to such circumstances, and there would be no deterrent value in

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[14](...continued)
defendant in that case lacked standing to challenge the installation of the GPS unit, and thus did not address that issue.

[15] Although not "binding precedent" under Davis, many district courts had likewise approved warrantless GPS surveillance prior to Jones. See, e.g., United States v. Narrl, 789 F. Supp. 2d 645, 652 (D.S.C. 2011); United States v. Walker, 771 F. Supp. 2d 803, 808-13 (W.D. Mich. 2011); United States v. Sparks, 750 F. Supp. 2d 384, 390-96 (D. Mass. 2010); United States v. Jesus-Nunez, 2010 WL 2991229, *4-*5 (M.D. Pa. 2010); United States v. Burton, 698 F. Supp. 2d 1303, 1305-08 (N.D. Fla. 2010); United States v. Coombs, 2009 WL 3823730, *4-*5 (D. Ariz. 2009); United States v. Williams, 650 F. Supp. 2d 633, 668 (W.D. Ky. 2009); United States v. Moran, 349 F. Supp. 2d 425, 467-68 (N.D.N.Y. 2005).

suppressing evidence obtained as a result. The district court's characterization of the prevailing authority prior to Jones as a "split" in a minority of circuits, App. 17-22, is not a fair description of the state of the law. See United States v. Baez, 2012 WL 2914318, *1 (D. Mass. 2012) (noting that before Jones, a "clear majority among those Courts of Appeals that had addressed the question" had held that use of a GPS on a vehicle was not a Fourth Amendment search). In fact, at the time of the FBI's action in this case, every applicable appellate decision supported the government's conduct.[16] Two circuits, the Seventh and Ninth, had held that installation of a GPS device is never a Fourth

[16] **At the time of the events in this case, the only law in this circuit relating to the warrantless installation of a GPS device was the decision of the district court for the Middle District of Pennsylvania in United States v. Jesus-Nunez, 2010 WL 2991229 (M.D. Pa. 2010). Jesus-Nunez held that under Knotts, attaching a GPS device to a vehicle was not a Fourth Amendment search. Although that decision would not have been binding on any other court in this circuit, it provided a reasonable basis for believing that warrantless application of a GPS would be lawful, particularly since it relied on Supreme Court precedent.**

Amendment search,[17] while two others, the Fifth and Eighth,[18] had indicated that reasonable suspicion sufficed.[19] Because reasonable suspicion was undoubtedly present in the present case, the placement of the GPS device was permissible under even the stricter of these decisions.

Although the D.C. Circuit had found a Fourth Amendment violation, in a case decided only four months before the FBI's action in this case, a crucial factor in the court's decision was the month-long duration of the monitoring. See Maynard, 615 F.3d at 556-58 (distinguishing Knotts on the basis that it did not involve long-term monitoring), 558-62 (holding that a reasonable expectation

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[17] **Garcia, 474 F.3d at 996-98; McIver, 186 F.3d at 1127.**

[18] **Arguably, the Eleventh Circuit should be included among the circuits with precedent approving use of GPS devices. Michael was decided by the en banc Fifth Circuit Court of Appeals before that circuit was divided to form the present Fifth and Eleventh Circuits. At least one district court in the Eleventh Circuit has viewed Michael as binding authority approving the use of GPS units. United States v. Rosas-Illescas, 2012 WL 1946580, *5 (N.D. Ala. 2012); but see United States v. Lujan, 2012 WL 2861546, *3 (N.D. Miss. 2012) (holding that because Michael involved a beeper, not a GPS, it was not binding Fifth Circuit authority on the GPS issue).**

[19] **Michael, 645 F.2d at 257-59; Marquez, 605 F.3d at 610.**

of privacy existed because, while a person may voluntarily expose his short-term movements to the public, "[t]he whole of one's movements over the course of a month is not constructively exposed to the public because, like a rap sheet, that whole reveals far more than the individual movements it comprises."). Thus, even if Maynard had been the majority view, it would not have dictated that the short-term monitoring in the present case was a Fourth Amendment violation.

In assessing the good faith of the agents here, it is critical to examine the legal underpinning of the Supreme Court's decision in Jones. The majority opinion represented a marked change in Supreme Court jurisprudence regarding the Fourth Amendment. Notably, even the D.C. Circuit opinion in Maynard which found a Fourth Amendment violation did not anticipate the Supreme Court's reasoning; the lower court applied the Katz reasonable expectation of privacy test, and rejected the GPS use only because it spanned 28 days.

For its part, the Supreme Court majority in Jones determined that any installation of a GPS device is a search only by stating a radical shift in Fourth Amendment law.

The Jones Court decreed that the "reasonable expectation of privacy" test that had held sway for over 40 years in defining a Fourth Amendment search or seizure was not the exclusive test, but that a search also occurs upon any physical trespass on property interests by the government. Four justices of the Supreme Court disagreed, joining Justice Alito's concurring opinion that rejected the trespass test and found that a search occurred only because the four-week-long monitoring at issue breached a reasonable expectation of privacy. Justice Alito stated that "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable," but "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."[20] Jones, 132 S. Ct. at 964.[21]

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[20] **Justice Alito did not specify a point at which short-term monitoring would become long-term monitoring that impinged on expectations of privacy.**

[21] **In rejecting the government's position, the district court focused entirely on the case law which existed in other circuits, mistakenly describing the agents' action as consistent with the holdings only of a "significant**

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Thus, it is impossible to see how the agents in this case, acting before the announcement of the trespass theory in Jones, could have anticipated this development, let alone seen fit to question the virtually unanimous view of judges and prosecutors in situations of short-term surveillance. Even four Supreme Court justices would have affirmed their conduct outright, and the Maynard decision, which focused entirely on the four-week duration of monitoring as offending a reasonable expectation of privacy, would not have condemned the agents' conduct here either. In this situation, it is apparent that the agents did not act in the deliberate, reckless, or grossly negligent

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[21](...continued)
minority" of courts. App. 19-23. However, the court did not address at all the government's argument based on the Supreme Court's guidance in Knotts and Katz, and the marked change in analysis undertaken in Jones, although the government made the same argument in the district court.

This would be a harder case if the U.S. Attorney and FBI had (for example) relied entirely on an out-of-circuit decision that had been criticized by other courts, or on a solitary precedent that had been called into question, or on conflicting precedent. But this case is not hard. The authorities relied on a uniform interpretation of the Fourth Amendment which was unexpectedly altered in Jones.

fashion to which the exclusionary rule is exclusively addressed. See Davis, 131 S. Ct. at 2423-24.

The showing of good faith is even stronger in this case in that a reasonable officer could rely not only on judicial precedent, but the considered opinions of experienced government attorneys. Recently, in Messerschmidt v. Millender, 132 S. Ct. 1235 (2012), the Supreme Court held that a lower court erred in denying qualified immunity to officers who conducted a search that was purportedly based on deficient probable cause. The Court noted that the standard for qualified immunity for an officer in a civil suit -- whether the officer's actions were objectively reasonable -- is the same test applied in criminal cases under the "good faith" rule of Leon. Messerschmidt particularly dealt with the principle that an officer who obtains a deficient search warrant may not be found to have acted in good faith where the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

Messerschmidt makes clear that this conclusion should be quite rare, applying only to "plainly incompetent"

conduct. Significantly, in the course of its lengthy analysis of the underlying facts, the Court held that it is relevant in demonstrating good faith to show that the affiant obtained approval of the warrant application from a superior and a prosecutor before submitting it to a magistrate. Id. at 1249.

In this case, the agent consulted with an Assistant United States Attorney, who also, relying on prevailing case law, deemed appropriate the warrantless installation and monitoring of a tracking device. App. 151. For this additional reason, the agent plainly did not engage in the type of grossly negligent conduct to which the exclusionary rule exclusively applies, and suppression is not warranted.

The district court in this case did not find that the agents acted in bad faith, recklessly, or even negligently. To the contrary, the district court stated that it

> **hastens to emphasize that it has no concern that the prosecutorial and law enforcement personnel here were undertaking their work in this investigation and prosecution in a calculated or otherwise deliberately cavalier or casual manner in the hopes of just meeting the outer limits of the constitutional contours of the Katzins' rights. Indeed, these actors could well profess surprise at the specific outcome of Jones.**

> **Nonetheless, this is neither the first – nor likely the last – time when rulings by appellate courts will more precisely define standards, requirements, processes and procedures that could have been, but were not, anticipated.**

App. 23. These statements virtually confirm the agents' good faith, and the inapplicability of the exclusionary rule.

The district court's refusal to apply the good faith rule arose not only from the court's erroneous view of the applicable precedent as conflicting, but from an unduly restrictive view of the Supreme Court's recent decisions explaining the limited applicability of the exclusionary rule, and of Davis in particular. The district court's opinion treats Davis as if it held that the good faith exception applies only when the agents or officers acted in reliance on binding appellate precedent. See, e.g., App. 21 (referring to one court "stray[ing] from the limitations set forth in Davis and expand[ing] the good faith exception to include reliance on a reasonable interpretation of existing case law."). The court stated that "to move beyond the strict Davis holding sharpens the instruments that can effectively eviscerate the exclusionary rule entirely."

App. 21. Davis, of course, did not preclude application of the good faith rule to situations, like this one, where persuasive judicial authority indicated the lawfulness of the officers' action but binding authority did not yet exist in the particular circuit where the action took place. Davis just happened to involve a situation of binding appellate precedent nationwide. More important here is its reasoning, consistent with many other Supreme Court decisions, focusing on whether officers have acted in a deliberate, reckless, or grossly negligent way before allowing the exclusion of evidence.[22]

Rather than restricting the application of the good faith rule, Davis emphasized that the exclusionary rule should be applied only as a "last resort." 131 S. Ct. at 2427. Under Davis, a court may not reflexively exclude evidence whenever a Fourth Amendment violation is found; before suppressing evidence, the court must conduct a "rigorous weighing" and find that "the deterrence benefits

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[22] **Again, it is helpful to recall the Supreme Court's description of the "dubious logic . . . that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it . . . ." Knights, 534 U.S. at 117-18.**

of suppression . . . outweigh its heavy costs." Id. The Davis court particularly noted that where the police acted without culpability, either with an objectively reasonable good faith belief that their conduct was lawful or from isolated negligence, there was no deterrent value and thus no basis for exclusion. Id. at 2427-28.

In Davis, the Court noted that "in 27 years of practice under Leon's good-faith exception, we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." 131 S. Ct. at 2429, quoting Herring, 555 U.S. at 144. The district court acknowledged that the agents in this case were not culpable. They relied in good faith on a body of case law holding that their conduct complied with the Constitution. The sole contrary appellate decision, Maynard, relied on factual circumstances that did not apply in this case.[23] Even more importantly, the agents' view, shared by experienced prosecutors and numerous other judges, rested squarely on Supreme Court precedent in Katz and

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[23] **The battery in the GPS device in this case was not expected to last more than a week. App. 62.**

Knotts, which the Court in Jones saw fit to apply in an entirely unexpected way.

In this case, the district court held, in essence, that reliance on this body of authority was not reasonable because there was no specific, binding authority in this circuit. That insistence on binding authority does not accord with this Court's approach following Davis. See United States v. Duka, 671 F.3d 329, 347 n.12 (3d Cir. 2011). In Duka, this Court held that evidence obtained from searches under the Foreign Intelligence Surveillance Act (FISA) would be admissible even if the Act was unconstitutional, because the searches were conducted in reasonable reliance on the Act. Id. at 346-47. Citing Davis, this Court noted that "[t]he objective reasonableness of the officers' reliance on the statute in this case is further bolstered by the fact that the particular provision at issue has been reviewed and declared constitutional by several courts, going as far back as 2002." Id. at 347 n.12. Notably, all of the cases on which Duka said the officers could "reasonably rely" were from courts outside

this circuit.[24] Duka thus undermines the district court's position that reliance on non-binding case law, particularly law as squarely grounded on Supreme Court guidance as that at issue here, is per se unreasonable.

As of this writing, no Court of Appeals has ruled on the applicability of the good faith rule in a circuit in which there was no binding authority on the installation of GPS devices.[25] District courts in such circuits have taken

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[24] In re Sealed Case, 310 F.3d 717, 746 (Foreign Intel. Surv. Ct. Rev. 2002) (per curiam); United States v. Abu-Jihaad, 630 F.3d 102, 128-29 (2d Cir. 2010); United States v. Wen, 477 F.3d 896, 898-99 (7th Cir. 2006); United States v. Damrah, 412 F.3d 618, 625 (6th Cir. 2005).

[25] The Court of Appeals for the Ninth Circuit, which had held before Jones that installing a GPS was not a search, has ruled that GPS evidence obtained before Jones is admissible under the good faith rule. United States v. Pineda-Moreno, 2012 WL 3156217 (9th Cir. 2012). Numerous district courts in that circuit have done the same. Similarly, district courts in the Eighth and Eleventh Circuits, where clear precedent validated the warrantless installation of a GPS device, have employed the good faith doctrine to deny suppression. United States v. Amaya, -- F. Supp. 2d --, 2012 WL 1188456, *5-8 (N.D. Iowa 2012); United States v. Barraza-Maldonado, -- F. Supp. 2d --, 2012 WL 2952312 (D. Minn. 2012); United States v. Rosas-Illescas, -- F. Supp. 2d --, 2012 WL 1946580, *5-6 (N.D. Ala. 2012). A district court in the Sixth Circuit has applied the good faith rule where the warrantless installation of the GPS device took place in the Seventh Circuit, which had appellate precedent approving such installation. United

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varying positions. The district court for the District of Massachusetts has applied the good faith rule in a warrantless GPS case, holding that in the absence of binding First Circuit precedent, officers could reasonably rely on decisions in other circuits. United States v. Baez, -- F. Supp. 2d --, 2012 WL 2914318 (D. Mass. 2012). The Baez court stated:

> **A rigorous and realistic cost-benefit analysis recognizes that there is no meaningful deterrence value to be gained — and a great deal of benefit in terms of truth seeking and public safety to be lost — by discouraging such good faith reliance and thereby making law enforcement officers unduly cautious in pursuing investigatory initiatives. To be sure, a different approach might be chosen in which law enforcement agents take no steps — without asking permission of a court — regarding the myriad circumstances in which there is no precedential case on point. Such a regime seems unnecessarily unwieldy - and potentially ennervating to timely police action in other settings — when, as here, a substantial consensus among precedential courts provides a good faith basis for the investigatory initiative law enforcement agents seek to pursue.**

2012 WL 2914318 at *8. In dicta, a district court in the Sixth Circuit, which likewise had no binding precedent on the GPS issue, has agreed. United States v. Luna-

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[25](...continued)
United States v. Shelburne, 2012 WL 2344457, *5-6 (W.D. Ky. 2012).

Santillanes, 2012 WL 1019601 (E.D. Mich. 2012). Although the Luna-Santillanes court found it unnecessary to consider the good faith rule in that case, the court stated, "[i]f this Court were to consider this additional argument, it would find it persuasive." 2012 WL 1019601 at *9.

In contrast, another district court in the Sixth Circuit followed the district court's decision here. United States v. Lee, -- F. Supp. 2d --, 2012 WL 1880621, *6-8 (E.D. Ky. 2012). Lee held that an officer acts in objective good faith only when he relies on binding appellate precedent. Similarly, in United States v. Ortiz, -- F. Supp. 2d --, 2012 WL 2951391 (E.D. Pa. 2012) (Dubois, J.), the district court held that the good faith rule did not apply because there was no binding appellate precedent in this circuit. In Ortiz, the district court referred to "the Davis requirement of 'binding appellate precedent,'" and stated, "the import of Davis is that officers acting without clearly applicable binding appellate guidance should err on the side of caution and obtain a warrant." 2012 WL 2951391 at *24. The opinions in Lee and Ortiz suffer from the same flaws as the district court's opinion here, as they do not

address the penumbra of Supreme Court precedent that suggested the validity of warrantless GPS installation, the marked break in precedent represented by the majority decision in Jones, or the broader conclusion of recent Supreme Court decisions that the exclusionary rule should only apply to culpable police conduct.[26]

The district court is undoubtedly correct that, if exclusion of evidence were the price of allowing officers to act in the absence of explicitly binding precedent, officers would have an incentive to ask judicial permission first. App. ___ [19]. But the Supreme Court has made the assessment, and determined that demanding such obedience simply comes at too high a price. The Supreme Court has held that exclusion applies only where officers, essentially, engage in misconduct, and that did not happen here.

In this case, the agents relied in good faith on a nearly unanimous body of case law holding that, under Supreme Court precedent, the installation of the GPS unit

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[26] **The government has filed appeals in both the Ortiz (Third Circuit No. 12-3225) and Lee cases (Sixth Circuit No. 12-5683).**

was lawful. Because that reliance was objectively reasonable, the district court erred in excluding the evidence, even if a warrant were required.

III. MICHAEL AND MARK KATZIN LACK STANDING TO CONTEST THE INSTALLATION OF THE GPS DEVICE.

Standard of Review

Same as above.

Discussion

The district court erred in holding that Michael and Mark Katzin had standing to object to the use of the GPS device on the vehicle registered to and driven by their brother, Harry Katzin. The district court held that regardless of whether Michael and Mark Katzin had any ownership interest in the van, they were entitled to challenge the use of the GPS because they were subject to an illegal seizure when the van was stopped as a result of the GPS monitoring. This holding was error. Therefore, if the government is not successful on the arguments presented above, the evidence nonetheless may not be suppressed as to Michael and Mark Katzin.

To seek suppression of evidence based on a Fourth Amendment violation, a defendant must show that his own Fourth Amendment rights were violated. Minnesota v. Carter, 525 U.S. 83, 88 (1998); see United States v. Payner, 447

U.S. 727, 731 (1980) ("the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party") (emphasis in original).

In this case, the Fourth Amendment search was the installation of a GPS device. Jones held that application of a GPS unit implicates the Fourth Amendment because it involves a physical trespass onto a person's property, that is, the vehicle to which the unit is attached, for the purpose of gathering information. 132 S. Ct. at 949. It has long been established that a person may not object to a trespass on property unless he has either ownership or possession of the property at the time of the trespass. Smith v. Milles, (1786) 99 Eng. Rep. 1205, 1208 (K.B.) ("To entitle a man to bring trespass, he must, at the time when the act was done, which constitutes the trespass, either have the actual possession in him of the thing, which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him."); see also United States v. Sterling, 369 F.2d 799, 802 (3d Cir. 1966) (defendant may not complain of trespass

to property he did not own). In Jones, the Supreme Court was careful to note that when the GPS device was attached, "[i]f Jones was not the owner [of the vehicle] he had at least the property rights of a bailee." 132 S. Ct. at 949 n.2.

In the present case, Harry Katzin, as the registered owner of the van, clearly had a right to assert that application of the GPS unit was a trespass that violated the Fourth Amendment.[27] It is by no means equally apparent, however, that Michael and Mark Katzin had any such right. See Marquez, 605 F.3d at 609 (holding that an individual who neither owned nor drove the vehicle and was only an occasional passenger in it lacked standing to contest the installation and use of the GPS device). The district court declined to make a finding on their factual claim that they had ownership rights in the van. They clearly were not in physical possession of the van when the

[27] Although there may be cases in which a registered owner has surrendered his rights in a vehicle to another person and so lacks standing to challenge a trespass to the vehicle, this case does not present such a situation.

GPS was attached; the evidence is undisputed that the van was parked on a public street and was unoccupied.

That Michael and Mark Katzin were passengers in the van at a later time does not give them a right to complain of the trespass involved in placing the GPS unit. They entered the van after the GPS unit had been placed. Thus, their position resembles that of the defendants in Knotts and Karo, cases in which the Supreme Court upheld the use of tracking devices installed in containers of contraband. As the Jones Court noted, Knotts and Karo presented no issue of trespass on the possessory rights of the defendants, because in each case the beeper had been installed earlier, when the container was in the possession of a third party. Jones, 132 S. Ct. at 951-52. With respect to Karo, the Court stated: "Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location." Id. at 952. The same conclusion must apply here, where Mark and Michael Katzin did not enter the van until after the GPS device was installed. See United States v. Hanna, 2012 WL 279435 (S.D. Fla. 2012)

(holding that members of "robbery crew" who did not have ownership or possessory interest in vehicle lacked standing to challenge attachment and use of a GPS device, despite later being arrested in the vehicle).[28]

Rather than address the Katzin brothers' standing under the analytical framework of Jones, the district court relied on United States v. Mosley, 454 F.3d 249 (3d Cir. 2006), which held that each occupant of a vehicle has standing to challenge an illegal stop of the vehicle. Subsequent to Mosley, the Supreme Court reached the same conclusion in Brendlin v. California, 551 U.S. 249 (2007), reasoning that a stop of a vehicle represents a "seizure" of the persons in the vehicle for Fourth Amendment purposes. Here, the district court concluded, "[b]ecause the GPS evidence taints the entire vehicle stop process, and there was no independent traffic violation or other reason to stop

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[28] The Hanna citation is to the report of a United States magistrate judge recommending denial of the defendants' motion to suppress evidence. Examination of the docket shows that the district court adopted the Report and Recommendation on January 31, 2012. The defendants were convicted and have appealed. United States v. Davis, et al., Criminal No. 11-20678 (S.D. Fla.). As of this writing, no other published decision has yet addressed the standing issue as presented by this case.

the vehicle, Mosley squarely applies, whether or not the passengers had a possessory interest in the vehicle." App. 25.

The problem with the district court's reasoning is that it has not been established that the use of the GPS violated any rights of Michael and Mark Katzin. If putting the GPS on the van did not violate their rights (in other words, if they did not own or possess the van when the GPS was placed), then the stop of the van was not "tainted" as to them. If Michael and Mark Katzin did not have standing to challenge the trespass on the van occasioned by placing the GPS, then using the information developed by use of the GPS as part of the probable cause for stopping the van did not violate their rights.

Mosley and Brendlin addressed a different subject. In those cases, the stop of the vehicle was a seizure of the people in it as well, and the courts held that each passenger had the right to challenge the seizure of his person. See Brendlin v. California, 551 U.S. at 256-57 (explaining at length that a traffic stop is a seizure of passengers as well as the driver). Here, in contrast, no

privacy or possessory right of Michael and Mark Katzin was affected by the search which occurred at the time it occurred.

Clearly, when the information obtained from the GPS is included, there was abundant probable cause to believe that the occupants of the van were involved in criminal activity and that the van contained evidence of the criminal activity. The defendants and the vehicle had been observed at the scene of earlier pharmacy burglaries, and, on December 16, 2010, they were departing the vicinity of another pharmacy burglary in the middle of the night, many miles from home. Because Michael and Mark Katzin cannot challenge the placement and monitoring of the GPS, they cannot challenge the stop of the van, which was based on probable cause.

Because the district court's holding that Michael and Mark Katzin had standing to challenge the use of the GPS device is inconsistent with the rationale of Jones, it should be reversed.[29] If this Court finds that the

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[29] **As passengers, defendants Michael and Mark Katzin also lacked a reasonable expectation of privacy in the (continued...)**

installation and use of the GPS was a Fourth Amendment violation and that the good faith rule does not apply, this Court should remand the case to the district court for factual findings on whether Michael and Mark Katzin had ownership or possessory rights in the van when the GPS was placed.

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[29](...continued)
vehicle, and thus lack standing even pursuant to Justice Alito's concurring opinion in Jones, which assessed the GPS issue in these terms. See Rakas v. Illinois, 439 U.S. 128, 140-49 (1978) (passengers in car which they neither owned nor leased lacked a reasonable expectation of privacy in the glove compartment and area under the seat); United States v. Pulliam, 405 F.3d 782, 786 (9th Cir. 2005) (passenger "with no possessory interest in the car" "has no reasonable expectation of privacy . . . that would permit [his] Fourth Amendment challenge to a search of the car") (internal quotation marks omitted); United States v. Cooper, 133 F.3d 1394, 1398 (11th Cir. 1998) ("A passenger usually lacks a privacy interest in a vehicle that the passenger neither owns nor rents, regardless of whether the driver owns or rents it.") (dictum).

CONCLUSION

For the reasons stated above, the government respectfully requests that the order of the district court suppressing evidence be reversed.

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CERTIFICATION

1. The undersigned certifies that this brief contains 13,538 words, exclusive of the table of contents, table of authorities, and certifications, and therefore complies with the limitation on length of a brief stated in Federal Rule of Appellate Procedure 32(a)(7)(B).

2. I hereby certify that the electronic version of this brief filed with the Court was automatically scanned by OfficeScan Real-Time Scan Monitor, version 10.5, by Trend Micro, and found to contain no known viruses. I further certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

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