No. _____

In the Supreme Court of the United States

WESLEY TORRANCE KELLY,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) can serve as the "binding appellate precedent" necessary under the good-faith exception to the exclusionary rule as defined by this Court in *Davis v. United States,* ____ U.S. _____, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) to specifically authorize the placement and continuous tracking of a Global Positioning System device on the Petitioner's private property over an extended period of time in the absence of any binding state or federal circuit precedent authorizing this police action at the time of the search.

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OTHER AUTHORITY

Petitioner, Wesley Torrance Kelly by counsel, Juan P. Reyes, Assistant Public Defender, Office of the Public Defender for the State of Maryland, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland entered on December 23, 2013 in *Wesley Torrance Kelly v. State of Maryland,* Court of Appeals, September Term, 2013, No. 26.

OPINIONS BELOW

The reported opinions of the Court of Appeals of Maryland, *Kelly v. State*, 436 Md. 406, 82 A.3d 205 (2013) and the Court of Special Appeals of Maryland, *Kelly v. State*, 208 Md. App. 218, 56 A.3d 523 (2012) are reproduced in the Appendix to this Petition. (App. 1) (App. 24). The relevant excerpts from the transcriptions of the motions hearings held in the respective trial courts are also included in the Appendix. (App. 64) (App. 84).

JURISDICTION

The opinion of the Court of Appeals of Maryland, affirming the judgments of the Circuit Courts for Anne Arundel County and Howard County, was issued on December 23, 2013. (App. 1). An application for an extension of time within which to file a petition for writ of certiorari was presented to the Chief Justice who on March 12, 2014, extended the time for filing to and including May 22, 2014. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, Amendment IV

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

STATEMENT OF THE CASE

1. A Global Positioning System ("GPS") unit was installed on Petitioner's car by Howard County detectives on April 2, 2010 at the request of property detectives who had been investigating a burglary that had occurred earlier in the year in Howard County and suspected Mr. Kelly's involvement. The tracker was programmed such that Howard County police would be notified if and when Mr. Kelly's vehicle, a Chevrolet Trailblazer, came within Howard County. The GPS tracking device was placed on Mr. Kelly's vehicle on a public street outside his residence at 1118 Harwall Road in Woodlawn in Baltimore County.

2. The GPS device, like most modern cellular phones, had a cell phone component and a GPS component and both were used to determine the location of the target vehicle at any given time. The device transmitted information, "just like a cell phone would." The self-powered device was installed on the exterior of the vehicle using magnets. Sergeant Duane Pierce of the Howard County Police Department crawled underneath the vehicle and attached the

device to the frame of the car. The GPS device was programmed to continuously track and record the location of the vehicle and immediately began to do so upon installation. Officers had the option of reviewing the location data at a later time and could also initiate "real time" tracking, which allowed them to track the vehicle as it moved. According to Sergeant Pierce, there were three methods of retrieving data from the GPS device: 1) connecting it to a computer after detachment from the vehicle, 2) obtaining the recorded information wirelessly while the device was still attached to the vehicle, and 3) "live tracking."

3. On April 5, 2010, shortly after 4:00 A.M., the GPS tracker notified Sergeant Pierce that Mr. Kelly's vehicle was approaching Howard County. He obtained the specific location and sent Detective Laffin to Riverwood Drive and Old Columbia Road in Howard County. As Detective Laffin drove towards the area, he observed a vehicle matching the description of Mr. Kelly's vehicle, but was not able to see who was driving the vehicle. Laffin continued to 7125 Riverwood Road after Sergeant Pierce informed him that the vehicle in question had stopped at that location. Laffin found a door at the Advanced Programs, Inc. ("API") building at 7125 Riverwood Drive to be unsecured and observed pry marks and damage to the strike plate. Meanwhile, the alarm company monitoring the business alerted police to an alarm at that location. Detectives met with an API employee who informed them that there were items in brown cardboard boxes that had been stolen from the warehouse. Specifically, two Hewlett Packard printer models, two API computer monitors and four API boxes containing computer hard drives, keyboards, and computer mice had been taken.

After determining that a burglary had occurred at API, officers again utilized the GPS tracker to locate Mr. Kelly's vehicle at 8:30 A.M. at the Carroll Manor Elementary School in Adamstown. Detectives responded to the area and observed the vehicle parked in the parking lot of the school, which was under construction. At 10:30 A.M., the officers went onto the construction site to look inside of the vehicle. Detectives saw several large boxes in the back of the vehicle and a Hewlett Packard printer manual located in the front passenger seat. They left the site and continued their surveillance and observed a man matching Mr. Kelly's description enter the vehicle, open the rear door, and place a computer monitor in one of the boxes. He remained in the car for 20 minutes then returned to the construction site. Mr. Kelly left in the vehicle at approximately 2:30 P.M. and the detectives followed him. The detectives followed him to his residence at 1118 Harwall Road in Gwynn Oak, Maryland. He entered the house, and then left shortly thereafter. He drove to another residence at 3706 West Saratoga Street, entered and exited with two computer boxes that he placed in his truck. Mr. Kelly was then observed visiting a number of local pawn shops in the area that evening.

On April 6, 2010, officers resumed surveillance when Detective Pierce received a notification from the GPS unit indicating that the vehicle was moving. Officers found the vehicle at the Westview Promenade Center in Frederick, parked to the rear of the shopping center behind several closed businesses. Detectives observed a black male matching Mr. Kelly's description walking from the direction of the Verizon Wireless and White House Black Market stores before the suspect

spotted police and returned to his vehicle and left the area. He proceeded to a commercial business park on Pegasus Court in Frederick and was observed driving and stopping in front of several closed businesses. He exited the vehicle briefly then walked back and drove to the construction site at Carroll Manor Elementary School. Officers found evidence of two attempted break-ins at the business park.

On April 12, 2010, at approximately 4:00 A.M., Detective Pierce received an alert from the GPS tracking unit that the vehicle was in motion and thereafter notified surveillance units to follow the vehicle. Sergeant Pierce notified officers that the vehicle was on Interstate 695 headed towards Glen Burnie. At 4:35 A.M., Sergeant Pierce notified the responding officers that the vehicle was parked in the parking lot of the Chesapeake Square Shopping Center. Officers arrived to find the vehicle backed into a parking spot in front of the Casual Male clothing store at 6710 Ritchie Highway in Glen Burnie in Anne Arundel County. One of the detectives noticed that the front door of the business had been smashed out and observed the suspect enter the store with an empty plastic bag and exit the store with a full bag of clothing. Officers then approached the vehicle and the suspect quickly entered the vehicle and exited the parking lot at a high rate of speed.

The suspect led officers on a high-speed chase and eventually eluded them. Sergeant Pierce utilized the GPS tracker to locate the vehicle parked in the alley between Wesley Avenue and Bellview Avenue. The driver had fled the scene prior to the officers' arrival and the vehicle was towed to the Howard County Police

Department Northern District. Search and seizure warrants were prepared for both of Mr. Kelly's suspected residences and for the vehicle as well as the pawn shops that he had visited. Mr. Kelly was taken into custody at 2:00 P.M. after leaving one of the residences.

4. Petitioner was indicted in both Howard and Anne Arundel counties and moved to suppress any and all evidence obtained as the result of the warrantless placement and use of the GPS device on the car he was driving in both cases. Both lower courts denied the motions. Judge Pamela L. North, presiding in Anne Arundel County, denied the motion due to the lack of legal authority prohibiting the officer's actions in placing the GPS unit on the car. (App. 94). Judge Timothy J. McCrone, presiding in Howard County, relied on *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) and *Stone v. State*, 178 Md. App. 428, 941 A.2d 1238 (2008)[1], in holding that Petitioner had no reasonable expectation of privacy in his location as he traveled on public roads and that the installation of the GPS device was not itself a search. (App. 81).

5. On December 1, 2010, in the Circuit Court for Howard County, Judge McCrone presiding, a jury convicted Petitioner of theft and acquitted him of burglary in the second degree. Judge McCrone

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[1] In *Stone v. State*, 178 Md. App. 428, 444, 941 A.2d 1238 (2008), an intermediate appellate court had occasion to discuss the use of GPS and cellular phone devices when the defendant contended that the lower court had abused its discretion by limiting the cross-examination of an officer concerning the use of such devices to locate the defendant and effectuate a stop.

sentenced Petitioner to ten years in the Division of Correction. On January 4, 2011, in a non-jury trial in the Circuit Court for Anne Arundel County, Judge William C. Mulford convicted Petitioner of burglary in the second degree and sentenced him to a concurrent ten years in the Division of Correction. Subsequently, the cases were consolidated for the purposes of briefing and argument on appeal.

6. On appeal, Petitioner argued that: (1) the placement and continuous tracking of the GPS device on Petitioner's vehicle constituted an unreasonable search and that all of the evidence discovered as a result of the illegal search should be suppressed and (2) that the good-faith exception to the exclusionary rule did not apply under the circumstances because no binding appellate precedent existed to authorize the detective's actions.

The Court of Special Appeals affirmed the judgments in a reported opinion filed on November 27, 2012, *Kelly v. State,* 208 Md. App. 218, 56 A.3d 523 (2012). The Court of Special Appeals agreed that the police officers' actions constituted a search but concluded that the good-faith exception to the exclusionary rule applied and that the trial courts did not err in denying the motions to suppress. (App. 63).

7. The Court of Appeals affirmed the decision of the lower court in *Kelly v. State*, 436 Md. 406 (2013). (App. 1). The Court of Appeals held that this Court's decision in *Knotts* was "binding appellate precedent" as defined by this Court in *Davis v. United States*, ____ U.S. _____, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011); that it authorized the police to install and utilize GPS tracking of Petitioner's vehicle on public roads; and

that detectives acted in objectively reasonable reliance on that authority when they conducted their GPS tracking of Petitioner's vehicle. *Id.* at 426. The Court of Appeals acknowledged that no Maryland appellate decision had held expressly that the attachment and use of a GPS tracking device was permissible under the Fourth Amendment, but held that police officers could have reasonably relied on *Knotts* in affixing the GPS tracking device to the vehicle of a person under their investigation for the purpose of conducting surveillance. *Id.* at 425-26.

REASONS FOR GRANTING THE WRIT

A. This Court's holdings in *Davis v. United States*, ____ U.S. ____, 131 S.Ct. 2419, 180 L.Ed. 2d 285 (2011) and *United States v. Jones*, 565 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) have raised numerous and persistent questions with respect to the proper application of the good-faith exception to the exclusionary rule where police use advanced technology not specifically authorized by binding appellate precedent.

On January 23, 2012, this Court issued its decision in *United States v. Jones*, 565 U.S. ___, 132 S.Ct. 945, 949, 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 meaning of the Fourth Amendment. Only six months earlier, in *Davis v. United States*, ____ U.S. ____, 131 S.Ct. 2419, 2434, 180 L.Ed. 2d 285 (2011), this Court held that the good-faith exception to the exclusionary rule applied when police conducted a search in

objectively reasonable reliance on "binding appellate precedent." At issue in *Davis* was the search incident to arrest of the occupants of a vehicle that included the passenger compartment of the vehicle. The search was unconstitutional under *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), but *Gant* was decided after the searches occurred. Existing Eleventh Circuit precedent prior to *Gant* explicitly held such searches to be constitutional under *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed 2d 768 (1981). The *Belton* rule was clear and unambiguous and the lower courts, including the Eleventh Circuit, had uniformly interpreted it as a bright-line rule that searches of the interior of the car were per se permissible incident to the arrest of the occupant. Where it was undisputed that the prior case law authorized the police action, this Court held application of the exclusionary rule would not be appropriate "when binding appellate precedent *specifically authorizes* a particular police practice," and the police conduct a search in "objectively reasonable reliance" on that precedent. *Davis,*131 S.Ct. at 2429. But the language in *Davis* was conspicuously specific and very narrow. In discussing whether the police were culpable, the majority in *Davis* noted that the "officers' conduct was in strict compliance with then-binding Circuit law." *Id*. at 2428-29. The opinion repeatedly referenced "binding" authority, *see, e.g., id*., at 2428, 2429, 2431, 2434; and made no reference to "persuasive" or "generally accepted" authority.

In her concurrence, Justice Sotomayor emphasized that the majority's holding was narrow, did not apply where the law was unsettled, and suggested that the exclusionary rule would still have deterrent value

where existing case law in the relevant jurisdiction was ambiguous:

> This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled. As we previously recognized in deciding whether to apply a Fourth Amendment holding retroactively, when police decide to conduct a search or seizure in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations….

Id. at 2435.

Justice Breyer noted in his dissent that "to apply the term 'binding appellate precedent' often requires resolution of complex questions of degree…[L]itigants will now have to create distinctions to show that previous Circuit precedent was not 'binding' lest they find relief foreclosed even if they win their constitutional claim." *Davis,* 131 S. Ct. at 2347 (Breyer, J., dissenting). Justice Breyer went on to predict the confusion that would be forthcoming. "Suppose an officer's conduct is consistent with the language of a Fourth Amendment rule that a court of appeals announced in a case with clearly distinguishable facts? Suppose the case creating the relevant precedent did not directly announce any general rule but involved highly analogous facts? What about a rule that all other jurisdictions, but not the defendant's jurisdiction, had previously accepted? What rules can be developed for determining when, where, and how these different

kinds of precedents do, or do not, count as relevant 'binding precedent?'" *Id*.

B. A split has developed among appellate courts at every level with respect to how the *Davis* good-faith exception should be applied to warrantless GPS placement and tracking pre-*Jones*.

As Justice Breyer predicted, the holding in *Davis* has prompted a surge in judicial decisions across the country regarding its application, post-*Jones*, to cases in which GPS monitoring began before *Jones* was decided. An analysis of the decisions reveals that there is no consensus as to how and when *Davis* should apply under these circumstances. Appellate courts at both the State and Federal levels are openly divided as to how to interpret this Court's holding in *Davis* with respect to "reasonable reliance on binding appellate precedent" and how to apply that holding to the police actions of warrantless placement and tracking of GPS devices on a suspect's private property. Some courts have held that law enforcement can rely on non-binding appellate precedent from other circuits. *See United States v. Baez*, 878 F. Supp. 2d 288 (D. Mass. 2012); *United States v. Leon*, 856 F. Supp. 2d 1188 (D. Haw. 2012). Others have held directly to the contrary, reading *Davis* to require actual binding appellate precedent specifically authorizing the challenged police practice in the jurisdiction's state or federal circuit court. *See United States v. Katzin*, 732 F.3d 187 (3d Cir. 2013), *vacated by, rehearing en banc, granted by United States v. Katzin*, 2013 U.S. App. LEXIS 24722 (3d Cir.

Dec. 12, 2013)[2]; *United States v. Lee*, 862 F. Supp. 2d 560 (E.D. Ky. May 22, 2012); *United States v. Ortiz*, 878 F. Supp. 2d 515 (E.D. Pa. July 20, 2012); *United States v. Lujan*, ____ F.3d ____, 2012 U.S. Dist. LEXIS 95804 (N.D. Miss. July 10, 2012); *State v. Henry*, 2012 Ohio 4748 (Ohio Ct. App., Montgomery County Oct. 12, 2012).

Still others, including the Maryland Court of Appeals in the case at bar, have held that this Court's holding in *Knotts*[3] can serve as "binding appellate precedent," such that law enforcement could rely solely on *Knotts*, in good faith, to carry out the placement and continuous tracking of a GPS device on a citizen's

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[2] Oral argument related to the en banc petition is now scheduled for May 28, 2014.

[3] In *Knotts*, a beeper was placed inside a container of chloroform and then sold to the defendant. The police followed the container as it was driven from Minnesota to Wisconsin. This Court employed a reasonable expectation of privacy analysis, see *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) to determine whether the officers' actions constituted a Fourth Amendment search and held that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. *Id.* at 281. It found that the beeper surveillance amounted principally to the following of an automobile on public streets and highways and it determined that such use should not be deemed a search for purposes of the Fourth Amendment. However, in response to the defendant's warning that the ruling would make possible "twenty-four hour surveillance of any citizen of this country…without judicial knowledge or supervision," this Court stated that "if such dragnet practices…should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 284.

private vehicle over an extended period of time. *See United States v. Aguiar*, 737 F.3d 251 (2d. Cir. 2013)[4]; *Kelly v. State*, 436 Md. 406 (2013). Such reasoning has in turn been rejected outright by a large contingent of state and federal courts. *See United States v. Sparks*, 711 F.3d 58, 65 (1st Cir. 2013) (*Knotts* "did not address the issue of a beeper's installation on the defendant's property."); *Katzin*, 732 F.3d at 207-208 ("*Davis* extends good faith protection only to acts that are explicitly sanctioned by clear and well-settled precedent, and neither *Knotts* nor *Karo*[5] sanction the type of intrusion [physical trespass] at issue in this

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[4] A *petition for writ of certiorari* was filed on May 12, 2014 in this case and presents the question: "Whether the good faith exception adopted by the Court in *United States v. Davis* applies to high-tech searches not previously sanctioned by binding appellate precedent." Petition for Writ of Certiorari, *Aguiar v. United States of America*, (May 12, 2014).

[5] In *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) agents from the Drug Enforcement Agency planted a beeper in a can of ether that was to be delivered to Mr. Karo with the consent of the seller of the shipment of ether. The monitoring of the beeper included monitoring in a private residence not open to visual surveillance. This Court addressed whether the installation of the beeper was a constitutional search and concluded that it was not because at the time of the installation of the beeper, the can belonged to the DEA and "by no stretch of the imagination" could it be said that the defendant had any legitimate expectation of privacy in it. *Id.* at 711. But, with respect to the monitoring of the beeper in a private residence, the Court held that the DEA engaged in an unreasonable search within the meaning of the Fourth Amendment where it surreptitiously employed an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. *Id.* at 715.

case."); *Lee*, 862 F. Supp. 2d 560, 571 (E.D. Ky. Mar. 22, 2012) (rejecting application of the good-faith exception where "*Jones* expressly distinguished [*Knotts*] because [it] did not involve a physical trespass."); *Ortiz*, 878 F. Supp. 2d 515, 541 (E.D. Pa. July 20, 2012) ("*Knotts* and *Karo* were decided almost twenty years before the investigation in this case, addressed different technology in a world that used technology very differently, and specifically stated that they did not reach the question of the constitutionality of installing a tracking device on a person's property to perform surveillance."); *State v. Mitchell*, 685 Ariz. Adv. Rep. 7, 27 (April 21, 2014) (*Knotts* does not meet the *Davis* test where it did not address the use of GPS technology nor the trespass issue).

Filling out the wide spectrum of opinions are those cases that subscribe to some combination of Supreme Court precedent and neighboring circuit consensus on the issue to provide the requisite "binding appellate precedent" or those excusing governmental conduct in the *absence* of any precedent prohibiting it. *United States v. Rose*, 914 F. Supp. 2d 15 (D. Mass., Sept. 14, 2012) ("in relying on the consensus of lower courts and a common-sense reading of Supreme Court doctrine, the agents here acted in good faith…"); *United States v. Figueroa-Cruz*, 914 F. Supp. 2d 1250, 1269 (N.D. Ala., 2012) ("The actual issue is whether the exclusionary rule is properly applied to the governmental conduct in the absence of any indication in this circuit that something more was required before a tracking device could be attached to a vehicle…"); *United States v. Lopez*, 951 F. Supp. 2d 657, 663 (D. Del. 2013).

In *United States v. Martin*, 712 F.3d 1080 (2013), the United States Court of Appeals for the Seventh Circuit held that *Davis* did not apply to the GPS tracking of the defendant's vehicle by Iowa police, located in the Eighth Circuit, before the defendant's arrest in Illinois, because the Eighth Circuit did not have binding appellate precedent expressly authorizing their actions at the time.

> On the limited remand, the district court concluded that pursuant to *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed. 2d 285 (2011), suppression was not warranted because of the "officer's good faith reliance on then-existing precedent." With respect, we find that to be an unwarranted expansion of the Supreme Court's decision in *Davis*, and not one that we should adopt in the present case. *Davis* expanded the good-faith rationale in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), only to a "search [conducted] in objectively reasonable reliance on *binding appellate precedent*," finding that this set of searches are not subject to the exclusionary rule. *See Davis*, 131 S. Ct. at 2434 (emphasis in original). As Justice Sotomayor pointed out in her opinion concurring in the judgment, *Davis* "d[id] not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled." The Supreme Court may decide to expand *Davis* in the coming years, but until it does so, we are bound to continue applying the traditional remedy of exclusion when the government seeks to introduce

> evidence that is the "fruit" of an unconstitutional search. We reject the government's invitation to allow police officers to rely on a diffuse notion of the weight of authority around the country, especially where the amorphous opinion turns out to be incorrect in the Supreme Court's eyes. Here, as Martin points out in his supplemental brief, there was no binding appellate precedent in the Eighth Circuit at the time that Iowa law enforcement officials attached the GPS to Martin's car.

Martin, 712 F.3d. at 1082. *See also United States v. Robinson,* 903 F. Supp. 2d 766, 783-84, (2012) (rejecting application of *Davis* good-faith exception and explicitly agreeing with "the *Ortiz* line of cases" that "the holding in *Davis* extends only to 'binding precedent.'")

In two of the most recent appellate decisions concerning the proper application of *Davis* under these circumstances, two state appellate courts have also explicitly rejected the notion that *Knotts* could somehow provide the "binding appellate precedent" needed to apply the *Davis* good-faith exception. In *State v. Sullivan*, 2014 Ohio 1443, 2014 Ohio App. LEXIS 1328 (Ohio Ct. App., Franklin County Apr. 3, 2014), the court rejected application of the *Davis* good-faith exception in the context of warrantless attachment and monitoring of a GPS device:

> First, neither *Knotts* nor *Karo* involved a physical trespass by the police onto the target vehicle; rather, in both cases, the police placed the beeper inside a container which was then loaded into the target vehicle by the driver (with

> the container owner's permission). Second, the relatively unsophisticated beeper technology at issue in *Knotts* and *Karo* is significantly different from the advanced technology utilized in GPS tracking devices.

Sullivan, 2014 Ohio 1443 at 73.

In *State v. Mitchell*, 685 Ariz. Adv. Rep. 7 (Ariz. Ct. App. Apr. 21, 2014), the court acknowledged the current split in authority regarding this issue and rejected any notion that *Knotts* alone could trigger application of the good-faith exception:

> Jurisdictions are divided on how apposite the authority must be in order for the good-faith exception to apply. In *Kelly v. State*, for example, the Maryland Court of Appeals concluded that *Knotts* was apposite authority for the purposes of the good-faith exception in a case involving the installation of a GPS device. (internal citations omitted).; *see also United States v. Aguiar*, 737 F.3d 251, 261-62, (2d Cir. 2013) (concluding that *Knotts*' de minimis treatment of the beeper's installation made the case sufficiently apposite on the trespass issue). On the other hand, in *United States v. Sparks*, although the First Circuit applied the good-faith exception to GPS installation and tracking, it did not consider *Knotts* sufficiently apposite on the installation issue. 711 F.3d 58, 63, 65 (1st Cir. 2013).

Mitchell, 685 Ariz. Adv. Rep. at 27-28. The *Mitchell* Court went on to conclude that *Knotts* was not sufficiently apposite on the trespass question and could

not trigger application of the good-faith exception. *Id.* at 29.

The United States Court of Appeals for the Second Circuit took the opposing view in *United States v. Aguiar*, 737 F.3d 251, 261-262 (2d Cir. 2013), holding that *Knotts* can serve as "binding appellate precedent":

> In the context of statutory interpretation, 'binding precedent' refers to the precedent of this Circuit and the Supreme Court. (internal citations omitted). 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….Moreover, we find the beeper technology used in *Knotts* sufficiently similar to the GPS technology deployed by the government here.

Aguiar, 737 F.3d at 261.

As further discussed below, the Maryland Court of Appeals followed suit.

C. Review of the present case is well suited to address the split of authority.

The facts of this case provide this Court with an ideal vehicle to clarify the meaning of the term "binding appellate precedent." As conceded by the Court of Appeals in its opinion, no governing law

existed in Maryland at the time of the search authorizing the specific police practice at issue here, placement and continuous tracking of GPS device on a person's private property. *Kelly*, 436 Md. at 426 ("Petitioner is correct that no Maryland appellate decision has held expressly that the attachment and use of a GPS tracking device is permissible under the Fourth Amendment."). Nonetheless, the Court of Appeals affirmed the lower court's decision based on *Knotts*. Its legal analysis cast *Knotts* in the role played so effectively by *Belton* in *Davis*. But the cases are not analogous in this context and *Knotts* cannot provide the shelter that *Belton* provided to pre-*Gant* automobile searches incident to arrest.[6] The reason, as espoused repeatedly by courts across the country, is very simple: *Knotts* did not address the legal issues presented in *Jones*. Not only did this Court *explicitly* leave the door open on the continuous and extended 24-hour surveillance that is the subject of this case and was the subject in *Jones*, but it did not address the constitutionality of the placement of the device. As discussed above, this Court explicitly acknowledged this fact in *Jones*:

> The Government contends that several of our post-*Katz* cases foreclose the conclusion that

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[6] See Caleb Mason, *New Police Surveillance Technologies and the Good-Faith Exception*, Nevada Law Journal (Vol. 13:60) (Fall 2012) ("In the GPS tracker scenario, there was no *Belton* ---No Supreme Court case expressly stating that warrantless, exception-less GPS tracking was permissible because it was not a search. There were five circuits with bright-line holdings that installation and monitoring was not a search. There were also three states with express holdings from their highest courts. That leaves six circuits and forty-seven states with no caselaw expressly on point.")

> what occurred here constituted a search. It relied principally on two cases in which we rejected Fourth Amendment challenges to "beepers," electronic tracking devices that represent another form of electronic monitoring. The first case, *Knotts*, upheld against Fourth Amendment challenge the use of a "beeper" that had been placed in a container of chloroform, allowing law enforcement to monitor the location of the container. We said that there had been no infringement of *Knotts*' reasonable expectation of privacy since the information obtained – the location of the automobile carrying the container on public roads, and the location of the off-loaded container in open fields near *Knotts*' cabin – had been voluntarily conveyed to the public. *But, as we have discussed, the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test. The holding in Knotts addressed only the former, since the latter was not at issue. The beeper had been placed in the container before it came into Knott's possession with the consent of the then-owner. Knotts did not challenge the installation, and we specifically declined to consider its effect on the Fourth Amendment analysis*.

Jones, 132 S. Ct. 951-52. (emphasis added).

In his concurrence, Justice Alito applied the more traditional *Katz*[7] analysis and specifically distinguished *Knotts* as applicable only to short-term monitoring:

> The best we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.
>
> *Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. See Knotts, 460 U.S., at 281-282, 103 S.Ct. 1081, 75 L. Ed. 2d 55. But the use of longer term GPS monitoring investigations of most offenses impinges on expectations of privacy.* For such offenses, society's expectation has been that law enforcement agents and others would not - - and indeed, in the main, simply could not monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark. Other cases may present more difficult questions. *But where uncertainty exists with respect to whether a certain period of GPS*

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[7] *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

> *surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant.*

Jones, 132 S.Ct. at 964. (emphasis added).

While the members of this Court could not agree as to *why* the government's actions constituted a search, the Court was unanimous in its opinion that *Knotts* did not address circumstances where officers directly place a GPS device on private property and monitor that device over an extended period of time. The government specifically advanced the argument that *Knotts* controlled the facts in *Jones*, and this Court unanimously rejected it. Consequently, to hold, as the Maryland Court of Appeals did, that *Knotts* could somehow qualify as "binding appellate precedent" under *Davis*, as a case that "specifically authorized" the police practice in question in *Jones,* completely contradicts one of the only points of unanimity in the *Jones* opinions. See Mason, Caleb, *New Police Surveillance Technologies and the Good Faith Exception*, *supra* at 78 (It would be "unlikely" that *Knotts* and *Karo* would be considered binding precedent for installation and monitoring of a GPS device after the "emphatic" holding in *Jones*.)

CONCLUSION

The law of good-faith can be traced from good-faith reliance on a defective warrant issued by a magistrate judge, *United States v. Leon*, 486 U.S. 897, 906; 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) to good-faith reliance on subsequently invalidated statutes, *Illinois v. Krull*, 480 U.S. 340, 349-50, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); to good-faith reliance on inaccurate court

records, *Arizona v. Evans*, 514 U.S. 1, 14, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995); and finally to good-faith reliance on erroneous records in a police database of outstanding warrants. *Herring v. United States*, 555 U.S. 135, 145, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). In each of those instances, the application of the exclusionary rule has no real deterrent value because the errant conduct was that of the judge, the legislature, the court staff, or those charged with maintaining a database, not with the officers who reasonably relied on that information in executing a search. The same cannot be said where law enforcement officers erroneously determine that case law that is neither binding nor directly on point is sufficient to authorize conduct later determined to violate the Fourth Amendment. This is why this Court so carefully chose its language in *Davis*, allowing application of the good-faith exception only where binding appellate precedent "specifically authorize[d] a particular police practice." *Davis*, 131 S.Ct. at 2429.

A police officer's role is law enforcement, not legal interpretation, and a broad reading of *Davis*, such as the one adopted by the Maryland Court of Appeals in this case, encourages officers to push the limits of established constitutional boundaries where the status of the law is unclear. Under these circumstances, the exclusionary rule retains its deterrent value in protecting constitutional freedoms from police overreaching. The Eleventh Circuit in *Davis*, affirmed by this Court, was particularly wary of this danger when it stressed the importance of clear and unambiguous precedent:

> We stress, however, that our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation. We have not forgotten the importance of the "incentive to err on the side of constitutional behavior," and we do not mean to encourage police to adopt a "let's-wait-until-it's-decided approach" to "unsettled" questions of Fourth Amendment law.

United States v. Davis, 598 F.3d 1259, 1266 (11th Cir. 2010).

In short, the fears articulated by Justice Breyer in his dissent in *Davis* concerning its susceptibility to divergent interpretations and the use of the majority opinion to undermine the exclusionary rule have been realized. *See Davis*, 131 S.Ct. at 2436-2440. Courts across the country are split as to how to properly apply *Davis* and, at this point, it is clear that guidance from this Court concerning the correct interpretation and application of the good-faith exception created in *Davis* is necessary.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 26

September Term, 2013

[Filed December 23, 2013]

WESLEY TORRANCE KELLY	)
	)
v.	)
	)
STATE OF MARYLAND	)
	)

Barbera, C.J.,
Harrell
Battaglia
Greene
Adkins
McDonald
Raker, Irma S. (Retired, Specially Assigned), JJ.

Opinion by Barbera, C.J.

For eleven days in April 2010, police conducted tracking of Petitioner Wesley Torrance Kelly's vehicle, using a global positioning system ("GPS") device attached to the vehicle's exterior. As a result of that GPS tracking, officers made observations and collected information they used to obtain warrants to search Petitioner's home, a separate residence in downtown

Baltimore, Petitioner's vehicle, and three pawn shops. The State sought to use evidence obtained during execution of the warrants in separate prosecutions of Petitioner for charges arising out of burglaries that occurred in Howard County and Anne Arundel County.

Petitioner filed pretrial motions in both the Howard County and the Anne Arundel County Circuit Courts to suppress all evidence obtained as the result of what the officers learned through their tracking of his vehicle, including evidence obtained pursuant to the execution of the search warrants. Petitioner argued that the tracking of his vehicle's movements, as well as the initial placement of the tracking device, violated the Fourth Amendment, thereby requiring suppression of all evidence resulting directly, or derived, from the tracking. In both cases, the motions were denied. Petitioner was convicted of various charges arising out of the two cases. He appealed both judgments of conviction.

During the pendency of the appeal of those convictions in the Court of Special Appeals, the Supreme Court of the United States decided the case of *United States v. Jones*. 132 S. Ct. 945 (2012). In a decision that many believed to be a break from the longstanding test for determining when police conduct is deemed a "search" for Fourth Amendment purposes,[1]

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[1] For the 45 years preceding *Jones*, the reasonable expectation of privacy test, enunciated in Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 360 (1967), was the predominant analysis courts employed when considering whether a search had taken place under the Fourth Amendment. In *Katz*, the Court "enlarged its then prevailing focus on property rights by announcing that the reach of the Fourth Amendment does not

the Supreme Court held in *Jones* 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'" under the Fourth Amendment. 132 S. Ct. at 949.

The Court of Special Appeals consolidated the appeals and, in a reported opinion, *Kelly v. State*, 208 Md. App. 218 (2012), affirmed both judgments of conviction. The Court recognized that the GPS tracking of Petitioner's vehicle fell within the purview of the new law announced in *Jones* and, pursuant to the holding of that case, was a search conducted in violation of the Fourth Amendment. *Kelly*, 208 Md. App. at 243. The Court of Special Appeals reasoned that then-applicable law in Maryland, namely *United States v. Knotts*, 460 U.S. 276 (1983), permitted the tracking of a vehicle on the public streets.[2] *Kelly*, 208 Md. App. at 248. From that legal premise, the Court of Special Appeals further reasoned that, under *Davis v.*

'turn upon the presence or absence of a physical intrusion.'" *Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J. concurring). Justice Scalia's opinion for the Court in *Jones* revived that common-law trespassory test, which, he explained, was augmented, not displaced, by the reasonable expectation of privacy test. 132 S. Ct. at 952.

[2] As we shall see, the Supreme Court held in *Knotts* that police monitoring of a signal put out by a beeper, which the police lawfully had placed on a container transported on the public streets, was neither a search nor a seizure within the contemplation of the Fourth Amendment, because such monitoring did not invade any legitimate expectation of privacy the respondent had in the movement of the vehicle on the public streets. 460 U.S. at 285.

United States, 131 S. Ct. 2419, 2423-24 (2011), in which the Supreme Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule," Petitioner was not entitled to suppression of the evidence obtained as the result of that unlawful search. *Kelly*, 208 Md. App. at 248.

For the reasons that follow, we affirm the judgment of the Court of Special Appeals.

I.

The following facts were adduced at the separate suppression hearings held in the Howard County and Anne Arundel County cases.[3]

Suspecting Petitioner's involvement in a series of commercial burglaries, officers of the Howard County Police Department Property Crimes Section requested that officers of the Repeat Offender Proactive Enforcement ("ROPE") Section assist in conducting surveillance of Petitioner. In response to this request, the ROPE Section began conducting covert visual surveillance of Petitioner. Additionally, on April 2, 2010, Sergeant Duane Pierce attached a GPS tracking device to Petitioner's Chevrolet Trailblazer, which at the time was parked down the road from Petitioner's home at 1118 Harwall Road, a public street in Baltimore County.

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[3] In material respect, the evidence adduced at each of these hearings was identical.

Sergeant Pierce explained the mechanics of the GPS tracking device the ROPE Section used. He described the GPS tracker as

> an electronic device that is much like an everyday cell phone, it has a cell phone component and it also has a GPS component in it, and those two devices communicate with both satellites and the cellular portion to determine where that unit is and it will give you a latitude and longitude [of] . . . where that unit is currently at.

Sergeant Pierce referred to the device as "self-contained," meaning that it is powered by a battery and does not in any way interfere with the operation of the vehicle. The device is attached to the frame of a vehicle by magnets. It is activated prior to installation and, once activated, stores location data to its own internal memory.

Officers may access this historical data and may also activate what Sergeant Pierce referred to as "live-tracking," which displays the tracker's location in real time.[4] As "livetracking" drains the device's battery more rapidly than regular operation, Sergeant Pierce testified that he only activated this mode when officers needed Petitioner's close-to-present location. The tracking device may be programmed to send alerts to a designated cell phone. Sergeant Pierce explained that he initially programmed the device to send an alert to his cell phone whenever Petitioner's vehicle approached

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[4] Sergeant Pierce clarified that the tracking device displays its location on a two- to five-second delay.

Howard County.[5] Later, he re-programmed the device to send an alert to his cell phone whenever Petitioner's vehicle went into motion. From the time of its installation on April 2 until April 5, 2010, the tracking device recorded to its internal memory the locations of Petitioner's vehicle. During that period, detectives did not access that historical data nor did they engage in "live-tracking."

On April 5, 2010, at approximately 4:00 a.m., the GPS tracking device notified Sergeant Pierce that Petitioner's vehicle had entered Howard County. Sergeant Pierce dispatched the ROPE detectives to the approximate location of Petitioner's vehicle and activated "live-tracking" to update them on the vehicle's movements. Advised that the vehicle was in the area of Riverwood Drive and Old Columbia Road, Detective James Laffin was the first officer to catch sight of the vehicle. Detective Laffin did not follow the vehicle; instead, he stopped to check the businesses in the area for signs of burglary. The other responding officers followed Petitioner's vehicle until it entered Montgomery County. Detective Darshan Luckey observed that a man matching Petitioner's description was driving the vehicle.

At the site of Advanced Programs, Inc. ("API"), 7125 Riverwood Road in Columbia, Detective Laffin noted that the building's entrance appeared to be "unsecured," with pry marks and damage to the door. He called for officers to respond and investigate the

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[5] Sergeant Pierce clarified that the tracking device has the capability to recognize a box approximating the shape of the county, not the precise boundaries of the jurisdiction.

apparent burglary. Detective Matthew Mergenthaler met with an employee of API and obtained a list, with serial numbers, of all inventory that was missing from the building. That list included two Hewlett Packard printers, two computer monitors, and four boxes containing hard drives, keyboards, and computer mouses.

Detectives had to use the GPS device to re-locate the vehicle later that morning. They learned that the vehicle was parked in the parking lot of Carroll Manor Elementary School, which Detectives Luckey and Laffin observed upon arrival to be a construction site where Petitioner was working. Two hours after their arrival, the detectives approached the vehicle to see what was inside of it. Detective Luckey observed "several large boxes" in the back and a Hewlett Packard printer manual on the front passenger seat. Shortly thereafter, the detectives observed Petitioner approach the vehicle. He removed a box from the vehicle, placed "an object that appeared to be a computer monitor" in the box, and replaced the box in the vehicle. He then sat in the vehicle driver's seat for 20 minutes before returning to work.

In the afternoon, Petitioner left the school construction site in his vehicle, and the officers followed. They followed him first to his home on Harwall Road. They then followed him to a residence on Saratoga Street in Baltimore City, which he entered with a key.[6] He came out of that residence carrying two "computer boxes," which he placed in his vehicle. The officers next followed him to the intersection of

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[6] That location was, apparently, Petitioner's brother's residence.

Hollins and Stockton Streets in Baltimore City, where they observed him exit his vehicle to speak for a few moments with a group of people.

The officers then followed Petitioner to the Gold Trading Center Pawn Shop in Baltimore City. They observed him park in front of the shop, remove a "big box" from his vehicle, and enter the shop. They observed him walk between the shop and the vehicle two times, carrying boxes of different sizes back and forth. Officers next followed Petitioner to Shine Corner, Inc., another pawn shop in Baltimore City. They observed him enter the shop carrying three "large . . . boxes." When he emerged from the shop, the officers followed Petitioner back to the Saratoga Street residence. They observed him carry "two large Hewlett Packard computer boxes, one small box that was open on the top and one long skinny type of box" inside the residence. The officers next followed him to the Edmondson Village Pawn Shop in Baltimore City. They observed Petitioner enter the shop carrying "paperwork." When he emerged from the shop, the officers followed Petitioner back to his home on Harwall Road, then terminated visual surveillance for the day.

On April 6, 2010, at approximately 4:30 a.m., the GPS tracking device notified Sergeant Pierce that Petitioner's vehicle was moving. Sergeant Pierce informed ROPE Section detectives that Petitioner's vehicle was traveling on Interstate 170 toward Howard County, and the officers caught up to the vehicle, which they followed to the Westview Promenade Shopping Center in Frederick. Detective Luckey observed Petitioner walking around one of the buildings,

carrying a plastic bag. Detective Laffin exited his vehicle to follow Petitioner on foot, but when Petitioner saw the detective he returned to his vehicle and drove away.

The detectives followed Petitioner to a commercial business park on Pegasus Court in Frederick, where they observed him stop his vehicle outside multiple closed businesses. Detective Laffin observed Petitioner walk from one of the buildings to his vehicle and drive away. Detectives Luckey and Kuczynski followed Petitioner while Detectives David Abuelhawa and Laffin stayed behind to check businesses for signs of burglary. Noting two attempted break-ins, they called the Frederick County Sheriff's Department to investigate.

Sergeant Pierce testified that, between April 6 and 12, 2010, detectives may have checked the voltage on the tracking device to ensure that the device's battery was not drained, but they did not access historical data nor activate "live-tracking" for the purpose of locating Petitioner. On April 12, 2010, at approximately 4:12 a.m., the GPS tracking device notified Sergeant Pierce that Petitioner's vehicle was moving. He informed the detectives that the vehicle was traveling on Interstate 695 toward Glen Burnie, and they attempted to catch up to the vehicle. Sergeant Pierce informed the detectives that the vehicle was located in the parking lot of the Chesapeake Square Shopping Center, and the detectives proceeded to the shopping center parking lot, where they observed the vehicle parked in front of the Casual Male XL store. Detective Abuelhawa exited his vehicle to follow Petitioner on foot. In doing so, Detective Abuelhawa noted that the front door to the

Casual Male XL store had been "smashed out" and observed Petitioner enter the store with an empty plastic bag and exit the store with the bag full of clothing.

Detective Abuelhawa instructed the other detectives in the parking lot to "do a vehicle take down." The other detectives pulled their vehicles beside Petitioner's, but he quickly got into his vehicle and drove off. Observing that the rear hatch of Petitioner's vehicle was open and that neither headlights nor taillights were illuminated, Detective Luckey attempted to stop Petitioner's vehicle, but Petitioner's vehicle sped up in response. The ROPE Section detectives pursued the vehicle from Ritchie Highway into Baltimore City. When the officers lost sight of Petitioner's vehicle, Sergeant Pierce informed them of its location using GPS, twice, before the officers found the vehicle, abandoned, in an alley.

Property Crimes Section detectives prepared search warrant applications for Petitioner's home, the Saratoga Street residence, Petitioner's vehicle, and the three pawn shops. ROPE Section officers conducted visual surveillance of Petitioner's home while Warrant Section officers conducted visual surveillance of the Saratoga Street residence. Warrant Section officers took Petitioner into custody that afternoon as he left the Saratoga Street residence.

Upon execution of the warrants, officers recovered from Petitioner's vehicle a shirt from Casual Male XL. From Gold Trading Center, officers seized a Hewlett Packard printer and a computer monitor. From the Saratoga Street residence, officers seized computer units. The serial numbers of these items matched the

serial numbers of the items API reported as missing to Detective Mergenthaler.[7]

Petitioner was charged in the Circuit Court for Howard County with second-degree burglary, theft, and malicious destruction of property in connection with the burglary of Advanced Programs and in the Circuit Court for Anne Arundel County with second-degree burglary, theft, and malicious destruction of property in connection with the Casual Male XL burglary. In both cases, he filed motions to suppress all evidence obtained as the result of the GPS tracking.

The Anne Arundel County Proceedings

On October 15, 2010, the Circuit Court for Anne Arundel County held a hearing on Petitioner's motion to suppress. Counsel for Petitioner argued that the officers' act of installing the GPS device on the exterior of Petitioner's vehicle itself amounted to a search. Further, he argued, officers' subsequent tracking of the vehicle using the device was also a search. Although "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," *Knotts*, 460 U.S. at 281, Petitioner's counsel argued that the "cumulative effect" of observing public movements over the long term is "greater than the parts." He argued that the GPS tracking was so "intertwined" with the visual surveillance that Petitioner was entitled not only to suppression of any GPS data the State might seek to

[7] All items that the officers seized from Petitioner's residence were merely "indicia of occupancy." They recovered nothing from the Edmondson Village Pawn Shop or Shine Corner, Inc.

introduce, but also the observations the detectives made as a result of their use of the GPS technology, as well as the evidence seized pursuant to the six search warrants. The Circuit Court denied the motion to suppress, explaining its ruling:

> I just need something. I need some case, some law, something that says it would be illegal for the police under these circumstances to put the GPS unit on the truck. And I feel like without that I can't take any next step toward the conclusion that you want to reach, although I certainly sympathize with your situation. It seems like just sort of as an average person would really be—feel that that's [a] personal [affront] you might say to have something placed on the car without their knowledge and for someone to be aware of their movements in society seems, you know, a little suspect, but without having any law to say that that's the case, and my understanding is there is no warrant requirement for the GPS, so if there's no warrant requirement and they didn't have a warrant I don't see a problem under current law . . . .

On January 4, 2011, Petitioner pled not guilty to second-degree burglary but waived his right to a jury trial and was convicted on an agreed upon statement of facts. The Circuit Court sentenced Petitioner to ten years' incarceration.

The Howard County Proceedings

On November 19, 2010, the Circuit Court for Howard County held a hearing on Petitioner's motion

to suppress. The State argued that Petitioner had no reasonable expectation of privacy in his movements on public streets and that the "addition of technology to assist" officers in their observations of those movements was insignificant to the analysis; thus, there had been no search. Counsel for Petitioner[8] acknowledged the clear holding of *Knotts*, but she contended that the expectation of privacy "changes" depending upon the duration of the surveillance; a person would not, she asserted, "expect the public . . . to notice [his] movements" for that long a period, "to put together the evidence of the behavior, the patterns, the habits." Thus, counsel argued, officers' long-term surveillance amounted to a search, and Petitioner was entitled to "suppression of all items and all information received as a result of the use of" the GPS technology. The Circuit Court denied the motion to suppress, explaining its ruling:

> I believe that the *Stone* [*v. State*, 178 Md. App. 428 (2008),] case is the Maryland case that's on point and that is supported by *U.S. v. Knotts*, for the proposition that the first question is, is there a reasonable expectation of privacy that society is prepared to recognize under the *Katz* test. And *Stone* stands for the proposition that a person traveling in an automobile on a public thoroughfare has no reasonable expectation of privacy in his movements from one place to another. And that by driving on the public roads one voluntarily conveys, to anyone wishing to look, his progress and his route and therefore

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[8] Petitioner was represented by different attorneys in the two cases.

> there's no reasonable expectation of privacy and therefore there's no Fourth Amendment implications. It is not a search under the Fourth Amendment to install this device magnetically to the bottom frame of the automobile.

On December 1, 2010, after a two-day trial, Petitioner was convicted by a jury of theft. The Circuit Court sentenced him to ten years' incarceration.

The Appeal

Petitioner appealed his convictions to the Court of Special Appeals, where the cases were consolidated for the purpose of appeal. Relying on the good-faith exception to the exclusionary rule announced in *Davis*, 131 S. Ct. at 2423-24 ("searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule"), the Court of Special Appeals affirmed the suppression courts' rulings. *Kelly*, 208 Md. App. at 248. Our brethren on the intermediate appellate court, relying on *Davis* and a decision of this Court applying *Davis*, *Briscoe v. State*, 422 Md. 384 (2011), concluded that officers could reasonably rely on "the rationale of *Knotts*, *i.e.*, that the owners of vehicles did not have a reasonable expectation of privacy in their movement on a public highway," to authorize warrantless GPS tracking. *Kelly*, 208 Md. App. at 248.

We granted a petition for a writ of certiorari to answer the following questions, as Petitioner has posed them:

1. Did the trial courts err in denying Petitioner's motions to suppress evidence obtained as a result of the warrantless

placement and subsequent tracking of a global positioning system ("GPS") device on Petitioner's vehicle over a period of 11 days?

2. Did the Court of Special Appeals incorrectly interpret and apply the Supreme Court's holding in *Davis v. United States*, ___ U.S. ___, 131 S. Ct. 2419, 180 L.Ed.2d 285 (2011) and this Court's holding in *Briscoe v. State*, 422 Md. 384, 30 A.3d 870 (2011), when it held that the good faith exception to the exclusionary rule applied to the circumstances in the case at bar where no "binding appellate precedent" existed that authorized the placement and continuous tracking of a GPS device for the purposes of establishing probable cause to arrest?

II.

In reviewing the rulings of the suppression courts, we rely solely upon the record developed at the suppression hearings. *Lee v. State*, 418 Md. 136, 148 (2011). We view the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion, here, the State. *Id.* We defer to the factual findings of the suppression courts, "and uphold them unless they are shown to be clearly erroneous." *Id.* (quoting *State v. Luckett*, 413 Md. 360, 375 n.3 (2010)). We, however, make an independent appraisal of the constitutionality of a search, "by reviewing the relevant law and applying it to the facts and circumstances of this case." *Lee*, 418 Md. at 148-49 (quoting *Luckett*, 413 Md. at 375 n.3).

The Fourth Amendment, applied to the states through the Fourteenth Amendment, protects against unreasonable searches and seizures. *See, e.g., Lewis v. State*, 398 Md. 349, 360-61 (2007) (citations omitted). Searches conducted without a warrant are presumptively unreasonable. *Henderson v. State*, 416 Md. 125, 148 (2010). The remedy for an unlawful search is the suppression of evidence obtained as a result of that search. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). This remedy is known as the "exclusionary rule."

Courts, however, do not redress every Fourth Amendment violation by applying the exclusionary rule. *United States v. Calandra*, 414 U.S. 338, 348 (1974). This is because the text of the Fourth Amendment does not provide for the suppression of evidence. *Davis*, 131 S. Ct. at 2426; *Arizona v. Evans*, 514 U.S. 1, 10 (1995). Suppression is not an individual right, but rather a judicial creation with the express purpose of deterring future misconduct on the part of law enforcement officers. *Herring v. United States*, 555 U.S. 135, 139-40, 141 (2009). Accordingly, courts will not suppress evidence where law enforcement officers act with a reasonable good-faith belief that their conduct is lawful. *United States v. Leon*, 468 U.S. 897, 909 (1984). This principle is known as the "good-faith exception" to the exclusionary rule. The good-faith exception applies to a variety of situations. *See, e.g., Arizona v. Evans*, 514 U.S. at 4, 14 (applying the good-faith exception to evidence seized pursuant to an arrest effected in reliance on outdated computer record of warrant where incorrect information resulted from clerical error on the part of court employee*); see also Herring*, 555 U.S. at 140, 144 (extending application of

the *Evans* exception to error on the part of police employee); *Illinois v. Krull*, 480 U.S. 340, 343, 345, 349 (1987) (applying the exception to evidence seized in search conducted in good-faith reliance on a statute authorizing warrantless administrative searches, later found unconstitutional).

If, as occurred during the pendency of the appeal in the present case, the Supreme Court announces a new rule of criminal procedure, then that new rule applies "to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Thus, absent application of the good-faith exception to the exclusionary rule, criminal defendants are permitted, on appeal, to "invoke . . . newly announced rule[s] of substantive Fourth Amendment law as a basis for seeking relief." *Davis*, 131 S. Ct. at 2431. The Supreme Court has made plain by its holding in *Davis* that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 131 S. Ct. at 2423-24. *See also Briscoe*, 422 Md. 384, 391 (applying *Davis*).

The State does not disagree with Petitioner that, by operation of the Supreme Court's recent *Jones* decision, the warrantless tracking of Petitioner's vehicle violated the Fourth Amendment. Petitioner and the State part company, however, over the question of whether suppression of the fruits of that tracking is required; in other words, whether, as in *Davis* and *Briscoe*, the officers who conducted the GPS tracking of Petitioner's vehicle reasonably relied on then-binding precedent in Maryland.

Petitioner argues that the *Davis* good-faith rule does not apply in this case because, here, unlike in

Briscoe, there is no binding, pre-*Jones* precedent in Maryland permitting warrantless tracking of public vehicular travel. The State counters that the *Davis* good-faith exception does apply, because binding precedent in Maryland at the time of the search, namely *Stone*, 178 Md. App. 428, specifically authorized the GPS tracking conducted in the present case. For reasons we shall explain, we agree with the State that there was binding appellate precedent in Maryland authorizing GPS tracking at the time officers installed the device on Petitioner's vehicle, but we find that authority in the Supreme Court's *Knotts* case, on which the Court of Special Appeals relied in *Stone*.

III.

We accept at the outset of our analysis the State's concession that, under *Jones*, the Howard County detectives' attachment and use of the GPS device in this case is a search under the Fourth Amendment. *Jones*, 132 S. Ct. 945, 949 ("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'"). By retrospective application of *Jones*, therefore, the tracking of Petitioner's vehicle without a proper warrant violated the Fourth Amendment. Our task is to examine Maryland law pre-*Jones* to determine whether there was binding appellate precedent in Maryland authorizing the officers to attach the GPS device to Petitioner's vehicle and track the vehicle with this technology without a warrant. If so, then, under *Davis*

and *Briscoe*, the evidence obtained as a result of this tracking is not subject to the exclusionary rule.[9]

The parties' dispute focuses upon what may serve as "binding appellate precedent," as the term was used in *Davis*. In *Briscoe*, we drew the following rule from *Davis*: "operation of the exclusionary rule is suspended only when the evidence seized was the result of a search that, when conducted, was a 'police practice' specifically authorized by the jurisdiction's precedent in which the officer operates." 422 Md. at 406. Petitioner considers this Court to have adopted a "narrow" interpretation of *Davis* by making this statement in *Briscoe*.

For support of that contention, Petitioner seizes upon the phrase "specifically authorized" and argues that this language requires the precedent on which officers rely to approve precisely the action they wish to take, and the technology they plan to use, for the search to fall under the ambit of *Davis*. Petitioner further maintains that a "broad" interpretation of *Davis* would encourage law enforcement officers to "push the limits of established constitutional boundaries where the status of the law is unclear." Petitioner points to Justice Sotomayor's concurring opinion in *Davis*, in which she cautioned against applying the *Davis* good-faith exception in cases where

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[9] The State argues that, in the event this Court holds that the *Davis* good-faith exception does not apply in this case, suppression is still inappropriate because "the evidence admitted against [Petitioner] was sufficiently attenuated from an unlawful use of the GPS device." *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). In light of our conclusion on the question of the applicability of *Davis*, we need not address this argument.

officers rely on unsettled law. 131 S. Ct. at 2435. He also cites cases in which courts have rejected *Davis* arguments where there was an absence of precedent on the specific practice of GPS tracking, *e.g., United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013), or where law enforcement officers relied on "persuasive or well-reasoned precedent, . . . a growing trend in decisions, or . . . situations in which a plurality, majority, or even overwhelming majority of circuits agree," *United States v. Ortiz*, 878 F.Supp.2d 515, 539 (E.D. Pa. 2012).

As it is the State's position that there does exist binding appellate authority in Maryland particularly allowing the use of GPS tracking, the State does not devote much of its argument to delineating the bounds of the Supreme Court's holding in *Davis*. The State argues, however, that adopting Petitioner's interpretation of *Davis* would undermine the purpose of the good-faith exception to the exclusionary rule by "requir[ing] too much of officers in the field" who should not be expected to concern themselves with "byzantine nuances of Fourth Amendment doctrine."

The State has the better part of the argument. We did not adopt in *Briscoe* a more narrow rule than that undergirding the *Davis* decision itself—the police practice at issue must have been specifically authorized by the jurisdiction's precedent. Maryland courts, of course, must and do follow the precedent established by the caselaw of the United States Supreme Court, in resolving Fourth Amendment claims. At the time of the search at issue in this case, *Knotts* provided the prevailing Fourth Amendment law, binding on Maryland, that allowed the use of a mechanical device,

attached to the exterior of a vehicle, to track that vehicle's movements in public.

In *Knotts*, the Court employed a reasonable expectation of privacy analysis, *see Katz v. United States*, 389 U.S. 347, 360 (1967), to determine whether officers had conducted a search under the Fourth Amendment, by attaching a beeper to a container of chloroform in order to track the vehicle in which the container had been placed. *Knotts*, 460 U.S. at 277, 281. The Court held that there had been no search under the Fourth Amendment, as "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281, 285. The Court continued, a person traveling on public streets "voluntarily convey[s] to anyone who want[s] to look the fact that he [is] traveling over particular roads in a particular direction, the fact of whatever stops he ma[kes], and the fact of his final destination when he exit[s] from public roads onto private property." *Id.* at 281-82.

No decision of this Court or the Court of Special Appeals, since the Supreme Court's issuance of *Knotts* and throughout the many years leading up to the Supreme Court's issuance of *Jones*, has limited the application of *Knotts* to the use of beepers, or, more recently, extended its application to the use of GPS devices, to track vehicular movements in public. Indeed, the Court of Special Appeals, in *Stone*, relied explicitly on *Knotts* in stating that police tracking of a vehicle's travels using GPS technology "could not be a Fourth Amendment violation." 178 Md. App. at 448.

Petitioner asserts that neither *Knotts* nor *Stone* can be read to authorize specifically the use of GPS tracking, as those cases did not address the constitutionality of the installation of the GPS tracking device or of "continuous tracking over an extended period of time to gather evidence of criminality." We agree with, and therefore adopt, as our answer to that concern, the Court of Special Appeals's statement that "binding precedent does not require that there be a prior appellate case directly on point, *i.e.*, factually the same as the police conduct in question." *Kelly*, 208 Md. App. at 248.

At the time of the search at issue in this case, without the benefit of *Jones*, we would have applied *Knotts*—which, as the Court of Special Appeals found in *Stone*, was at the time, and had been since 1983, Maryland law—to resolve the question of the constitutionality of GPS tracking of a vehicle on public roads. We can expect no more from law enforcement officers. Petitioner is correct that no Maryland appellate decision has held expressly that the attachment and use of a GPS tracking device is permissible under the Fourth Amendment. Nevertheless, just as the Court of Special Appeals applied *Knotts*, pre-*Jones*, when considering the relevance of testimony on the subject of GPS tracking of a vehicle on public streets in *Stone*, so too could police officers reasonably rely on *Knotts*, pre-*Jones*, in affixing a GPS tracking device to the vehicle of a person under their investigation for the purpose of conducting surveillance.

We therefore hold that, before *Jones*, binding appellate precedent in Maryland, namely *Knotts*,

authorized the GPS tracking of a vehicle on public roads. The Howard County detectives acted in objectively reasonable reliance on that authority when they conducted their GPS tracking of Petitioner's vehicle, and the *Davis* good-faith exception to the exclusionary rule applies. Petitioner is not entitled to the suppression of evidence. Consequently, we affirm the judgment of the Court of Special Appeals.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED; COSTS TO BE PAID BY PETITIONER.

APPENDIX B

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Nos. 2479 & 2679

September Term, 2010

[Filed November 27, 2012]

WESLEY TORRANCE KELLY)
)
v.)
)
STATE OF MARYLAND)
)

Woodward,
Watts,
Eyler, James R.
(Retired, specially assigned),

JJ.

Opinion by Eyler, James R., J.

This is an appeal by Wesley Torrance Kelly, appellant, from convictions in the Circuit Court for Howard County and the Circuit Court for Anne Arundel County. The cases were consolidated on appeal.

In Anne Arundel County, the court convicted appellant of burglary in the second degree, committed

on April 12, 2010, and sentenced him to ten-years' imprisonment. In Howard County, a jury convicted appellant of theft, committed on April 5, 2010, and the court sentenced him to ten-years' imprisonment.

In both cases, appellant contends the courts erred in denying his motions to suppress evidence allegedly obtained as a result of a Global Positioning System (GPS) device placed on his vehicle on April 2, 2010, by police officers without a warrant. On January 23, 2012, the Supreme Court decided United States v. Jones, 132 S. Ct. 945 (2012), holding that placement of a GPS device on a vehicle located on a public thoroughfare constitutes a search. Jones applies to the cases before us; nevertheless, based on the good faith exception to the exclusionary rule, we shall affirm the judgments.

Factual and Procedural Background

On December 1, 2010, appellant was convicted in Anne Arundel County. On January 4, 2011, appellant was convicted in Howard County. After appeal and briefing in this Court, the parties requested that the cases be stayed pending the Supreme Court's decision in Jones. This Court granted the request. After the Supreme Court's decision was issued on January 23, 2012, the parties filed new briefs.

The issue in both cases is the denial of a motion to suppress evidence. Consequently, the material evidence is that introduced at the hearings on the motions to suppress.

In summary, a series of commercial burglaries occurred in Howard County on February 22, 2010, February 24, 2010, March 2, 2010, March 29, 2010, April 5, 2010, and in Anne Arundel County on April 12,

2010. Howard County police officers began investigating the incidents on February 22, 2010. The first burglary was of a dental office from which, *inter alia*, a signed blank bank check was taken. On February 27, 2010, the check was cashed, with the name of a payee, Nicole Cromwell, and an amount having been added. After reviewing surveillance tape at the bank where the check was cashed, police officers identified Ms. Cromwell through a computer check. Police officers also learned from the tape that Ms. Cromwell had been dropped off at the bank by a green Chevrolet Trailblazer. On March 5, 2010, officers obtained an arrest warrant for Ms. Cromwell. On March 9, officers arrested Ms. Cromwell. She cooperated and identified a person named "Tony" as the person who gave her the check. She also provided a residence address for Tony, an apartment at 3706 W. Saratoga Street. Police officers conducted surveillance of that residence, noted the presence of the Trailblazer, conducted a computer check of the Trailblazer, and determined it was owned by appellant. Police officers obtained a photograph of appellant and showed it to Ms. Cromwell, who identified appellant as Tony, the person who gave her the check.

Subsequently, on April 2, 2010, police officers placed a GPS tracking device on the exterior of appellant's Trailblazer. The device was on the vehicle from April 2 through April 12. The device tracked and recorded movement of the vehicle, producing six hundred pages of data. Police officers did not monitor the device at all times but used it to locate appellant on at least three occasions. Based on the information obtained prior to placement of the device and additional information obtained after placement of the device, police officers,

on April 12, 2010, obtained search warrants for appellant's Trailblazer, two residences, and three pawn shops. A search of those locations produced incriminating evidence.

A more detailed recitation follows.

Anne Arundel County Suppression Hearing

On October 15, 2010, the Anne Arundel County circuit court held a hearing. Sergeant Duane Pierce, a detective with the Howard County Police Department, testified that, sometime prior to April 2, 2010, he became involved in the surveillance of appellant because appellant was a suspect in commercial burglaries. Sergeant Pierce determined that appellant lived at 1118 Harwall Road in Gwynn Oak. On April 2, 2010, Sergeant Pierce attached, with a magnet, a GPS device to the exterior of appellant's vehicle. At that time, the vehicle was located on a public street, parked near appellant's residence. Sergeant Pierce stated the device was basically "an ordinary cell phone" with GPS and cellular components. In addition to monitoring the signal from the GPS device, officers conducted visual surveillance of appellant's vehicle at various times, the first being on April 5. On April 12, Sergeant Pierce was monitoring the GPS device, and he was alerted that appellant's vehicle was moving. Sergeant Pierce directed units to the location of the vehicle as revealed by the device, which was the Chesapeake Square Shopping Center, on Ritchie Highway, south of the Interstate 695 Beltway.

Corporal David Abuelhawa, a detective with the Howard County Police Department, testified that he was involved in visual surveillance of appellant's

vehicle on April 5, 6, and 12. On April 12, after being alerted by Sergeant Pierce, Corporal Abuelhawa responded to the location of appellant's vehicle at Chesapeake Square Shopping Center. After observing appellant's vehicle parked in front of a clothing store, Corporal Abuelhawa called for back up. Corporal Abuelhawa observed appellant kick the glass out of the front door to the store, enter the store, and exit with a bag full of clothing. Appellant placed the bag in his vehicle. When a police officer approached appellant, appellant fled the scene.

Detective Matthew Mergenthaler, a detective with the Howard County Police Department, testified that on April 12, he obtained a search warrant for appellant's vehicle. The documents relating to the warrant were admitted into evidence.

Detective Mergenthaler included the following information in the affidavit in support of the request for a warrant. Detective Mergenthaler was assigned to investigate a series of commercial burglaries of medical offices and computer stores that had occurred from February 22, 2010 through April 5, 2010 in Howard County.

The burglary on February 22 was of a dental office. Among other things, a signed blank bank check was reported missing. Detective Mergenthaler determined that the stolen check had been made payable to Nicole Cromwell and cashed. A review of the bank's surveillance footage from the time of the transaction revealed a white female matching the description of Nicole Cromwell, as determined from a computer check with the Maryland Motor Vehicle Administration. The surveillance footage also revealed that the female had

been dropped off by someone driving a green Trailblazer.

On March 5, 2010, Detective Mergenthaler obtained an arrest warrant for Nicole Cromwell and, on March 9, arrested her. Ms. Cromwell stated that she had obtained the check from someone named "Tony" who drove the Trailblazer depicted in the surveillance tape and who resided at 3706 W. Saratoga Street. Detectives conducted surveillance of the residence and determined that the Trailblazer described by Ms. Cromwell was registered to appellant. They obtained a photo of appellant and showed it to Ms. Cromwell who identified him as Tony.

With respect to the April 5 burglary, when police officers arrived at the scene of the burglary, they noticed a Trailblazer in the area that matched, by appearance, appellant's vehicle. The scene of the burglary was a computer warehouse from which computer equipment had been taken. Shortly after the burglary, detectives located appellant, observed a printer manual on the front seat of his vehicle, and observed appellant place what appeared to be a computer monitor in a box. Detectives followed appellant while he visited three different trading stores or pawn shops, and in each instance, he entered with boxes and returned to his vehicle with boxes. They followed appellant to a residence at 3706 W. Saratoga Street, which he entered carrying boxes.

On April 12, while conducting visual surveillance of appellant in his Trailblazer, they followed him to a location on Ritchie Highway, the Chesapeake Square Shopping Center. The detectives observed appellant smash a window in a place of business, enter the

business, and return with clothing. When approached, appellant fled in his vehicle. The detectives pursued him. Appellant "bailed out" at some point, and the detectives recovered appellant's vehicle.

Defense counsel argued that all of the evidence had been obtained as a result of the illegal placement of the GPS device and should be suppressed. The court denied the motion.

Anne Arundel County Trial

Appellant and the State entered into a plea agreement. Appellant pled not guilty on an agreed statement of facts to burglary in the second degree in exchange for a *nolle pros* in another case and a sentence not to exceed ten years to run concurrently with any other sentence.

The agreed facts were as follows.

> That on April 12, 2010 beginning at approximately 4 a.m. detectives from the Howard County Police Department ROU [Repeat Offender] Unit as well as Property Crimes Section began surveillance of the Defendant with the aid of a GPS system attached to the Defendant's car. They also began visual surveillance of the Defendant.
>
> They followed the Defendant into Anne Arundel County and the Defendant proceeded to the Casual Male store which was at 6710 Governor Ritchie Highway Number G in Glen Burnie, Anne Arundel County, Maryland. That store is the property of Casual Male Retail Group, LLC.

At that time the detective set up surveillance and watched the Defendant from covert locations and at that point Detective Abuelhawa of the Howard County Police got out of his car and then proceeded to the Defendant's location on foot. The Defendant's car was parked in front of the Casual Male store with the hatch up. He was driving a Chevrolet Trail Blazer blue–sorry–green in color.

The Defendant was seen by Detective Abuelhawa [to] go into the back of his truck and retrieve a plastic bag. He then took that plastic bag over to the front of the store where Detective Abuelhawa observed that the glass window of the side of [the] front door had been smashed. The Defendant further smashed the glass using the plastic bag to cover his hand and then proceeded inside of the store without permission of owners or the manager, Andrew Zabka.

The Defendant went into the Casual Male, he then proceeded to load the plastic bag with several items of clothing, then left the store, went to this truck, and then put the bag of clothing inside of his truck.

At that point the Defendant had also dropped some of the items that he had taken from the store. Detective Abuelhawa identified himself as a police officer. The Defendant made eye contact with the detective [who] recognized the Defendant as Wesley Torrence Kelly who is seated at defense table next to counsel in blue. He recognized him from prior surveillance.

> He watched as the Defendant jumped into his vehicle and fled. The defendant led the police officers on a high speed chase. At some point Anne Arundel County got involved in the chase, and in fact at some point they lost sight of the Defendant.
>
> They knew that at some point the Defendant made a stop, I believe it was at Powder Mill Lane–Wesley Lane and Powder Mill Road. The Defendant proceeded into Baltimore City where he bailed out of the car and left the car. Detective Laffin of the Howard County Police actually recovered the car, secured it, and police towed it back to Howard County where they did in fact search the car and found a shirt belonging to the Casual Male with the tag still attached.
>
> They also found along the trail, the route the Defendant took, clothes belonging to the Casual Male store. Mr. Zabka would have testified the Defendant did not have permission to go into the store, nor was he an employee, he did not have permission to remove any of the clothing items that belonged to Casual Male.

Howard County Suppression Hearing

On November 19, 2010, Howard County held a hearing on appellant's motion to suppress. The court admitted into evidence the six search warrants obtained by Detective Mergenthaler on April 13, including the applications for warrants. In addition to appellant's vehicle, the warrants were directed at the apartment at 3706 W. Saratoga Street, the Gold

Trading Center, Shine Corner, the Edmondson Village Center Pawn Shop[1] and the residence at 1118 Harwall Road. The applications for warrants directed at residences and businesses contained essentially the same information as that contained in the application for a search warrant for appellant's vehicle.

Defense counsel argued that all evidence was obtained as a result of the illegal placement of the GPS unit and should be suppressed. After Sergeant Pierce and Detective Mergenthaler testified, the parties supplemented the evidence with a proffer of relevant facts.

We reproduce appellant's summary of the testimony and proffer, as set forth in his brief, deleting transcript references.

> The State proffered that a GPS tracker was placed on Mr. Kelly's vehicle on a public street outside his residence at 1118 Harwall Road in Woodlawn in Baltimore County. The GPS unit was installed on April 2, 2010 at the request of property detectives who had been investigating a burglary that had occurred earlier in the year in Howard County and suspected Mr. Kelly's involvement. The tracker was programmed such that Howard County police would be notified if and when Mr. Kelly's vehicle, a green 2004 Chevrolet Trailblazer, came within a perimeter

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[1] The three businesses are the trading center/pawn shops referenced in Detective Mergenthaler's affidavit in support of the search warrant for appellant's vehicle, which was admitted into evidence in the Anne Arundel County proceeding as well as the Howard County proceeding, and is summarized above.

of Howard County. On April 5, 2010, shortly after 4:00 a.m., the GPS tracker notified Sergeant Pierce that Mr. Kelly's vehicle was approaching Howard County. He obtained a location and sent Detective Laffin to Riverwood Drive and Old Columbia Road in Howard County. As Detective Laffin drove towards the area, he observed a vehicle matching the description of Mr. Kelly's, but was not able to see who was driving the vehicle. Laffin continued to 7125 Riverwood Road after Sergeant Pierce informed him that the vehicle in question had stopped at that location. Laffin found a door at the Advanced Programs, Inc. ("API") building at 7125 Riverwood Drive to be unsecured and observed pry marks and damage to the strike plate. Meanwhile, the alarm company monitoring the business alerted police to an alarm at that location. Detective Mergenthaler met with an API employee who informed him that there were items in brown cardboard boxes that had been stolen from the warehouse. Specifically, two Hewlett Packard printer models, two API computer monitors and four API boxes containing computer hard drives, keyboards, and computer mice had been taken. Mergenthaler obtained serial numbers for the missing equipment.

After determining that a burglary had occurred at API, officers again utilized the GPS tracker to locate Mr. Kelly's vehicle at 8:30 a.m. at the Carroll Manor Elementary School in Adamstown. Detectives Luckey and Laffin responded to the area and observed the vehicle

parked in the parking lot of the school which was under construction. At 10:30 a.m., the officers went onto the construction site to look inside of the vehicle. Detective Luckey saw several large boxes in the back of the vehicle and a Hewlett Packard printer manual located in the front passenger seat. They left the site and continued their surveillance and Detective Luckey observed a man matching Mr. Kelly's description enter the vehicle, open the rear door, and place a computer monitor in one of the boxes. He remained in the car for 20 minutes then returned to the construction site.

Mr. Kelly left in the vehicle at approximately 2:30 p.m. and he was followed by the detectives. They followed him to his residence at 1118 Harwall Road in Gwynn Oak, Maryland. He entered the house, then left shortly thereafter. He drove to another residence at 3706 West Saratoga Street, entered and exited with two computer boxes that he placed in his truck. Mr. Kelly was then followed to the Gold Center Pawn Shop at 2022 Dennison Street in Baltimore. He removed a large box from the rear of the vehicle and entered the pawn shop. He returned and retrieved another object and reentered the shop. He then exited the pawn shop at 4:21 p.m. carrying a small box and returned to his vehicle. He then drove to the Shine Corner, Inc. pawn shop at 26 Hilton Street in Baltimore. He entered the pawn shop with three large computer boxes, then exited about ten minutes later and drove back to the residence at 3706 West Saratoga Street.

At 5:06 p.m. Mr. Kelly was observed carrying two large Hewlett Packard boxes and two other smaller boxes up to the residence. At 5:10 p.m., Mr. Kelly was observed entering the vehicle and driving to the Edmondson Village Pawn Shop in Baltimore. He entered carrying paperwork, and exited about five minutes later. He returned to the Harwall Road residence and went inside.

On April 6, 2010, surveillance was resumed when Detective Pierce received a notification from the GPS unit indicating that the vehicle was moving. Officers found the vehicle at the Westview Promenade Center in Frederick, parked to the rear of the shopping center behind several closed businesses. Detective Laffin observed a black male, matching Mr. Kelly's description walking from the direction of the Verizon Wireless and White House Black Market stores before the suspect saw Laffin and returned to his vehicle and left the area. He proceeded to a commercial business park on Pegasus Court in Frederick and was observed driving and stopping in front of several closed businesses. He exited the vehicle briefly then walked back and drove to the construction site at Carroll Manor Elementary School. Officers found evidence of two attempted break-ins at the business park.

On April 12, 2010, at approximately 4:00 a.m., Detective Pierce received an alert from the GPS tracking unit that the vehicle was in motion and thereafter notified surveillance units to follow the vehicle. Sergeant Pierce notified

officers that the vehicle was on Interstate 695 headed towards Glen Burnie. At 4:35 a.m., Sergeant Pierce notified the responding officers that the vehicle was parked in the parking lot of the Chesapeake Square Shopping Center. Officers arrived to find the vehicle backed into a parking spot in front of the Casual Male clothing store at 6710 Ritchie Highway in Glen Burnie. One of the detectives noticed that the front door of the business had been smashed out and observed the suspect enter the store with an empty plastic bag and exit the store with a full bag of clothing. Officers then approached the vehicle and the suspect quickly entered the vehicle and exited the parking lot at a high rate of speed.

The suspect led officers on a high speed chase and eventually eluded them. Sergeant Pierce utilized the GPS tracker to locate the vehicle parked in the alley between Wesley Avenue and Bellview avenue. The driver had fled the scene prior to the officers's arrival and the vehicle was towed to the Howard County Police Department Northern District.

At 6:15 a.m., officers set up surveillance at both the 1118 Harwall Road residence in Gwynn Oak and the 3706 West Saratoga Street residence in Baltimore. Search and seizure warrants were prepared for both locations and for the vehicle as well as the pawn shops visited by Mr. Kelly. Mr. Kelly was taken into custody at 2:00 p.m. after leaving 3706 West Saratoga Street.

* * *

Sergeant Duane Pierce of the Howard County Police Department testified that he installed a GPS tracking device on Appellant's Chevrolet Trailblazer on April 2, 2010. According to Sergeant Pierce, the GPS device used, like most modern cellular phones, had a cell phone component and a GPS component and both were used to determine the location of the target vehicle at any given time. The device transmitted information, "just like a cell phone would." The self-powered device was installed on the exterior of the vehicle using magnets. Sergeant Pierce crawled underneath the vehicle and attached the device to the frame of the car. At the time of the installation, the car was parked at 1118 Harwall Road in Gwynn Oak, Maryland, across the street from Appellant's residence. It was stationed in a public parking spot on the street. The GPS device was programmed to continuously track and record the location of the vehicle and immediately began to do so upon installation. Officers had the option of reviewing the location data at a later time and could also initiate "real time" tracking, which allowed them to track the vehicle as it moved. Sergeant Pierce programmed the device to alert him whenever Appellant's vehicle approached the Howard County line. According to Sergeant Pierce, there were three methods of retrieving data from the GPS device: 1) connecting it to a computer after detachment from the vehicle, 2) obtaining the recorded information wirelessly while the device

was still attached to the vehicle, and 3) "live tracking." Sergeant Pierce could not recall whether "live tracking" was used between April 6th and April 12th, nor did he know whether the archived information n the GPS device was later used in the investigation.

On April 5th, 2010, at approximately 4:00 a.m., Sergeant Pierce received a notification from the tracker that the vehicle had entered Howard County and at that point he notified other officers to respond to the Columbia area of Riverwood Drive and Old Columbia Road. Detective Laffin responded to the area, and observed the vehicle driving through parking lots slowly making short stops. Laffin then proceeded to check the buildings in the area. Later that day it became known that a burglary had occurred at 7125 Riverwood Drive, in the area in question.

Detective Matthew Mergenthaler responded to 7125 Riverwood Drive on April 5, 2010 and met with a business representative of Advanced Programs, Inc. He learned that items had been taken from the business early that morning and obtained search and seizure warrants in an attempt to locate the missing items. The warrants were executed on April 13th, 2010 at different pawn shops and some items were recovered.

At approximately 8:30 a.m. on April 5, 2010, the GPS device was again utilized to locate the vehicle at Carroll Manor Elementary School in Adamstown. Detectives Laffin and Luckey were

> directed to respond to that area. Once the detectives responded, they found the vehicle and conducted surveillance throughout the day. Sergeant Pierce used the "live tracking" option on the GPS periodically throughout the day as needed in conjunction with the surveillance by the other detectives.
>
> Sergeant Pierce testified that based on previous patterns, he was requested to do more mobile surveillance and change the parameters utilized in locating the vehicle. At around 4:00 a.m. on April 12, 2010, Detective Pierce received an alert through his phone that the Appellant's vehicle was moving and he initiated "live tracking." He then directed police surveillance members to the location of the vehicle which was parked at the 6700 block of Ritchie Highway in Glen Burnie. The officers responded and found the vehicle. A chase ensued later that day and Sergeant Pierce assisted with the pursuit by tracking the vehicle and advising officers of its location. The vehicle was eventually found unoccupied in Baltimore City and was towed back to the Northern District where the GPS tracker was removed on April 12.

Relying on this Court's decision in Stone v. State, 178 Md. App. 428 (2008), discussed later in this opinion, the court denied the motion to suppress all evidence.

Howard County Trial

At trial, the police officers testified to their investigation and observations but did not mention GPS tracking.

Arguments

Relying heavily on Jones, *supra*, appellant argues that placement of the GPS device was a search because it constituted a physical trespass to chattel and violated his reasonable expectation of privacy. Acknowledging that the Supreme Court, in Jones, did not reach the question of reasonableness, appellant argues that a warrantless search is per se unreasonable, unless it fits within a recognized exception, none of which are applicable in these cases. Appellant adds that the State has waived any reasonableness argument because it was the State's burden to establish reasonableness, and it failed to do so in circuit court.

Appellant also argues that the good faith exception to application of the exclusionary rule, as enunciated in Davis v. United States, 131 S. Ct. 2419 (2011), does not apply because there was no "binding appellate precedent" in Maryland, at the time of placement of the tracking device, holding that such action was legal. Appellant explains that this Court's decision in Stone, *supra*, relied on by the circuit court, is distinguishable and, in light of Jones, based on faulty reasoning. Thus, it was not binding appellate precedent within the meaning of Davis.

The State, impliedly conceding that placement of the GPS device was a search, argues that appellant failed to argue that the search was unreasonable, and thus, he waived that argument. The State also argues that the facts in these cases are very different from those in Jones, and the search in these cases was reasonable. Relying on Davis and Stone, the State argues that, in any event, the officers acted in good

faith based on established precedent. Next, the State argues that all of the evidence was seized pursuant to search warrants, and thus, the independent source doctrine applies. Pursuant to that doctrine, the State argues the "tainted" information in the applications for warrants should be excised, and the untainted information assessed to determine if it constituted probable cause. The State concludes that the untainted information was sufficient to constitute probable cause. Finally, the State argues that appellant's commission of a new crime on April 12, in the presence of police officers, purged the taint from any unlawful search.

With respect to the independent source and intervening crime arguments, appellant responds that they were not raised in circuit court and, thus, cannot be raised on appeal. In any event, according to appellant, all of the evidence was obtained as a result of placement of the GPS device and was tainted.

Discussion

Pre-United States v. Jones

In the context of police use of electronic tracking devices, we begin with Katz v. United States, 389 U.S. 347 (1967). In that case, the defendant was convicted of transmitting wagering information by telephone, in violation of a federal statute. The government introduced evidence of a telephone conversation by defendant which had been obtained by virtue of a listening device attached to the outside of a public telephone booth. The majority, recognizing the absence of a physical trespass, and recognizing that the government had probable cause to obtain a warrant, id. at 354, concluded that placing the device without a

warrant was an unreasonable search and seizure. Id. at 353. The basis for the conclusion was that the government's action violated what has come to be known as a reasonable expectation of privacy.

In United States v. Knotts, 460 U.S. 276 (1983), police officers had information that the defendant was purchasing chloroform to use in an illicit drug operation. With the consent of the seller, the officers placed a beeper in a drum of chloroform which was then sold to the defendant. After the drum was placed in the defendant's vehicle, the officers followed the vehicle through a combination of tracking the beeper signal and visual surveillance. They tracked the defendant to a cabin in a secluded area. After three days of visual surveillance, the officers obtained a search warrant for the cabin and found a drug laboratory. Id. at 277.

A majority of the Court held that the application for warrant, based in part on information obtained via the beeper, was not constitutionally infirm. Applying the Katz analysis, the Court explained that a person traveling on a public highway in a vehicle has no reasonable expectation of privacy in the person's movements from one location to another. Id. at 281. The Court further explained that the Constitution did not prevent the officers from augmenting their natural senses with technology, id. at 282, and that the beeper simply was a more effective method of observing what was already public. Id. at 284.

Before turning our attention to Maryland cases, we expound on Davis, *supra*. In that case, police officers conducted a traffic stop of a vehicle in which the defendant was a passenger. The officers arrested the

defendant for providing a false name and placed him in their vehicle. The officers then conducted a search incident to arrest of the vehicle, including the defendant's jacket, where they found a firearm. After the defendant's motion to suppress the firearm was denied, the defendant was convicted of unlawful possession of a firearm.

The search occurred in Alabama, located in the Eleventh Circuit. It was conducted in accordance with binding precedent in that circuit, *i.e.*, United States v. Gonzalez, 71 F.3d 819, 822 (11th Cir. 1996), which, applying New York v. Belton, 453 U.S. 454 (1981), had held that a search of a passenger compartment in a motor vehicle incident to arrest of an occupant is lawful, even if the occupant is no longer in the vehicle at the time of the search. While the defendant's appeal was pending, the Supreme Court decided Arizona v. Gant, 556 U.S. 332 (2009), which limited the scope of a search of an unoccupied vehicle. The Davis Court applied the Gant decision retroactively, 131 S. Ct. at 2430, thus rendering the Davis search unlawful. Nevertheless, the Supreme Court held that the exclusionary rule did not apply because the search was conducted in good faith reliance on binding precedent. 131 S. Ct. at 2429.

In Briscoe v. State, 422 Md. 384 (2010), the Court of Appeals had before it a challenge to a search incident to arrest of a locked glove compartment in a vehicle. While the case was pending on appeal, the Supreme Court decided Gant. The State conceded the search violated Gant but argued, *inter alia*, that the good faith exception to the exclusionary rule applied. Id. at 389. The Court of Appeals applied the Davis good faith

exception because the search was lawful at the time under Belton, as applied in Maryland. *E.g.*, Gee v. State, 291 Md. 663 (1981). 422 Md. at 391. In explaining, the Court stated:

> The principle that emerges from Davis is that operation of the exclusionary rule is suspended only when the evidence seized was the result of a search that, when conducted, was a "police practice" specifically authorized by the jurisdiction's precedent in which the officer operates. To decide whether the particular search at issue in the present case—the search of the locked glove compartment—comes within the Davis rule, we must examine what Maryland law dictated at the time of that search.
>
> The search of Petitioner's vehicle was conducted on June 26, 2007. At that time, the search of the minivan incident to Petitioner's arrest was governed by the then-prevailing Belton bright-line rule. See Gee, 291 Md. at 668, 435 A.2d at 1389-90; McCain, 194 Md. App. at 276, 4 A.3d at 66. Under Belton, a glove compartment is included in the Belton perimeter. See Belton, 453 U.S. at 461 n. 4. At the time of the search at issue, no reported decision of this Court or the Court of Special Appeals had addressed specifically whether a police officer conducting a Belton search could open a locked glove compartment.
>
> Petitioner takes the position that, because, at the time of the search at issue, no reported decision in Maryland expressly authorized police to open a locked glove compartment as part of a

Belton search, there did not exist at that time "binding appellate" Maryland authority upon which Officer Bormanshinov could have "reasonably relied" in searching the glove compartment. The State acknowledges that there was no then-existing reported Maryland decision specifically authorizing the search of a locked glove compartment. The State points out, though, that, "just prior to the suppression hearing in this case, the Court of Special Appeals [in Hamel v. State, 179 Md. App. 1, 18, 943 A.2d at 696 (2008)] made it clear that Belton permitted the search of a locked gloved compartment." Petitioner replies that Hamel is of no benefit to the State, because it was filed two months after the search in question and thus could not serve as precedent upon which Officer Bormanshinov could objectively and in good faith rely. We are in general accord with the State that the Davis good-faith exception applies to the search at issue, although we take a slightly different tack in reaching that conclusion.

We understand the Davis Court's reference to binding appellate precedent to mean that the caselaw of the jurisdiction must have been clear about whether that jurisdiction had adopted the bright-line rule of Belton. Petitioner and the State do not disagree that, until Gant was decided, Belton was a part of Maryland law. And, under Belton, the police are entitled to search the entire passenger compartment of a vehicle, including the glove compartment. To repeat, the Belton Court made clear that, in a

search for both weapons and destructible evidence incident to a valid arrest of a vehicle's occupant, police may search 'inside the relatively narrow compass of the passenger compartment" of the vehicle, and may "examine the contents of any containers found within the passenger compartment[.]" 453 U.S. at 460. The Belton Court defined "container" for this purpose as 'denot[ing] any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." Id. at 460-61 n.4. We believe it to be clear, under Belton itself, that a locked glove compartment is within the scope of the rule announced in that case, notwithstanding that the Court made no effort to include that detail or, for that matter, any other fact-specific details concerning the scope of the search. Indeed, the Belton Court expressly eschewed a fact-specific rule in favor of a brightline rule that could be easily applied by officers in the field. See id. at 458 ("[A] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." (internal quotation marks omitted)).

Petitioner is correct that, before the Court of Special Appeals's decision in Hamel, no reported Maryland appellate decision expressly held that the police, in conducting a Belton search, may

> open a locked glove compartment. Given the bright-line nature of the Belton rule, however, it would be unfaithful to its very design and purpose to have its application and, in turn the application of the Davis good-faith exception, depend on whether a container, undeniably within the so-called Belton perimeter, is locked or unlocked. In other words, the Court of Special Appeals, in deciding Hamel as it did, merely applied the Belton rule to the specific facts of the case. Hamel did not create new "binding appellate precedent" in Maryland; rather, that case merely applied what was at the time, and had been since 1981, Maryland law.
>
> We therefore hold that, before Gant, binding appellate precedent in Maryland, namely Belton, dictated that searches incident to arrest of recent occupants of vehicles included searches of all containers, whether locked or unlocked, within the passenger areas of the vehicles. Officer Bormanshinov acted in objectively reasonable reliance on that authority when he searched the locked glove compartment. It follows then, that the good-faith rule of Davis applies, and the suppression court correctly denied the motion to suppress the handgun found there.

(Footnotes omitted.) Id at 406-410.

In Stone v. State, 178 Md. App. 428 (2008), the defendant was convicted of burglary and theft. The defendant was arrested after the vehicle in which he was riding as a passenger was stopped by police officers. The officers effected the stop because they had

probable cause to believe, based on their prior investigation, that appellant was involved in a burglary. The officers obtained the information on October 14, 2005. On the same day, after obtaining the information, the officers obtained the defendant's cell phone number, and through enlisting his cell phone carrier to "ping" his phone, located the defendant's vehicle. At that time, the officers placed a GPS device on his vehicle. On October 17, 2005, using the signal from the GPS device to locate the defendant's vehicle, the officers effected the stop and arrest of the defendant. Between October 14 and October 17, the officers did not obtain information implicating the defendant in the crimes in question in addition to that which they already had. Id. at 437-38.

On appeal, appellant argued, *inter alia*, that the trial court abused its discretion in limiting the defendant's cross-examination of a police officer with respect to locating the defendant's vehicle through the use of the "ping" and, later, through the GPS device. We stated:

> The suppression court did not abuse its discretion in cutting short the appellant's cross-examination about the cell phone "ping" and the GPS tracking device because it was unlikely that cross-examination on those points would have produced any relevant evidence. United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983), is controlling.
>
> In Knotts, government agents investigating allegations that the defendant and two codefendants were manufacturing amphetamines arranged with the seller of

chloroform, used in the manufacturing process, to place a radio transmitter, i.e., a "beeper," inside a chloroform container sold to a co-defendant. At first, the agents used visual observation and the beeper monitoring to follow the co-defendant's vehicle after he purchased the chloroform. Eventually, when they suspected their cover was no longer intact, they relied upon the beeper alone to show the route of that vehicle, which ended at the defendant's secluded cabin in West Virginia. After conducting surveillance for three days, the agents obtained a search warrant for the cabin. The search revealed "a fully operable, clandestine drug laboratory." Id. at 279. The defendants were charged with federal drug crimes.

The defendant moved to suppress the evidence found in his cabin on the ground that the agents had violated his Fourth Amendment rights by using the "beeper" placed in the chloroform container to follow the co-defendant's vehicle to the cabin. His argument was rejected at the trial level but accepted on appeal. The Supreme Court reversed. It noted first that application of the Fourth Amendment depends upon whether the person invoking it can claim a legitimate expectation of privacy. Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). It observed that

> [t]he governmental surveillance conducted by the means of the beeper in this case amounted to principally following an automobile on public streets

> and highways," and that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."Knotts, *supra*, 460 U.S. at 281 (quoting Cardwell v. Lewis, 417 U.S. 583, 590, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974) (plurality)).

The Court reasoned that when the co-defendant "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property." Id. at 281-82. It observed that, although the defendant had a reasonable expectation of privacy inside his cabin, that expectation did not "extend[] to the visual observation of [the co-defendant's] automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields.'" Id. at 282 (quoting Hester v. United States, 265 U.S. 57, 58, 44 S. Ct. 445, 68 L. Ed. 898 (1924)). Ultimately, the Court concluded that

> [v]isual surveillance from public places along [the co-defendant's] route or adjoining [the defendant's cabin] would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of [the co-defendant's] automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

460 U.S. at 282 (emphasis added). See also Gibson v. State, 138 Md. App. 399, 414-17, 771 A.2d 536 (2001) (holding that a person has no reasonable expectation of privacy in his location within a public space).

The GPS tracking device in the case at bar is simply the next generation of tracking science and technology from the radio transmitter "beeper" in Knotts, to which the Knotts Fourth Amendment analysis directly applies. The appellant and his wife did not have a reasonable expectation of privacy in their location as they traveled on public thoroughfares. With the transmission from the GPS device, Trooper Bachtell was able to locate Joanne Stone's pickup truck as she was driving it on a public road, where she had no reasonable expectation of privacy, and where she could be seen by the

trooper or anyone else. Under Knotts, the use of the GPS device could not be a Fourth Amendment violation, and hence further inquiry about it, on cross-examination of Trooper Bachtell, would not have led to relevant information.

Use of the cell phone "ping" information also was not relevant. The "ping" information revealed that the appellant's cell phone was located, at that very time, somewhere "within a two mile radius of the Frederick County Detention Center." Using that information, Trooper Bachtell drove on the public roads in the vicinity of the detention center and saw, outside on a motel parking lot, in full public view, a vehicle registered in the appellant's name. Thus, the cell phone "ping" information, like the GPS tracking information and the beeper information in Knotts, served to narrow the area of public space in which to look for the appellant, his vehicle, or both.

In In the Matter of the Application of the United States for an Order Authorizing the Installation and Use of Pen Register and a Caller Identification System on Telephone Numbers, 402 F. Supp.2d 597, 604-05 (D. Md. 2005), the court held that, to use real time cell phone "ping" technology to obtain evidence of a crime, the Fourth Amendment requires the government to obtain a warrant by showing probable cause to believe a crime has been or is being committed. In the case at bar, however, the cell phone "ping" technology was not being

> used to obtain evidence with which to generate probable cause. As we have explained, the investigating officers already had probable cause to believe that the appellant had committed burglary and felony theft. They were using the cell phone "ping" technology merely to find the appellant so they could take him into custody, already having probable cause to support an arrest, and not to gain information that would furnish probable cause to arrest. Moreover, they were not using the technology to locate the appellant in a private space. They used it only to narrow the area of public space in which to search for the appellant to place him under arrest. In other words, the cell phone "ping" technology was being used as a tracking device, like the GPS, to locate the appellant in public.
>
> For the reasons we just have discussed, the appellant did not have a reasonable expectation of privacy in his location in the public, and, more specifically, in a vehicle riding on public roads, and therefore evidence about the use of the GPS device and the cell phone "ping" information merely to locate him in public, which just as well could have been done by human visualization -- though less efficiently -- was not relevant to the appellant's Fourth Amendment-based suppression motion.

Stone, 178 Md. App. at 446-50.

United States v. Jones

The defendant, Jones, was suspected by law enforcement of trafficking in narcotics. Police officers

obtained information through various investigative techniques and then applied for a warrant authorizing the placement of a GPS device on a vehicle that was regularly used by the defendant. A warrant was issued, authorizing placement of the device in the District of Columbia within ten days. The device was not placed in ten days and was placed in Maryland, in violation of the warrant requirement. Consequently, the issue presented was whether a warrant was required. Jones, 132 S. Ct. at 948.

The device was placed on Jones's vehicle while the vehicle was parked in a public parking lot. Police officers used the device to track the vehicle over a period of 28 days. The information was transmitted to a computer, generating over 2,000 pages of data. Id.

After the defendant was indicted, he filed a motion to suppress evidence obtained through use of the GPS device. The motion was granted in part, and the defendant was ultimately convicted. On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed and, employing a Katz analysis, held that the admission of the evidence obtained by the warrantless use of the GPS device violated the Fourth Amendment. Id. at 949 (citing United States v. Maynard, 615 F. 3d 544 (D.C. Cir. 2010)).

The Supreme Court, in Jones, affirmed the Court of Appeals. The sole issue decided by the Court was whether 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*." Id. at 948. Justice Scalia,

writing for a majority of the Court, relying on pre-Katz tort law, based their decision on the fact that government officials had committed a common law physical trespass. 132 S.Ct. at 950. Justice Scalia explained that the Katz reasonable expectation of privacy analysis was intended to be in addition to, not a substitute for, the common law trespassory test. Id. at 951. Thus, there was no need to determine whether the officials' actions violated the Katz test as well.

Justice Scalia added:

> The Government argues in the alternative that even if the attachment and use of the device was a search, it was reasonable–and thus lawful–under the *Fourth Amendment* because "Officers had reasonable suspicion, and indeed probable cause, to believe that [Jones] was a leader in a large-scale cocaine distribution conspiracy.". . . We have no occasion to consider this argument. The Government did not raise it below, and the D.C Circuit therefore did not address it.

Id. at 954.

Justice Sotomayor, concurring, agreed that physical trespass was appropriate and sufficient to support the Court's conclusion but, given the extent of electronic surveillance, also discussed the reasonable expectation of privacy test, positing many hypothetical questions and opining that at some point the questions would have to be answered under that test. Id. Justice Alito, writing for the remaining justices, and concurring in the judgment, stated that those justices would decide the case under the expectation of privacy test and

would conclude that the "lengthy monitoring" was a search. Id. at 958.

Was there an unreasonable search in the case at bar?

With respect to whether a search occurred, in Jones, five justices concluded that the government's actions constituted a search, based on physical trespass. In the case before us, there was a physical trespass, and therefore, placement of the GPS device constituted a search, without need to address appellant's reasonable expectation of privacy and whether the facts in this case, distinguishable from the facts in Jones, would pass muster.

The Supreme Court did not reach the question of reasonableness. We will not predict how the Supreme Court will decide that question and what standard it will employ when the question is before it in the context of GPS devices. In the cases before us, we note that, at the time a police officer placed the GPS device, officers knew there had been a series of commercial burglaries, and they had information that appellant was involved in one of them. Thus, at the time an officer placed the device, officers had probable cause to arrest appellant for the February 22 burglary, but did not arrest him, and they had reasonable suspicion that appellant was involved in other burglaries. We need not decide the question of reasonableness because we conclude that, in any event, the search comes within the Davis good faith exception.[2]

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[2] The parties agree that Jones applies to the facts of this case, even though the search occurred well prior to the Jones decision. *See* Briscoe v. State, *supra*, and State v. Holt, ___Md. App.___ (No. 132, Sept. Term, 2012, filed August 29, 2012).

Good faith exception

As we noted above, in Davis, the Supreme Court held that the exclusionary rule does not apply if a search was conducted in good faith reliance on binding precedent. The question then becomes what is meant by binding precedent. We shall review the federal cases cited by the parties because we find that helpful to our application of Davis, Briscoe, and Stone.[3]

After the decision in Knotts, prior to the decision in Jones, and prior to the search in the cases before us, United States Courts of Appeals for the Seventh, Ninth, and Eighth Circuits filed opinions, addressing the placement of GPS devices on a vehicle. In all three instances, a GPS device was placed by law enforcement authorities on the defendant's vehicle when it was located in a public place. Relying heavily on Knotts, the courts concluded there was no search because the defendants had no reasonable expectation of privacy with respect to the acts in question. United States v. Garcia, 474 F.3d 994, 996 (7th Cir. 2007) (length of monitoring is unclear); United States v. Pineda-Moreno, 591 F.3d 1212, 1216 (9th Cir., January 11, 2010) (officers installed several GPS devices on defendant's vehicle and monitored movement over a four month period), vacated *sub nom* Pineda-Moreno v. United States, 132 S. Ct. 1533 (2012); and United States v. Marquez, 605 F.3d 604, 609 (8th Cir. January

[3] The applicability of the good faith exception to the exclusionary rule was not decided by the circuit courts. It is an issue of law, and we exercise our discretion to decide the issue because it arises due to a change in the law after the circuit courts' decisions. *See* McCain v State, 194 Md. App. 252, 278 (2010).

14, 2010) (officers monitored movement over a multi-month period). In Marquez, 605 F.3d at 610, and in Garcia, 474 F.3d at 996, the Courts noted that the law enforcement authorities had reasonable suspicion that the defendants were engaged in criminal activity at the time they placed the devices, perhaps implying that was the applicable standard.

Appellant calls our attention to People v. Weaver, 909 N.E.2d 1195 (N.Y. 2009), Commonwealth v. Connolly, 913 N.E.2d 356 (Mass. 2009), and State v Jackson, 76 P.3d 217 (Wash. 2003), all decided post Knotts, pre Jones, and prior to the date of the search in the case before us. In Weaver, a GPS device was placed on the defendant's vehicle and monitored for 65 days. 909 N.E.2d at 1202. In Connelly, a GPS device was placed in the defendant's vehicle by officers who entered the vehicle and over a one hour period connected the device to the vehicle's electrical system. 913 N.E.2d at 369. In Jackson, a GPS device was placed on the defendant's vehicle after obtaining a warrant. Thus, the search was legal, but the court stated that a warrant was necessary. 76 P. 3d at 251. In all three cases, the basis of the courts' decisions was the state's constitution, not the Fourth Amendment.

Appellant also calls our attention to the decision in United States v. Maynard, *supra*, the decision by the District of Columbia Court of Appeals that was reversed in Jones. The Maynard decision was not filed until August 6, 2010, however, after the search in the case before us.

The parties also cite cases, decided post Jones and post Davis, applying the good faith exception to the

exclusionary rule. The State calls our attention to the following.

In United States v. Baez, ___ F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 97969 (D. Mass. 2012), the court, located in the First Circuit, applied the good faith exception to a placement of a GPS device on a vehicle for 347 days. Id. at *10. The court stated there was no split in the federal circuits prior to Maynard and even though that case was filed prior to the search in Baez, it was filed only three days before and, thus, insignificant to the analysis. Id. at *22. The court concluded that "binding" within the meaning of the Davis good faith exception should not be applied literally and a substantial consensus among precedential courts is sufficient. Id. at *26.

In United States v. Leon, ___F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 42737 (D. Haw. 2012), in 2009, a GPS device was placed on a vehicle for five months. Id. at *3-5. The court, located in the Ninth Circuit, found there was binding Ninth Circuit precedent authorizing the placement of the device prior to the placement in Leon, *i.e.*, United States v. McIver, 186 F.3d 1119 (9th Cir. 1999) (held placement of GPS device on a vehicle located in a public place did not violate reasonable expectation of privacy, decided prior to United States v. Pineda-Morena, *supra*). The court concluded that there was an objective good faith belief that the extent of the monitoring in Leon was authorized. Id. at *10.

In United States v. Rosas-Illescas, ___F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 74594 (N.D. Ala. 2012), a GPS device was placed on a vehicle in December, 2011. Id. at * 2-8. The court applied the good faith exception to the exclusionary rule, based on precedent,

specifically, United States v. Michael, 645 F. 2d 252 (the former Fifth Circuit 1981) (*en banc*) (device was a beeper). Id. at *19.

In United States v. Shelburne, ___ F. Supp. 2d ___, 2012 U. S. Dist. LEXIS 85368 (W. D. Ky. 2012), a GPS device was placed on a vehicle in November, 2011. The Shelburne court was located in Kentucky, in the Sixth Circuit, but the device was placed by law enforcement officers in Indiana, which is located in the Seventh Circuit. Id. at *11-12. The Shelburne court stated that there was precedent in the Seventh Circuit authorizing the placement of the device, *i.e.*, United States v. Garcia, *supra*, and that was sufficient to apply the good faith exception. Id. at *14.

Appellant references the following. In United States v. Lee, ___ F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 71204 (E.D. Ky. 2012),[4] a GPS device was placed on the defendant's vehicle in September, 2011. Id. at *2. The court, located in the Sixth Circuit, interpreted the Davis requirement of "binding precedent" literally, and, observing that the Sixth Circuit had not spoken on the subject of GPS devices, concluded that the good faith exception did not apply. Id. at *25.

In United States v. Ortiz, ___F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 101245 (E.D. Pa. 2012), authorities placed a GPS device on the defendant's vehicle, when located in a public area, in November, 2010, and again in January, 2011. Id. at *11-24. The court, located in the Third Circuit, refused to apply the good faith

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[4] Appellant cites to 2012 U.S. Dist. LEXIS 71205 but that was the recommended opinion by a United States Magistrate Judge.

exception because there was no binding Third Circuit precedent. The court stated that, in order for the Davis good faith exception to apply, there must be binding precedent, explaining that non binding persuasive precedent, even if it represents the majority or super majority view, does not suffice. In addition, the binding precedent must be on the "particular" police practice in question. Id. at * 65.

In United States v. Katzin, ___ F. Supp. 2d ___, 2012 U.S. Dist. LEXIS 65677 (E.D. Pa. 2012), authorities placed a GPS device on the defendant's vehicle for two or three days. Id. at * 17. The court, located in the Third Circuit, noted there was no binding decision in that circuit and also noted that United States v. Maynard, decided after the search in the case before us, id. at *23, created a "split" in the federal circuits. Id. at * 24. Based on that split and the fact that less that half of the federal circuits had opined on the issue, the court concluded that the good faith exception did not apply. Id. at *32.

Similar to what some United States District Courts have done, we read the Court of Appeals's decision in Briscoe as interpreting Davis to mean that binding precedent does not require that there be a prior appellate case directly on point, *i.e.*, factually the same as the police conduct in question. Indeed, the situation before us is similar to the situation before the Court in Briscoe. Just as Maryland had generally recognized Belton as permitting a search incident to arrest of an unoccupied vehicle, Maryland had recognized and applied the rationale of Knotts, *i.e.*, that the owners of vehicles did not have a reasonable expectation of privacy in their movement on a public highway. Stone,

178 Md. App. at 446-48. 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.

We conclude the good faith exception to the exclusionary rule applies, and the court did not err in denying the motion to suppress evidence. In light of our conclusion, there is no need to address the remaining arguments.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX C

IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND

Criminal Docket No. 13-K-10-050346

[Filed November 19, 2010]

STATE OF MARYLAND	)
	)
vs.	)
	)
WESLEY TORRANCE KELLY	)
Defendant	)
	)

[Excerpts of]
OFFICIAL TRANSCRIPT OF PROCEEDINGS
MOTION TO SUPPRESS

Ellicott City, Maryland
Friday, November 19, 2010

BEFORE:

HONORABLE TIMOTHY MCCRONE, JUDGE

APPEARANCES:

For the State of Maryland:

MARY MURPHY, ESQUIRE

For the Defendant:

JANETTE DEBOISIERRE, ESQUIRE

Transcribed from digital audiotape recording by:

GARY P. MICHAEL,
Official Court Reporter
8360 Court Avenue
Ellicott City, Maryland
410-313-2064

* * *

[p.67]

throughout this area versus just Howard County. Because we're not just interested in crimes that occur and, however, we're also interested in crimes that the person is committing everywhere.

Q. And so you want it continuously surveilling?

A. Yes, ma'am, to link him to as many burglaries as possible.

MS. DEBOISSIERE: Okay, thank you. No further questions, Your Honor.

MS. MURPHY: Nothing further.

THE COURT: Thank you, very much, Detective Pierce.

THE WITNESS: Thank you.

MS. MURPHY: Your Honor, I don't believe there's a need for any further witnesses with respect to this particular issue unless the Court feels or Defense Counsel feels otherwise.

MS. DEBOISSIERE: I don't think so either, I think we have the information. I will say that, I guess here,

that I've never seen the records regarding the GPS system, that's not part of what's been provided in discovery.

MS. MURPHY: Your Honor, I did print out a copy last night, so I can provide that to Counsel, I'd be happy to do so, if you can make sense out of it.

MS. DEBOISSIERE: Exactly.

THE COURT: Be careful what you ask for.

MS. DEBOISSIERE: Exactly. So, I mean, I knew that it would be similar to cell phone records, that it would be dated,

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it's printed out, it does look like it's, I'm guessing, 300 pages maybe 400 pages of data and I'm assuming ordered by date it looks like.

But, that -- I don't think we need to make it part of the evidence here for the purposes of this motion. I do, I guess, wanna make sure that it's not intended to be evidence in the trial in any way, I would object to that, of course.

But, I think that you have the information you need for us to be able to argue, Your Honor, with regard to this motion.

THE COURT: Would you like to --

MS. MURPHY: Just stating for the record, Your Honor, that the State has delivered the GPS historical information from April 2nd through April 12th that was obtained on the GPS unit, the tracker, since I didn't prepare a cover letter of the discovery, Your Honor.

THE COURT: Do you know how many pages that is, Ms. Murphy?

MS. MURPHY: Your Honor, it, I believe --

THE COURT: Are they numbered?

MS. MURPHY: They are not numbered, I apologize, Your Honor.

THE COURT: And just so the record will be clear, it's apparently?

MS. MURPHY: It is apparent -- it is approximately -- I would say it's approximately 600 pages, Your Honor.

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THE COURT: Okay. It appears to be about two inches thick, just for the record.

Would you like to be heard on the legal issue? I guess it's your motion so I'll?

MS. DEBOISSIERE: Sure, Your Honor, thank you.

I think, if I may, first, Your Honor, go through the cases a bit.

Well, let me back up, I really should state what I'm suppressing. I think that the -- that testimony about the alerts from this tracking system should not be admitted into evidence. I think that the testimony of observations made of mr. Kelly, where the police first were alerted by the tracking system to go -- to know where to find him and then they made observations, each of those observations should not be permitted. So, that would include the observation of him leaving the

Riverwood Drive area, the observation of him at the school parking lot with items in his car --

THE COURT: Well, first let's approach it slightly differently. First, perhaps, just convince me that he has a reasonable expectation of privacy.

MS. DEBOISSIERE: Okay. That's where the Maynard case helps us, Your Honor, because they do a very careful review of why someone would have a reasonable expectation.

THE COURT: And I've read the Maynard case.

MS. DEBOISSIERE: In the -- in that case it shows,

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clearly, that it's the pattern over time that the intrusion occurs. That in the Knott case where one tracking device in a drum that was going to be the big lead, would be picked up by their suspect and transported to another location, they put the tracking device in the drum, not on the actual vehicle, but in the drum that was picked up and delivered. It was a one time trip and --

THE COURT: And that ended up in the interior of the vehicle.

MS. DEBOISSIERE: Sure, once it was loaded on the vehicle it was transported and they used it to track the location of that substance that was being used to produce drugs. And the Knott court ruled that the; Knott is K-N-O-T-T; ruled that the one time driving from -- a journey from one location to another is public and you don't have a reasonable expectation of privacy

in that, you're out in public, you shouldn't have a reasonable expectation of privacy in that.

But, the Maynard case points out that when there's a continuous 24 hour surveillance of someone using these tracking devices that the expectation of privacy changes, it's not the -- you don't measure your expectation of privacy based on whether you're out in public but whether you would expect the public or others, other people, to notice your movements or notice your conduct or notice the observations of your movements in any manner. And so, the continuous surveillance allows the police to

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put together the evidence or the behavior, the patterns, the habits of that person that tend to show the criminal activity and that's where the intrusion has occurred. And it wasn't actually Mr. Maynard it was Mr. Jones who was a co-defendant of Mr. Maynard's that won a reversal in his case because they were able to show that he did have a reasonable expectation of privacy in his vehicle and that a 24 hour continuos surveillance, in that case it was for 28 days, was an intrusion on that reasonable expectation of privacy and without a warrant to permit it they would only be allowed to do it if they were an automobile exception or some other exception that would permit a warrantless search of the car. So, they found that the placement of the device was a search, that when it was placed to be a 24 hour surveillance and not a one time traveling trip, one time journey and that the expectation of privacy in that continuous driving of that car or the location of that car was reasonable for the -- for Mr. Jones to have. And I think that's --

THE COURT: So, would your argument be that anything that extends beyond 24 hours would be a search?

MS. DEBOISSIERE: I don't know where to cut the line, I don't where we should draw the line as to where -- as to how long it can be before it's determined to be an intrusion. I think that it's very simple for the police to get a court order to put a tracking device on and that would be the easy thing, to rule that they should always have a court order to put a tracking device on

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a vehicle. I think the Knott case gives them a reason why they don't have to do it under certain circumstances, but that certainly isn't the circumstance in Mr. Kelly's case. Detective Pierce has made it clear that this was an intention -- they're intention was to learn whether he was committing burglaries anywhere and to help catch him. And that it was a 24 hour surveillance, that they could access at any time and could even look back at later for historical data if they found that there were burglaries in certain neighborhoods, they could check to see if he had been there.

THE COURT: But, isn't Stone a Maryland case that controls in the State of Maryland?

MS. DEBOISSIERE: I think Stone controls if the facts match Stone, absolutely, but it doesn't. Stone is the best GPS case out there so far for Maryland, certainly the most recent one, but I think it's very different from the circumstances in this particular case. First of all, in the Stone case they had Mr. Stone -- they had evidence of Mr. Stone actually pawning the

stolen camera on the day of the burglary, so they had probable cause to stop him, they had probable cause to charge him, they didn't need a GPS system to do anything in charging him or proving the evidence sufficient in that case for the burglary. But, they still did put a tracking device on the vehicle and I believe it was a one day -- it was a one trip -- no, I'm sorry, I'm looking at Knott, I'm getting now on Stone what the --

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THE COURT: 'Cause Judge Eyler doesn't even hint that there would be any sort of --

MS. DEBOISSIERE: No, you're right, they --

THE COURT: -- timeline.

MS. DEBOISSIERE: -- viewed the Knott case as dictating that it's not a search. But, the Maynard case later shows how we should view the Knott case, that the Knott court did not determine -- the Knott wasn't saying that it's not a search, they were saying that it's okay to put it -- it's not a search if it's one journey. And I think that's where the Stone case makes the error and I expect that in the next year or two we're going to see that the Stone case is modified or changed or at least we're going to see a set facts like Mr. Kelly's case, where it's continuous surveillance over a longer period of time.

I'm forgetting at the moment, Your Honor, how long the Stone case was.

I think in -- I think probably the most important in the Stone case is that it wasn't the tracking device that was the evidence against him, that there was virtually

no harm by the use of this tracking device, as far as proving the case against him. I think that's probably the single greatest factor to distinguish this.

In this case if it weren't for the tracking device and the data they were receiving from it there would be no evidence in this case. There is no evidence in this case, there are

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observations of him with boxes that might be the boxes found at Gold's or might be the boxes found at 3706 West Saratoga, which is not his residence, it's some other man's residence. They can't link him to those boxes other then through observations of the police, where the police checked the data from the tracking device to see if he's there and they go and see him there. So, it's -- I think that's why it's very different from the Stone case, where they had other evidence to prove that he had committed the burglary and the tracking device was really a no relevant area in the case.

In the Stone case they weren't assessing the legality, in my view, of the search warrants so much as determining whether or not the defense attorney could cross-examine with regard to the tracking device and the court ruled that it was going to elicit irrelevant information, it really was not the crux of the case. And so it does mention the GPS system and they do make a finding that GPS is not a search in light of Knott. But, they don't have to reach that conclusion in the Knott case because it's really an irrelevant portion of the evidence.

I think in the Kelly case if they were asked to review this case in light of the facts I think it's much closer to the Maynard/Jones analysis and I think that's what we're gonna find that the Maryland law will end up being. And so I do ask that you find that this evidence -- that there should have been a warrant to put the tracking device on Mr. Kelly's car and that everything

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that results in information gathered that might be evidence here should be suppressed, including the observations of him in the Riverwood area, the observations of him with boxes at the school parking lot, with boxes at the pawn shops and the Saratoga address. So, we ask to suppress all of those things, Your Honor, and if I'm forgetting anything else relating to the GPS observations I make those motions as well.

THE COURT: Alright, thank you.

MS. DEBOISSIERE: Thank you.

MS. MURPHY: Thank, Your Honor.

Your Honor, the Court must first determine whether there is an expectation of privacy that is reasonable on behalf of Mr. Kelly, on his vehicle and having the GPS tracker placed there. I suggest to the Court that the *U.S. versus Knott* case, which was relied upon in great detail by the Court of Special Appeals in the Stone case, *U.S. versus Knott* being 460 US 276, a 1982 case. It doesn't rise or fall on the limited nature of that opinion, I don't believe, as the Maynard court perhaps has interpreted it. I think a fair reading of the case says that there's very --

" . . . There is no reasonable expectation of privacy in a person's movements from one place to another while traveling in an automobile on a public thoroughfare."

And that's exactly what occurred here, Your Honor. We know that the installation of the GPS tracker was done on a

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public street. It was something that was done, placed under the vehicle by Detective Pierce on April 2nd, involving no entry into the car whatsoever, it was attached to the exterior of the vehicle, it was self-contained unit did not interfere whatsoever with the automobile's driving, it was no entry within the vehicle. And what it then did was to internally maintain GPS sites of where the vehicle had traveled, but for purposes of what this case is about, the use in this case was the alert to Detective Sergeant Pierce on April the 5th alerting Detective Pierce that the vehicle was coming into the Howard County area. At that time, Your Honor, he directed Detective Laffin to respond to the area of Riverwood Road and Old Columbia Road in an attempt to locate or to begin conducting surveillance on Mr. Kelly's vehicle at that point in time. That's something law enforcement are able to do at any point in time, there's no intrusion into anybody's privacy by following and surveilling a vehicle and/or surveilling a person there's comings and goings.

It is not entry into a residence, it's not entering into the vehicle, it has been traditional law enforcement tools that have been employed throughout the ages. What we have is the addition of technology to assist

with respect to that tool and investigative measure that was employed by the police. We have an enhancement, so to speak, of their ability to conduct surveillance.

THE COURT: And what's the enhancement?

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MS. MURPHY: The enhancement being merely that they don't have to sit on the car 24 hours a day and to observe the vehicle. In this case the program that was set forth by detective Pierce was that, in fact, they were not alerted to -- or that they were alerted to Mr. Kelly's vehicle being in the Howard County area, that's what initially drew their attention in this case to Mr . Kelly on April 5th . When --

THE COURT: Isn't that -- what I meant was, isn't that essentially the same information that these kinds of devices have sent for many, many, many years?

MS. MURPHY: Oh, absolutely. It's similar to the beeper that was used in the *U. S. versus Knott* case, it's absolutely the same type of technology, it's just a little different in terms of the positioning and that type of thing that is done. With advancements we get new technology and that's the information that is given similar to that of the beeper used in the *U.S. versus Knott* case, it's where, in fact, that-- in the Knott case where the drum was, in this case where the vehicle is.

And what we have is that Detective Laffin observes the vehicle in and around the area, he then learns about the burglary, the tracker had been -- the live tracking had been turned off for a period of time until such time as it was determined that there was a crime that was committed. At that point in time Detective

Pierce testified that later in that day they did utilize, later that morning, the GPS live tracking to

[p.78]

locate again the vehicle. That vehicle was located at a construction site, a school construction site, the detectives were sent to that location, the live tracking was stopped once they were there and able to make visual observation of that vehicle.

So, really at issue here and I think the crucial issues with respect to this particular case are what happened in terms of the GPS notification alerting to the Defendant's vehicle being in the particular area of Riverwood Road on the morning of, very early morning hours of April 5th.

I suggest to the Court that that inevitably would have been -- the burglary inevitably would have been discovered because the alarm did go off and the police received an alarm to that location, Advanced Program. Detective Laffin noted that location had been opened in terms of the door being open and pry marks having been there as well. He had seen the vehicle from that area, relying upon the instructions from Detective Pierce that the vehicle was in that particular area. They then utilized the GPS tracker only for purposes of relocating the vehicle that day, once they established where the vehicle is all the other observations that they make that day are done, in large part, with visual surveillance, either in a stationary mode while the Defendant was at the work site or in a mobile mode while they were following him around to the different locations. Both to two different home location as well as three different pawn shops

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that were subsequently the subject of search and seizure warrants that the Court has before the Court.

I suggest to the Court that there is no reasonable expectation of privacy, officers -- there's no expectation of privacy in traveling on the public roads in Howard County or any other particular place. And that's what, in fact, this information is, it's merely transmitting the information as to the vehicle's location. And if the Court looks at both Knott as well as *Stone versus State* that's exactly what the Court of Special Appeals said.

In *Stone versus State,* which is 178 Md App 428, a 2008 case, the court in determining whether or not the trial had erred in limiting defense counsel's cross-examination said it wouldn't have mattered because it wouldn't have been a problem for the police to have done the tracking that they did with the GPS tracking device in question here. The GPS tracking device in that case;

". . . So far as simply the next generation of tracking science and technology from the radio transmitter beeper used in Knott, to which the Knott Fourth Amendment analysis directly applies. The appellant and his wife did not have a reasonable expectation of privacy in their location as they traveled on public thoroughfares. With the transmission from the GPS device Trooper Backtell was able to locate Joanne Stone's pickup truck, that she was driving it on a public road, where she had no

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reasonable expectation of privacy and where she could be seen by the trooper or anyone else."

And that is from page 448, Your Honor, of the opinion in the Court of Special Appeals case in Stone.

The court ruled;

". . . The appellant did not have a reasonable expectation of privacy in his location in the public and more specifically in a vehicle riding on public roads and therefore evidence about the use of the GPS device and the cell phone ping information merely to locate him public, which just as well could have been done by human visualization, though less efficiently, was relevant to the appellant's Fourth Amendment based suppression motion."

And that's it, again, 449 and 450 of *Stone versus State.*

And I suggest to the Court that many other courts throughout the country, perhaps with very few exceptions like Maynard, have held, in fact, that there is no expectation of privacy by use of a GPS tracker. And have claimed that is not a search of the vehicle by placing the GPS unit under the carriage of the vehicle.

And with respect to that, Your Honor, I would cite to *U.S. versus Juan Pineda-Moreno*, a 9th Circuit opinion from just January of this year, indicating that agents did not violate defendant's Fourth Amendment rights by attaching GPS unit to his

[p.81]

vehicle.

And *U.S. versus Bernardo Garcia,* 474 F 2nd -- excuse me, F 3rd, 994, a 2007 case in which, again, the court reasoned that the device did not effect the car's driving qualities, did not draw power from the vehicle, did not alter the car's appearance and was not any seizure whatsoever to have that installed.

And lastly, Your Honor, *U.S. versus Jose Acosta Marquez,* 605 F 3rd, 604;

". . . Under the Fourth Amendment police were required to obtain a warrant to place a GPS tracking device, with magnetic strips, on the truck the defendant drove in order to record it's travels."

Additionally, Your Honor, there would be *U.S. versus Edward Isis Nunez,* out of the U.S. District Court for the Middle District of Pennsylvania, a July 2010 case in which, again, the court indicated that;

". . . Consistent with the Supreme Court's reasoning in Knott, the court found that the government's conduct in attaching a GPS device to defendant's vehicle did not constitute a search under the Fourth Amendment."

And so those would be --

THE COURT: Can I trouble you for a copy of the Pennsylvania case?

MS. MURPHY: Yes, Your Honor, I have -- I apologize.

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THE COURT: Thank you, very much.

MS. MURPHY: You're welcome.

Your Honor, with respect to further argument, you know, I think one of the things that's clear in this case is, that the observations and the use of the GPS specifically in this case were all -- the relevant evidence is all indicating that the vehicle was traveling on public roads in the Riverwood Road area in Columbia, as he travels to his two different locations of residence and as he travels to the pawn shops, all of those are areas that are public roads. And he would have no expectation of privacy to believe that no one would be able to see him or view him conducting what business he was conducting on those dates in question.

THE COURT: Alright, thank you, very much.

I appreciate the Defense's attention to current developments in the law and legal precedents, albeit precedents from another jurisdiction. And, of course, this area has gotten a lot of attention lately because of that case and the Pennsylvania case. But, and called me old fashioned, but I believe that the Stone case is the Maryland case that's on point and that is supported by *U.S. V Knott*, for the proposition that the first question is, is there a reasonable expectation of privacy that society is prepared to recognize under the Katz test. And Stone stands for the proposition that a person traveling in an automobile on a public thoroughfare has no reasonable expectation

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of privacy in his movements from one place to another. And that by driving on the public roads one voluntarily conveys, to anyone wishing to look, his progress and his route and therefore there's no reasonable expectation of privacy and therefore there's no Fourth Amendment implications. It is not a search under the Fourth Amendment to install this device magnetically to the bottom frame of the automobile.

So, I find that the Defendant has no reasonable expectation of privacy in his location as he travels on the public thoroughfare and that the installation of the particular device to monitor his progress on the public roads was not a search. Therefore his motion to suppress would be denied.

MS. DEBOISSIERE: Thank you for hearing us, Your Honor. And if I may fine tune some of the -- or maybe we should wait until -- I don't know who our trial judge will be, maybe it's --

THE COURT: I think it is me.

MS. DEBOISSIERE: Oh, it is you on the 30th?

THE COURT: I'm told it's me.

MS. DEBOISSIERE: Okay. Well, then maybe address some -- may I approach Ms. Murphy whether we should address the motions in limine now?

THE COURT: Sure.

MS. DEBOISSIERE: Your Honor, we agree to wait until Monday morning on the 30th to -- by then we may

have resolved how we might handle certain evidence and --

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MS. MURPHY: Tuesday, I believe, isn't it?

THE CLERK: Tuesday.

MS. MURPHY: Tuesday.

THE COURT: Is it the 30th?

MS. DEBOISSIERE: Oh, 30th is a Tuesday, you're right.

THE CLERK: Tuesday, yes.

MS. DEBOISSIERE: Okay. So, we will need, I think, a short period of time of the Court's attention before picking a jury with regard to minor little --

MS. MURPHY: I think we could --

MS. DEBOISSIERE: -- parts --

MS. MURPHY: -- pick the jury and perhaps take up the motions in limine if any.

THE COURT: Alright. Well, thank you, very much ladies for a very thoughtful, professional presentation, I appreciate it.

MS. MURPHY: Thank, Your Honor.

MS. DEBOISSIERE: Thank you also, Your Honor .

END OF PROCEEDINGS

COURT REPORTER'S CERTIFICATE

I hereby certify that I reported verbatim by digital audio recording the proceedings attached hereto in the case of State vs. Kelly, Case No. 13-K-10-050346 heard in the Circuit Court for Howard County, Maryland, on Friday, November 19, 2010, before the Honorable Timothy McCrone were recorded by means of digital audiotape.

I further certify that the proceedings were transcribed by me to the best of my ability in a complete and accurate manner, and page numbers one through eighty-four constitute the official transcript of the proceedings.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In Witness Whereof, I have affixed my signature this 8th day of February, 2011.

/s/ Gary Michael
Gary Michael, Transcriber
Official Court Reporter

APPENDIX D

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

Case Number: 02-K-10-000928

[Filed October 15, 2010]

STATE OF MARYLAND,	)
	)
vs.	)
	)
WESLEY TORRANCE KELLY,	)
Defendant.	)
	)

[Excerpts of]
OFFICIAL TRANSCRIPT OF PROCEEDINGS
MOTIONS HEARING

Anne Arundel, Maryland
Friday, October 15, 2010

BEFORE:

HONORABLE PAMELA L. NORTH

APPEARANCES:

For the State:

KAREN LYNETTE ANDERSON-SCOTT, ESQUIRE

For the Defendant:

WILLIAM H. COOKE, ESQUIRE

Electronic Proceedings Transcribed by: Dawn South

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* * *

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THE COURT: Sir -- oh, I'm sorry.

MS. ANDERSON-SCOTT: I'm sorry.

THE COURT: Sir, I'm ordering you not to discuss your testimony with anyone.

THE WITNESS: Okay.

MS. ANDERSON-SCOTT: Your Honor, I don't have any further witnesses on this issue.

MR. COOKE: I have nothing further as well. I'll just --

THE COURT: Okay. Well let's --

MR. COOKE: -- make a few remarks.

THE COURT: -- excuse the police officer and then we'll hear you.

(Pause.)

THE COURT: Okay.

MR. COOKE: All right.

THE COURT: So now that we're in this posture do you want the State to go first because we're just looking at the validity of the GPS?

MR. COOKE: No, I actually think I -- I don't mind going first.

THE COURT: Okay.

MR. COOKE: And I recognize that there are a lot of things that are out of order in this case through I don't think anyone's particular fault, but there are a couple

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unique issues that I think were never anticipated to the time the Constitution was written at the time of English common law was developing, et cetera.

The technology that we've had in the last couple of years since really the '90s has really changed really old questions and made them difficult to answer.

Essentially what my argument was and is in this case is that the police used the GPS. Now it was illegal. It was essentially a search of my client's property. And they can say well, we attached it on the outside, we didn't have to do anything to his car. If I go up to someone's car, if anyone goes up to someone's car and starts placing things on it there's a crime for that and it's called tampering --

THE COURT: Uh-huh.

MR. COOKE: -- that, you know, essentially just can't go up and play with another person's property, let the air out of the tires and attach things, et cetera.

You know I think it's interesting that the detective made the point that -- and that's Detective Pierce I believe -- that he just couldn't go and attach one of these things to anyone's car, the office would have to write up essentially a statement of probable cause --

THE COURT: Uh-huh.

MR. COOKE: -- except there wouldn't be a judge

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deciding whether or not it was valid it would be him doing it. So essentially he is writing his own search warrants in this case and just making arbitrary decisions about who he's going to attach a tracking device to and who he's not.

And I think the -- that's why the D.C. Court of Appeals -- and admittedly there is mixed record in this case -- but I think that's ultimately why the Supreme Court and I'm predicting here is going to say that this type of behavior is not right.

THE COURT: Uh-huh.

MR. COOKE: I think the State to some extent that since it's not well, I don't want to speak for the State -- but I think --

MS. ANDERSON-SCOTT: Thank you.

MR. COOKE: -- that argument is fairly strong, but the question becomes what happens next? Because the State's going to argue I think that well (a), they had visual surveillance on Mr. Kelly, but I think that visual surveillance is in many ways intertwined, tangled up with the GPS surveillance, and they would not have

had the visual surveillance on Mr. Kelly if they would have had but for the illegal GPS surveillance.

THE COURT: Uh-huh.

MR. COOKE: The State is then going to argue I'm sure that Judge, even if they violated his rights in doing

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the illegal surveillance you can't suppress what they saw.

THE COURT: Uh-huh.

MR. COOKE: And I guess my question is, then what remedy does Mr. Kelly have? What remedy does anyone have? Because then even if we establish that you can illegally attach a GPS unit onto someone's car, the police can always come into court and say, yeah, but I saw him do it, I saw him in the -- and really there is no remedy whatsoever for the violation of the Constitution of the law in that regard.

THE COURT: But in criminal court and not civil isn't that true with so many things? Let's say I'm arrested this afternoon and my arrest is completely illegal --

MR. COOKE : Uh-huh.

THE COURT: -- but they seize nothing, I make no statements, what good does it do me to come into court and complain that I was illegally arrested --

MR. COOKE: Well --

THE COURT : -- unless I'm going to sue civilly?

MR. COOKE: And I guess Mr. Kelly would have perhaps civil rights here in terms of a civil suit, and that used to be the remedy that you would traditionally have no violations of the Fourth Amendment. I guess I can see the Court's point. There's nothing that the Court can legally suppress here and therefore there's nothing it can be do even if it is illegal.

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And I just would say that, you know, at least in the case where they arrest you illegally you're at least gone that day. In Mr. Kelly's case, because of --

THE COURT: What'd you say, at least when you --

MR. COOKE : At least when they arrest you -- if Your Honor is arrested illegally --

THE COURT: Yeah.

MR. COOKE : -- you go home. You're not being held for, you know, 10, 15 years on some charge.

THE COURT: Okay.

MR. COOKE: In this case their illegal search of Mr. Kelly is going to result in the production of evidence that's going to be used against him that potentially can take away his freedom for a significant period of time.

And I guess as Your Honor has a question there or maybe I'm not explaining this correctly, but --

THE COURT: But I could go to jail for 15 years. This is my example.

MR. COOKE: Okay.

THE COURT: Let's say this afternoon I walk out of the courthouse and the police come and they handcuff me and they arrest me for robbing a bank yesterday.

MR. COOKE: Okay.

THE COURT : And let's say it's a mistaken identification. I didn't rob the bank but I get convicted.

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MR. COOKE: Okay.

THE COURT: So I've been arrested illegally, let's say they have no probable cause whatsoever.

MR. COOKE: Okay.

THE COURT: And I've got this illegal arrest but there's nothing to suppress so I go to jail for 15 years unfortunately, but what's my remedy in the criminal court?

MR. COOKE: Well, in that case it wouldn't necessarily be an illegal -- an illegal arrest --

THE COURT: But I'm-- that's part of my factual scenario, that I have an illegal arrest. I'm telling you they just picked up the first person off the sidewalk they could that was closest to the bank and that happened to be me, then I come in, I try to defend myself but I lose, so I could go to jail for a very long time even though I was arrested illegally. And I'm just wondering what difference does it make if I was arrested illegally? How can I use that to my benefit?

MR. COOKE: I guess I'm trying to think of -- I think the fact that the police just decided to frame someone yes, you would have a civil remedy, you would have a

remedy in court in terms of arguing that you were not guilty, but there is nothing to suppress --

THE COURT: Yeah, but it doesn't work --

MR. COOKE: -- there. I understand that.

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THE COURT: Right. There's nothing to suppress.

MR. COOKE: Yeah. And you know, I think there ought to be a remedy though. I think when the police do something --

THE COURT: Uh-huh.

MR. COOKE: -- otherwise they can just track anyone. I guess that's my argument, they can track anyone for any reason and they come into court and say there's no remedy.

THE COURT: Uh-huh.

MR. COOKE: And the remedy ought to be the throwing out the evidence --

THE COURT: Uh-huh.

MR. COOKE: -- and saying, you know, in this case you shouldn't be allowed to testify to what you saw because what you saw is a direct result of --

THE COURT: Uh-huh.

MR. COOKE: -- of your illegal acts.

THE COURT: Uh-huh.

MR. COOKE: And so you can't use that protection. And I recognize that it's not an argument that has

support from the court, and the State again is going the cite the Gibson case that basically says tough luck, but I think this case is different because unlike Gibson there's not that -- there's -- there are no great (indiscernible - 2:32:58)

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factors, it's in my view illegal activity witnessing something arrest --

THE COURT: Uh-huh.

MR. COOKE: -- and of course that -- witnessing that illegal activity leads to the warrant, but the warrant at this point suppress -- they got a shirt out of the car --

THE COURT: Uh-huh.

MR. COOKE: -- I'm more concerned about --

THE COURT: But they didn't seize the bag?

MR. COOKE: I don't think they got the bag.

MS. ANDERSON-SCOTT: They didn't --

THE COURT: Okay.

MS. ANDERSON-SCOTT: -- they didn't recover that.

MR. COOKE: So they have a shirt that allegedly belonged to the store, but --

THE COURT: Okay.

MR. COOKE: -- I just think everything, you know, at a certain point there -- that everything ought to be dismissed and I --

THE COURT: Okay. Let me just ask you one preliminary question though. The beginning of your argument is the illegality of the GPS placement.

MR. COOKE: Yes.

THE COURT: Is there any case law you could cite

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for the authority that it's illegal for them to put the GPS on his car?

MR. COOKE: Not the Maryland one, but I think the D.C. Court of Special -- the D.C. Court of Appeals --

THE COURT: -- Okay.

MR. COOKE: -- I think -- and again, as I said, it's not resolved law, I but I think the idea that essentially you can put GPS on anyone. It's not so much I have case law supporting it, but I think it's just the fact that they obviously have some criteria, that they recognize they just cant do this to anyone.

THE COURT: Uh-huh.

MR. COOKE: And so what they're really doing is they're writing their own internal search warrants for who it goes on and who it does not, and I think because it's so intrusive --

THE COURT: Uh-huh.

MR. COOKE: -- that there ought to be some judicial oversight of that, there ought to be a complete judicial oversight of that.

So I don't have any Maryland case law that says that what they did is per se illegal, but I think it is.

THE COURT: Uh-huh.

MR. COOKE: And I think there will be.

THE COURT: Okay, thank you. I'm going to deny.

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I just need something. I need some case, some law, something that says that it would be illegal for the police under these circumstances to put the GPS unit on the truck.

MR. COOKE: Uh-huh.

THE COURT: And I feel like without that I can't take any next step toward the conclusion that you want to reach, although I certainly sympathize with your situation. It seems like just sort of as an average person would really be -- feel that that's personal up front you might say to have something placed on the car without their knowledge and for someone to be aware of their movements in society seems, you know, a lit suspect, but without having any law to say that that's the case, and my understanding is there is no warrant requirement for the GPS, so if there's no warrant requirement and they didn't have a warrant I don't see a problem under current law, so I'm going to deny your motion.

MR. COOKE: All right.

THE COURT: Okay?

MS. ANDERSON-SCOTT: Thank, Your Honor.

MR. COOKE: All right.

THE COURT: Do you want your copy of the warrant back?

MS. ANDERSON-SCOTT: Could I?

(At 2:35p.m., proceeding concluded.)

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CERTIFICATE OF TRANSCRIBER

I hereby certify that the proceedings in the matter of State of Maryland versus Wesley Torrence Kelly, 02-K-10-000928, heard in the Circuit Court for Anne Arundel County, Maryland, on October 15, 2010, were recorded by means of electronic sound recording.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 62 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of the case.

In witness whereof, I have affixed my signature this 7th day of February, 2011.

/s/ Dawn South
Dawn South