

ORIGINAL

IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,

Case No. 13-1973

Plaintiff-Appellee,

-vs-

On Appeal from the
Butler County Court of
Appeals, Twelfth
Appellate District

SUDINIA JOHNSON,

Court of Appeals
Case No. CA 2012-11-235

Defendant-Appellant.

**BRIEF OF AMICI CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION,
FAIRFIELD COUNTY PROSECUTOR GREGG MARX, CUYAHOGA COUNTY
PROSECUTOR TIMOTHY J. MCGINTY, AND FRANKLIN COUNTY
PROSECUTOR RON O'BRIEN IN SUPPORT OF APPELLEE STATE OF OHIO**

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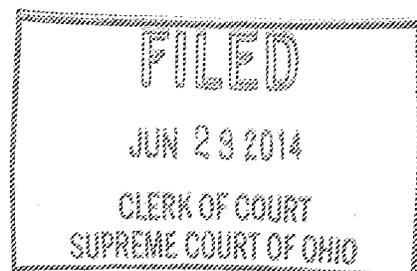


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STATEMENT OF AMICUS INTEREST

Amici curiae Prosecutors Gregg Marx, Timothy J. McGinty, and Ron O'Brien have a keen interest in the outcome of the present appeal involving the applicability of the good-faith exception. Each prosecutor is relying on the good-faith exception in opposing efforts to suppress evidence in relation to the pre-*Jones* attachment and monitoring of a GPS device.

The Cuyahoga County case pending in this Court is *State v. Allen*, Sup.Ct. No. 13-1776. The Fairfield County cases are *State v. Sullivan*, Sup.Ct. No. 14-11, and *State v. White*, Sup.Ct. No. 14-12.

The *Allen*, *Sullivan*, and *White* appeals are being held pending the outcome of the present appeal in *Johnson*.

The relevant Franklin County case is *State v. Sullivan*, 10th Dist. No. 13AP-173, 2014-Ohio-1443. The State's appeals in that case are due to be filed in this Court by mid-July 2014. The Tenth District recently denied reconsideration in that case but certified a conflict on June 10, 2014.

Given that the present case is the lead case that will receive briefing and oral argument, amici Prosecutors believe it is important to present their views on the legality of the GPS "search" and their views on the applicability of the good-faith exception.

In all of these cases, the police were acting at a time when there were strong reasons to think that the warrantless attachment of a tracking device like a GPS device to monitor travels on public roadways was not a "search." These strong reasons included United States Supreme Court case law.

Moreover, in all of these cases, the defendants were engaged in substantial, serious, and/or violent criminal activity. The defendant in *Johnson* is a seven-kilo drug trafficker. The defendants in *Sullivan* and *White* are serial armed home invaders. The defendant in *Allen* was a serial home burglar. They are, in short, the kind of recidivist felons that clearly deserve prosecution and punishment. Giving them the windfall of suppression in order to thwart or hinder their prosecutions offends basic notions of justice.

The Ohio Prosecuting Attorneys Association (“OPAA”) is a private non-profit organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. The OPAA seeks to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice. The OPAA assists county prosecuting attorneys to pursue truth and justice as well as promote public safety. The OPAA joins in this amicus brief because application of the exclusionary rule would hinder the pursuit of truth and justice in this case and other cases.

STATEMENT OF FACTS

Amici Prosecutors and OPAA adopt by reference the Statement of Facts from the Brief of Plaintiff-Appellee.

ARGUMENT

Introduction

The decision in *United States v. Jones*, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), only addressed the issue of whether the installation/monitoring of the GPS device on a vehicle is a “search.” *Jones* did not address the question of whether a warrant is required, and that issue “remain[s] open” after *Jones*. *United States v. Sparks*, 711 F.3d 58, 62 (1st Cir. 2013). Also, the *Jones* Court refused to address the government’s contention therein that the warrantless GPS installation and monitoring was a reasonable search, stating that the government had forfeited that argument by failing to raise it below. *Jones*, 132 S.Ct. at 954.

Accordingly, *Jones* is not dispositive of the arguments regarding the validity of the GPS “search” being made under the Second Proposition of Law below. The instant amici contend that the warrantless installation/monitoring of the GPS qualified as a reasonable search allowed by the Fourth Amendment and falls within the automobile exception to the warrant requirement, which allows warrantless vehicle searches for evidence of crime based on probable cause.

Even assuming a Fourth Amendment violation occurred, amici contend that the actions in installing/monitoring the GPS without a warrant fell within the good-faith exception to the federal exclusionary rule. The police were not acting with a deliberate, reckless or grossly-negligent disregard of Fourth Amendment rights. There were strong reasons to think that no warrant was needed to attach and monitor a GPS device because no “search” was involved when the attachment occurred off the suspect’s property and

the monitoring related to travel on public roadways.

These cases point up, again, the folly that is the federal exclusionary rule. Compare *State v. Lindway*, 131 Ohio St. 166, 2 N.E.2d 490 (1936) (no exclusion at all under Ohio Constitution). Based on a purported error by the police, the exclusionary rule has been invoked by some lower courts to suppress reliable evidence relevant to the guilt of serious criminal offenders. It confounds justice and logic to let these felons potentially “walk” based on an “error” that many reasonably believed before *Jones* was not an “error” at all in light of the pre-*Jones* case law holding that no “search” was involved in electronic tracking on public roadways. If the good-faith exception is to apply anywhere, it should apply here, as the Twelfth District held in the present case.

The Fifth District’s decisions in *Sullivan* and *White* demonstrate the need for the good-faith exception. The Fifth District relied primarily on an extensive quotation from the pre-*Jones* District of Columbia Circuit decision in *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) (the lower-court decision in *Jones*). But *Maynard* was decided over six months after the warrantless GPS attachment/monitoring had occurred in *Sullivan/White*. It took another 17 months before the United States Supreme Court weighed in by announcing *Jones* in January 2012 and by finding a “search” based on a trespass-to-chattel theory that was, at a minimum, a surprising theory. Not even the *Maynard* decision had anticipated the trespass-to-chattel approach, as it focused on an expectation-to-privacy theory that was *not* adopted by the *Jones* majority.

The decisions in *Maynard* and then *Jones*, both coming well after the police actions here, do not undercut the applicability of the good-faith exception. Indeed, even

after *Maynard*, two Ohio appellate courts (*Johnson* (12th Dist.) and *Winningham* (1st Dist.)) issued pre-*Jones* decisions in 2010 and 2011 concluding that no “search” was involved in warrantless GPS attachment/monitoring. Opining before *Jones*, these courts provide a helpful barometer of the existing law in the time frame before *Jones*, in which many courts were reasonably concluding that no “search” was involved by attaching a GPS device on a vehicle and by monitoring its public movements. Since it was reasonable for courts to arrive at this conclusion before *Jones*, it was equally reasonable for police before *Jones* to do so as well. The police were not acting in deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights.

Given the pre-*Jones* case law, defense attorneys were not even required before *Jones* to file motions to suppress challenging GPS attachment/monitoring. *State v. Miranda*, 10th Dist. No. 13AP-271, 2013-Ohio-5109. Such attorneys were not required to be clairvoyant in predicting *Jones*. *Id.* at ¶¶ 19-20. Under the good-faith exception, the police need not have been clairvoyant either.

In addition, not every “search” requires a warrant, and the GPS “search” here can be found to be a reasonable warrantless search because no invasion of privacy is involved in monitoring a vehicle’s travels on public roadways. The “search” would also fall within the automobile exception allowing a warrantless vehicle search based on probable cause. An assessment of these questions should be part of the assessment of the good-faith exception. See Second Proposition of Law.

Proposition of Law No. 1. When the warrantless attachment and monitoring of a GPS device on a vehicle occurred before *United States v. Jones*, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), the exclusionary rule will not be applied to suppress evidence arising therefrom unless such attachment and monitoring involved the deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights or involved circumstances of recurring or systemic negligence. (*Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496; *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), followed and applied).

Even if the warrantless attachment and monitoring of a GPS device was unlawful, see Second Proposition of Law, the search would still fall within the good-faith exception to the federal exclusionary rule.

A.

Before *Jones*, a number of Ohio and federal appellate courts had concluded that the installation/monitoring of a GPS did not require a warrant because no reasonable expectation of privacy was invaded and therefore no “search” was involved. See *State v. Winningham*, 1st Dist. No. C-110134, 2011-Ohio-6229, vacated, 132 Ohio St.3d 77, 969 N.E.2d 251, 2012-Ohio-1998; *State v. Johnson*, 190 Ohio App.3d 750, 2010-Ohio-5808, vacated, 131 Ohio St.3d 301, 964 N.E.2d 426, 2012-Ohio-975; *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216-17 (9th Cir. 2010), vacated, 132 S.Ct. 1533, 182 L.Ed.2d 151 (2012); *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2004).

These conclusions were based in major part on the logic underlying the beeper-technology cases from the 1980’s, in which the United States Supreme Court had concluded that the monitoring of a tracking device like a beeper, so as to reveal locations and travel routes on public highways, did not constitute a “search” because a person

“traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” *United States v. Knotts*, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). The Court also concluded that the surreptitious transfer of a tracking device to the recipient without his knowledge at most was a “technical trespass,” that a physical trespass was only marginally relevant to the Fourth Amendment issue, and that “an actual trespass is neither necessary nor sufficient to establish a constitutional violation.” *United States v. Karo*, 468 U.S. 705, 712-13, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). Importantly, both of these tracking-device cases defined a “search” exclusively in terms of whether a reasonable expectation of privacy was invaded. *Knotts*, 460 U.S. at 280-81; *Karo*, 468 U.S. at 712.

Jones was announced over three years after the GPS installation and monitoring in the present case, two years after the attachment/monitoring in *Sullivan/White*, and over 14 months after the attachment/monitoring in *Allen*. The police could not be expected to foresee how that case would turn out and especially could not be expected to foresee the resurrection of a trespass-to-chattel theory that prior cases had eschewed in favor of a “reasonable expectation of privacy” standard.

B.

The existence of a Fourth Amendment violation “does not necessarily mean that the exclusionary rule applies.” *Herring v. United States*, 555 U.S. 135, 140, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). “Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation.” *Id.* at 137. “[E]xclusion ‘has always been our last resort, not our first impulse’ * * *.” *Id.* at 140 (quoting another

case). “[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence.” Id. at 141 (quote marks & brackets omitted). “The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct.” Id. at 143.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 144. “[T]he question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.” Id. at 137. “[W]e have focused on the efficacy of the [exclusionary] rule in deterring Fourth Amendment violations in the future.” Id. at 141. “The rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application.” Id. at 141 (quote marks and brackets omitted).

“The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers. We have already held that our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances” taking into account the “particular officer’s knowledge and experience * * * but not his subjective intent.” Id. at 145-46 (internal quotation marks omitted).

“[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way. In such a case, the criminal should not go free because

the constable has blundered.” *Id.* at 147-48 (internal quotation marks omitted).

No deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights was involved here. At the time the police installed and monitored the GPS device in the present case and in the *Allen*, *Sullivan*, and *White* cases, there were strong reasons to believe that a warrant was not required because the installation and monitoring of a tracking device had been found in the 1980’s not to involve a “search” when used to monitor travels on public roads. Suppression is unwarranted under the good-faith exception to the federal exclusionary rule.

C.

This good-faith exception applies to warrantless police actions. Indeed, the *Herring* Court noted that the good-faith exception already applied to warrantless searches that were based on a statute later found unconstitutional. *Herring*, 555 U.S. at 142 (discussing *Illinois v. Krull*, 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)). *Herring* summarized the good-faith exception in broad terms and did not even mention the word “warrant” in that summary *Herring*, 555 U.S. at 147-148. *Herring* itself involved warrantless police action because the police mistakenly believed there was an arrest warrant.

In *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), the Court confirmed that the good-faith exception can apply to avowedly warrantless searches. The *Davis* Court repeated *Herring*’s test for the good-faith exception:

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion “var[y] with the culpability of the law enforcement conduct” at issue. *Herring*, 555 U.S., at 143, 129 S.Ct. 695. When the police exhibit

“deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.*, at 144, 129 S.Ct. 695. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, *Leon, supra*, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, “isolated” negligence, *Herring, supra*, at 137, 129 S.Ct. 695, the “deterrence rationale loses much of its force,” and exclusion cannot “pay its way.” See *Leon, supra*, at 919, 908, n. 6, 104 S.Ct. 3405 (quoting *United States v. Peltier*, 422 U.S. 531, 539, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

Davis, 131 S.Ct. at 2427-2428. “The [exclusionary] rule’s sole purpose, we have repeatedly held, is to deter *future* Fourth Amendment violations.” *Id.* at 2426 (emphasis added). “Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted.” *Id.* at 2426-27 (quotation marks and ellipses omitted). “For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.” *Id.* at 2427.

The *Davis* Court emphasized that “[t]he Court has over time applied this ‘good-faith’ exception across a range of cases.” *Id.* at 2428. “The good-faith exception * * * is no less an established limit on the *remedy* of exclusion than is inevitable discovery.” *Id.* at 2431. *Davis* plainly allows for the good-faith exception to be applied to warrantless searches.

In light of *Herring*, *Davis*, and *Krull*, the good-faith exception easily applies to the warrantless searches that occurred in the present case and in the *Allen*, *Sullivan*, and *White* cases. Police were not acting in a grossly-negligent disregard of Fourth Amendment rights when they installed and monitored the GPS device. Indeed, even after

the *Jones* conclusion that a “search” was involved, there is *still* a substantial question whether a search warrant is even required. See Second Proposition of Law.

D.

Defendant argues that there is bad faith when officers do not presume they need a warrant. According to defendant, warrantless searches are per se unreasonable subject only to a limited number of well-delineated exceptions allowing warrantless action. But the key here initially is whether a “search” was involved. The *defense* bears the burden of proving there was a “search,” not the police or prosecution. *Xenia v. Wallace*, 37 Ohio St.3d 216, 220, 524 N.E.2d 889 (1988) (“the movant is required to establish a warrantless search or seizure”). There is no presumption that a police action constitutes a “search,” and, given the extant case law, there were strong reasons to think that the attachment of a GPS device to monitor travels on public roadways was not a “search.” Given the good-faith basis to believe there was no “search,” police at the time were not required to presume the need to get a search warrant.

In addition, as discussed under the Second Proposition of Law, a warrantless GPS “search” would fit within the well-delineated automobile exception. The good-faith exception applies to warrantless-search exceptions, as demonstrated by *Davis*.

This is not a matter of the police “begging forgiveness instead of asking for permission.” Numerous police actions do not require a warrant, such as when no “search” or “seizure” occurred or when the action falls within a warrantless-search exception. The pithy “beg forgiveness” phrase does an injustice to those officers who could believe in good faith that no warrant was required. What should matter is whether

the officer's actions amounted to a deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights, not whether the officer failed to presume the need for a warrant. To be sure, a court might eventually conclude that a warrant was needed, but that does not automatically place the officer's action outside the reach of the good-faith exception.

E.

Some argue that the *Herring* test is limited to instances of database clerical errors, and defendants in other cases have contended that *Herring* only applies when the police mistake was "attenuated" from the police search. But the principles animating the holdings in *Herring* and *Davis* apply in all search cases. The rationale for the exclusionary rule is *always* to deter police misconduct, and applying the exclusionary rule *always* imposes substantial societal costs. Thus, applying the exclusionary rule should *always* be reserved for those cases in which the deterrence benefits outweigh the substantial costs.

The reach of *Herring* and *Davis* cannot be confined to a narrow category of search cases. For example, in *Davis*, the Court applied the good-faith exception described in *Herring* to the warrantless search-incident-to-arrest context. Thus, the *Herring* test extends beyond search warrant cases, beyond database clerical errors, and beyond instances where the police mistake was "attenuated" from the search or seizure. It applies to all searches and all seizures, including warrantless searches.

Nor does the applicability of the *Herring* test turn on whether the police error was "attenuated" from the search. In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57

L.Ed.2d 667 (1978), the Court held that police negligence in obtaining a warrant does not violate the Fourth Amendment at all, let alone require suppression. *Id.* at 171. There was no attenuation in *Franks* – the police negligence directly led to the acquisition of the warrant. The Court in *Herring* relied extensively on *Franks*, noting that both cases “concern false information provided by police.” *Herring*, 129 S.Ct. at 703. The Court never suggested that suppression was less warranted in *Herring* because the police error was one step further removed from the search.

An “attenuation” argument especially fails in light of *Davis*, in which the police conduct found illegal was the very conduct that led to the discovery of the evidence.

In short, *Herring* is not a fact-specific holding. True, the outcome of *Herring*’s balancing test will vary depending on the specific facts of each case. But even when the police rely on an exception to the warrant requirement, and even when the police error is not “attenuated,” courts must still engage in the balancing test before applying the federal exclusionary rule.

F.

Many contend that the *Herring-Davis* test is limited to cases in which the officers were acting in compliance with “binding precedent.” The *Davis* case did involve a particular application of the good-faith exception to an instance involving compliance with then-existing precedent. But its language is broader, as is the *Herring* language. *Davis* recognizes “[t]he Court has over time applied this ‘good-faith’ exception across a range of cases.” *Davis*, 131 S.Ct. at 2428. “The good-faith exception * * * is no less an established limit on the *remedy* of exclusion than is inevitable discovery.” *Id.* at 2431.

Inevitable discovery potentially applies in every case, as would the good-faith exception.

The broad *Herring-Davis* test applies across the range of search cases. Although *Davis* involved a case in which there was “binding precedent” supporting the good-faith exception, nothing in the *Davis* language made “binding precedent” a necessary component of every case in which the good-faith exception would apply. Applying the good-faith exception in that one context does not exclude or preclude applying it in other contexts. “When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound”, including the “rationale” used by the Court and “their explications of the governing rules of law.” *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67, 116 S.Ct. 1114, (1996). The *Herring-Davis* test is a rule of law that is just as binding as the result in *Davis*.

Indeed, the good-faith exception has been applied in a number of cases in which the officer lacked “binding precedent” to think he was acting correctly, including *Herring*, *Krull*, and *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Given the substantial social costs involved with the exclusionary rule, courts should welcome the broad *Herring-Davis* test. More cases will be decided on their full merits, and the truth-finding process will not be distorted by the exclusion of reliable truthful evidence. And fewer defendants will receive the windfall of free crimes. Application of the good-faith exception here allows a seven-kilo drug trafficker to be prosecuted fully on the merits. This is a good thing. It is understandable why drug traffickers and home invaders would seek the windfall of suppression and therefore

would seek a narrowing of the broad *Herring-Davis* standard. But it is perplexing why anyone else would seek to confine the broad *Herring-Davis* test to narrow categories of searches.

G.

Defendant's strict "binding precedent" argument is based on the flawed reading of *Davis* in *State v. Henry*, 2nd Dist. No. 25007, 2012-Ohio-4748. In *Henry*, the Second District focused on a statement in *Davis* that defendants would have an undiminished incentive to litigate the merits of Fourth Amendment claims in jurisdictions where the Fourth Amendment issue remains "open." *Henry*, ¶¶ 17-18. From this isolated statement, the *Henry* court asserted that the good-faith exception cannot apply where the merits question remained open in the pertinent jurisdiction at the time of the police action. But this "undiminished incentives" statement was merely a make-weight observation as to why the *Davis* majority was rejecting the defendant's "incentives" argument against the good-faith exception; the defense argument stood rejected for at least two other reasons in *Davis*.

More importantly, the "incentives" argument was already rejected in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), which concluded that any diminishment of incentives to litigate would be insubstantial and was no ground for rejecting application of a good-faith exception. *Id.* at 924-25 & n. 25. As stated in *Leon*:

Nor are we persuaded that application of a good-faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. There is no need for courts to adopt the inflexible practice of always

deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate. As cases addressing questions of good-faith immunity under 42 U.S.C. § 1983, * * * and cases involving the harmless-error doctrine, * * * make clear, courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases.

If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue. Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors and so evaluate the officers' good faith only after finding a violation. In other circumstances, those courts could reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith. We have no reason to believe that our Fourth Amendment jurisprudence would suffer by allowing reviewing courts to exercise an informed discretion in making this choice.

Id. at 924-25 (citations and footnotes omitted). As further stated in *Leon*:

The argument that defendants will lose their incentive to litigate meritorious Fourth Amendment claims as a result of the good-faith exception we adopt today is unpersuasive. Although the exception might discourage presentation of insubstantial suppression motions, the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished.

Id. at 924 n. 25.

As these passages show, the good-faith exception can apply to cases in which the Fourth Amendment issue remains “open.” *Leon* specifically references the scenario in which the officers’ good faith is being determined *before* the Fourth Amendment issue is resolved or is being determined *in the very same decision* as the resolution of the Fourth Amendment issue. The good-faith exception plainly does not require that an officer have a “binding precedent” in hand before the officer acts. Nothing in the good-faith exception supports the creation of an overarching “binding precedent” requirement.

H.

Even if a “binding precedent” standard applied, however, the police met it in the present case and in the *Allen*, *Sullivan*, and *White* cases. The electronic-tracking cases from the 1980’s provided the substantial “binding precedent” for believing that the installation/monitoring of a GPS device would not be a “search” because no reasonable expectation of privacy was invaded. In *Sparks*, the First Circuit recognized that officers could objectively rely directly on *Knotts* itself as allowing the warrantless monitoring of an electronic tracking device like a GPS to track movements on public highways. *Sparks*, 711 F.3d at 65-68.

The First Circuit concluded that there were no material distinctions between the warrantless beeper monitoring allowed by *Knotts* and the warrantless GPS monitoring for 11 days that occurred in *Sparks*. “[T]he fact that the device was a GPS tracker rather than a beeper does not render *Knotts* inapplicable.” *Sparks*, 711 F.3d at 66. “Certainly, a GPS tracker is more capable than a beeper, but nothing inheres in the technology to take it out of *Knotts*’s holding.” *Id.* at 66 (quotation marks omitted). “*Knotts* clearly authorized the

agents to use a GPS-based tracking device in the place of a beeper.” Id. at 66.

In addition, the 11-day duration of the GPS in *Sparks* did not materially distinguish the *Knotts* case, since “*Knotts* gave scant reason to think that the duration of the tracking in that case was material to the Court’s reasoning.” Id. at 67. “*Knotts* was widely and reasonably understood to stand for the proposition that the Fourth Amendment simply was not implicated by electronic surveillance of public automotive movements * * *.” Id. at 67.

The First Circuit had also noted that its own circuit precedent had found it immaterial under the Fourth Amendment that there was a “trespass” in attaching an electronic device like a beeper to the undercarriage of a car. Id. at 67. But there was no need to rely on circuit precedent, as *Karo* itself established that a “technical trespass” was insufficient to invalidate the surreptitious transfer of the device to the recipient in that case. Indeed, *Knotts* and *Karo* both demonstrate that an expectation-of-privacy analysis applied, and that “trespass” was only “marginally relevant” and insufficient to create a constitutional violation.

I.

The federal Sixth Circuit likewise recently applied the good-faith exception to a pre-*Jones* GPS search. In the now-published decision in *United States v. Fisher*, 745 F.3d 200 (6th Cir. 2014), the Sixth Circuit broadly applied the concept of “binding appellate precedent” and relied in major part on *Knotts* and *Karo* as supporting warrantless GPS attachment and monitoring. “Taken together, *Knotts* and *Karo* strongly suggested that the warrantless installation and monitoring of a tracking device to follow

an individual in public spaces was permissible.” Id. at 204. The Sixth Circuit noted that some appellate courts have held that “*Knotts* and *Karo* actually authorized the warrantless use of GPS devices and therefore are themselves a basis for asserting the good-faith exception.” Id. at 204.

The Sixth Circuit also relied on its own case law approving of warrantless tracking through cell-phone “pinging” and through the use of beepers. While such case law “dealt with cell phones and beepers, not GPS, the cases clearly indicated that the warrantless use of electronic tracking devices was permissible. Put differently, our precedent on the constitutionality of warrantless tracking was unequivocal.” Id. at 204-205 (footnote omitted). The Sixth Circuit noted that “[o]ther circuits have similarly held that pre-*Jones* cases, authorizing the use of tracking devices like beepers, provided binding authority for the warrantless use of GPS trackers. As such, officers relying on these earlier cases were still within the scope of the good-faith safe harbor, even though the technology described by the cases was not exactly the same.” Id. at 205.

The Sixth Circuit also noted the shift in constitutional law that occurred when *Jones* relied on the trespass-to-chattel theory. “[P]rior to *Jones*, the Supreme Court’s jurisprudence had downplayed the relevance of a physical trespass.” Id. at 204 n. 4. “A reasonable officer would not have been able to anticipate this shift in the Supreme Court’s Fourth Amendment jurisprudence.” Id. at 204 n. 4. “[A]lthough a GPS device could be used as part of a more extensive governmental surveillance program that would be sufficiently distinguishable to make prior precedent inapposite, the facts of the present case are a far cry from that Orwellian vision.” Id. at 205.

J.

The federal Second Circuit has also applied the good-faith exception to a pre-*Jones* warrantless GPS search, noting that several courts have applied the good-faith exception to such searches. *United States v. Aguiar*, 737 F.3d 251 (2d Cir. 2013).

Several of our sister circuits have applied the good-faith exception in cases where warrantless GPS searches were conducted pre-*Jones*, and did not require the evidence collected by those searches be suppressed. See *Sparks*, 711 F.3d at 62–63; *United States v. Andres*, 703 F.3d 828, 834–35 (5th Cir. 2013) cert denied, — U.S. —, 133 S.Ct. 2814, 186 L.Ed.2d 873 (2013); *United States v. Pineda–Moreno*, 688 F.3d 1087, 1090–91 (9th Cir. 2012) cert denied, — U.S. —, 133 S.Ct. 994, 184 L.Ed.2d 772 (2013). Several district courts have also applied the good faith exception to allow evidence obtained from pre-*Jones* warrantless GPS searches to stand. See, e.g., *United States v. Baez*, 878 F.Supp.2d 288, 289 (D.Mass. 2012) (“Where, as here, law enforcement officers at the time they act have a good faith basis to rely upon a substantial consensus among precedential courts, suppression of probative evidence is too high a price to pay because of the subsequent supervention of that consensus by the Supreme Court.”); *United States v. Leon*, 856 F.Supp.2d 1188, 1193 (D.Haw. 2012) (as there was no binding precedent authorizing the practice at the time, *Davis* did not control, but “after examining precedent as of 2009, the court finds that the agents’ conduct in the use of the GPS tracking device was objectively reasonable”); *United States v. Oladosu*, 887 F.Supp.2d 437, 448 (D.R.I. 2012) (evidence would not be excluded where at the time the GPS device was attached to defendant’s vehicle, the Supreme Court had approved the warrantless use of beeper technology and two circuit courts had extended that rule to GPS devices).

Aguiar, 737 F.3d at 260. The Second Circuit then relied directly on *Knotts* and *Karo* as providing the “binding precedent” supporting the police action.

* * * Prior to *Jones*, our Circuit lacked occasion to opine on the constitutionality of using electronic tracking devices

attached to vehicles, either of the beeper or GPS variety. However, the Supreme Court did have occasion to address the issue in both *Knotts* and *Karo*, and we find that at the time the GPS tracking device was applied to Aguiar's car in January 2009, law enforcement could reasonably rely on that binding appellate precedent.

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

Moreover, we find the beeper technology used in *Knotts* sufficiently similar to the GPS technology deployed by the government here. *See, e.g., Sparks*, 711 F.3d at 66 (finding defendants failed to distinguish in any substantive way how the installation of a beeper differed from the installation of a GPS device). Like the device at issue in *Knotts*, the GPS device allows law enforcement to conduct the same sort of surveillance it could conduct visually, but in a more efficient and cost-effective manner. Appellants argue that the GPS surveillance here continued over a period of months, tantamount to the sort of "dragnet type law enforcement practices" the *Knotts* court specifically

declined to address. *Knotts*, 460 U.S. at 284, 103 S.Ct. 1081. But the record indicates that the GPS device was used to track Aguiar's vehicles on public thoroughfares, with technology undertaking an activity that police officers would have physically performed in the past. "Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled police to be more effective in detecting crime, it simply has no constitutional foundation." *Id.*

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

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

Aguiar, 737 F.3d at 261-62; see, also, *Kelly v. State*, 436 Md. 406, 426, 82 A.3d 205 (2013) (directly relying on *Knotts*; "before *Jones*, binding appellate precedent in Maryland, namely *Knotts*, authorized the GPS tracking of a vehicle on public roads.").

Other federal circuits have also applied the good-faith exception to warrantless

GPS attachments, concluding that the precedents allowed such warrantless actions.

United States v. Smith, 741 F.3d 1211 (11th Cir. 2013); *United States v. Andres*, 703 F.3d 828, 834-35 (5th Cir. 2013) (“In December 2009, it was objectively reasonable for agents operating within the Fifth Circuit to believe that warrantless GPS tracking was permissible under circuit precedent.”); *United States v. Pineda-Moreno*, 688 F.3d 1087, 1090 (9th Cir. 2012).

No officer can be blamed for not having predicted that the *Jones* Court would resort to a trespass-to-chattel theory that the earlier electronic-tracking cases had expressly eschewed. Under those precedents, an officer reasonably could believe that there was no reasonable expectation of privacy implicated by monitoring public automotive movements and that a “technical trespass” would not create a need for a warrant.

K.

The Ohio case law points up another aspect of the issue. Many judges in pre-*Jones* cases were relying on *Knotts* and/or *Karo* to conclude that no “search” was involved in the installation and monitoring of a GPS device. Two pre-*Jones* Ohio appellate courts reached that very conclusion *Winningham*, supra; *Johnson*, supra. Other Ohio judges reached the very same conclusion.

Is this Court willing to conclude that these trial and appellate judges were not acting in good faith?

Is this Court willing to say that these judges were acting with deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights in reaching these

conclusions?

Unless this Court is willing to take these various judges to task, then the police in the present case and in the *Allen*, *Sullivan*, and *White* cases cannot be blamed either. The courts were using their best judgment as to what was needed, as were the police. They were not being negligent, let alone grossly negligent, in concluding no “search” was involved and no warrant was needed.

The shifting views of Judge Hoffman in the *Sullivan* and *White* cases are perhaps the best indicator of why it was reasonable to think that no “search” was involved. Substantial litigation had taken place in those cases before *Jones*, with the Fifth District deciding in 2-1 decisions in September 2011 that the warrantless GPS attachment/monitoring had constituted a “search” because it invaded a reasonable expectation of privacy. *State v. Sullivan*, 5th Dist. No. 2010-CA-52, 2011-Ohio-4967; *State v. White*, 5th Dist. No. 2010-CA-60, 2011-Ohio-4526. But Judge Hoffman dissented in both decisions. Like other judges in other courts, he reasonably concluded no “search” was involved. *Sullivan*, 2011-Ohio-4967, ¶¶ 74-85.

Fast forward 26 months later, after this Court had vacated the 2-1 decisions and remanded to the common pleas court for further proceedings in light of *Jones*. On review this time, Judge Hoffman authored the opinions finding not only that a “search” was involved but also that a warrant was required (a result not dictated by *Jones*).

Judge Hoffman’s shifting positions perfectly capture in microcosm why the good-faith exception should apply. Judge Hoffman was not acting in deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights in concluding before *Jones* that

no “search” was involved and thus no warrant was required. Yet now, after the fact, the reasonable pre-*Jones* “no search” conclusion has been found to be incorrect, and the defendants in *Sullivan* and *White* are being granted the windfall of suppression.

If the good-faith exception is to apply in any case, it should apply here.

L.

The broad *Herring-Davis* test for the good-faith exception represents a welcome development in Fourth Amendment jurisprudence, as it represents a narrowing of the flawed and ill-conceived exclusionary rule. The exclusionary rule should be narrowed and limited (and ultimately rejected) because of its “substantial social costs.” *Leon*, 468 U.S. at 907. As stated in *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976):

The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. * * * Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. * *

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Id. at 489-90 (footnotes omitted).

An exclusionary rule “allows many who would otherwise be incarcerated to escape the consequences of their actions.” *Pennsylvania Bd. of Probation v. Scott*, 524 U.S. 357, 364, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998), “The principal cost of applying any

exclusionary rule ‘is, of course, letting guilty and possibly dangerous criminals go free * * *.’” *Montejo v. Louisiana*, 556 U.S. 778, 796, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (quoting *Herring*). Letting the guilty go free is “something that ‘offends basic concepts of the criminal justice system.’” *Herring*, 129 S.Ct. at 701, quoting *Leon*, 468 U.S. at 908; *Hudson v. Michigan*, 547 U.S. 586, 595, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (discussing “the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society)”). “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” *Herring*, 129 S.Ct. at 701, quoting *Scott*, 524 U.S. at 364-65.

An exclusionary rule also disserves the public welfare by consuming scarce criminal-court resources through the “extensive litigation” often required for suppression motions. *Scott*, 524 U.S. at 366.

Perhaps most perniciously, in a process designed to search for the truth, an exclusionary rule allows the defense to mislead the jury by claiming innocence when the suppressed physical evidence would show otherwise. An exclusionary rule “undeniably detracts from the truthfinding process * * *.” *Id.* at 364. To be sure, a defendant taking the witness stand is subject to impeachment with the otherwise suppressed physical evidence. *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980). But the defense is free to put other witnesses on the witness stand to support the defendant’s claim of innocence, and those witnesses cannot be impeached by the suppressed physical evidence. *James v. Illinois*, 493 U.S. 307, 110 S.Ct. 648, 107 L.Ed.2d

676 (1990). And, without putting any witnesses on the stand, the defense counsel, who is the defendant's agent at trial, is allowed to argue the defendant's innocence to the jury and to cross-examine witnesses under theories of innocence, all without fear that the suppressed evidence (which everyone but the jury knows about) will be used against the defendant.

Courts should reject this kind of shell game where the truth is hidden from the factfinder and the factfinder is affirmatively deceived. "After all, a trial before a judicial tribunal is primarily a truth-determining process, and if it in any sense loses its character as such, it becomes the veriest sort of a mockery." *State v. Marinski*, 139 Ohio St. 559, 560, 41 N.E.2d 387 (1942).

It is appropriate here to quote the following passage from this Court's decision in *Lindway*, which rejected the exclusionary rule altogether under the Ohio Constitution.

"All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, this view appears indifferent to the direct and immediate result, viz., of making Justice inefficient, and of coddling the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer." And to bring the list more up to date we might add the terms gangster, gunman, racketeer and kidnaper.

Lindway, 131 Ohio St. at 181 (quoting Wigmore).

This Court itself has recognized that "the exclusionary rule and the concomitant suppression of evidence generate substantial social costs in permitting the guilty to go free and the dangerous to remain at large." *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, 860 N.E.2d 1002, ¶ 12 (internal quotation marks omitted).

It bears emphasis here that the exclusionary rule is merely a “judicially created remedy” that is prudential in nature, not constitutionally mandated. *Herring*, 129 S.Ct. at 699, 700 (“judicially created rule”; “We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.”); *Scott*, 524 U.S. at 362, 363 (“prudential rather than constitutionally mandated”; “use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.”); *Leon*, 468 U.S. at 906 (“Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands”; exclusion is not a “personal constitutional right of the party aggrieved”).

Ironically, the defense accuses the Twelfth District of engaging in a “tortured analysis” of the problem. But what would truly be “tortured” would be letting a major drug trafficker “walk” in this case. Applying the good-faith exception here is the right thing to do, and the correct thing to do legally.

M.

The defense citation to *State v. Kosla*, 10th Dist. No. 13AP-514, 2014-Ohio-1381, triggers the question of whether the defense is also seeking suppression based on a purported violation of Section 14, Article I, of the Ohio Constitution. The State is appealing from the flawed *Kosla* decision in that case, see Sup.Ct. No. 14-780, and so that decision should not be taken at face value.

Even so, it should be noted that there is no exclusionary rule for a violation of Section 14. Syllabus law of this Court indicates that the Ohio Constitution does not recognize an exclusionary rule for illegal searches and seizures thereunder. *State v.*

Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936), paragraphs four, five, six of syllabus.

The constitutional provision itself contains no exclusionary rule. “The constitutional provision makes an unreasonable search and seizure illegal. But there is nothing in its language changing the rule as to, or in any way affecting, the admissibility of evidence.” *Lindway*, 131 Ohio St. at 180 (quoting law review). The legality of the search or seizure is “a collateral issue” to admissibility. *Id.*

In *State v. Mapp*, 170 Ohio St. 427, 430, 166 N.E.2d 387 (1960), this Court followed *Lindway* in concluding that “evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution.” To be sure, in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the United States Supreme Court determined that the evidence in that case must be excluded, but it did so only by applying the federal exclusionary rule to the states. The United States Supreme Court could not countermand this Court’s state constitutional ruling in *Lindway* or *Mapp*. *Wainwright v. Goode*, 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 488, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Howard v. Kentucky*, 200 U.S. 164, 173, 26 S.Ct. 189, 50 L.Ed. 421 (1906).

Even after *Mapp v. Ohio*, Ohio courts recognized as late as 1978, 1989, and 1993 that *Lindway* had never been overruled. *Cincinnati v. Alexander*, 54 Ohio St.2d 248, 255-56 n. 6, 375 N.E.2d 1241 (1978); *State v. Thierbach*, 92 Ohio App.3d 365, 370 n. 5, 635 N.E.2d 1276 (1st Dist. 1993); *State v. Harris*, 2nd Dist. No. 11309 (1989).

Some noteworthy cases have failed to overrule *Lindway* because the issue was not presented or addressed. *State v. Pi Kappa Alpha Fraternity*, 23 Ohio St.3d 141, 491

N.E.2d 1129 (1986); *State v. Burkholder*, 12 Ohio St.3d 205, 466 N.E.2d 176 (1984), overruled, *State ex rel. Wright v. OAPA*, 75 Ohio St.3d 82, 91, 661 N.E.2d 728 (1996); *State v. Jones*, 88 Ohio St.3d 430, 727 N.E.2d 886 (2000); *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175.

It is unlikely that this Court ever intended to overrule *Lindway*. This Court would not have left such an important shift in constitutional policy to mere implication. At best, the foregoing cases suggest that the Court has not needed to squarely address whether it should adhere to or overrule the *Lindway* non-exclusionary rule.

The *Kosla* majority contended that this Court has “assumed” the existence of an exclusionary rule and thereby overruled *Lindway* “by implication.” But it is well settled that this Court does not make precedents “by implication.” *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, 983 N.E.2d 350, ¶ 6 (express language of earlier case’s syllabus not dispositive because earlier case “never addressed the discrete issue presented here”); *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶¶ 10-12 (“perceived implications” of earlier decisions/dispositions not binding and “entitled to no consideration whatever as settling * * * a question not passed upon or raised at the time of the adjudication.”); *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, ¶ 31 (earlier summary reversal not precedential because issue not briefed or addressed); *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, ¶ 46 (earlier case assuming existence of jurisdiction not binding in later case actually raising that issue); *B.F. Goodrich v. Peck*, 161 Ohio St. 202, 118 N.E.2d 525 (1954),

paragraph four of the syllabus. “Implicit overruling” is an oxymoron in Ohio.

Nor does it matter that this Court has “assumed” the existence of an exclusionary rule in some cases. Assuming something without deciding it is not precedent. Courts often review cases “to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions – even on jurisdictional issues are not binding in future cases that directly raise the questions.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (citations omitted); see, also, *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶¶ 25-27 (validity of statute was assumed in earlier decision).

Even though the *Kosla* majority apparently believed some subsequent decisions have undermined or “implicitly” overruled *Lindway*, the *Kosla* majority still should not have concluded that *Lindway* has been overruled. That conclusion could only be reached by the court of last resort, in this instance the Ohio Supreme Court. See, e.g., *Hohn v. United States*, 524 U.S. 236, 252-53, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Smith v. Klem*, 6 Ohio St.3d 16, 18, 450 N.E.2d 1171 (1983).

Any decision to overrule *Lindway* now would belong to the Ohio Supreme Court, which would need to apply the factors for overruling forth in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. The defendants in *Kosla* cannot satisfy any of the factors to support an overruling of *Lindway*. Most pertinent here, the defendants would be unable to show that *Lindway* was incorrectly decided. Nor would

the defendants be able to show that *Lindway*'s principle of non-exclusion is unworkable.

The failure of this Court to ever engage in any *Galatis*-like analysis of *Lindway* is another sign that this Court simply has never reviewed that issue. Overruling does not occur "by implication," but, rather, by a thorough and structured legal analysis as exemplified by the *Galatis* standard.

Some make a "new federalism" argument, contending that Ohio must have an exclusionary rule because the federal courts have created one for purposes of the Fourth Amendment. But there is no requirement that a state have a state-law exclusionary rule that equals or exceeds the federal rule. Federalism "does not necessarily mean that state constitutional guarantees always are more stringent than decisions of the Supreme Court under their federal counterparts. A state's view of its own guarantee may indeed be less stringent, in which case the state remains bound to whatever is the contemporary federal rule." *State v. Kennedy*, 295 Ore. 260, 270-71, 666 P.2d 1316, 1323 (1983).

In *California v. Greenwood*, 486 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Court recognized that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." But the Court also recognized that the States may eliminate the exclusionary rule for a violation of state law, as California had done. *Id.* at 44. "[T]he people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law." *Id.* at 45.

Finally, the *Kosla* majority's erroneous conclusions about *Lindway* are not aided

by the even-more-flawed discussion of *Lindway* in *State v. Sullivan*, 10th Dist. No. 13AP-173, 2014-Ohio-1443. Amongst the many flaws therein were reliance on two Ohio Supreme Court decisions that never reached the *Lindway* issue and did not even rely on Section 14. In *Chatton*, there was no need to address *Lindway* because the State was not arguing it and the Court's holding was expressly limited to reliance on the Fourth Amendment. *State v. Chatton*, 11 Ohio St.3d 59, 463 N.E.2d 123 (1984). The *Chatton* footnote cited in *Sullivan* went nowhere, only raising the rhetorical or hypothetical question of whether state law would have a good-faith exception.

The *Sullivan* court also misstated the import of *State v. Perkins*, 18 Ohio St.3d 193, 480 N.E.2d 76 (1985). The *Perkins* Court *never mentioned* Section 14 or the Ohio Constitution. *Perkins* could not constitute any overruling or limiting of *Lindway*.

Since Ohio does not provide an exclusionary rule for Section 14 violations, any motion to suppress based thereon must fail. And, given the good-faith exception to the federal exclusionary rule, the purported Fourth Amendment violation in the present case would not require suppression.

Amici Prosecutors and OPAA respectfully request that the Court recognize the good-faith exception as set forth in the first proposition of law.

Proposition of Law No. 2. The warrantless attachment and monitoring of a GPS device on a vehicle so as to follow the vehicle's movements on public roadways does not violate the Fourth Amendment when there is reasonable suspicion or probable cause justifying such attachment/monitoring.

Jones did not address whether a GPS search requires a warrant or whether the

automobile exception would apply. The present briefing does so.

The briefing in Part A is drawn largely from the brief of the United States in *Jones* regarding whether warrantless GPS installation/monitoring should be treated as a “reasonable” search under the Fourth Amendment. Part B discusses a recent decision applying the “reasonable search” doctrine to a warrantless body search.

Part C addresses the status of “privacy” as a factor in the aftermath of *Jones*.

In the remaining Parts of the discussion, amici address the applicability of the automobile exception when probable cause exists to support the GPS search.

A.

Not every Fourth Amendment intrusion requires a warrant or probable cause; to the contrary, the general test is one of reasonableness. Because installation/use of a GPS device is, at most, only minimally intrusive and rarely yields truly private information, and because GPS surveillance is a critically important law enforcement tool that often may be most important in the inception of an investigation when probable cause is lacking, the Fourth Amendment balancing test should not require probable cause or a warrant as a prerequisite to use of GPS.

The United States Supreme Court has stated that under its “general Fourth Amendment approach,” it “examine[s] the totality of the circumstances” to determine whether a search or seizure is reasonable under the Fourth Amendment.” *Samson v. California*, 547 U.S. 843, 848, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) (internal quotation marks and citation omitted). Under that analysis, the reasonableness of a search or seizure is determined “by assessing, on the one hand, the degree to which it intrudes

upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.*

Since *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Court has identified various law enforcement actions that qualify as Fourth Amendment searches or seizures, but that may nevertheless be conducted without a warrant or probable cause. In *Terry*, the Court noted that an officer who stops a person on the street and frisks him for weapons has effected a "seizure" and "search" within the meaning of the Fourth Amendment. But because "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security," *id.* at 19, the Court concluded that a stop and frisk, which is considerably less intrusive than a full-blown arrest and search of a person, may be undertaken based on a showing of reasonable suspicion, which is less than probable cause.

In subsequent cases, the Court has continued to recognize various types of police activities that amount to searches or seizures, but need not be justified by a warrant or probable cause. See, e.g., *Samson*, 547 U.S. at 847 (individualized suspicion not required for search of parolee's home or person); *United States v. Knights*, 534 U.S. 112, 118-121, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (upholding search of probationer's home based on reasonable suspicion); *New Jersey v. T.L.O.*, 469 U.S. 325, 341-342, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (upholding search of student based on reasonable suspicion); *United States v. Place*, 462 U.S. 696, 706, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (upholding seizure of traveler's luggage on reasonable suspicion of narcotics); *United States v.*

Martinez-Fuerte, 428 U.S. 543, 554-555, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)

(upholding suspicionless vehicle stops at fixed border patrol checkpoints).

Applying this balancing test to GPS tracking of vehicles on public roads, this Court should conclude that neither a warrant nor probable cause should be required. The privacy interest, if any, is minimal. No reasonable expectation of privacy is invaded, and *Jones* does nothing to disturb that conclusion, having only concluded that a “search” takes place based on a trespass-to-chattel theory. A GPS tracking device does not conduct either a visual or aural search of the item to which it is attached. The device does not reveal who is driving the car, what the occupants are doing, or what they do when they arrive at their destination; it provides information only about the vehicle’s location. And the information that the tracking device reveals about the vehicle’s location could also be obtained (albeit less efficiently) by means of visual surveillance. The Court “has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts.” *United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); see also *South Dakota v. Opperman*, 428 U.S. 364, 368, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). Accordingly, GPS monitoring should not require the protection of a warrant.

The intrusion occasioned by attachment of a tracking device on a vehicle is also minimal. Attachment is much less intrusive than the typical stop and frisk. Nothing from the vehicle is removed, nor is any enclosed area entered.

On the other side of the ledger, the minimal protection of an individual’s privacy,

if any, resulting from the necessity of obtaining a warrant before using a tracking device on a vehicle would come at great expense to law enforcement investigations. Requiring a warrant and probable cause before officers could attach a GPS device to a vehicle would seriously impede the government's ability to investigate leads and tips on drug trafficking, terrorism, organized crime, and other offenses. Law enforcement officers could not use GPS devices to gather information to establish probable cause, which is often the most productive use of such devices.

B.

The Court recently reaffirmed this “reasonableness” approach in *Maryland v. King*, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013), which upheld the warrantless and suspicionless search of an arrestee’s mouth for DNA evidence through the use of an oral buccal swab. The Court recognized that the issue was governed by the “well established” standard of reasonableness. Although the warrantless buccal swabbing was an undoubted “search” intruding on the cherished personal security of the human body, the Court emphasized that the “negligible” nature of the intrusion occupied “central relevance to determining reasonableness * * *.” *Id.* at 1968-69.

“Reasonableness” is the “ultimate measure of constitutionality,” and that standard does not always require a warrant, especially when the intrusion to privacy is “minimal” or the search involves “diminished expectations of privacy.”

To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis. “[T]he Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.” *Schmerber, supra*, at 768. “As the

text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’” *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 652 (1995). In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred “some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion.” *United States v. Martinez-Fuerte*, 428 U. S. 543, 560–561 (1976) (citation and footnote omitted).

In some circumstances, such as “[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.” *Illinois v. McArthur*, 531 U. S. 326, 330 (2001). Those circumstances diminish the need for a warrant, either because “the public interest is such that neither a warrant nor probable cause is required,” *Maryland v. Buie*, 494 U.S. 325, 331 (1990), or because an individual is already on notice, for instance because of his employment, see *Skinner, supra*, or the conditions of his release from government custody, see *Samson v. California*, 547 U. S. 843 (2006), that some reasonable police intrusion on his privacy is to be expected. The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the “interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.” *Treasury Employees v. Von Raab*, 489 U. S. 656, 667 (1989).

King, 133 S.Ct. 1969-70.

The Court reaffirmed the balancing test for reasonableness, stating that there is no *per se* rule of unreasonableness.

Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior. To say that no warrant is required is merely to acknowledge that “rather than employing a *per se*

rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.” *McArthur, supra*, at 331. This application of “traditional standards of reasonableness” requires a court to weigh “the promotion of legitimate governmental interests” against “the degree to which [the search] intrudes upon an individual’s privacy.” *Wyoming v. Houghton*, 526 U. S. 295, 300 (1999). * * *

King, 133 S.Ct. at 1970.

Under the Fourth Amendment balancing test, no violation exists here. The police had at least reasonable suspicion for the installation/monitoring of the GPS device. The legitimate governmental interest of investigating ongoing criminal acts and possibly preventing further criminal acts based at least on the existence of reasonable suspicion substantially outweighs the minimal, and really non-existent, privacy interests revealed through the GPS monitoring of the vehicle on public roadways. The attachment of the GPS device to the vehicle amounted at most to a “technical trespass,” see *Karo*, 468 U.S. at 712, and no expectation of privacy existed because a car travels public thoroughfares where both its occupants and its contents are in plain view.” *Knotts*, 460 U.S. at 281.

C.

The Court in *Jones* did not decide that “privacy interests” were involved in GPS monitoring on an automobile. Although Justice Sotomayor agreed with Justice Alito’s view that “longer-term GPS monitoring in investigations of most offenses impinges on expectations of privacy,” see *Jones*, 132 S.Ct. at 955, she ultimately chose not to decide such questions, saying that “[r]esolution of these difficult questions in this case is unnecessary * * * because the Government’s physical intrusion on Jones’ Jeep supplies a narrower basis for decision.” *Id.* at 957.

In addition, the four-justice concurring opinion by Justice Alito was not willing to find a “search” based on the mere trespass-to-chattel theory. It was only willing to find a “search” based on expectations of privacy if the monitoring lasted “for a very long period.” *Id.* at 964. “[R]elatively short-term monitoring” was in accord with what persons reasonably expected. *Id.* at 964. But the use of “longer term GPS monitoring” impinges on expectations of privacy “in investigations of most offenses * * *.” *Id.* at 964. In *Jones*, the monitoring had lasted four weeks. The Alito concurrence contended that it need not say when the GPS monitoring had crossed the line into becoming a “search,” as the line had been crossed before the four-week mark. *Id.* at 964.

As can be seen, the Sotomayor and Alito concurrences do not establish any intrusion into a legitimate expectation of privacy. Under the Alito concurrence, only GPS monitoring for a “very long period” triggers the conclusion that a “search” occurred, and, even then, only for “investigations of most offenses.” In the present case and in the *Allen*, *Sullivan*, and *White* cases, only “relatively short-term monitoring” was involved. In addition, these cases did not involve “most offenses,” but, rather, large-scale drug trafficking in *Johnson*, an extraordinary series of violent home invasions in *Sullivan* and *White*, and a lengthy series of home burglaries in *Allen*.

It is far from clear that the Alito approach would yield the conclusion in these cases that a “search” occurred. To be sure, there is a “search” based on the *Jones* majority’s trespass-to-chattel theory, but that theory does not reflect any conclusion that a legitimate expectation of privacy was invaded.

In the “reasonableness” balancing of the governmental interests against any

legitimate expectations of privacy, the governmental interests outweigh the non-existent invasion of privacy allowed by GPS monitoring that merely yielded information about travels on publicly-viewable roadways. Even for the four justices who would recognize “privacy” as to long-term monitoring, there is no clear indication that they would have found that the GPS monitoring in these cases was extended enough to be a “search,” let alone a search that is unreasonable if it is warrantless even though based on at least reasonable suspicion.

D.

With *Jones* holding that the installation/monitoring of the GPS qualifies as a “search,” such a “search” can fall within the automobile exception, which allows warrantless searches of vehicles based on probable cause.

The United States Supreme Court has repeatedly held that there is no “exigent circumstances” requirement to allow a warrantless search under the automobile exception. In *Maryland v. Dyson*, 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999), the state court had found that a separate finding of exigency was required in addition to probable cause in order to conduct the search. The Supreme Court summarily reversed:

The Fourth Amendment generally requires police to secure a warrant before conducting a search. *California v. Carney*, 471 U.S. 386, 390-391 [105 S.Ct. 2066, 85 L.Ed.2d 406] (1985). As we recognized nearly 75 years ago in *Carroll v. United States*, 267 U.S. 132, 153 [45 S.Ct. 280, 69 L.Ed. 543] (1925), there is an exception to this requirement for searches of vehicles. And under our established precedent, the “automobile exception” has no separate exigency requirement. We made this clear in *United States v. Ross*, 456 U.S. 798, 809 [102 S.Ct. 2157,

72 L.Ed.2d 572] (1982), when we said that in cases where there was probable cause to search a vehicle “a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*” (Emphasis added.) In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), *Pennsylvania v. Labron*, 518 U.S. 938 [116 S.Ct. 2485, 135 L.Ed.2d 1031] (1996) (per curiam), we repeated that the automobile exception does not have a separate exigency requirement: “If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.” *Id.* at 940.

In this case, the Court of Special Appeals found that there was “abundant probable cause” that the car contained contraband. This finding alone satisfies the automobile exception to the Fourth Amendment’s warrant requirement, a conclusion correctly reached by the trial court when it denied respondent’s motion to suppress. The holding of the Court of Special Appeals that the “automobile exception” requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings in *Ross* and *Labron*.

Dyson, 527 U.S. at 466-67 (parallel citations omitted).

As the Court stated in *Labron*, which also rejected the need for a separate exigency finding:

Our first cases establishing the automobile exception to the Fourth Amendment’s warrant requirement were based on the automobile’s “ready mobility,” an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. *California v. Carney*, 471 U.S. 386, 390-391 (1985) (tracing the history of the exception); *Carroll v. United States*, 267 U.S. 132, (1925). More recent cases provide a further justification: the individual’s reduced expectation of privacy in an automobile, owing to its pervasive regulation. *Carney*, *supra*, at 391-392. If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle

without more.

Labron, 518 U.S. at 940. “The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation.” *Carney*, 471 U.S. at 394.

In those cases in which probable cause exists, a warrantless GPS search can be justified under the automobile exception.

In a GPS-search case, the search satisfies the “ready mobility” exigency even more than other automobile searches. And the invasion of privacy that usually attends such automobile searches was non-existent here, as this “search” only revealed information/evidence regarding the travels along publicly-viewable roadways.

E.

Some would contend that the automobile exception only allows a search for contraband. But a Fourth Amendment search can reach beyond contraband and include a search for “mere evidence” having a nexus to criminal behavior because it “will aid in a particular apprehension or conviction.” *Warden v. Hayden*, 387 U.S. 294, 306, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). “Mere evidence” can relate to evidence that merely will aid in proving the State’s case-in-chief, such as evidence of motive, and even evidence that would merely aid in rebutting or impeaching defense claims. *Messerschmidt v. Millender*, 132 S.Ct. 1235, 1247-48, 1248 n. 7, 182 L.Ed.2d 47 (2012). “The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.” *California v. Acevedo*, 500 U.S. 565, 580, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

“If there is probable cause to believe a vehicle contains evidence of criminal activity, * * * *Ross* * * * authorizes a search of any area of the vehicle in which the evidence might be found.” *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 1721, 173 L.Ed.2d 485 (2009). “Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize” in a warrant. *Ross*, 456 U.S. at 823.

In light of the foregoing, the automobile exception could allow a search even to gather “mere evidence.”

F.

Some would argue that the automobile exception is inapposite to a GPS search extending over a period of days. But the extended involvement of a GPS does not require that the automobile exception be disregarded. For example, automobile-exception searches can occur several hours or days after the seizure of the vehicle. See, e.g., *United States v. Johns*, 469 U.S. 478, 487-88, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) (delay of three days “was reasonable and consistent with our precedent involving searches of impounded vehicles”; collecting cases, including case of seven-day delay).

In addition, it is well settled under Fourth Amendment doctrine that the police need not undertake any particular action as soon as they develop probable cause. “Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.” *Hoffa v. United States*, 385 U.S. 293, 310, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). There is no requirement that the police fully seize and carry out a

hands-on search of the vehicle as soon as they develop probable cause. They can keep investigating.

Most importantly, GPS searches are *less* intrusive than most automobile searches in significant ways. A hands-on search under the automobile exception can proceed to search every part of the car where contraband or evidence could be found. *Ross*, 456 U.S. at 825. The police can view inside hidden compartments, closed containers, and other areas that the owner/driver has clearly decided to keep private. Thus, the Fourth Amendment allows warrantless searches under the automobile exception that significantly intrude on reasonable expectations of privacy.

In sharp contrast, GPS monitoring in the vast majority of situations only collects information on the location of the vehicle on roadways and in openly-viewable locations. One of the rationales for allowing warrantless automobile searches is the reduced expectation of privacy involved in automobiles, see *Carney*, 471 U.S. at 391-93, and, in a GPS search, no “private” information is revealed at all when the vehicle is being monitored on roadways. Since there is no invasion of privacy by using a GPS in the vast majority of situations, and since only a technical trespass occurs in attaching the GPS device when the vehicle is parked in a public area as occurred here, *greater* reasons exist to apply the automobile exception to GPS searches.

In addition, the chief rationale for allowing warrantless automobile searches is the ready mobility of the vehicle. *Carney*, 471 U.S. at 390-91. In such cases, the vehicle is still mobile and is still being used on roadways. Under the mobility rationale, there are greater reasons for allowing a warrantless GPS search under the automobile exception.

In this regard, it should be noted that the automobile exception continues to apply even after the vehicle is otherwise immobilized. As the United States Supreme Court has recognized, “the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court’s assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.” *Michigan v. Thomas*, 458 U.S. 259, 261, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982); *Johns*, 469 U.S. at 484 (citing *Thomas*). Since the automobile exception applies even after the vehicle has been immobilized, it follows that it should apply to GPS searches while the vehicle is still being driven by the suspect.

In short, there are substantial reasons to conclude that the automobile exception applies with even *greater* force to the usual kinds of GPS installation and monitoring. As a matter of Fourth Amendment law, the long-standing automobile exception is readily applied in this context.

G.

Some would focus on language in the automobile-exception cases that mention that an automobile search is a search for contraband “contained” in the vehicle. Since many automobile-search cases do involve searches for physical contraband or evidence “contained” in the vehicle, the inclusion of such language is neither surprising nor controlling.

What ultimately controls is the United States Supreme Court’s conclusion that an automobile search based on probable cause can be *just as broad* as a search authorized by

a warrant. “Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize” in a warrant. *United States v. Ross*, 456 U.S. 798, 823, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). And, as noted above, a Fourth Amendment search extends beyond contraband to allow a search for “mere evidence” that bears a nexus to criminal offense(s).

In effect, these critics wish to take advantage of the new *Jones* ruling without accepting its natural implications. *Jones* holds that GPS attachment/monitoring is a “search,” not because it is seeking the discovery of contraband or evidence “contained” in a private area but because it is seeking to gather information, i.e, temporal and location evidence, about the use of the vehicle. But if this is a “search,” as *Jones* holds, then that search and whatever information/evidence it seeks should also fall within whatever other doctrines normally govern such a Fourth Amendment “search,” including the automobile exception that is regularly applied to automobile searches. The natural implication of *Jones* is that treating GPS installation/monitoring as a “search” under Fourth Amendment standards would also mean that the same “search” should qualify as an automobile “search” that is allowed under those very same Fourth Amendment standards.

H.

These questions about the validity of warrantless GPS searches are properly before this Court for at least two reasons. First, they can provide alternative grounds for affirming the Twelfth District’s decision. *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944).

Second, the questions regarding the validity of such searches help inform the

question of whether the good-faith exception applies. As noted in *Leon*, “it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue.” *Leon*, 468 U.S. at 924-25. This Court’s analysis of the good-faith exception should not merely assume that a warrant was required when there are legitimate questions about whether a warrant really is required. The police conduct did not amount to a deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights when there were strong reasons to think that no “search” was involved and that, even if a “search” was involved, no warrant would be required because of the absence of “privacy” interests in monitoring travels of a vehicle on public roadways.

Amici Prosecutors and OPAA respectfully request that the Court adopt the rule of law set forth in the second proposition of law.

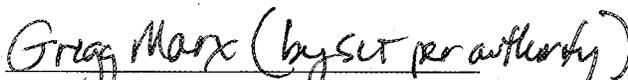
CONCLUSION

Amici respectfully request that this Court affirm the Twelfth District's decision for the reasons stated herein and for the reasons stated in the State's merit brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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