

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2013-1973
Appellee, :
vs. :
SUDINIA JOHNSON, :
Appellant. :

On Appeal from the Court of Appeals for the Twelfth District
Case No. CA2012-11-235

MERIT BRIEF OF APPELLEE STATE OF OHIO

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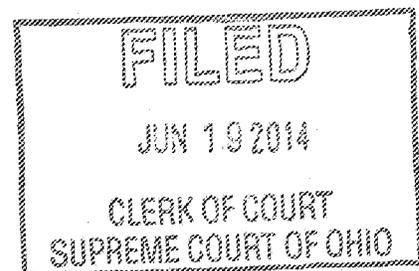
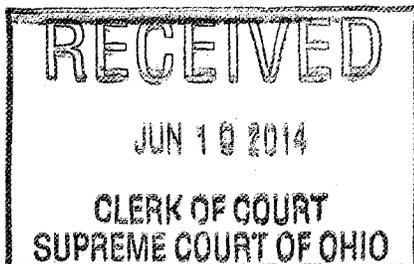


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STATEMENT OF THE CASE

Procedural Posture:

The following statement of the case was originally set forth in *State v. Johnson*, 12th Dist. No.2012-11-235, 2013-Ohio-4865, 1 N.E.3d 491 (hereafter, *Johnson II*), and are hereby incorporated in full:

Johnson was indicted in November 2008 on one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2), one count of possession of cocaine in violation of R.C. 2925.11, and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3). Following his indictment, Johnson filed numerous motions to suppress evidence obtained by law enforcement as well as a motion to sever the charge of having weapons while under disability from the trafficking and possession charges. Johnson's motion to sever was granted, a bench trial was held, and Johnson was acquitted of having weapons while under disability.

An evidentiary hearing on Johnson's motions to suppress was held on March 3, 2009. At this time, the trial court considered Johnson's "Supplemental Motion to Suppress as to GPS Issue," in which Johnson sought to suppress all evidence obtained "directly or indirectly" from searches and seizures of himself and his property as "said searches and seizures were conducted with the unmonitored, unbridled use of a GPS device" in violation of his constitutional rights. The trial court denied Johnson's motion to suppress as to the GPS issue. Thereafter, Johnson entered a plea of no-contest to the trafficking and possession charges, and he was sentenced to 15 years in prison.

Johnson appealed, arguing that "[t]he trial court erred in denying the motion to suppress when it ruled police did not need a search warrant to place a GPS tracking device on Mr. Johnson's car." *Johnson I*, 190 Ohio App.3d 750, 2010-Ohio-5808, 944 N.E.2d 270, at ¶ 18. In *Johnson I*, this court concluded that Johnson did not have a reasonable expectation of privacy in the undercarriage of his vehicle and that the placement and subsequent use of the GPS device to track the vehicle's whereabouts did not constitute a search or seizure under either the Fourth Amendment to the United States Constitution or Section 14, Article I of Ohio's Constitution. *Id.* at ¶ 18-47.

Johnson appealed to the Ohio Supreme Court, which accepted review of the case. *State v. Johnson*, 128 Ohio St.3d 1425, 2011-Ohio-1049, 943 N.E.2d 572. While the matter was pending before the Ohio Supreme Court, the United States Supreme Court issued a decision in *United States v. Jones*, ---U.S. ---, 132 S.Ct. 945, 948, 181 L.Ed.2d 911 (2012), holding 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 context of the Fourth Amendment. (Footnote omitted.) Thereafter, the Ohio Supreme Court vacated our holding in *Johnson I*, and

remanded the case back to the trial court for application of *Jones. State v. Johnson*, 131 Ohio St.3d 301, 2012-Ohio-975, 964 N.E.2d 426, ¶ 1.

The trial court permitted both parties to file supplemental briefs addressing the impact that Jones had on Johnson's motion to suppress. At a hearing on September 12, 2012, Johnson and the state stipulated to the trial court's consideration of the transcript and exhibits from the March 3, 2009 evidentiary hearing. The parties further agreed that no additional evidence was necessary for the trial court to rule on the motion to suppress. At a hearing held on October 19, 2012, the trial court issued a decision denying Johnson's motion to suppress. Although the court found a clear violation of Johnson's Fourth Amendment right in the warrantless placement of the GPS device on Johnson's vehicle, the court concluded that exclusion of the evidence obtained from the use of the GPS device was not warranted under the facts of the case. Relying on *Davis v. United States*, --- U.S. ---, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), the trial court concluded that "the deterrence benefit exclusion in this case of nonculpable, non-flagrant police conduct does not outweigh the heavy costs of exclusion to society and the judicial system. * * * The Court finds that the officers acted in good faith * * * and the evidence will be admitted at trial."

Following the denial of his motion to suppress, Johnson entered a plea of no-contest to the trafficking and possession charges. The possession charge was merged with the trafficking charge for sentencing purposes, and Johnson was sentenced to ten years in prison.

Johnson II. at ¶¶ 3-8.

Johnson then brought a timely appeal before the Twelfth District Court of Appeals. See, *Id.* The Twelfth District denied Johnson's appeal, finding that "[b]ecause suppression of the evidence would not yield appreciable deterrence and law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful, we find that the trial court did not err in denying Johnson's motion to suppress. For the reasons set forth below, Johnson's convictions are affirmed." *Id.* at ¶ 1.

Johnson then timely sought for this Court to accept jurisdiction of the case. This Court accepted, and the issue of suppression and the good faith doctrine are now before this Court.

Statement of Facts:

Over a six-month period in 2008, Detective Mike Hackney of the Butler County Sheriff's Office received information from three confidential informants that Appellant Sudinia Johnson was involved in cocaine trafficking. (Tr. 30-35.¹) Specifically, Detective Hackney learned that Appellant had recently distributed several kilograms of cocaine and intended to acquire seven more kilograms. (Tr. 37.) Police were told that Appellant used a white Chevy van in order to transport the drugs. (Tr. 11.)

On October 23, 2008, Detective Hackney and two other law enforcement officers went to Appellant's residence. (*Id.*) The two agents removed trash that was on the curb in front of Appellant's house. (*Id.*) They discovered receipts for gas purchased on the same date in both the Chicago and Cincinnati areas. (Tr. 13.) Police also located a white Chevy van parked across the street from the residence. (Tr. 11.) Detective Hackney attached a battery-powered global positioning system ("GPS") device to the undercarriage of the van. (*Id.*) The device was not hard-wired to the van's electrical system, but instead was affixed to a piece of metal on the van via magnets attached to a case enclosing the device. (Tr. 11-12.)

For the next six days, police intermittently monitored the location of the GPS device by means of a secure website. (Tr. 14.) During the first five days of monitoring, the device only moved from its location near Appellant's house in Hamilton, Ohio, to an address in Fairfield and back again. (*Id.*) On October 28, police checking the website learned that the device was in Calumet City, a suburb of Chicago in Cook County, Illinois. (*Id.*) On that date, the device was moved from an address on 171st Street in Calumet City to a shopping center, also in Calumet City. (*Id.*) Upon

¹Citations to the transcript refer to the suppression hearing conducted by the trial court on March 3, 2009.

learning this, Hackney contacted Bob Medellin, an employee of the Cook County Sheriff's Office. (Tr. 15.) Medellin called his brother, Rudy Medellin, a retired Immigration and Customs officer, who went to the shopping center and confirmed the presence of the white Chevy van to which Hackney had attached the GPS device. (*Id.*)

Rudy followed the van from the shopping center back to its prior location on 171st Street and watched as its occupants entered a residence there. (Tr. 16.) One of the occupants, later identified as Appellant, left the residence with a package and re-entered the van. (*Id.*) The other man, later identified as Otis Kelly, emerged from the house's garage driving a car with an Ohio license plate. (*Id.*) Rudy continued his visual surveillance of the two vehicles as they traveled south in a two-car caravan on I-65 and eventually back into Butler County. (*Id.*) As Rudy followed the vehicles, he communicated with Hackney via cell phone. (*Id.*)

Hackney, in turn, contacted other officers throughout Ohio, readying them to assist once Appellant and Kelly re-entered the state. (Tr. 17.) While an officer was constantly assigned to monitor the GPS device's location via the secure website in the event that Rudy lost sight of the vehicles, Rudy was able to maintain his visual surveillance. (*Id.*) Hackney told law enforcement officers to stop the vehicles if they "were able to find probable cause to make a stop." (Tr. 19.) After observing Appellant commit a marked lane violation, Butler County Sheriff's Deputy Daren Rhoads, a canine handler, initiated a traffic stop. (Tr. 75.) Appellant was removed from the car, and officers deployed a narcotics-detection canine, who made a passive response on the driver's side door and the rear cargo door. (Tr. 78.) Appellant also gave his consent to have the van searched. (Tr. 77-78.) While no drugs were found in the van, seven kilograms of cocaine were found in a hidden compartment within the trunk of the vehicle driven by Kelly. (Tr. 20-22, 79.) Appellant was carrying a key that opened the concealed compartment in Kelly's car. (Tr. 101.)

Appellant was indicted for trafficking in cocaine, possession of cocaine, and having weapons while under a disability. *State v. Johnson*, 190 Ohio App.3d 750, 944 N.E.2d 270, 2010-Ohio-5808, ¶ 15 (*Johnson I*). He filed numerous motions to suppress, arguing that the use of a GPS device to track his van in the absence of a warrant was unlawful; that the stop of his van was unlawfully initiated; that Appellant was detained longer than necessary to issue him a traffic citation; that search warrants that authorized the search of Appellant's home and a rented storage unit were issued in the absence of probable cause; and that he was denied his right against self-incrimination. *Id.* All of these motions were denied. *Id.* Appellant then decided to enter a plea of no contest to the drug charges, but took the weapons charges to trial. Following the bench trial, Appellant was acquitted of the weapons charge. *Id.* at ¶ 16. After entering his plea of no-contest to the drug charges, Appellant was sentenced to an aggregate prison term of fifteen years. *Id.*

The Twelfth District originally affirmed the trial court's denial of the motion to suppress. *Id.* However, while the case was before this Court, the United States Supreme Court decided in *United States v. Jones*, 132 S.Ct. 945 (2012), that the use of a GPS device was a search. Based upon this ruling, the case was remanded back to the trial court for further proceedings.

Upon resuming jurisdiction of the case, the trial court allowed both sides to brief and argue the impact that the *Jones* case had on Appellant's motion to suppress. After reading and hearing all of the arguments, the trial court again denied the motion to suppress based upon the good faith doctrine (The legal conclusions of the trial court will be more fully articulated in the argument section of this brief). The Twelfth affirmed the trial court's decision, and the Court accepted jurisdiction.

ARGUMENT

Proposition of Law I:

WHEN OFFICERS ACT IN GOOD FAITH, SUPPRESSION IS UNWARRANTED AS THERE IS NO UNDERLYING DETERRENT VALUE.

In Appellant's first assignment of error he argues that the only way the good faith exception applies, is when the police have acted in conformity with binding appellate precedent. The State agrees that the good faith exception will apply in those situations, but disagrees that the good faith exception is that narrow in its application.

In the present case, all parties are bound to agree, based upon the United States Supreme Court's decision in *United States v. Jones*, --- U.S. ---, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), that there was a search conducted in the present case. Because the officers in the present case did not obtain a search warrant before placing the GPS device on the vehicle, Appellant argues that a Fourth Amendment violation occurred. Additionally, based upon his interpretation of *Davis v. United States*, --- U.S. ---, 131 S.Ct. 2419 (2011), Appellant argues that the good faith exception cannot apply to this case because there was no binding appellate precedent that the police relied upon when utilizing the GPS. As such, the foundations, reasons for creation, and parameters of the exclusionary rule and the good faith doctrine must be explored. Upon such exploration, the Appellant's arguments should be overruled in total.

"The exclusionary rule is a 'prudential doctrine' that was created by the United States Supreme Court to 'compel respect for the constitutional guaranty' expressed in the Fourth Amendment." *State v. Widmer*, 12th Dist. No. CA2011-03-027, 2012-Ohio-4342, ¶ 55, citing *Davis*, 131 S.Ct. 2419, 2426, citing *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437 (1960). As such, "[t]he exclusionary rule is not a personal right or a means to redress constitutional injury;

rather, it is used to deter future violations.” *State v. Hoffman*, 6th Dist. No. L-12-1262, 2013-Ohio-1082, ¶ 23, citing *Davis*, 131 S.Ct. 2419. “Indeed, the purpose of the exclusionary rule is to deter deliberate, reckless, and grossly or systematically negligent police conduct, rather than to remedy such past violations. See *Davis v. United States*, — U.S. —, 131 S.Ct. 2419, 2426–27, 180 L.Ed.2d 285 (2011). To this end, the Supreme Court has clarified that the exclusionary rule does not apply when ‘police act with an objectively reasonable good faith belief that their conduct is lawful.’ See *id.* at 2427.” *United States v. Lopez*, No. 10-cr-67 (GMS), 895 F.Supp.2d 592, 604, 2012 WL 3930317 (D.Del. Sept. 10, 2012).

As the *Lopez* court noted, the rationale for the application of this rule was espoused in *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695 (2009) and *Davis*, when the High Court recognized that:

suppression imposes a “costly toll upon truth-seeking and law enforcement objectives” by “letting guilty and possibly dangerous defendants go free.” See *Herring*, 555 U.S. at 141–42, 129 S.Ct. 695. In light of this consideration, the Supreme Court has instructed district courts tasked with assessing exclusionary rule suppression issues to exclude evidence only when “the benefits of deterrence ... outweigh the costs.” See *id.*; see also *Davis*, 131 S.Ct. at 2427 (“For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.”).

Thus, the question of suppression should ultimately “turn[] on the culpability of the police and the potential of exclusion to deter wrongful police conduct.” See *Herring*, 555 U.S. at 137, 129 S.Ct. 695. In this assessment, “the deterrence benefits of exclusion” will inevitably “ [v]ary with the culpability of the law enforcement conduct’ at issue.” See *Davis*, 131 S.Ct. at 2427. Specifically, “when 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.” *Id.* at 2427–28 (internal citations omitted).

Lopez, 895 F.Supp.2d 592, 604.

These points were recently echoed by the Sixth Circuit when it affirmed the Supreme Court’s intent:

As the Supreme Court has made clear, however, “[e]xclusion is not a personal constitutional right” but is intended “to deter future Fourth Amendment violations.” *Davis*, 131 S.Ct. at 2426. Because “[e]xclusion exacts a heavy toll on both the judicial system and society at large,” not all violations of the Fourth Amendment result in the exclusion of evidence. *Id.* at 2427. “[E]xclusion has always been our last resort, not our first impulse.” *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009) (internal citation and quotation marks omitted) (emphasis added). To assess whether exclusion is demanded, a “rigorous weighing of [] costs and deterrence benefits” is necessary. *Davis*, 131 S.Ct. at 2427. In particular, because the extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct, the cost-benefit analysis should focus on the “flagrancy of the police misconduct” and on whether the police misconduct was “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” *Herring*, 129 S.Ct. at 701–02.

United States v. Fisher, 745 F.3d 200, 203 (6th Cir. 2014).

However, in light of the clear directives from the Supreme Court that the exclusionary rule and the good-faith doctrine must contemplate a balance of the benefits of deterrence as opposed to the costs, Appellant now wants this Court to interpret the good faith doctrine to mandate that if there is no binding appellate precedent, then the balancing test and all the language about such test is of no application. Appellant calls on this Court to opine that the good faith doctrine is now a strict and inflexible doctrine that does not contemplate the benefits of deterrence as opposed to the weight of the costs. However, this interpretation cannot withstand scrutiny, and does not pay deference to the full body of case law governing the good faith doctrine.

Specifically, in crafting a narrow and unwieldy rule, Appellant relies only upon the most narrow reading of the *Davis* decision. The Twelfth District rejected this overly narrow reading, instead finding that “a case-by-case approach examining the culpability and conduct of law enforcement is more appropriate given the preference expressed in *Davis* for a cost-benefit analysis in exclusion cases as opposed to a ‘reflexive’ application of the doctrine to all cases involving a Fourth Amendment violation. *Davis*, 131 S.Ct. at 2427 (“We abandoned the old, ‘reflexive’ application of the [exclusionary] doctrine, and imposed a more rigorous weighing of its costs and

deterrence benefits”).” *Johnson II*, 2013-Ohio-4865, ¶ 23.

The reasoning of the Twelfth District is correct for at least two distinct reasons. First, the *Davis* decision must be read in conjunction with, and not in exclusion of the *Herring* decision. Secondly, even the *Davis* decision alone does not support such a narrow holding.

1. *Davis & Herring*

In a number of judicial decisions subsequent to the *Davis* decision, court’s have found that both *Davis* and *Herring* must be properly evaluated before the correct rules governing the application of both the exclusionary rule and the good faith doctrine can be applied. One such case is that of the *United States v. Ford*. The relevant portions of the *Ford* case begin with a report and recommendation by Magistrate Lee. See, *United States v. Ford*, 2012 WL 5366359, (E.D. Tenn. Sept. 12, 2012) (Lee, Mag. J.).

In authoring the recommendations to deny Ford’s motion to suppress, Magistrate Lee began by noting that courts without binding precedent are now grappling with the issues concerning the application of the exclusionary rule and the good faith doctrine to evidence obtained by the use of GPS technology prior to the *Jones* decision. In evaluating these issues, Magistrate Lee noted that:

On the issue of warrantless use of GPS tracking technology, *Herring*—another fairly recent Supreme Court opinion addressing the good faith exception—has not received as much attention in the post- *Jones* cases as *Davis*. In *Herring*, the Court rejected the application of the exclusionary rule where an “officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee.” *Herring*, 555 U.S. at 137. Analogizing to its decisions in *Leon*, 468 U.S. at 922 (exclusionary rule inapplicable where police act on objectively reasonable reliance on a warrant issued by a neutral magistrate) and *Evans*, 514 U.S. at 14–15 (exclusionary rule inapplicable where police acted in reasonably reliance on a court database which mistakenly indicated that a warrant was outstanding), the Court concluded that any deterrent effect of applying the exclusionary rule in *Herring* was outweighed by the costs to society. *Herring*, 555 U.S. at 140–43, 147–48.

The Sixth Circuit interpreted the impact of *Herring* on Fourth Amendment violations in *United States v. Master*, 614 F.3d 236, 241–43 (6th Cir.2010), a case arising from this district. In *Master*, a case involving a defective warrant, the Sixth Circuit read *Herring* as “effectively creat[ing] a balancing test by requiring that in order for a court to suppress evidence following the finding of a Fourth Amendment violation, ‘the benefits of deterrence must outweigh the costs.’ ” *Master*, 614 F.3d at 243 (quoting *Herring*, 555 U.S. at 141). The Sixth Circuit reasoned that “the *Herring* Court’s emphasis seems weighed more toward preserving evidence for use in obtaining convictions, even if illegally seized, than toward excluding evidence in order to deter police misconduct unless the officers engage in ‘deliberate, reckless, or grossly negligent conduct.’ ” *Id.* (quoting *Herring*, 555 U.S. at 144). See also *United States v. Godfrey*, 427 F. App’x 409, 412 (6th Cir.2011) (quoting *Master*). *Id.* at *14-15.

The report and recommendation went on to find that “[u]nder *Herring*, as applied in *Master*, evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’ *Herring*, 555 U.S. at 143 (quoting *Krull*, 480 U.S. at 348–49) (internal quotation marks omitted); accord *Master*, 614 F.3d at 241–43.” *Id.*, at *16. Based upon the aforementioned, the Magistrate concluded “that a bright-line rule rejecting the application of the exclusionary rule under *Davis* simply because there was no binding precedent in the Sixth Circuit, as urged by Defendant, does not pay due regard to *Herring* and *Master*. Applying the *Herring* balancing test, as I believe I must under *Master*, and considering the benefits of deterrence against the costs, I FIND that even though there was a Fourth Amendment violation in this case, suppression is not an appropriate remedy.” *Id.*

Thereafter, the report and recommendation in *Ford* went before Judge Collier, who accepted and adopted it. See, *United States v. Ford*, No. 1:11–CR–42, 2012 WL 5366049 (E.D.Tenn. Oct.30, 2012). In so adopting the report, Judge Collier noted that:

From the government's perspective, circumscribing the good-faith exception to binding precedent unduly limits *Davis* and *Herring*, which focus on deterring culpable police action. Allowing police to rely on non-binding appellate precedent accounts for the culpability inquiry of the good-faith exception, because if, as occurred here, a panel of judges on four appellate circuits believed the action was constitutional, and only one concluded otherwise, the police activity can hardly be called a “ ‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights.” *Davis*, 131 S.Ct. at 2427; see also *id.* at 2428 (“Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms *Davis*'s claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield ‘meaningfu[l]’ deterrence, and culpable enough to be ‘worth the price paid by the justice system.’ ”). Limiting *Davis* to binding precedent could also have the unintended effect of making law enforcement officers “unduly cautious in pursuing investigatory initiatives.” *United States v. Baez*, No. 10–10275–DPW, 2012 WL 2914318, at *8 (D.Mass. July 16, 2012). That consequence must be factored into the costs visited upon the judicial system by the application of the exclusionary rule.

The Court believes the government has the better argument. Defendant's points are well taken, and indeed the Court believes there may be some instances of police reliance on non-binding precedent that do not satisfy the good-faith exception. **However, the Court believes a rule limiting *Davis* to binding precedent ignores the underlying rationale in *Davis* and *Herring*.** The Court did not simply hold law enforcement acted reasonably by relying on binding law, but also acknowledged the officer's reasonable reliance rendered his conduct inculpable. *Davis*, 131 S.Ct. at 2427 (“The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion ‘var[y] with the culpability of the law enforcement conduct’ at issue.”) (quoting *Herring*, 555 U.S. at 143). The costs imposed on the judicial system by the exclusionary rule outweigh the value of deterrence when police conduct is not culpable. *Davis*, 131 S.Ct. at 2429; *Herring*, 555 U.S. 147–48; see also *United States v. Master*, 614 F.3d 236, 243 (6th Cir.2010) (“The Supreme Court has effectively created a balancing test by requiring that in order for a court to suppress evidence following the finding of a Fourth Amendment violation, ‘the benefits of deterrence must outweigh the costs.’ ”) (quoting *Herring*, 555 U.S. at 141). *Id.*, at *10-11. (internal footnote omitted)(Emphasis added).

What is more, in *United States v. Batista*, 2013 WL 782710, (W.D.Va. Feb. 28, 2013), the Court began by identifying “[t]he principal cost of applying the [exclusionary] rule is, of course, letting guilty and possible dangerous defendants go free—something that offends basic concepts of the criminal justice system, and the application of the rule is only proper where its deterrence benefits outweigh its substantial social cost.” *Id.*, at *5, quoting *Herring*, 555 F.3d at 141 (internal

citations omitted). After recognizing the difficulty that courts have had in interpreting the parameters of the exclusionary rule in light of the decision in *Jones*, the *Batista* court stated that:

The court believes, given the purpose of the exclusionary rule as laid out by the Supreme Court in *Herring* and *Davis*, the question of whether the good faith exception applies is a case specific and fact dependent analysis analyzing the specific actions of the law enforcement official and the ensuing need for deterrence.FN6 Indeed, “the *Davis* majority rejected a restrictive and reflexive application of the doctrine in favor of a ‘rigorous weighing of its costs and deterrence benefits,’ with a focus on the ‘flagrancy of the police misconduct.’ ” *United States v. Rose*, CRIM. 11–10062–NMG, 2012 WL 4215868, at *4 (D.Mass. Sept.14, 2012) (quoting *Davis*, 131 S.Ct. at 2426–27). In determining whether or not deterrence is needed in a particular situation, the court looks at the culpability of the law enforcement conduct.

FN6. **Limiting the application of *Davis* to situations in which there is only binding precedent would necessarily subvert the clear instruction by the Supreme Court to weigh the social costs against the deterrent value of exclusion when determining whether to apply the exclusionary rule.** Like the court in *United States v. Rose*, CRIM. 11–10062–NMG, 2012 WL 4215868 (D.Mass. Sept.14, 2012), the court believes such a bright line rule is unworkable in practice and would require courts to shift their focus from the particular facts of the case before it to an academic determination of whether the situation is “sufficiently analogous to a previous case to be considered ‘binding.’ ” *Id.* at *5. Furthermore, the majority opinion in *Davis* clearly believed that suppression turned on the culpability of the officer. As noted by the court in *Rose*. Justice Breyer pointed out in his dissent in *Davis* that an officer is no more culpable if he believes the search he has conducted is within the bounds of the Fourth Amendment than if he follows “binding precedent” that is subsequently overturned. *Id.*

Id., at *6. (Emphasis added).

The *Rose* court also rejected this binding / non-binding precedent bright line rule finding that it would be unworkable. *United States v. Rose*, CRIM. 11–10062–NMG, 2012 WL 4215868 (D.Mass. Sept.14, 2012). The *Rose* court then went a step further stating that “[e]ven if it were workable in practice, however, the binding/non-binding distinction does not jibe with the majority’s pronouncement that suppression is required only where an officer acts culpably.” *Id.*, at *5.

The unworkability of the bright line rule was also noted by the Seventh Circuit “One can doubt that much deterrence is to be had from telling the police that they are not entitled to rely on

decisions issued by several circuits, just because the circuit covering the state in which an investigation is ongoing lacks its own precedent. If the question were whether police who installed a GPS locator, in reliance on Circuit A's precedent, could be ordered to pay damages when, years later, Circuit B disagreed with Circuit A, the answer would be no. It's hard to see why the exclusionary rule should be handled differently. But that's a question for another day.” *United States v. Brown*, 744 F.3d 474, 478 (7th Cir.2014).

It should also be noted that the question asked of the United States Supreme Court in the *Davis* case was whether reliance on binding precedent would support an argument under the good faith exception. Thus, it is not a surprise that the decision noted that binding precedent would support the good faith exception. However, this does not indicate that non-binding precedent would not support the good faith exception as that question was not asked of the United States Supreme Court, and the High Court need not author an opinion that goes beyond the question presented.

In her concurrence, Justice Sotomayor noted that the majority opinion **does not** address whether the exclusionary rule applies “when the governing law is unsettled.” *Davis*, 131 S.Ct. at 2436 (Sotomayor, J., concurring); *See, also United States v. Fisher*, Nos. 10–cr–28, 10–cr–32, 2013 WL 214379, at *2 (W.D.Mich. Jan. 18, 2013)(“In *Davis*, the Supreme Court was dealing with ‘[t]he question [of] whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent.’ 131 S.Ct. at 2428. The Supreme Court's holding, therefore, applies to cases in which binding judicial precedent is present; it does not, in this Court's opinion, foreclose the possibility of the good faith exception being applied in cases where only non-binding precedent exists.”)(Emphasis added.)

As such, while relying on binding appellate precedent will clearly lead to a finding that officers acted in good faith (See, *Fisher*, 745 F.3d 200), the proper balancing of the cost benefit

analysis is still the correct standard of law as espoused by the United States Supreme Court's jurisprudence on this issue. This is exactly how the Twelfth District applied the law.

Specifically, the Twelfth District found that “[a]s of October 23, 2008, no court had ruled that the warrantless installation and monitoring of GPS devices on vehicles that remained on public roadways was a violation of the Fourth Amendment. Courts that had considered the issue of electronic monitoring determined that the United States Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) controlled.” *Johnson II*, 2013-Ohio-4865, ¶ 26. Therefore, “It was not until August 6, 2010, more than 21 months after the GPS device was placed on Johnson's vehicle, that the D.C. Circuit Court broke with the majority of other jurisdictions by holding that the use of a GPS tracking device for 28 days violated a defendant's reasonable expectation of privacy and was a violation of the defendant's Fourth Amendment rights. *United States v. Maynard*, 615 F.3d 544 (D.C.Cir.2010).” *Johnson II*, 2013-Ohio-4865, ¶ 29.

Based upon this, the Twelfth District applied the cost benefit analysis and found:

Given that, at the time Hackney attached the GPS device to Johnson's car, the United States Supreme Court had sanctioned the use of beeper technology without a warrant in *Knotts*, at least one circuit court had applied the rationale expressed in *Knotts* and determined that the warrantless placement and subsequent monitoring of a GPS device on a vehicle was not a violation of a defendant's Fourth Amendment rights, and Hackney acted only after consulting with fellow officers, other law enforcement agencies, and a prosecutor, we find that the Butler County Sheriff's Office acted “with an objectively ‘reasonable good-faith belief’ that their conduct [was] lawful.” *Davis*, 131 S.Ct. at 2427, quoting *Leon*, 468 U.S. at 909, 104 S.Ct. 3405. Taking into account the steps taken by law enforcement and the legal landscape that existed at the time the GPS device was attached to Johnson's vehicle, we find that law enforcement did not exhibit a deliberate, reckless, or grossly negligent disregard for Johnson's Fourth Amendment rights in attaching and monitoring the GPS device without the authorization of a warrant. Suppression under the facts of this case would therefore fail to yield appreciable deterrence. As such, the deterrence value does not outweigh the social costs exacted by application of the exclusionary rule, which would require the court “to ignore reliable, trustworthy evidence bearing on guilt or innocence.” *Id.*

We therefore find that the good faith exception to the exclusionary rule

applies in this case. The evidence obtained from the attachment and subsequent use of the GPS device is not subject to exclusion. *Johnson II*, 2013-Ohio-4865, ¶¶ 30-31.

Based upon this well reasoned logic, as supported by both the *Herring* and *Davis* decisions, the Twelfth District did not error, and should be affirmed.

2. *Davis Alone*

A number of courts have also found that even when *Davis* alone is analyzed, the narrow reading that binding appellate precedent is required to invoke the good faith exception is unsupportable. In one such decision, a Federal District Court in Louisiana took note of the legal landscape of emerging decisions on this issue. *See, United States v. Guyton*, 2013 WL 55837 (E.D.La. Jan. 03, 2013). In depicting this landscape, the *Guyton* court noted that while some “courts read *Davis* narrowly and hold that the good faith exception is inapplicable in the absence of binding appellate precedent. Other courts interpret *Davis* to mandate a case-by-case inquiry in which the relevant inquiry is whether police act with an objectively reasonable good faith belief that their conduct is lawful.” *Id.*, at *3 (internal footnotes omitted). The court then held that it believed that the “interpretation adopted by the former line of cases is inconsistent with both the language in *Davis* as well as the Supreme Court's evolving jurisprudence on the good faith exception.” *Id.*

The *Guyton* court then identified and expounded on the proper scope of *Davis* by finding that “[t]o understand and apply *Davis*, it is necessary to view the opinion as a logical extension of the Supreme Court's jurisprudence on the good faith exception to the exclusionary rule. *See Oladosu*, 2012 WL 3642851 at *6. Much like the Court in *Herring*, the *Davis* Court discussed the precepts of law undergirding the exclusionary rule before applying those precepts to the facts.” *Id.*, at *5. The court then completely eviscerated the arguments made by the Appellant in the case at bar when

it stated:

Under this standard, the *Davis* Court easily concluded that suppression is not warranted “when the police conduct a search in objectively reasonable reliance on binding judicial precedent.” *Id.* at 2428–29. Consistent with the Court’s exclusionary-rule precedents, the *Davis* Court emphasized that the “acknowledged absence of police culpability doom[ed] [the defendant’s] claim.” *Id.* at 2428. In other words, because the officers in *Davis* did not violate the defendant’s Fourth Amendment rights “deliberately, recklessly, or with gross negligence,” the “harsh sanction of exclusion” was not warranted. *Id.* “Indeed, 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.” *Id.* at 2429 (quoting *Herring*, 555 U.S. at 144). The Court concluded by “reaffirm[ing]” the basic insight of the *Leon* line of cases that “exclusion ‘should not be applied to deter objectively reasonable law enforcement.’” *Id.* (citing *Leon*, 468 U.S. at 919).

Some courts argue, as do Moving Defendants, that *Davis* be read narrowly to prevent suppression only where officers reasonably rely on binding appellate precedent. **This inflexible approach is untenable for three reasons.** **First**, and most importantly, a rigid interpretation of *Davis* “does not jibe with the majority’s pronouncement that suppression is required only where an officer acts culpably.” *Rose*, 2012 WL 4215868 at *5. As Justice Breyer and Justice Ginsburg note in dissent, “an officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside of the Fourth Amendment’s bounds is no more culpable than an officer who follows erroneous ‘binding precedent.’” *Davis*, 131 S.Ct. at 2339 (Breyer, J., dissenting). “Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer’s conduct,” the relevant inquiry is not whether the precedent upon which officers rely is legally binding but whether it was objectively reasonable to rely on that precedent. See *id.*

Second, a narrow reading of *Davis* does not comport with the Court’s previous good faith jurisprudence. Regardless of the factual circumstances in which the good faith exception has been applied, the Court has consistently required that “the deterrence benefits of suppression.. outweigh its heavy costs.” *Id.* at 2427; see further *Leon*, 468 U.S. at 922 (“We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”); *Krull*, 480 U.S. at 351–52 (“When we indulge in such weighing, we are convinced that applying the exclusionary rule in this context is unjustified.”); *Herring*, 555 U.S. at 702 (“[W]e conclude that when police mistakes are the result of negligence such as that described here ... any marginal deterrence does not ‘pay its way.’”) (quoting *Leon*, 468 U.S. at 907–08 n. 6). Thus, *Leon* and its progeny require that courts weigh the deterrence benefits of suppression against the costs of exclusion in each case. Interpreting *Davis* to require a per se finding of unreasonableness when officers do not rely on legally binding appellate precedent is inconsistent with this mandate.

Third, the Court appeared to anticipate that the principles of *Davis*—with a focus on police culpability—would be worked out by lower courts. See *Oladosu*, 2012 WL 3642851 at *6; *Baez*, 2012 WL 2914318 at *6; *Leon*, 856 F.Supp.2d at 1194. In her concurrence, Justice Sotomayor noted that the majority opinion does not address whether the exclusionary rule applies “when the governing law is unsettled.” *Davis*, 131 S.Ct. at 2436 (Sotomayor, J., concurring) (emphasis added). Justice Breyer noted in dissent that the majority’s mandate that courts focus on police culpability will affect “a very large number of cases, potentially many thousands each year.” *Id.* at 2439–40 (Breyer, J., dissenting). Ultimately, “[t]he Supreme Court in *Davis* ... engaged in ... a cost-benefit analysis and effectively directed lower courts to do likewise in the developing case law.” *Baez*, 2012 WL 2914318 at *8.

For the foregoing reasons, this Court interprets *Davis* to require that decisions regarding the suppression of evidence be made on a case-by-case basis. The “absence of police culpability” is dispositive: “when police act with an objectively ‘reasonable good-faith belief that their conduct is lawful,’ exclusion is inappropriate. *Davis*, 131 S.Ct. at 2427–28 (quoting *Leon*, 468 U.S. at 909).

Id., at *5-6. (Emphasis added)

These sentiments of rejection of the narrow reading of *Davis* were also voiced in the *Oladosu* case. See, *United States v. Oladosu*, No. 10–056–01 S., 2012 WL 3642851, (D. R.I. Aug. 21, 2012). The court in *Oladosu* noted that “Defendants, like Oladosu, have advocated, generally speaking, that *Davis*’s ‘binding circuit precedent’ language creates a strict limitation on the good faith exception. * * * One obvious problem with this approach is the bind it creates in circuits where no ‘binding circuit precedent’ exists. In this Court’s view, this rigid reading of *Davis* cannot withstand scrutiny, at least in the context of the facts presented in this case.” *Id.*, at 443.

While agreeing with the outcome of *Davis*, calling it a “slam-dunk application of the good faith doctrine”, the *Oladosu* court noted that it was clear that *Davis* “did ‘not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled’ or ‘whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled.’ *Id.* at 2435, 2436 (Sotomayor, J., concurring in the judgment). Clearly, the Supreme Court anticipated that the questions left unanswered by *Davis*

would need to be worked out in subsequent cases.” *Id.* Ultimately, the *Oladosu* court found that what the *Davis* decision truly did was simply undertake “what has become the standard good faith assessment of the ‘culpability’ of law enforcement and whether police acted with ‘an objectively ‘reasonable good faith belief’ that their conduct [was] lawful.’ *Id.* at 2427 (quoting *Leon*, 468 U.S. at 909, 104 S.Ct. 3405).” *Id.*, at 445.

What is more, in *United States v. Rose*, --- F.Supp.2d ---, 2012 WL 4215868, (D.Mass. Sept. 14, 2012), the court took note of the cases Appellant Johnson now cites claiming that binding precedent must be relied upon. The *Rose* court noted that those courts believed that “extending the good-faith exception to situations in which police rely on non-binding precedent, e.g., a district court opinion, an unpublished opinion by one's own circuit court of appeals or a published opinion by another circuit court of appeals, would give police little incentive to err on the side of constitutional behavior. Suppression, they argue, would serve the beneficial purpose of deterring officers from picking and choosing which law to follow.” *Id.*, at *4.

However, as the *Rose* court was quick to point out:

If those concerns sound familiar, it is because they were voiced by Justice Sotomayor in *Davis*. 131 S.Ct. at 2434–36 (Sotomayor, J., concurring). **Unfortunately for defendants, her view of the good-faith exception garnered only two other votes, *id.* at 2436–40 (Breyer, J., joined by Ginsberg, J., dissenting), and was not adopted by the majority, *id.* at 2426–29. Writing for the Court, Justice Alito emphasized that the “sole purpose” of the exclusionary rule is to deter future Fourth Amendment violations and described suppression as a “last resort.” *Id.* at 2426–27 (majority opinion). The *Davis* majority rejected a restrictive and reflexive application of the doctrine in favor of a “rigorous weighing of its costs and deterrence benefits,” with a focus on the “flagrancy of the police misconduct.” *Id.* at 2427. *Id.*, at *4. (Emphasis added).**

Finally, in *United States v. Baez*, 878 F.Supp.2d 288, (D.Mass.2012), that court was again presented with a Defendant who was claiming that the *Davis* decision “be read only to prevent suppression where officers face binding appellate precedent that is subsequently overturned.” *Id.*,

at 294. In rejecting this interpretation, the *Baez* court found that “[t]his interpretation is entirely too static an approach to a considered Supreme Court opinion. It is apparent that both the majority opinion and the concurring and dissenting opinions anticipated the principles of *Davis* would be worked out in subsequent cases raising themes and variations.” *Id.*

The *Baez* court then rejected the position taken by courts such as the *Katzin* court, noting that “*Katzin's* vivid allusion to evisceration suggests that the exclusionary rule is some living entity rather than an inanimate instrument available to be deployed as necessary and when appropriate to serve enforcement of Fourth Amendment guarantees. The choice of metaphor is telling in this context. The deployment of an instrumentality is properly governed by a cost-benefit analysis rather than concern for imputed bodily injury to an otherwise disembodied prophylactic rule. The Supreme Court in *Davis* was engaged in just such a cost-benefit analysis and effectively directed lower courts to do likewise in the developing case law.” *Id.*, at 296-297. (Emphasis added).

The *Baez* court then concludes its analysis by recognizing that:

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 enervating 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.

Id., at 297.

As such, based upon the United States Supreme Court’s precedent, it is clear that the proper application of the good faith exception to the exclusionary rule is predicated upon a rigorous and factually based cost benefit analysis, and not upon a rigid and unwieldy binding precedent standard.

As such, the Twelfth District did not err when it adopted and applied the cost benefit analysis to the actions of the Butler County Sheriff's Office in attaching a GPS device to Appellant's vehicle. Because the officers were acting in conformity with the state of the law, and on the advice from an assistant prosecutor, there can be no argument that they acted in a manner that disregarded the Fourth Amendment. The Twelfth District's holding that the good faith exception applies should be affirmed, as more fully analyzed below.

3. Cost Benefit Analysis

"In light of this consideration, the Supreme Court has instructed district courts tasked with assessing exclusionary rule suppression issues to exclude evidence only when 'the benefits of deterrence ... outweigh the costs.'" *Lopez*, 895 F.Supp.2d at 604, citing *Davis*, 131 S.Ct. at 2427 ("For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs."). This is exactly what the trial court and appellate court did in the present case.

Specifically, the trial court stated that it was reaching its conclusion by taking stock of the fact that "the *Davis* court employed a cost-benefit analysis, where the deterrence benefits of excluding the evidence must outweigh its heavy social costs." (M.p. 6-7)² Thereafter, the trial court noted that the Appellant asked for the *Davis* decision to be read narrowly, however the trial court responded: "I reject that characterization because the specific holding of *Davis* is not to be confused with the rule of law that is espoused in *Davis*. I don't view this Court's duty to merely engage in a mechanical application of the narrow holding in *Davis*. The holding is a result of the Supreme Court's application of the rule of law to the facts in that case. This Court's duty is to apply the rule of law espoused in *Davis* to our own facts, not to simply note that our facts differ from *Davis* and,

² (M.p.) Refers to the Motion Hearing held on October 19, 2012.

therefore, *Davis* does not apply.” (M.p. 8-9)

In then applying the proper cost-benefit analysis to the facts of the case, the trial court noted that:

applying the exclusionary rule would result in the suppression of approximately seven kilos of cocaine from evidence and would likely result in the Defendant's acquittal and/or dismissal of his case. Given the seriousness of the charges and the quantity of illegal drugs involved, the social cost of suppression in this particular case would be heavy.

Against this heavy social cost, the Court must weigh the deterrence benefit of suppression, which requires us to focus on the flagrancy or culpability of the law enforcement conduct at issue. Regarding this issue of flagrancy, the Court notes, in similar fashion to the *Davis* Defendant, that Mr. Johnson does not allege that the conduct of the Butler County Sheriff's office was flagrant or malicious. (M.p. 9)

The trial “[c]ourt's analysis of the facts presented in this case lead to the conclusion that the behavior of law enforcement officers in this case was not a deliberate, reckless, or grossly negligent disregard for the Defendant's Fourth Amendment rights. At worst, it was simple negligence. However, this Court does not even make that finding.” (M.p. 11) The court also found that “the placement of the GPS in this case occurred on October 23rd, 2008”, that the tracking “lasted a mere five days, and seven kilos of cocaine were seized”, that Detective Hackney conferred with Assistant Prosecutor [K]ash about the tracking, and that the Detective “referred to his training, noting that is should not be hard-wired and that GPS should be placed on vehicle in a public place.” (M.p. 11-12)

In evaluating the legal precedent available to Detective Hackney at the time of the placement, the trial court found:

At the time of this placement, the Knotts case had been on the books for about 25 years. The Fifth Circuit Court of Appeals, in U.S. v. Michael (phonetic), had also held that beeper monitoring on public roads was not a Fourth Amendment search. The Ninth Circuit in MacIver (phonetic) had found that the placement of magnetized tracking devices on a vehicle undercarriage was not a Fourth Amendment search. And the Seventh Circuit in Garcia had upheld GPS tracking analogous to this case based on these prior cases.

As of October 23rd, 2008, no federal circuit court in this country had found that the placement of a GPS device on a vehicle required a warrant and three districts had authorized the practice of relying on a seemingly analogous -- or had authorized the practice in relying on a seemingly analogous Supreme Court case, that being the Knotts case.

Not until August 6th, 2010, when Maynard was decided in the D.C. circuit did any court find that warrantless placement of a GPS was a United States Fourth Amendment constitutional search.

(M.p. 12-13).

The trial court then reflected and concluded that:

The Honorable Judge Posner of the Seventh District thought that a warrant was not required. He expressed this in the Garcia case. He believed that the Knotts line of cases out of the Supreme Court ruled the day and, yet, this Court is urged to find that Detective Hackney was grossly negligent because he wasn't smarter than Judge Posner. This, I cannot do. The Davis majority clearly espoused a rule of law that requires lower courts to apply a cost-benefit analysis to determine whether the remedy of exclusion should apply in this case.

Having done that, based on these facts, the Court finds that the deterrence benefit exclusion in this case of non-culpable, non-flagrant police conduct does not outweigh the heavy costs of exclusion to society and the judicial system. And therefore, the Court will not apply the exclusionary rule in this case. The Court finds the officers acted in good faith under Davis and the evidence will be admitted at trial.

(M.p. 14-15).

The Twelfth District affirmed the trial court's reasoning stating that "Hackney's belief that a warrant was unnecessary was not unfounded given the legal landscape that existed at the time the GPS device was placed on Johnson's car. As of October 23, 2008, no court had ruled that the warrantless installation and monitoring of GPS devices on vehicles that remained on public roadways was a violation of the Fourth Amendment. Courts that had considered the issue of electronic monitoring determined that the United States Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) controlled." *Johnson II*, 2013-Ohio-4865, ¶ 23. Additionally, the Twelfth District noted that:

Hackney acted only after consulting with fellow officers, other law enforcement agencies, and a prosecutor, we find that the Butler County Sheriff's Office acted 'with an objectively 'reasonable good-faith belief' that their conduct [was] lawful.' *Davis*, 131 S.Ct. at 2427, quoting *Leon*, 468 U.S. at 909, 104 S.Ct. 3405. Taking into account the steps taken by law enforcement and the legal landscape that existed at the time the GPS device was attached to Johnson's vehicle, we find that law enforcement did not exhibit a deliberate, reckless, or grossly negligent disregard for Johnson's Fourth Amendment rights in attaching and monitoring the GPS device without the authorization of a warrant. Suppression under the facts of this case would therefore fail to yield appreciable deterrence. As such, the deterrence value does not outweigh the social costs exacted by application of the exclusionary rule, which would require the court 'to ignore reliable, trustworthy evidence bearing on guilt or innocence.' *Id. Johnson II*, at ¶ 30.

The court's decision is in line with a number of other court's across the country that have found that the good faith doctrine should apply in GPS cases where the placement occurred before the decision in *Jones*, and when the benefits outweigh the costs. See e.g., *United States v. Rose*, CRIM. 11-10062-NMG, 2012 WL 4215868 (D.Mass. Sept.14, 2012); *United States v. Lopez*, 895 F.Supp.2d 592, 2012 WL 3930317 (D.Del.2012); *United States v. Leon*, 856 F.Supp.2d 1188 (D.Haw.2012); *United States v. Oladosu*, 887 F.Supp.2d 437 (D.R.I.2012); *United States v. Batista*, 2013 WL 782710, (W.D.Va. Feb. 28, 2013); *United States v. Baez*, 878 F.Supp.2d 288, 2012 WL 2914318 (D.Mass. July 16, 2012); *United States v. Ford*, No. 1:11-CR-42, 2012 WL 5366049 (E.D.Tenn. Oct.30, 2012); *United States v. Guyton*, 2013 WL 55837 (E.D.La. Jan. 03, 2013); See, also, *United States v. Luna-Santillanes*, No. 11-20492, 2012 WL 1019601, at *9 n. 5 (E.D.Mich. Mar.26, 2012) (declining to reach the question but stating the government's argument was persuasive "because the use of a GPS device on a vehicle without first obtaining a search warrant was a widely-accepted practice in the police community that had not been held unconstitutional by the Sixth Circuit").

In one such case that has very similar facts, the court in the *Lopez* case declined to suppress evidence because it found that the good faith exception applied "because the WPD detectives: (1)

acted in reasonable reliance on the absence of federal or state case law establishing that GPS monitoring of a vehicle in public is a Fourth Amendment ‘search’; and (2) attempted to comply with Fourth Amendment search requirements in good faith.” *Lopez*, 895 F.Supp.2d at 605.

First, the *Lopez* court noted that at the time the GPS device was placed, there “were no Federal Courts of Appeals decisions indicating that the warrantless use of GPS tracking devices was unreasonable and unlawful.” *Id.* The *Lopez* court then took note that the commentary to the Federal Rule of Criminal Procedure 41 stated “that a warrant is only required for a tracking device ‘if the device installed (for example, in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.’” *Id.*, citing Fed. R.Crim. Proc. 41 (Advisory Committee's note to the 2006 amendments).

Turning to the second factor, the *Lopez* court noted that the detectives in the case did not believe based upon their experience that a warrant was necessary. However, the detectives also spoke with a member of the State’s Attorney General’s Office who advised that the methods for the GPS were appropriate. *Id.*, at 606. Thus, based upon the fact that all case law at the time of the placement indicated that the tracking was appropriate, coupled with the fact that the detectives attempted to comply with the Fourth Amendment, the *Lopez* court found that the good faith exception was applicable.

The same or similar findings were made by both the trial court and the Twelfth District in the case at bar. Specifically, that there was no negative precedent in existence when detective Hackney placed the GPS on the vehicle, and that an assistant prosecutor and the detective’s own experience all indicated that no warrant was necessary. *See, Johnson II*, at ¶¶ 26-30. As such, this Court should apply the good faith doctrine and find that the cost benefit analysis easily weighs

against suppression. *See, also, United States v. Leon*, 856 F.Supp.2d 1188, 1194-1195 (D.Haw.2012)(“Given the state of the law in 2009, the court simply finds no sufficiently culpable conduct by the agents. As Justice Breyer wrote, ‘if the Court means what it now says,’ *id.*, suppression of the evidence in this case would yield no ‘appreciable deterrence’ and is thus unwarranted.”); *United States v. Baez*, 878 F.Supp.2d 288, 297, 2012 WL 2914318 (D.Mass. July 16, 2012)(“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.”)

4. Time Line Approach

A slightly different approach, although one still leading to the application of the good faith exception, was put forward by the court in the *Oladosu* case. In that decision, the court noted that:

In a recent and well-reasoned opinion, the United States District Court for the District of Massachusetts—apparently, the only other case in this Circuit to address the issue—offered a useful framework. *Baez*, 878 F.Supp.2d at 294–95, 2012 WL 2914318, at *6. In *Baez*, Judge Woodlock first observed that “the immediate implications of *Davis* for *Jones* in the circuits are arrayed along a rather narrow spectrum.” *Id.* He then suggested that this “spectrum can be refined further by plotting a time dimension that identifies when the issue first became unsettled as a result of [the D.C. Circuit's opinion in] *Maynard* and when it was resettled by the Supreme Court for all courts in *Jones*.” *Id.*

Oladosu, 887 F.Supp.2d at 445.

The *Oladosu* court then plotted out a time line of relevant case law. *Id.*, at 446. Thereafter, the court noted the two supposedly conflicting opinions on this issue. *Id.*, at 447 (“In *Ortiz*, *Lujan*, *Lee*, and *Katzin*, the district courts adopted a bright-line rule: law enforcement cannot rely in good faith on non-binding precedent from other circuits. * * * The district courts in *Baez* and *Leon* held

to the contrary.”) However, the court then found that when the time line approach is utilized, the outcomes of all of these cases are truly not at odds with one another:

Despite these divergent approaches, the district court results are not necessarily at odds with one another when plotted on the *Baez*-inspired timeline. What emerges from all of these decisions is a common theme—assessment of police culpability, based on the legal landscape at the time of the GPS attachment. Drawing from the collective experience of these district courts, this Court joins with the district court in *Leon* in declining to adopt a bright-line rule. The better approach in this Court's view is to conduct an analysis of whether law enforcement relied in good faith on judicial precedent, which in turn requires a case-by-case assessment of the legal landscape at the time of the Fourth Amendment violation at issue.

If the agents in this case had placed the GPS after both *Maynard* and Judge Kozinski's dissent, as agents did in the *Lujan*, *Katzin*, *Ortiz*, and *Lee* cases, the outcome here may have been different, and this Court might have concluded as those courts did, that the good faith exception should not apply. This is because, after *Maynard* and the Kozinski dissent, the law was unsettled and law enforcement officials in circuits where no binding precedent was present were arguably on notice that use of a GPS device may require a warrant. In this situation, it might not have been objectively reasonable for law enforcement to rely on the decisions of the Seventh, Eighth, and Ninth Circuits. It could be that proceeding to use a warrantless GPS in the face of emerging uncertainty would be a "reckless[] or grossly negligent disregard for Fourth Amendment rights." See *Davis*, 131 S.Ct. at 2427 (internal quotations omitted). The requisite "culpability" could be there. See *id.* at 2428.

Here, just as in *Baez* and *Leon*, however, the requisite "culpability" of law enforcement is simply not there. This "absence of police culpability," to use *Davis*'s words, "dooms" Oladosu's claim. See *id.* At the time Detective DiFilippo attached the GPS to Defendant Oladosu's car, the United States Supreme Court had sanctioned the use of beeper technology without a warrant, and two circuits had ruled, in what appeared to be a growing consensus, that the beeper precedent was analogous and applicable to GPS use. Just as in *Davis*, law enforcement here acted "with an objectively reasonable good-faith belief that their conduct [was] lawful." *Id.* at 2427 (quoting *Leon*, 468 U.S. at 909, 104 S.Ct. 3405); see also *Baez*, 878 F.Supp.2d at 293, 2012 WL 2914318, at *5; *Leon*, 856 F.Supp.2d at 1192-94.

Id., at 447-448 (Internal Footnote Omitted)(Emphasis added).

In the present case, this time line approach would clearly support the fact that detective Hackney acted in good faith and in reasonable reliance on then existing case law. Specifically:

- 1981 *United States v. Michael*, 645 F.2d 252, 259 (5th Cir.1981) (en banc)(“[I]nstallation and monitoring of the beeper [not] violation of [defendant's] fourth amendment rights.”)
- 1983 *United States v. Knotts*, 460 U.S. 276, 285 (1983) (beeper monitoring on public roads not a search or seizure within the meaning of the Fourth Amendment)
- 1984 *United States v. Karo*, 468 U.S. 705, 714–18 (1984)(monitoring of a beeper in a private residence constitutes a search and requires a warrant.)
- 1999 *United States v. McIver*, 186 F.3d 1119, 1126–27 (9th Cir.1999) (placement of magnetized tracking devices on vehicle undercarriage not Fourth Amendment violation.)
- 2007 *United States v. Garcia*, 474 F.3d 994, 996–97 (7th Cir.2007)(GPS attachment and monitoring not a search and no warrant required.)
- Oct. 23, 2008** **GPS Placement in the present case**
- Aug. 6, 2010 *United States v. Maynard*, 615 F.3d 544 (D.C.Cir.2010)(warrantless use of GPS for one month was a search.)
- Aug. 12, 2010 Ninth Circuit: Chief Judge Kozinski, joined by four other judges, authors vigorous dissent from denial of rehearing en banc.
- June 27, 2011 U.S. Supreme Court: cert granted in *Jones*, 131 S.Ct. 3064.

Pursuant to this time line approach, the actions of detective Hackney must clearly fall within the purview of the good faith exception. As the *Oladosu* court concluded, “[n]ot only does suppression in these contexts ‘fail[] to yield ‘appreciable deterrence,’’, a prerequisite to application of the exclusionary rule, but to the contrary, by discouraging the lawful use of new investigatory tools, it would only ‘discourage the officer from ‘do[ing] his duty,’.” “It is one thing for the

criminal ‘to go free because the constable has blundered,’” but “quite another to set the criminal free because the constable has scrupulously adhered to governing law.” *Oladosu*, 887 F.Supp.2d at 448 (internal citations omitted).

For all of the aforementioned reasons, the State asks that this Court to apply the cost-benefit analysis and hold that detective Hackney acted with objectively reasonable good faith.

5. *Binding Precedent*

Even if this Court were to now hold, in conflict with all of the aforementioned authority and analysis, that the State must have binding appellate precedent for the good faith exception to apply, the State believes that such precedent exists. *See, generally, Fisher*, 745 F.3d 200 (finding good faith exception applies when then-binding precedent authorized police activity.) In *Jones*, the Supreme Court, decided that the attachment of a GPS device “to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.” *Jones*, 132 S.Ct. 945, 948. To have binding precedent, the Butler County Sheriff’s department would have had to believe that they had the ability to track and monitor a person’s movements on public roads, and that the placement of the GPS device was not relevant to the Fourth Amendment because the trespass doctrine was not applicable. Both of these criteria were satisfied by binding precedent.

First, the *Knotts* decision would be the binding precedent that using a device to monitor a person’s movements in a car on a public road does not implicate the Fourth Amendment. *See, United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), *See, also, United States v. Sparks*, 711 F.3d 58, (1st Cir.2013) (finding *Knotts* satisfies the role of binding precedent for GPS cases).

Secondly, both the United States Supreme Court and the Twelfth District Court of Appeals have previously found that the common-law trespass doctrine was either not relevant or not a sufficient part of, Fourth Amendment jurisprudence before the *Jones* decision. See, *United States v. Karo*, 468 U.S. 705, 712–13, 104 S.Ct. 3296 (1984); *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 1743-1744 (1984); *State v. Payne*, 104 Ohio App.3d 364, 386, 662 N.E.2d 60 (12th Dist. 1995); See, also, *Kelly v. State*, 208 Md.App. 218, 248, 56 A.3d 523 (Md.App.,2012).

In *Jones*, Justice Scalia, relying on pre- *Katz* tort law, based the Court’s decision on the fact that government had committed a common law physical trespass. *Id.*, at 132 S.Ct. at 950. Justice Scalia explained that the “*Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.” *Id.*, at 952. However, the majority opinion in *Jones* also pointed out that “our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century” and that “[o]ur later cases, of course, have deviated from that exclusively property-based approach.” *Id.*, at 949-950. With the concurrence by Justice Sotomayor stating that “[w]hen the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.” *Id.*, at 955.

What becomes clear is that the United States Supreme Court deviated from the common-law trespass doctrine, and that *Jones* reintroduced this doctrine into Fourth Amendment jurisprudence. See, also, *Kelly v. State*, 208 Md.App. 218, 248, 56 A.3d 523 (Md.App.,2012) (Discussing the reintroduction of the common-law trespassory test: “In addition, as was true of many courts, including apparently the four dissenting members of the Supreme Court, this Court, in *Stone*, assumed that the expectation of privacy test was the prevailing legal standard.”)

As such, when the Supreme Court has itself stated that it has deviated from this trespass test,

and that it needed reintroduction, how can the police be found to not have followed the precedent that the Supreme Court was utilizing at the time, which by their own admissions, did not include a trespass test. *See, Jones*, at 949-950, 955. The answer is the police should be found to have acted properly.

In 1984, the Supreme Court twice indicated that the trespass doctrine was not relevant or sufficient to the Fourth Amendment. *See, also, United States v. Karo*, 468 U.S. 705, 712-13, 104 S.Ct. 3296 (1984) (“At most, there was a technical trespass on the space occupied by the beeper. The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation.”)(Emphasis added); *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 1743-1744 (1984)(property rights protected by the common law of trespass have limited relevance to the application of the Fourth Amendment)(Emphasis added).

Thereafter, in 1995, the Twelfth District stated in *State v. Payne*, 104 Ohio App.3d 364, 386, 662 N.E.2d 60 (12th Dist. 1995) that “[u]nder a Fourth Amendment analysis, the fact that a police officer may have technically trespassed outside the curtilage is not relevant. However, suppression is inevitable when the trespass breaks the close of the curtilage.” (Emphasis added.); *See, also, State v. Paxton*, 83 Ohio App.3d 818, 615 N.E.2d 1086 (6th Dist. 1992) (“The court concluded that, even if the government's intrusion upon an open field is a trespass at common law, it is not a search in the constitutional sense, since property rights protected by the common law of trespass have little or no relevance to the application of the Fourth Amendment.”)(Emphasis added.)

Thus, Butler County law enforcement had reasonable grounds to believe that the binding precedent from the Supreme Court, the Twelfth District and other Ohio appellate courts, would not have found that there was a trespass of Constitutional magnitude when a magnetic GPS was placed

on Appellant's car when the car was on a public road. It was only after the reintroduction of the trespass doctrine in the *Jones* decision that law enforcement was aware that a common-law trespass was now grounds for suppression. As such, even if this Court were to conclude that binding appellate precedent is necessary, the State believes that the combination of *Knotts* with *Karo*, *Oliver*, and *Payne* satisfy this standard and provide that the police acted in good faith.

The Second Circuit has adopted this very reasoning in finding that the good faith doctrine applied in *United States v. Aguiar*, 737 F.3d 251, 261-262 (2d Cir 2013). Specifically, the Second District analyzed and decided the issue as follows:

We start by addressing what is "binding appellate precedent" within the meaning of *Davis*. In the context of statutory interpretation, "binding precedent" refers to the precedent of this Circuit and the Supreme Court. See *S.E.C. v. Dorozhko*, 574 F.3d 42, 46 (2d Cir.2009). Prior to *Jones*, our Circuit lacked occasion to opine on the constitutionality of using electronic tracking devices attached to vehicles, either of the beeper or GPS variety. However, the Supreme Court did have occasion to address the issue in both *Knotts* and *Karo*, and we find that at the time the GPS tracking device was applied to Aguiar's car in January 2009, law enforcement could reasonably rely on that binding appellate precedent.

The Supreme Court's decision in *Knotts* stood for the proposition that the warrantless use of a tracking device to monitor the movements of a vehicle on public roads did not violate the Fourth Amendment. 460 U.S. at 281-82, 285, 103 S.Ct. 1081. Further, *Karo* discounted the importance of trespass in placing a device, stating that "a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated." 468 U.S. at 712-13, 104 S.Ct. 3296. ***Karo's de minimis treatment of the trespass issue gave no indication that the issue of trespass would become the touchstone for the analysis in Jones. Moreover, Karo's brushing off of the potential trespass fits logically with earlier Supreme Court decisions concluding that "the physical characteristics of an automobile and its use result in a lessened expectation of privacy therein."*** *New York v. Class*, 475 U.S. 106, 112, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986). Nor is there an expectation of privacy when a car "travels public thoroughfares where its occupants and its contents are in plain view," *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). Taken together, law enforcement could reasonably conclude placing a GPS device on the exterior of Aguiar's vehicles did not violate the Fourth Amendment.

Moreover, we find the beeper technology used in *Knotts* sufficiently similar to the GPS technology deployed by the government here. See, e.g., *Sparks*, 711 F.3d at 66 (finding defendants failed to distinguish in any substantive way how the installation of a beeper differed from the installation of a GPS device). Like the

device at issue in *Knotts*, the GPS device allows law enforcement to conduct the same sort of surveillance it could conduct visually, but in a more efficient and cost-effective manner. Appellants argue that the GPS surveillance here continued over a period of months, tantamount to the sort of "dragnet type law enforcement practices" the *Knotts* court specifically declined to address. *Knotts*, 460 U.S. at 284, 103 S.Ct. 1081. But the record indicates that the GPS device was used to track Aguiar's vehicles on public thoroughfares, with technology undertaking an activity that police officers would have physically performed in the past. "Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled police to be more effective in detecting crime, it simply has no constitutional foundation." *Id.*

Our conclusion that the officers here relied in good faith on *Knotts* in placing the GPS device on Aguiar's vehicles is reinforced by the fact that several sister circuits reached similar conclusions. See *Pineda-Moreno*, 591 F.3d at 1216-17 (holding that GPS tracking device used to monitor individual's movements in his vehicle was not a search, relying on *Knotts*); *Garcia*, 474 F.3d at 997-98 (same); see also, e.g., *United States v. Jesus-Nunez*, No. 1:10-CR-00017-01, 2010 WL 2991229, at *5 (M.D.Pa.2010); *United States v. Burton*, 698 F.Supp.2d 1303, 1307-08 (N.D.Fla.2010); *United States v. Moran*, 349 F.Supp.2d 425, 467-68 (N.D.N.Y.2005). These cases are not binding precedent and thus do not control our analysis under *Davis*, but do support the conclusion that relying on *Knotts* was objectively reasonable. See, e.g., *Katzin*, 732 F.3d at 209 (noting that at the time the GPS device in question was placed, there was a circuit split on the issue of whether the warrantless use of such devices violated the Fourth Amendment).

At bottom, sufficient Supreme Court precedent existed at the time the GPS device was placed for the officers here to reasonably conclude a warrant was not necessary in these circumstances. Plainly, post-*Jones*, the landscape has changed, and law enforcement will need to change its approach accordingly.

Aguiar, 737 F.3d 251, 261-262. (Emphasis added).

Based upon the aforementioned, when the GPS device was placed on Appellant's vehicle in 2008, the police acted in conformity with then binding appellate precedent. As such, even if this Court were to mandate binding appellate precedent before the good faith doctrine can be invoked, binding precedent did exist in the present case. See *Knotts*, *Karo*, *Oliver*, and *Payne*. Because the officers acted in good faith, the decision of the Twelfth District should be affirmed.

6. Reasonable Search

Finally, the State asserts that the detectives had reasonable suspicion and probable cause to believe that Appellant was involved in illegal drug trafficking, thus the use of the GPS device, though a search, was reasonable under the Fourth Amendment and does not trigger the exclusionary rule against evidence obtained as a result of the GPS device.

The United States Supreme Court recently held that the attachment of a GPS tracking device to a motor vehicle, and the use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment of the United States Constitution. *Jones*, 132 S. Ct. 945. The Fourth Amendment protects only against "unreasonable" searches and seizures. U.S. Const., Amend. IV. "There is nothing in the amendment's text to suggest that a warrant is required in order to make a search or seizure reasonable." *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007). The court in *Jones* did not discuss whether the use of a GPS tracking device could be reasonable under the Fourth Amendment. *See Jones*, 132 S.Ct. at 954. Therefore, this Court must separately determine whether the search was reasonable under the Fourth Amendment and whether the exclusionary rule should apply to evidence obtained as a result of the search.

In the present case, the State concedes that under *Jones*, the use of the GPS device to track Appellant's vehicle was a search. However, such search was reasonable within the bounds of the Fourth Amendment and thus does not trigger the exclusionary rule. Here, officers did not engage in indiscriminate tracking of Appellant's vehicle. Rather, the police had received information from multiple sources indicating that Appellant was engaged in drug trafficking and that he previously used his white Chevy van in furtherance of that crime. *See, Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543 (1925) (automobile exception); *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Additionally, the police discovered receipts in Appellant's

garbage showing gas purchases made in both Cincinnati and Chicago on the same date, bolstering other information that Appellant was involved in drug trafficking between the two cities.

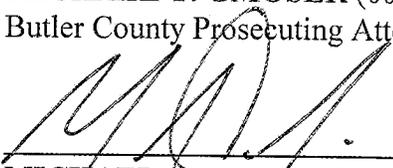
Police officers conducted traditional visual surveillance of Appellant to confirm the information they had received. Once police began use of the GPS device, they only tracked the Appellant intermittently for a short period of time. Further, the GPS device was not hardwired to Appellant's van. Thus, the use of the GPS device was based on reasonable suspicion, and probable cause, to believe that Appellant was involved in drug trafficking and does not violate the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the decision applying the good faith doctrine and overruling the motion to suppress should be affirmed.

Respectfully submitted,

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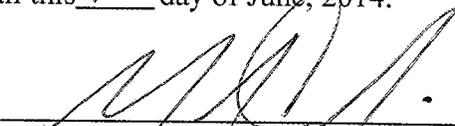
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Federal Rules of Criminal Procedure, Rule 41

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions. The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, any other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district -- or if none is reasonably available, a judge of a state court of record in the district -- has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;

(3) a magistrate judge--in an investigation of domestic terrorism or international terrorism--with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located

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outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises--no matter who owns them--of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) In General. After receiving an affidavit or other information, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Reliable Electronic Means. In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by

telephone or other reliable electronic means.

(e) Issuing the Warrant.

(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) Contents of the Warrant.

(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 14 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(B) Warrant Seeking Electronically Stored Information. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(C) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

(A) Noting the Time. The officer executing the warrant must enter on it the exact date and time it was executed.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.

(D) Return. The officer executing the warrant must promptly return it--together with a copy of the inventory--to the magistrate judge designated on the warrant. The officer may do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.

(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) Return. Within 10 days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so by reliable electronic means.

(C) Service. Within 10 days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) Delayed Notice. Upon the government's request, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--may delay any notice required by this rule if the delay is authorized by statute.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue

necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.