STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2010AP001366 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

JAMES G. BRERETON,
Defendant-Appellant-Petitioner.

ON APPEAL FROM THE CORRECTED JUDGMENT OF CONVICTION AND THE ORDER DENYING MOTION TO SUPPRESS EVIDENCE ENTERED BY THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL GIBBS PRESIDING, AND FROM THE COURT OF APPEALS DISTRICT II DECISION AFFIRMING THE JUDGMENT OF CONVICTION AND ORDER ON SUPPRESSION

Walworth County Case No. 2008-CF-411

DEFENDANT-APPELLANT-PETITIONER'S BRIEF

Respectfully submitted:

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STATEMENT OF THE ISSUE

Whether Defendant-Appellant-Petitioner James G. Brereton's constitutional right to be free of unreasonable searches and seizures was violated when law enforcement seized his vehicle, moved it to a private lot, installed a sophisticated GPS tracking device within it, and then used that device to continuously monitor in real-time the location of his vehicle for several days?

History of the Issue Below

The above-stated issue was presented to the Court of Appeals in the Defendant-Appellant's brief-in-chief. It was preserved for review at the Court of Appeals by the circuit court's adverse ruling on a motion to suppress evidence in which Brereton had joined. The Court of Appeals *affirmed* the circuit court's conclusion that Brereton's rights *were not* violated.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Whereas the instant case merits this Court's review, both oral argument and publication of the Court's opinion are warranted.

STATEMENT OF THE CASE

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW

This case comes before the Court following James G. Brereton's unsuccessful attempt to suppress GPS data and other evidence obtained by the State after it surreptitiously installed a GPS tracking device inside his vehicle and monitored his movements for several days. The challenged evidence linked Brereton and his codefendant to a number of burglaries that had occurred in Rock and Walworth counties during the fall of 2007. After the circuit court denied his suppression motion, Brereton pled guilty and was sentenced to twelve years imprisonment—seven years of initial confinement and five years of extended supervision. He filed a timely direct appeal challenging the circuit court's ruling on his motion to suppress. *See* Wis. Stat. § 971.31(10) (ruling on motion to suppress reviewable despite guilty plea).

The Court of Appeals, District II, affirmed in a published opinion. *State v. Brereton*, 2011 WI App 127, ___ Wis. 2d ___, 804 N.W.2d 243. It held that the circuit court correctly concluded that both the original seizure of Brereton's vehicle and the subsequent installation and use of a GPS tracking device to monitor the vehicle's movements did not violate his

Fourth Amendment rights. *Id.* ¶ 1. Brereton petitioned this Court for review, and the State opposed it. The petition was then held in abeyance pending the outcome of *United States v. Jones*, No. 10-1259, slip op. (2012), APP114-APP147, which involved similar issues and was then before the United States Supreme Court.

On January 21, 2012, the Supreme Court decided in *Jones* that the use of a GPS tracking device can implicate the Fourth Amendment. *Id.* at 3, APP118. This Court then requested simultaneous briefing by the parties regarding the impact of *Jones* on Brereton's petition. Both parties took the same position that they had previously asserted: Brereton argued that the petition should be granted; the State argued against it. This Court granted review on March 15, 2012.

The following facts are relevant to this Court's understanding of the argument presented herein.

II. STATEMENT OF RELEVANT FACTS

In the fall of 2007, the Walworth and Rock County Sheriff's Departments were investigating a string of burglaries happening in their respective jurisdictions. (*See* R.40:7, APP035.) In early October, a Walworth County detective contacted the Rock County Sheriff's Department to discuss the break-ins that

his department was investigating. (*See* R.40:7-9, APP035-APP037.) As a result of that conversation, the two law enforcement agencies identified correlating information that had been collected from witnesses at different burglaries in their respective counties. (*Id.*) Included in that information was the description of a light-blue vehicle that had been seen in the vicinity of multiple burglaries. Several witnesses consistently reported observing a "'teal' colored vehicle" believed to be "a late 80's to early 90's General Motors product similar to a Grand Am or Grand Prix." (R.2:5, APP008.) A witness near one of the Walworth County burglaries had taken down the license plate number of a vehicle matching that description. (*Id.*)

On October 5, 2007, at 11:00 A.M., the Rock County Sheriff's Department located and began to surveil a vehicle matching the description of the one seen in the vicinity of the various burglaries. (R.44:1, APP015; *see also* R.40:3-4, APP031-APP032 (parties stipulate to facts as stated in motion).) Within fifteen minutes, Walworth County had been informed of the surveillance and had decided to install a GPS tracking device on the vehicle. (R.44:1, APP015.) At 12:56 P.M., Rock County executed a pretextual stop on the vehicle, the purpose of which was to detain it until such time that a GPS device could be

installed. (R.44:1-2, APP015-APP016; R.40:10, APP038.) The occupants of the vehicle were Brereton and his later-to-be codefendant, Brian Conaway. (*Id.*) Prior to obtaining an order authorizing installation of the GPS device (R.40:43, APP071), law enforcement officers removed Brereton and Conaway from the vehicle and subsequently the scene (R.40:12, APP040). The two men were transported by law enforcement to a Dollar Store in Janesville, Wisconsin, where they were made to wait while their car was in the sole possession of law enforcement. (R.40:16, APP044.) It is undisputed that Brereton and Conaway were removed from the scene to accommodate the surreptitious installation of the GPS monitoring device on their vehicle, and they were never told that the car would be towed from where they had left it. (*See* R.40:17, 20, APP045, APP048.)

At some point after Brereton and Conaway were removed from the scene, law enforcement decided that installation of the GPS device would be better done at a tow lot, rather than on the highway where the vehicle had been stopped. (R.40:17-18, APP045-APP046.) Thus, it was towed—at the request of law enforcement—to a private lot, where it remained in police custody. (R.40:17, APP045.) Still, no order had issued granting the authority to install the GPS device, let alone to

seize the vehicle for that purpose. (R.40:17-18, APP045-APP046.) While waiting for authorization to install the GPS device and after having towed the vehicle, law enforcement decided that they would lie to Brereton and Conaway regarding the whereabouts of the vehicle if they inquired into what had happened to it. (R.40:20, APP048.)

The Walworth County Sheriff's Department had earlier that day contacted the Walworth County District Attorney's Office seeking assistance in applying for an order allowing installation of a GPS tracking device. (R.44:1, APP015) Detective Robert Schiltz filed an affidavit in support of the request for authorization to install the GPS device, which read in relevant part:

> 14) That the Affiant states there is probable cause to believe, based upon information obtained through these investigations, the target vehicle has been utilized in the commission of a crime, to wit; burglary in violation of § 943.10(1m), Wisconsin Statutes. Affiant further states that there is probable cause to believe the installation of a GPS tracking device on the target vehicles [*sic*.] in conjunction with the monitoring, maintenance and retrieval of information from that GPS tracking device, will lead to evidence of the aforementioned criminal violation, as well as the location where the fruits of the crimes are being stored and the identification of associates assisting in the aforementioned crimes.
> 15) Affiant states that the GPS tracking device, which is covertly placed on a criminal suspect's automobile, is equipped with a satellite radio receiver, which, when programmed, periodically records at specified times, the latitude, longitude, date and time of readings and stores these readings until they are downloaded to a computer interface unit and overlaid on a computerized mapping program for analysis. . . .

> 17) That based upon the Affiant's experience and/or the experiences of other law enforcement officers, the GPS tracking device's internal battery pack has limited use, but will not be drawing power from the suspect vehicle's battery.
> 18) Affiant is aware that persons involved in criminal activities or conspiracies often store and/or dispose the fruits of their crimes in homes, garages, storage sheds outlying fields or other remote locations. The locations of the fruits of the crimes are not easily obtained by using standard investigatory techniques.
> 19) Affiant believes the installation of the GPS tracking devices onto the target vehicle and the monitoring thereof will enable law enforcement officers to identify locations and associates currently unknown to law enforcement officers. Furthermore, Affiant believes the installation of the GPS tracking device has been shown to be a successful supplement to visual surveillance of the vehicle. There is an increased inherent risk of detection by suspects when law enforcement personnel use visual surveillance techniques. The GPS tracking device lessens the risk of visual detection by the suspects and is generally considered more reliable since visual surveillance often results in the loss of sight of the target vehicle.

(R.12, APP097-APP098.)

At 3:35 P.M., law enforcement received notice that the requested order had been signed. (R.44:2, APP016.) That order read, in relevant part, as follows:

> This matter came before the court at the request of Detective Robert Schiltz to place and monitor an electronic tracking device on a vehicle that may enter private areas. . . . Based on the information provided in the affidavit submitted by Detective Robert Schiltz, the Court finds there is probable cause to believe that the installation of tracking devices in [Brereton's vehicle] is relevant to an ongoing criminal investigation and that the vehicles are being or have been used in the commission of the crime of burglary . . .. The Court hereby orders that:
>
> The State's request to install and monitor a tracking device on [Brereton's vehicle] is granted based on the authority granted in *United States v. Karo*, 468 U.S. at 718, 104 S.Ct. at 3305 (1984).

> The Walworth County Sheriff's Department, located in Elkhorn, Wisconsin, or other law enforcement agencies acting on its behalf, are authorized to place an electronic tracking device on: a 1993 blue Pontiac Grand Am SE 4 door registered to Sherry Bloyer of Clinton, Wisconsin, vehicle identification # 1GNE543N7PM605764, and they are hereby authorized to surreptitiously enter and re-enter the vehicle, any buildings and structures containing the vehicles or any premises on which the vehicles are located to install, use, maintain and conduct surveillance and monitoring of the location and movement of the target vehicle in all places within or outside the jurisdiction of Walworth County. This includes, but is not limited to private residences and other locations not open to visual surveillance, to accomplish the installation. Officers are authorized to obtain and use keys to operate and move the vehicles for the required time to a concealed location and are authorized to open the engine compartments and trunk areas of the vehicles to install the devices.
>
> It is further ordered that Detective Robert Schiltz, or other law enforcement officers, shall remove the electronic tracking device as soon as practicable after the objectives of the surveillance are accomplished or not later than sixty (60) days from the date this order is signed unless extended by this court or another court of competent jurisdiction.

(R.12, APP090-APP091.) Pursuant to that warrant,[1] law enforcement officers entered the vehicle's passenger compartment to access the hood release, and then installed the GPS device in the engine compartment. (R.12, R.40:38, 42; APP066, APP070, APP107.)

Subsequent to the device's installation, law enforcement returned Brereton's vehicle to its prior location and to Brereton. (R.40:12, APP040.) Law enforcement thereafter used the device to track the vehicle's movements. When active, the GPS device

[1] *State v. Sveum* (*Sveum II*), 2010 WI 92, Wis. 2d 369, 787 N.W.2d 317) dictates that the order was a warrant, pursuant to Wis. Stat. § 968.12.

transmitted real-time tracking data to a computer and a cellular telephone. (R.12, R.44:2; APP016, APP111.) Those transmissions, when incorporated into related software, presented a graphical depiction of the vehicle's route of travel, allowing law enforcement to view the vehicle's movements as they occurred. (*See id.*) Additionally, the software was capable of storing the live tracking results transmitted from the device even if law enforcement officers were not present. (*See id.*) This allowed law enforcement to later access a graphical depiction of the vehicle's routes of travel. (*See id.*) The text messages sent to law enforcement informed them when the device began or ceased moving. (*See id.*) Thus, without retrieving the GPS device from Brereton's vehicle, law enforcement was able to continuously monitor where the vehicle was located, twenty-four hours a day, seven days a week. (*See id.*)

Law enforcement tracked the vehicle until October 9, 2007. (R.2:8, APP011.) On that date, the GPS device reported Brereton's vehicle stopped in a rural area of Rock County for approximately ten minutes. (*Id.*) Solely on the basis of that information, sheriff's deputies were dispatched to the area, and their investigation showed that a residence in the vicinity had been burgled. (*See id.*) Deputies were then able, via the GPS

device, to instantaneously locate the vehicle and send a squad to stop and search it. (*See id.*) That search produced physical evidence tying the vehicle's occupants—Brereton and Conaway—to the burglary. (*Id.*) Both were subsequently arrested and charged with numerous offenses arising out of the string of criminal activity that law enforcement had been investigating. (*See* R.2:1-4, APP004-APP007.)

Brereton moved to suppress the evidence seized by use of the GPS device, as well as the physical evidence recovered from the vehicle on the date of his arrest. (R.43, APP013-APP014.) He argued that the vehicle had been illegally seized and that the GPS warrant was invalid. (*See id.*) The circuit court, Judge Michael Gibbs presiding, held a hearing on the motion. (*See* R.40.) Following the testimony of two law enforcement officers, the circuit court denied the motion. (R.40:56-57, APP084-APP085.) It explained that the seizure was constitutional because law enforcement acted with probable cause. (*Id.*) However, the circuit court made no ruling on the propriety of the GPS warrant, concluding that any claims regarding the validity of the warrant were moot because law enforcement did not need a warrant to install and monitor the GPS device. (*Id.*) Brereton appealed. (R.28.)

At the Court of Appeals, Brereton divided his argument into two parts. First, he sought to establish that the installation of the GPS device necessitated a warrant, contrary to the circuit court's conclusion. Second he attacked the seizure of his vehicle, the warrant, and its execution. The Court of Appeals agreed that the Fourth Amendment was implicated, but nonetheless found no fault with the seizure, the warrant, or its execution. *Brereton*, 2011 WI App 127, ¶¶ 8, 10, 15. The Court of Appeals' conclusion that the Fourth Amendment was applicable in the instant case was later validated by the United States Supreme Court in *Jones*. No. 10-1259, slip op. at 3, APP118. As the Supreme Court explained, the "physical intrusion" that occurs when a GPS tracking device is installed on "private property for the purpose of obtaining information" is unquestionably a search under the Fourth Amendment. *Id.* at 4, APP119. Thus, *Jones* obviated any need for this Court to consider whether law enforcement searched Brereton's car by its 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.'" *Id.* at 3, APP118. Although *Jones* resolved that question, it left unresolved his other contentions.

Brereton argues herein that his motion to suppress should have been granted. First, he contends that the original seizure of his vehicle was improper and the ensuing search thereby tainted. Second, he explains that even if law enforcement properly seized his car and the GPS warrant was duly issued, execution thereof was unreasonable in both manner and scope. Either way, he concludes, the evidence against him should have been suppressed as obtained in violation of his constitutional rights. He offers the following in support.

ARGUMENT

I. INSTALLATION OF THE GPS TRACKING DEVICE WAS ACCOMPLISHED BY AN ILLEGAL SEIZURE OF BRERETON'S VEHICLE.

Although the Fourth Amendment is most often asserted when challenging the propriety of searches, the protections that it affords are also applicable to seizures of private property. *United States v. Place*, 462 U.S. 696, 701 (1983), *State v. Friday*, 147 Wis. 2d 359, 374-75, 434 N.W.2d 85, 90 (1989). "'A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.'" *Friday*, 147 Wis. 2d at 374, 434 N.W.2d at 90 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The seizure of personal property is "*per se* unreasonable within the meaning of

the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *Place*, 462 U.S. at 701; *see also State v. Carroll*, 2010 WI 8, ¶ 18, 322 Wis. 2d 299, 778 N.W.2d 1 ("The United States Supreme Court has viewed warrantless seizures of personal property such as containers to be *per se* unreasonable within the meaning of the Fourth Amendment."). An exception to the warrant requirement exists for a seizure based on probable cause. *Place*, 462 U.S. at 701. The Supreme Court has explained,

> Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

Id.

In the instant case, the facts clearly establish that law enforcement seized Brereton's vehicle at the moment that officers removed Brereton and Conaway from the scene and transported them, without their vehicle, to a separate location. At that moment, law enforcement possessed the vehicle and exercised exclusive control over it, which meaningfully intruded on Brereton's possessory interest in it. That meaningful

intrusion was continued and exacerbated when law enforcement moved the vehicle from the public thoroughfare on which it was originally seized to a private tow lot and then held it there for over two hours with the intent to deceive Brereton and Conaway of its whereabouts should they inquire.

Importantly, the seizure of Brereton's vehicle was not, at the time it occurred, authorized by a warrant: the vehicle's occupants were removed from the scene and the vehicle towed sometime prior to 1:30 P.M.; the GPS warrant was issued at approximately 3:30 P.M. Thus, the propriety of the seizure depends on whether law enforcement had the requisite probable cause to seize the vehicle.

A. Law Enforcement Lacked Probable Cause to Seize Brereton's Vehicle.

The standard for probable cause has been oft discussed. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 235 (1983), *State v. Paszek*, 50 Wis. 2d 619, 624-625, 184 N.W.2d 836, 839-40 (1971). Probable cause to seize does not exist unless "the facts available to the officer would warrant a [person] of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quotation and quoted authority omitted). Courts deciding the existence of probable cause engage in an

objective test to decide whether, "under all the circumstances, there is a fair probability that an item seized contain[ed] contraband or evidence of a crime." *Friday*, 147 Wis. 2d at 376-77, 434 N.W.2d at 92; *see State v. Robinson*, 2010 WI 80, ¶ 26, 327 Wis. 2d 302, 786 N.W.2d 463.

Deciding whether a seizure "comports with the Fourth Amendment is a question of constitutional fact." *See Carroll*, 2010 WI 8, ¶ 17. When reviewing such questions, appellate courts uphold a circuit court's findings of historical fact unless they are clearly erroneous. *Sveum II*, 2010 WI 92, ¶ 16. However, this Court has explained that it "determine[s] the application of constitutional principles to those evidentiary facts independently of the circuit court and the court of appeals, but benefit[ing] from those courts' analyses." *Carroll*, 2010 WI 8, ¶ 17.

In the instant case, there was not a fair probability that Brereton's vehicle contained contraband or evidence of a crime or was useful as evidence of a crime. When law enforcement stopped the vehicle, it was not because it had been seen contemporaneously leaving the scene of a burglary. Instead, his vehicle was not stopped until at least two days after the last reported burglary. (*See* R.2:6-7, APP009-APP010). Residents had reported seeing a similar vehicle in the vicinity of criminal

activity, but no one had seen Brereton's vehicle leaving a home that had been burgled. (*Id.*) Only one person could confirm having seen Brereton's vehicle, and the only complaint that person had was that the vehicle had been acting suspiciously at the time he saw it. (*Id.*) At no time prior to the stop had anyone witnessed stolen property being placed in or removed from the vehicle.

During the period of time between the last burglary and the stop, the vehicle had been free to move about with an unknown number of individuals able to access it. Officers had previously located the vehicle at a residence in Rock County where any number of people had access to it and its contents. (R.2:7, APP010). On the date of the stop, law enforcement followed the vehicle from the moment that it left that Rock County residence until they stopped it to install the GPS tracking device. (R.44:1, APP015.) The two days that had passed between the last reported burglary and the stop render the investigated criminal activity remote in time, which, when coupled with the mobility of the vehicle, diminishes the likelihood that evidence of a crime would be found within. *See California v. Carney*, 471 U.S. 386, 390-91 (1985).

Courts have long recognized that "automobiles present a unique problem in regard to the constitutional warrant requirement because of their mobility." *Thompson v. State*, 83 Wis. 2d 134, 141, 265 N.W.2d 467, 470 (1978) (citing *Carroll v. United States* (*Carroll v. U.S.*), 267 U.S. 132 (1925)). The mobility of a vehicle authorizes law enforcement to seize an automobile without a warrant, so long as they have probable cause to believe that it contains evidence of a crime. *See United States v. Chadwick*, 433 U.S. 1, 12-13 (1977). Requiring law enforcement to wait for a warrant to search a vehicle has long been rejected on the ground that it could result in lost evidence because vehicles can be easily moved and accessed. *See, e.g., Carroll v. U.S.*, 267 U.S. at 153. The mobility of a vehicle should also contribute to the analysis of whether law enforcement legitimately had probable cause to seize it, especially when the seizure is remote in time to the criminal activity in which the vehicle is believed to have been involved.

The Court of Appeals reasoned that the vehicle itself may have been evidence of a crime, and thus law enforcement had probable cause to seize it regardless of whether it may have contained contraband. *Brereton*, 2011 WI App 127, ¶ 10. As noted above, even though Brereton's vehicle matched the

description of a car witnessed at the scene of a few burglaries, witnesses were unable to specifically identify his car as having been at the scene of any criminal activity. The only vehicle that was seen leaving a burgled home was a blue pick-up truck. (*See* R.2:4, APP007). In addition to the reasons stated above, the uncertainty about which vehicle had been involved in the burglaries further diminished the probability that the car was evidence of a crime.

For those reasons, under the totality of the circumstances known to law enforcement at the time of the seizure, there was not a fair probability that Brereton's vehicle would contain contraband or evidence of a crime or itself be evidence of a crime. The officers thus lacked probable cause to seize the vehicle when they did, and the circuit court's contrary conclusion was erroneous.

B. Even if Law Enforcement had Probable Cause to Seize Brereton's Vehicle, the Manner of the Seizure was Unreasonable, and thus Unconstitutional.

"Although [Wisconsin's] legal lexicon often presents 'searches and seizures' as an inseparable tandem, the two are constitutionally and analytically distinct. . . . A seizure differs from a search, as it 'deprives the individual of dominion over his or her person or property.'" *State v. Arias*, 2008 WI 84, ¶ 25,

311 Wis. 2d 358, 752 N.W.2d 748 (quoting *Horton v. California,* 496 U.S. 128, 133 (1990)). Even a seizure that "was based on probable cause and was concededly lawful . . . can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

In the instant case, the seizure of Brereton's vehicle became unreasonable when law enforcement officers removed he and Conaway from the scene and then moved the car to a private tow lot. The record shows that law enforcement believed a warrant was necessary to allow installation of the GPS device. (R.12, APP097 (the affidavit explains "a court order is required to install a monitoring device on private property").) And yet, when the officers towed the vehicle, they knew that no warrant had issued for that purpose. Thus, law enforcement towed the vehicle with both the belief that they needed a warrant to permit their doing so and the knowledge that no such warrant had yet been issued.

Law enforcement explained that it became necessary to tow Brereton's car because it was deemed too dangerous to install the GPS device on the side of the road. However, law enforcement elected to stop Brereton's vehicle on the busy

thoroughfare that later mandated their movement of it to a private lot. Thus, by choosing where to conduct the traffic stop, law enforcement created the very danger that was later relied upon to justify moving the vehicle to a private lot. As with other exigent circumstances, law enforcement should not be allowed to manufacture a justification for their interference with private property. *See State v. Hughes*, 2000 WI 24, ¶ 28 n.7, 233 Wis.2d 280, 607 N.W.2d 621 (recognizing that police-created exigency cannot justify warrantless search of home). At the time law enforcement moved Brereton's vehicle, there was neither a legitimate reason for doing so nor judicial authority permitting it. Indeed, there was no reason to move the vehicle until the warrant had been issued. Thus, in light of the totality of the circumstances, the seizure of Brereton's vehicle was unreasonable and a violation of his Fourth Amendment rights.

C. The Warrant Authorizing Use of the GPS Tracking Device Was Defective Because it was Issued Based on Evidence Obtained as a Result of the Illegal Seizure of Brereton's Vehicle.

Following the seizure, law enforcement discovered that "the VIN number on [Brereton's] vehicle [did] not match the registration VIN number connected to the plates displayed on the vehicle." (R.12, APP096.) Law enforcement included details

of that discrepancy in the search warrant affidavit to establish probable cause for allowing the installation of a GPS tracking device. (*See id.*) The stop of the vehicle also netted individuals of similar description to those that witnesses had seen in the vicinity of various burglaries. (*See id.*) Law enforcement likewise included that fact in the affidavit. (*Id.*)

Without having seized Brereton's vehicle, details about the VIN number discrepancy and the occupants' similarities to the burglary suspects would have been omitted from the affidavit. The inclusion of that information added to the probable cause analysis. However, that information was tainted by the illegal seizure of Brereton's vehicle, and thus the warrant that issued based upon it was likewise tainted. *See Carroll*, 2010 WI 8, ¶ 44 (noting that warrant tainted by inclusion of illegally obtained evidence in affidavit may be invalid). The warrant was therefore defective and the fruits of any search conducted pursuant to it should be suppressed as the result. *See id.*

For all those reasons, law enforcement seized Brereton's vehicle without probable cause or a valid warrant, and the seizure was thus unconstitutional. The evidence derived therefrom should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Brereton urges this Court to

reach the same conclusion. However, even if this Court concludes that law enforcement had probable cause to seize his vehicle and that the warrant was not impermissibly tainted, the evidence should still have been suppressed based on the later unreasonable execution of the warrant. *See Sveum II*, 2010 WI 92, ¶ 53.

II. LAW ENFORCEMENT'S EXECUTION OF THE GPS WARRANT WAS UNREASONABLE.

"Even if a court determines that a search warrant is constitutionally valid, the manner in which the warrant was executed remains subject to judicial review. A search must be conducted reasonably and appropriately limited to the scope permitted by the warrant." *Id.* (quotation marks and quoted authority omitted). The requirement that a search must be done reasonably derives directly from the Fourth Amendment, which, in no uncertain terms, dictates that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated." (Emphasis added.) When the reasonableness of a search or seizure is questioned, a reviewing court considers "the particular circumstances of each individual case and balances the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the

governmental interests alleged to justify the intrusion." *State v. Henderson*, 2001 WI 97, ¶ 18, 245 Wis. 2d 345, 629 N.W.2d 613 (quotation and quoted authority omitted). While "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant," "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Dalia v. United States*, 441 U.S. 238, 257-58 (1979). Whereas the reasonableness of any search or seizure depends on a balance between the person's Fourth Amendment interests and the government's need to intrude, there is a preference for the least intrusive search necessary to achieve the government's asserted interests. *See Florida v. Royer*, 460 U.S. 491, 500 (1983) (following *Terry* stop, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion"), *State v. Davis*, 2011 WI App 74, ¶¶ 14-15, 333 Wis. 2d 490, 798 N.W.2d 902 (warrantless entry into home deemed unreasonable because not "least intrusive means of attempting contact" with occupant).

Brereton argues that execution of the GPS warrant was unreasonable for the following reasons. One, the GPS device's

intrusion into his privacy was not justified by law enforcement's asserted need for it. Two, the set of evidence seized by the GPS monitoring device exceeded the set of evidence authorized seized by the GPS warrant.

A. The Manner of the Search was More Intrusive than Authorized by the Warrant.

The Fourth Amendment protects both people and property from government intrusion. Trespass to private property is one manner of intruding on a person's Fourth Amendment interests. *Jones*, slip op. at 5, APP120. However, a Fourth Amendment violation can also occur "when government officers violate a person's 'reasonable expectation of privacy.'" *Id.* at 3 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)), APP118. With the GPS tracking device in Brereton's car, law enforcement was able to monitor his travels over the course of several days, thereby discerning intimate details of his life. Thus, the trespass is not the end of the inquiry into the reasonableness of the search, but rather the beginning. *See id.* (Sotomayor, J., concurring opinion) at 3 (explaining that "situations involving merely the transmission of electronic signals without trespass would remain subject to the *Katz* analysis" (textual alterations and quotation omitted)), APP130. In that way, the GPS tracking device infringed not only on

Brereton's possessory interest in his vehicle, but also on something in which he had a reasonable expectation of privacy: the otherwise indiscernible intimate details of his life.

1. Use of the GPS tracking device intruded on Brereton's Fourth Amendment interests

This Court has never before decided whether the use of a GPS tracking device to continually monitor a person's movements intrudes upon something in which a person has a reasonable expectation of privacy. However, the issue has been considered by the Court of Appeals, as well as numerous other jurisdictions, and those courts' analyses have consistently addressed two United States Supreme Court cases: *United States v. Knotts*, 460 U.S. 276 (1983) and *United States v. Karo*, 468 U.S. 795 (1984). *See State v. Sveum* (*Sveum I*), 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53; *see also Jones*, (Sotomayor, J., concurring opinion) at 3, APP130, *id.* (Alito, J., concurring opinion) at 6, APP139, *Commonwealth v. Connolly*, 913 N.E.2d 356, 367 (Mass. 2009), *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009), *State v. Jackson*, 76 P.3d 217, 223 (Wash. 2003), *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *affirmed sub nom. United States v. Jones*, No. 10-1259.

Knotts is the seminal case deciding whether law enforcement's use of technology to follow a criminal suspect over public thoroughfares implicated the Fourth Amendment. 460 U.S. at 277. Police officers in *Knotts* installed a beeper—"a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver"—in a container that was to later be purchased by the suspect. *Id.*. After the suspect placed the tagged container in his car, officers were able to follow him to the scene of drug manufacturing "by using both visual surveillance and a monitor which received the signals sent from the beeper." *Id.* at 278. The Court concluded that the suspect's Fourth Amendment rights were not violated because "[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.

That language was subsequently relied upon by the Wisconsin Court of Appeals to reach a similar conclusion. *Sveum I*, 2009 WI App 81, ¶ 8. The Court of Appeals wrote, "We agree with the State that neither a search nor a seizure occurs when the police use a GPS device to track a vehicle while it is visible to the general public. The seminal cases on this topic are [*Knotts*] and [*Karo*] . . .." *Id.* Based on *Knotts*, *Sveum I*

concluded "that, to the extent a tracking device reveals vehicle travel information visible to the general public, and thus obtainable by warrantless visual surveillance, the use of the device does not normally implicate Fourth Amendment protections." *Id.* ¶ 11.

Sveum I's blanket assertion that the use of a GPS device does not implicate the Fourth Amendment ignores two important aspects of *Knotts*. First, as described in *Jones*, the Fourth Amendment was not implicated because the government did not trespass to property in which the suspect had a possessory interest. No. 10-1259 at 8-9, APP123-APP124. Second, *Knotts*'s "relied on the level of sophistication of the particular electronic device, and the physical location from which the device transmitted its signal, to determine whether use of the device interferes with a reasonable expectation of privacy." *Connolly*, 913 N.E.2d at 367. The "very primitive tracking device" used in *Knotts* "was fairly described by the Court as having functioned merely as an enhancing adjunct to the surveilling officers' senses." *Weaver*, 909 N.E.2d at 1199. It was thus, "in this context, not unconvincingly analogized by the Court to a searchlight, a marine glass, or a field glass." *Id.* Given the beeper's technological limitations, and thus its limited

enhancement of the officer's senses, *Knotts* expressly withheld the conclusion that the use of any tracking device on a public thoroughfare would never implicate the Fourth Amendment. *See* 460 U.S. at 283-84. Instead, the Court wrote that if the "twenty four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision" became a reality, it would be time "to determine whether different constitutional principles may be applicable." *Id.* (quotation marks omitted).

In the late 1970s, when the government decided to track the *Knotts* suspect with a beeper, the technology accommodating that task was primitive. *Weaver*, 909 N.E.2d at 1199. As described above, the beeper device emitted a radio transmission that could be intercepted and interpreted by only those persons within close range and in possession of the proper equipment. *Knotts*, 460 U.S. at 278. To accomplish their task of tracking the suspect, officers in *Knotts* had to be actively involved in the process. *See id.* Unless an officer was near the suspect with the requisite receiver, there would be no way to identify where the suspect was or was going. *See id.* Thus, the efficacy of that technology was tied directly to the ability of law enforcement to keep tabs on the suspect. *See id.* For the *Knotts* Court, the reality of beeper tracking was incapable of causing the type of

"dragnet" law enforcement practices projected by the defendant; namely the non-stop surveillance of any person, any place, any time. *Id.* at 283-84. Based on that reality, the Court had no trouble holding that use of a beeper as an aid in tracking a suspect does not implicate the Fourth Amendment. *Id.*

Officers using a beeper like the one in *Knotts* could not possibly have cataloged the information accessible to the officers in the instant case. The notion of continual, autonomous tracking with live, computer-aided mapping and nearly limitless storage capabilities was science fiction when *Knotts* was decided. GPS tracking as it exists today with powers far beyond the simplistic transmission of a radio wave to a nearby receiver would, to the *Knotts* Court, be science fiction brought to life.

The technological capabilities of the GPS device affixed to Brereton's vehicle allowed officers to watch from miles away as the vehicle moved throughout Wisconsin and Illinois. On at least one occasion, law enforcement observed the vehicle travel around Rock County for more than ten minutes. (*See id.*) Given those capabilities, the GPS device inside of Brereton's vehicle is incomparable to the beeper that helped officers chase down the suspects in *Knotts*. Its use gave law enforcement access to the

totality of Brereton's movements from place to place for the duration of time that his movements were tracked, including any pattern that would have derived from an analysis of that data. Such analysis was easily accomplished by the software affiliated with the GPS device.

Importantly, the GPS tracking device cannot be divorced from the attendant software relied upon by law enforcement to utilize the device. The two are part-and-parcel of the same mechanism of search. For, without one, the other is irrelevant. A GPS tracking device that electronically records information in an inaccessible or indecipherable manner is useless to law enforcement officers seeking to determine where the device has been. Similarly, a computer program that interprets and visually displays the electronic data communicated to it by a GPS device is worthless without receiving communications from a properly functioning device. Thus, the reasonableness calculus must consider not only what information was collected, but also how that information was accessible to law enforcement through the affiliated software.

When married with its computer program, the GPS device in the instant case was simultaneously all of the following: it was an officer driving a car following Brereton,

obeying the rules of the road, and avoiding detection; it was that officer's partner who was communicating with the station; it was an officer back at the station taking down notes regarding Brereton's reported route; and it was the officer looking over the note-taker's shoulder and drawing a map of the route as documented by the note-taker. With a single automaton—the GPS device in Brereton's car—law enforcement officers were able to gain access to a catalog of information that would have otherwise required many officers to collect.

Thus, with little effort, officers had access to an intimate picture of the route Brereton traveled, the stops that he made, the places that he visited, and the time spent at each. (*See id.*) In other words, Brereton's personal history for the period of time the vehicle was tracked—and any information that could be derived therefrom—was at the fingertips of law enforcement in the form of accumulated data collected and saved by the GPS tracking device. Brereton believes that the vast technological differences between the beeper in *Knotts* and the GPS device in the instant case demonstrate that *Knotts* is distinguishable and its holding inapposite. *See Knotts*, 460 U.S. at 283-84.

A number of courts to have considered GPS monitoring have reached the conclusion championed by Brereton, namely

that the use of a GPS device distinguishes *Knotts*. *See Connolly*, 913 N.E.2d at 367, *Weaver*, 909 N.E.2d at 1201, *Jackson*, 76 P.3d at 223, *Maynard*, 615 F.3d 544. It is perhaps on that basis that the Court of Appeals "agree[d] with Brereton . . . [that] the Fourth Amendment issue must be addressed." *Brereton*, 2011 WI App 127, ¶ 8. Most significantly, five members of the United States Supreme Court have recently agreed that the use of GPS technology to monitor a person's movements—even across public thoroughfares—impinges on expectations of privacy and thus implicates the Fourth Amendment. *Jones*, No. 10-1259 (Sotomayor, J. concurring), *id.* (Alito, J. concurring (joined by Ginsburg, Breyer, and Kagan, JJ)). To Justice Sotomayor, "the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques" is not determinative of the reasonable expectation of privacy inquiry. *Id.* (Sotomayor, J., concurring opinion) at 3, APP130. She explained that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* For those reasons, the unique capabilities of GPS tracking must be taken "into account when considering the existence of a reasonable

societal expectation of privacy in the sum of one's public movements." *Id.* at 4, APP131. In his concurrence, Justice Alito rejected the majority's property based analysis and reasoned that the use of a GPS technology to track persons in public can implicate the Fourth Amendment. *Id.* (Alito, J., concurring opinion) at 13, APP146.

Brereton urges this Court to reach a similar conclusion and hold that the use of a GPS tracking device implicates the Fourth Amendment by intruding upon an individual's personal history, which is something in which one has a reasonable expectation of privacy. From that conclusion it becomes clear that the use of the GPS tracking device intruded upon Brereton's Fourth Amendment interests. He now addresses how that intrusion was unreasonably accomplished under the auspices of a warrant.

2. Execution of the GPS warrant was unreasonable insofar as the GPS device used had intrusive capabilities not explained to the magistrate that issued the warrant.

The unreasonableness of the search in the instant case derives from the more intrusive capabilities of the device used to perform the search as opposed to the device that law enforcement said would be used to search. By describing in the

affidavit a GPS tracking device with limited technological capabilities, law enforcement thus limited the intrusion that could be reasonably accomplished by a warrant issued on those representations. The reason for describing the device in the affidavit was so that the neutral magistrate could balance the proposed government intrusion against Brereton's Fourth Amendment rights when deciding whether the warrant should issue. Without knowing the contours of the proposed search, the magistrate deciding whether to authorize the attendant intrusion could not meaningfully weigh it against Brereton's Fourth Amendment rights. The parameters of the reasonableness analysis were thus established when law enforcement described in the affidavit the device they intended to use.

Some hypothetical examples divorcing the issue presented from GPS monitoring—an emerging technology—are helpful to make clear how the search was unreasonable in light of law enforcement's expressed interests in the type of device they requested permission to install. These examples focus on technologies that have already been tested in courts so that their familiarity will aid in understanding the issue.

First, consider a circumstance in which law enforcement believes that a drug trafficking operation is being run out of a home but they do not know who is involved. As part of their ongoing investigation, law enforcement seeks to obtain audio recordings of drug transactions to prove that drugs are actually being sold in the home. To that end, officers decide that they want to install an audio recording device in the home, and they apply for a warrant for that purpose. In the affidavit, officers explain their suspicions and further explain that the listening device will obtain audio recordings of illegal drug activity. On that basis, a reviewing magistrate authorizes the installation of an audio recording device in the home.

Suppose, then, that the officers install a device in the home that is capable of recording not only audio but also video. Thus, the device actually installed is more intrusive than the device that was authorized under the warrant. Instead of just hearing what is going on in the home, officers would also be able to see what was going on inside. The video device would allow officers to know intimate details of what was going on in the home even when the audio device would not. By using the audio and video capable device, officers acted unreasonably because they intruded on the privacy of the home's occupants

in a way that was not authorized by the warrant. The quantitative difference between the capabilities of the device described in the warrant and the one actually used makes a qualitative difference for the purpose of ascertaining the reasonableness of the search.

Consider another example: officers believe, but are not sure, that there is a substantial marijuana grow operation occurring at a person's home and they apply for a warrant authorizing them to collect evidence of the heat signature emanating from the home. In the affidavit, they describe the device that they will use to collect the heat signature but make no mention of its ability to visually penetrate the walls of the home. By issuance of the warrant, the magistrate indicates that an intrusion into privacy by collecting the heat signature is justified.

Now, suppose that the officers executing the warrant enlist a device that is capable of obtaining a heat signature by infrared technology, but also is able to create an accurate visual reproduction of the interior of the home by that same technology. With the device, officers can actually see the layout of the interior; they can see the furniture in the home; they can even see the outlines of people as they take showers, change

their clothes, or engage in other intimate behaviors. There can be no question that the evidence collected with the device actually used is different from a simple heat signature, although it is the heat signature that makes possible the seizure of that evidence. Law enforcement is obtaining more information by their search than they represented as collectible in the affidavit. Again, the quantitative difference between the information actually obtained makes a qualitative difference for the purpose of measuring the reasonableness of the intrusion.

Such is also the case here. Law enforcement used a technologically superior device to the one described in the affidavit, and thereby was able to intrude upon Brereton's Fourth Amendment rights in a way not authorized by the warrant. Specifically, the affidavit explained that the device to be installed would "periodically record[] at specified times, the latitude, longitude, date and time of readings and store[] these readings until they are downloaded to a computer interface and overlaid on a computerized mapping program for analysis." (R.12, APP098.) The affidavit made no mention of the fact that the GPS tracking device would send text message alerts to law enforcement whenever it began or ceased to move. It is mute regarding the device's ability to transmit its location in real-time

to a remote receiver that could instantaneously analyze the transmission and display the device's location on a computerized map. Absent all those details, the affidavit's description of the device provides the impression that it will merely act as a static receiver storing location data until later retrieved and its stored contents analyzed.

Based on the information both included in and omitted from the affidavit, the device described therein (R.12, APP097-APP098) seems akin to the one used *Sveum*. *Compare Sveum II*, ¶¶ 8-9 *with* (R.12, APP111). The device used in *Sveum* was unable to transmit its location to a receiver. *See id.* ¶ 9. Instead, law enforcement had to physically retrieve the device to then download the archived data to a computer. *Id.* Only after the device was retrieved were officers able to learn of the vehicle's travels. *See id.* The affidavit in the instant case seems to describe a *Sveum*-esque device insofar as it references the storage of collected location data until it can be downloaded for analysis. Additionally, it references the "retrieval of information from" the device as something that will be a necessary part of the investigation. (R.12, APP097). Thus, the language of the affidavit, relied upon by the magistrate who issued the warrant, describes a GPS tracking device more substantially limited than

the one eventually attached to Brereton's car. The Court of Appeals "agree[d] with Brereton that the GPS device used in this case was more technologically advanced, and therefore more intrusive than the one described in the affidavit." *Brereton*, 2011 WI App 127, ¶ 14.

With the device described in the affidavit, law enforcement would have had access to only historical information of the vehicle's movements that could, at a later date and after retrieval of the device, show where the vehicle had traveled. However, law enforcement in the instant case had immediate access to that information.

Law enforcement told the reviewing magistrate that they wanted to use the GPS tracking device as part of "an on-going investigation" to determine "the location where the fruits of the crimes [were] being stored and the identification of associates assisting in the [Rock and Walworth County burglaries]." (R.12; APP097.) In the affidavit supporting the warrant, it was represented that "the installation of a GPS tracking device on [Brereton's vehicle] in conjunction with the monitoring, maintenance, and retrieval of information from that GPS tracking device, [would] lead to evidence" of the burglaries under investigation. (*Id.*) The GPS tracking device was deemed

necessary because "[t]he locations of fruits of the crime are not easily obtained by using standard investigatory techniques" and because it would lessen "the risk of visual detection by the suspects and is generally considered more reliable since visual surveillance often results in the loss of sight of the target vehicle." (R.12:7; APP098.) The affidavit says nothing about identifying a crime in progress or catching the suspects immediately after they committed a crime. By its language, law enforcement's stated interests were simply to (1) identify who was committing the burglaries and (2) find out where stolen goods might be stashed.

Thus, the magistrate deciding whether to issue the warrant would have balanced the government's need to uncover the location of stolen goods or the residences of criminal associates against the purported collection of historical data showing the vehicle's travels. The reviewing magistrate would not have known that law enforcement would be able to compile a real-time catalog of Brereton's movements and have instantaneous access to that information. The reasonableness of law enforcement's execution of that warrant was therefore tied to the limited intrusion that they had described in the affidavit. When law enforcement attached a GPS device that was able to

collect more information than was represented in the affidavit and authorized by the warrant, law enforcement was able to intrude on Brereton's privacy in a manner not contemplated under the warrant. Law enforcement thus acted unreasonably in the manner of the warrant's execution.

Brereton asks this Court to reach the same conclusion. But, even if this Court determines that the manner of the search's execution was not unreasonable, the evidence seized pursuant to it should be suppressed as obtained outside the warrant's scope.

B. The Evidence Seized by Law Enforcement was Outside the Scope of the Warrant.

The GPS warrant permitted law enforcement to seize electronic evidence showing the location and movement of Brereton's vehicle. (R.12, APP090.) As detailed above, the GPS tracking device that was actually used was capable of collecting far more electronic data than the one authorized by the warrant. Brereton argues that by collecting more evidence than was authorized by the warrant, law enforcement exceeded its scope and violated the Fourth Amendment. *See State v. Pender*, 2008 WI App 47, ¶ 9, 308 Wis. 2d 428, 748 N.W.2d 471.

1. The Fourth Amendment's protections apply to the seizure of intangible evidence.

Since *Katz*, the Supreme Court has recognized that the Fourth Amendment applies to both tangible and intangible evidence. 389 U.S. at 352-53. When the government argued in *Katz* that the Fourth Amendment "was thought to limit only searches and seizures of tangible property," the Supreme Court responded "that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any technical trespass under local property law." *Id.* at 353 (quotation and quoted authority omitted). Thus, in *Katz*, the Supreme Court concluded that recording a person's voice—an intangible thing—amounts to a seizure. *Id.*; *see also On Lee v. United States*, 343 U.S. 747, 765 (1952) (Burton, J., dissenting) ("The Fourth Amendment's protection against unreasonable searches and seizures is not limited to the seizure of tangible things. It extends to intangibles, such as spoken words."). Other courts have reiterated the position that intangible things are subject to seizure under the Fourth Amendment. *See, e.g., LeClair v. Hart*, 800 F.2d 692 (7th Cir. 1986). The Seventh Circuit explained that "the Fourth Amendment embraces more than just the forced

physical removal of tangible objects . . . . [T]he government may seize intangible items." *Id.* at ___. This Court also has indicated that intangible items are protected under the Fourth Amendment. *See Carroll*, 2010 WI 8, ¶ 3 (concluding that 4th Amend. violation occurred in search of cell phone picture gallery); *see also State v. Felix*, 2012 WI 36, ¶ 30, ___ Wis. 2d ___, ___ N.W.2d ___, (recognizing that evidence seized in violation of the 4th Amend., and thus subject to the exclusionary rule, can be "both tangible and intangible evidence"), *State v. Knapp*, 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899 (same). And, the Wisconsin Statutes authorize the seizure of "anything other than documents which may constitute evidence of any crime." Wis. Stat. § 968.13(1)(c). That arguably must include intangible things.

Thus, when law enforcement obtained electronic data with the GPS tracking device showing Brereton's location and movement, it seized that information under the Fourth Amendment. The question of the propriety of that seizure turns on the particularity requirement.

2. A warrant must particularly describe the evidence to be seized pursuant to it.

The particularity requirement of the Fourth Amendment demands that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." It "reflect[s] the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford v. Texas*, 379 U.S. 476, 481 (1965) (quoting 4th Amend.). Historically, general warrants were despised by the founders of this county for the "blanket authority" they gave to customs officials "to search where they pleased." *Id.* The Fourth Amendment's particularity requirement was created out of to the founders' disgust for such general warrants, *id.*, and by it the founders both made "general searches under [a warrant] impossible" and prevented "the seizure of one thing under a warrant describing another," *Marron v. United States*, 275 U.S. 192, 196 (1927). Thus, the particularity requirement is purposed not only on "prevent[ing] general searches," but also "prevent[ing] the seizure of objects when the warrant describes

different objects." *State v. Petrone*, 161 Wis. 2d 530, 540, 468 N.W.2d 676, 679 (1991).

Given the founders' concern that searches and seizures should be limited to the warrants on which they are based, the Fourth Amendment has been understood as limiting the scope of searches and seizures pursuant to a warrant. Thus, when acting under the authority of a warrant, law enforcement must conduct a search that is "reasonably and appropriately limited to the scope permitted by the warrant." *Id.* at 542, 468 N.W.2d at 680. A search that exceeds the scope authorized by a warrant implicates the constitutional ban against unreasonable searches and seizures, *Dalia*, 441 U.S. at 257, and evidence obtained outside a warrant's scope is subject to suppression, *Pender*, 2008 WI App 47, ¶ 9. In other words, the seizure of evidence not particularly described in a warrant is considered outside the scope of the warrant and a violation of the Fourth Amendment. *See id.*

3. The evidence to be seized in the instant case was particularly described by reference to the GPS tracking device's technological capabilities.

The GPS warrant granted "[t]he State's request to install and monitor a tracking device on [Brereton's] vehicle." (R.12, APP090.) It authorized law enforcement "to place an electronic

tracking device on" Brereton's vehicle and to take whatever steps were needed "to install, use, maintain, and conduct surveillance and monitoring of the location and movement of [Brereton's] vehicle." (R.12, APP090.) By that language, the warrant only generally describes the evidence that is to be seized. However, the warrant's authorization to "install and monitor a tracking device" at the "State's request" was "based on the information provided in the affidavit." (R.12, APP090.) Thus, by its reference to the GPS tracking device as it was described in the accompanying affidavit, the warrant particularly describes what is permitted seized.

As earlier detailed, the affidavit set forth a description of the GPS tracking device as being able to collect only limited information. Thus, the information available for seizure pursuant to the warrant was similarly limited. Fidelity to the particularity requirement mandated that law enforcement should have been able to seize by the GPS device only historical information of the vehicle's movements.

4. The evidence seized in the instant case was in excess of that authorized by the warrant, and thus outside its scope.

As was previously explained, the evidence actually seized was qualitatively different than the evidence that the warrant

authorized to be seized because of the quantitative difference in collectable location data. Think of the evidence both seized and seizeable as sets of information, the members of which are the location and movement data. From that perspective, the set of evidence allowed seized under the warrant (the collectable evidence) is subsumed within the set of evidence actually collected (the collected evidence). While all the members of the set of collectable evidence are also members of the set of collected evidence, there are members of the set of collected evidence that are not included in the set of collectable evidence. It is that discrepancy that runs afoul of the particularity requirement; for, the particularity requirement is purposed on ensuring that the set of collected evidence is subsumed within the set of collectable evidence.

That is to say, an officer executing a warrant may seize no more than is particularly described in the warrant as a thing to be seized under it. When the set of collected evidence—what law enforcement collects upon execution of the warrant—exceeds the set of collectable evidence—what the warrant authorizes law enforcement to seize—the warrant has been unreasonably executed by exceeding its scope. Say, for example, a warrant allows seizure of items *x*, *y*, and *z*. So long as only *x*, *y*,

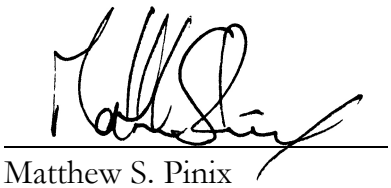
and *z* are collected, the scope of the warrant is not exceeded. However, if *x*, *y*, *z*, and *w* are seized, the scope has been exceeded because the set of collected evidence includes members that are not members of the set of collectable evidence. In this case, the result is like the latter circumstance: the set of collected evidence subsumes the set of collectable evidence. It is that quantitative difference that amounts to a qualitative difference and demonstrates that law enforcement exceeded the scope of the warrant when they collected location data by a more sophisticated GPS tracking device than the one described in the affidavit.

Thus, by use of a more sophisticated GPS device, law enforcement seized evidence far beyond what would have been possible had a device like the one described in the affidavit been used. The execution of the warrant was therefore unreasonably beyond its scope. So, even if the warrant was properly issued and the manner of the search reasonable, all of the GPS tracking data and the evidence derived therefrom—including the evidence seized from the target vehicle on October 9, 2007—should have been suppressed on the ground that it was obtained in violation of Brereton's constitutional rights. *See Pender*, 2008 WI App 47, ¶ 9.

CONCLUSION

For the aforementioned reasons, Brereton respectfully requests that this Court hold that his Fourth Amendment rights were violated when law enforcement seized his vehicle, installed a sophisticated GPS tracking device on it, and then used that device to track his movements for several days. He asks that this Court remand his case to the circuit court for proceedings consistent with that holding.

Dated this 26th day of April, 2012.



Matthew S. Pinix
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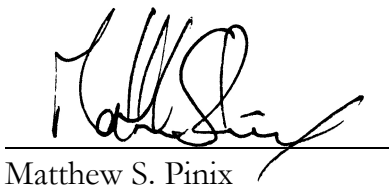
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,096 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 26th day of April, 2012.



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CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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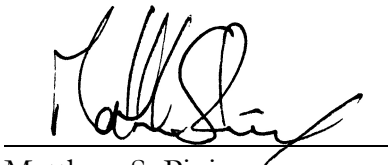

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Defendant-Appellant-Petitioner's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on April 26, 2012. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 26th day of April, 2012.

Matthew S. Pinix
Attorney for the Defendant-Appellant-Petitioner

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2010AP001366 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

JAMES G. BRERETON,
Defendant-Appellant-Petitioner.

ON APPEAL FROM THE CORRECTED JUDGMENT OF CONVICTION AND THE ORDER DENYING MOTION TO SUPPRESS EVIDENCE ENTERED BY THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL GIBBS PRESIDING, AND FROM THE COURT OF APPEALS DISTRICT II DECISION AFFIRMING THE JUDGMENT OF CONVICTION AND ORDER ON SUPPRESSION

WALWORTH COUNTY CASE NO. 2008-CF-411

DEFENDANT-APPELLANT-PETITIONER'S APPENDIX

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APPENDIX TABLE OF CONTENTS

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 4 | WALWORTH COUNTY

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CIRCUIT COURT
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State of Wisconsin vs. James G. Brereton

Judgment of Conviction
Corrected
Sentence to Wisconsin State Prisons and Extended Supervision
Case No.: 2008CF000411

Date of Birth: 12-12-1965

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	[939.05 Party to a Crime] Burglary-Building or Dwelling	943.10(1m)(a)	Guilty	Felony F	09-20-2007		11-25-2009
4	[939.05 Party to a Crime] Burglary-Building or Dwelling	943.10(1m)(a)	Guilty	Felony F	10-02-2007		11-25-2009
8	[939.05 Party to a Crime] Burglary-Building or Dwelling	943.10(1m)(a)	Guilty	Felony F	10-02-2007		11-25-2009
11	[939.05 Party to a Crime] Burglary-Building or Dwelling	943.10(1m)(a)	Guilty	Felony F	10-03-2007		11-25-2009
15	[939.31 Conspiracy] Burglary-Building or Dwelling	943.10(1m)(a)	Guilty	Felony F	10-02-2007		11-25-2009

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	11-25-2009	State prison	7 YR		THE DEPARTMENT OF CORRECTIONS SHALL DEDUCT RESTITUTION AND ALL OTHER COURT OBLIGATIONS AT THE RATE OF 25% OF ALL MONIES RECEIVED WHILE INCARCERATED.
4	11-25-2009	State prison	7 YR		See count #1.
8	11-25-2009	State prison	7 YR		See count #1.
11	11-25-2009	State prison	7 YR		See count #1.
15	11-25-2009	State prison	7 YR		See count #1.

Total Bifurcated Sentence Time

	Confinement Period				Extended Supervision			Total Length of Sentence		
Ct.	Years	Months	Days	Comments	Years	Months	Days	Years	Months	Days
1	7	0	0		5	0	0	12	0	0
4	7	0	0		5	0	0	12	0	0
8	7	0	0		5	0	0	12	0	0
11	7	0	0		5	0	0	12	0	0
15	7	0	0		5	0	0	12	0	0

Sentence Concurrent With/Consecutive Information:

Ct.	Sentence	Type	Concurrent with/Consecutive To Comments
1	State prison	Concurrent	Concurrent with any sentence now serving and concurrent with all other counts in file 2008CF000411.
4	State prison	Concurrent	See count #1.
8	State prison	Concurrent	See count #1.
11	State prison	Concurrent	See count #1.
15	State prison	Concurrent	See count #1.

State of Wisconsin vs. James G. Brereton

Judgment of Conviction
Corrected
Sentence to Wisconsin State Prisons and Extended Supervision
Case No.: 2008CF000411

FILED
CIRCUIT COURT
JAN 07 2010
Clerk Of Courts, Walworth County
Lori Schiemann, Deputy Clerk

Date of Birth: 12-12-1965

Conditions of Extended Supervision:

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	[X] Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
10.00	226.70		3,295.16	507.28	425.00	200.61	

Ct.	Condition	Agency/Program	Comments
1	Restitution		Pay restitution in the amount of $3,295.16 and restitution surcharges. Restitution is to be paid first to the victims and then the insurance companies.
1	Costs		Pay court costs and Department of Corrections Supervision Fees. If the defendant's extended supervision is revoked or discharged with outstanding financial obligations, a civil judgment may be entered against the defendant and in favor of restitution victims and governmental entities for the balance due. Collections may include income assignment.
1	Prohibitions		No contact with the victims or their residences. No contact with co-defendants.
1	Other		Counseling as recommended by Probation Agent. Provide biological specimen to state crime lab for DNA analysis, unless previously proved. DNA surcharge already ordered in Rock County Case.
4	Costs		See count #1.
4	Prohibitions		See count #1.
4	Other		See count #1.
8	Costs		See count #1.
8	Prohibitions		See count #1.
8	Other		See count #1.
11	Costs		See count #1.
11	Prohibitions		See count #1.
11	Other		See count #1.
15	Costs		See count #1.
15	Prohibitions		See count #1.
15	Other		See count #1.

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 4	WALWORTH COUNTY	*For Official Use Only*

State of Wisconsin vs. James G. Brereton

Judgment of Conviction
Corrected
Sentence to Wisconsin State Prisons and Extended Supervision
Case No.: 2008CF000411

FILED
CIRCUIT COURT
JAN 07 2010
Clerk Of Court
Lori Schiemann, Deputy

Date of Birth: 12-12-1965

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☒ eligible for the Challenge Incarceration Program.
The Defendant is ☒ is not ☐ eligible for the Earned Release Program.

The following charges were Dismissed but read In

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Date(s) Read In
3	Criminal Damage to Property	943.01(1)		Misd. A	09-20-2007	11-25-2009
5	Criminal Damage to Property	943.01(1)		Misd. A	10-02-2007	11-25-2009
6	Disorderly Conduct	947.01		Misd. B	10-02-2007	11-25-2009
7	Burglary-Building or Dwelling	943.10(1m)(a)		Felony F	10-02-2007	11-25-2009
10	Criminal Damage to Property	943.01(1)		Misd. A	10-02-2007	11-25-2009
14	Criminal Damage to Property	943.01(1)		Misd. A	10-03-2007	11-25-2009
2	Theft-Movable Property <=$2500	943.20(1)(a)		Misd. A	09-20-2007	11-25-2009
9	Theft-Movable Property <=$2500	943.20(1)(a)		Misd. A	10-02-2007	11-25-2009
12	Theft-Movable Property-Special Facts	943.20(1)(a)		Felony H	10-03-2007	11-25-2009
13	Theft-Movable Property <=$2500	943.20(1)(a)		Misd. A	10-03-2007	11-25-2009

IT IS ADJUDGED that **0** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

BY THE COURT:

Circuit Court Judge/~~Clerk/Deputy Clerk~~

1/7/10 npt 1-5-2010
Date

Distribution:

Michael Gibbs, Judge
Diane Donohoo, District Attorney
Leslie L Johnson, Defense Attorney
Walworth County Sheriff's Department
Department of Corrections-Probation (2)
Department of Corrections-Prison (2)
1-11-10
SS

State of Wisconsin | Circuit Court | ORIGINAL | Walworth County

STATE OF WISCONSIN

Plaintiff,

-vs-

James G. Brereton
4802 N. West River Rd.
Janesville, WI 53545
DOB: 12/12/1965
Sex/Race: M/W
Eye Color: Blue
Hair Color: Brown
Height: 5 ft 11 in
Weight: 230 lbs

Brian J. Conaway
2115 Schaller St.
Janesville, WI 53545
DOB: 08/11/1967
Sex/Race: M/W
Eye Color: Brown
Hair Color: Brown
Height: 6 ft 4 in
Weight: 150 lbs

Defendants,

CRIMINAL COMPLAINT

DA Case No.: 2008WL003104
Assigned DA/ADA: Diane M Donohoo
Agency Case No.: CWA07-34525

Court Case No.: 08 CF 411

FILED
CIRCUIT COURT
OCT 13 2008
CLERK OF COURTS-WALWORTH CO.
BY: MISTY LaREAU

Court Case No.: 08 CF

Dana Nigbor of the Walworth County Sheriff's Department, being first duly sworn, on information and belief, states that:

Count 1: BURGLARY OF A BUILDING OR DWELLING - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Thursday, September 20, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally enter a dwelling, belonging to Karen L. Logterman, without the consent of the person in lawful possession of the place, and with intent to steal, contrary to sec. 943.10(1m)(a), 939.05 Wis. Stats., a Class F Felony, and upon conviction may be fined not more than Twenty Five Thousand Dollars ($25,000), or imprisoned not more than twelve (12) years and six (6) months, or both.

Count 2: MISDEMEANOR THEFT - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Thursday, September 20, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally steal the movable property of Karen L Logterman, without consent and with intent to permanently deprive the owner of possession of the property, contrary to sec. 943.20(1)(a) and (3)(a), 939.05 Wis.

Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 3: CRIMINAL DAMAGE TO PROPERTY - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Thursday, September 20, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally cause damage to the physical property of another belonging to Karen L Logterman, without that person's consent, contrary to sec. 943.01(1), 939.05 Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 4: BURGLARY OF A BUILDING OR DWELLING - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Tuesday, October 02, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally enter a dwelling, belonging to Mindy J. Wade, without the consent of the person in lawful possession of the place, and with intent to steal, contrary to sec. 943.10(1m)(a), 939.05 Wis. Stats., a Class F Felony, and upon conviction may be fined not more than Twenty Five Thousand Dollars ($25,000), or imprisoned not more than twelve (12) years and six (6) months, or both.

Count 5: CRIMINAL DAMAGE TO PROPERTY - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Tuesday, October 02, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally cause damage to the physical property of another belonging to Mindy J. Wade, without that person's consent, contrary to sec. 943.01(1), 939.05 Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 6: DISORDERLY CONDUCT - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Tuesday, October 02, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, while in a private or public place, did engage in abusive, boisterous, indecent, unreasonably loud, violent, or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance, contrary to sec. 947.01, 939.05 Wis. Stats., a Class B Misdemeanor, and upon conviction may be fined not more than One Thousand Dollars ($1,000), or imprisoned not more than ninety (90) days, or both.

Count 7: ATTEMPT BURGLARY OF A BUILDING OR DWELLING - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Tuesday, October 02, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, attempted to intentionally enter a

dwelling, belonging to Bonnie J. Treder, without the consent of the person in lawful possession of the place, and with intent to steal, contrary to sec. 943.10(1m)(a), 939.32, 939.05 Wis. Stats., an attempt to commit a Class F Felony, and upon conviction may be fined not more than $12,500, or imprisoned not more than six years and three months, or both.

Count 8: BURGLARY OF A BUILDING OR DWELLING - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Tuesday, October 02, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally enter a dwelling, belonging to Dale R. Bunger, without the consent of the person in lawful possession of the place, and with intent to steal, contrary to sec. 943.10(1m)(a), 939.05 Wis. Stats., a Class F Felony, and upon conviction may be fined not more than Twenty Five Thousand Dollars ($25,000), or imprisoned not more than twelve (12) years and six (6) months, or both.

Count 9: MISDEMEANOR THEFT - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Tuesday, October 02, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally steal the movable property of Dale R Bunger, without consent and with intent to permanently deprive the owner of possession of the property, contrary to sec. 943.20(1)(a) and (3)(a), 939.05 Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 10: CRIMINAL DAMAGE TO PROPERTY - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Tuesday, October 02, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally cause damage to the physical property of another belonging to Dale R Bunger, without that person's consent, contrary to sec. 943.01(1), 939.05 Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 11: BURGLARY - ARMING SELF WITH A DANGEROUS WEAPON - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Wednesday, October 03, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally enter a dwelling belonging to Sue A. Gray and Nancy Weber without the consent of the person in lawful possession of the place, and with intent to steal, and armed themselves with a dangerous weapon, 380 Browning pistol, while in the burglarized enclosure, contrary to sec. 943.10(2)(b), 939.05 Wis. Stats., a Class E Felony, and upon conviction may be fined not more than Fifty Thousand Dollars ($50,000), or imprisoned not more than fifteen (15) years, or both.

Count 12: THEFT - MOVABLE PROPERTY (SPECIAL FACTS) - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Wednesday, October 03, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally steal movable property of Nancy C. Weber, which property is a firearm, without consent, and with intent to permanently deprive the owner of possession of the property, contrary to sec. 943.20(1)(a) and (3)(d), 939.05 Wis. Stats., a Class H Felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than six (6) years, or both.

Count 13: MISDEMEANOR THEFT - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Wednesday, October 03, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally steal the movable property of Sue A. Gray, without consent and with intent to permanently deprive the owner of possession of the property, contrary to sec. 943.20(1)(a) and (3)(a), 939.05 Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 14: CRIMINAL DAMAGE TO PROPERTY - PTAC, AS A PARTY TO A CRIME (As to defendants James G. Brereton and Brian J. Conaway)

The above-named defendants on Wednesday, October 03, 2007, in the Town of Darien, Walworth County, Wisconsin, as a party to a crime, did intentionally cause damage to the physical property of another belonging to Sue A. Gray, without that person's consent, contrary to sec. 943.01(1), 939.05 Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

PROBABLE CAUSE:

1) Your complainant makes this complaint based upon the following, all of which your complainant believes to be reliable. The information in this complaint does not exhaust your complainant's knowledge of this incident.

2) Complainant has reviewed the reports from the Walworth County Sheriff's Department, which reflect that on September 20, 2007 at approximately 12:25 p.m., Deputy Kampas was dispatched to W9342 Creek Road located in the Town of Darien, Walworth County, Wisconsin, regarding a report of a burglary. Dispatch advised that a witness, Kenneth P. Howell, was driving by and observed two Hispanic males looking in the windows at the residence and that it appeared that the garage door had been kicked in. Howell advised that he observed the suspects driving away from the residence in a late model Ford pickup truck, dark blue or black in color with a poor paint job and primer in the front. Howell described the suspects as in their late 30's. He further stated that the driver had a mustache and one of the suspects was wearing a flower button up shirt. Upon arrival at the residence, Deputy Kampas observed that the garage entry door was open and appeared

to have been kicked in. Deputy Kampas observed that the door jam was broken and a light colored footprint was on the door. The interior door inside the garage was also damaged. After securing the house, Deputy Kampas reports he called the owner of the residence, Karen Logterman, who arrived on scene shortly thereafter. Karen advised that two DVD players, and an IPod charger with speakers was taken from the residence. Complainant further reports based upon the reports made to police that no one had permission to enter the Logterman's residence, or to damage or take their property.

3) Sergeant Tim Otterbacher and Deputy Kirk Dodge report that on October 2, 2007 they were dispatched to W8918 Territorial Road located in the Town of Richmond, Walworth County, Wisconsin, regarding a report of a burglary in progress. En route to the call, Otterbacher was advised by the dispatcher that the owner of the residence, who identified herself as Mindy Wade, had run out of the residence after a door to the residence was kicked in. Wade further advised that there was a 'teal' colored vehicle in the driveway and that the vehicle was not known to her. Upon arrival, deputies observed that the 'teal' vehicle was no longer on the premises. During the investigation, Wade reported that she watched the teal vehicle pull into her drive, which is a remote farming area. She observed two male occupants in the teal vehicle, one believed to be a white male, the other a Hispanic or Asian male. Wade reported that she feared what they may do and left her residence and hid in a cornfield as she heard the door to her residence being kicked in. Deputy Dodge observed that the front entry door into the garage had been kicked in and that that door jamb and part of the frame were lying on the ground. Sergeant Otterbacher further observed that the shoe impression left on the door appeared very consistent with the shoe impressions left at a burglary scene at W9342 Creek Road approximately a week ago. Based upon Wade's report to the police and her conduct in fleeing her home, complainant concludes that Wade had not given anyone permission to enter or cause any damage to her residence. Otterbacher reports that Wade described the 'teal' vehicle as a late 80's to early 90's General Motors product similar to a Grand Am or Grand Prix. Detective Shannon Illingworth later showed Wade a photo line up containing the photo of Brian Conaway. Illingworth reports that Wade identified Conaway as the subject who was sitting in the passenger side of the 'teal' car that came to her residence on October 2, 2007.

4) On October 2, 2007 at approximately 4:50 p.m., Deputies Trombley, Trussler, and Anderson were dispatched to W9359 Stader Road located in the Town of Whitewater, Walworth County, Wisconsin for a report of a burglary. Dispatch advised they were on the phone with the owner of the residence, Dale Bunger, who was calling from his cell phone. Upon arrival, Deputy Trussler observed that it appeared the front door to the residence had been kicked in. The frame of the door inside of the front door was broken off and lying on the floor. Trussler also observed a partial footwear impression on the door. In walking through the house with Bunger, Deputy Trussler reports Bunger reported a black flat panel monitor was stolen off the desk. Complainant further states based upon the report made to police that no one had permission to enter Bunger's residence, or to damage or take any of his property.

5) Detective Sharp reports that he spoke with an individual who identified herself as Cindy A. Carlson. Carlson reported that on October 2, 2007 between 10:00 a.m. and noon she was sitting on her couch in her living room at W9273 Stader Road located in the Township of Whitewater, Walworth County, Wisconsin when she observed a late 80's early 90's teal

Pontiac Grand Am or Grand Prix pull half way up her driveway. Carlson described the driver as a male possible Hispanic with dark hair and possibly a mustache. Carlson was unable to see if anyone else was in the vehicle. Carlson stated the vehicle backed out of her driveway after she observed the driver look up at her. Carlson stated the vehicle left her residence and traveled west on Stader Road towards the Rock/Walworth County line. Carlson stated that approximately five minutes later she observed the same vehicle and the same driver drive back by her house heading East on Stader Road towards Highway 89.

6) Complainant has reviewed Deputy Ennis' report which reflects that on October 2, 2007 at 11:45 approximately a.m., Ennis was dispatched to N6989 Chapel Hill Drive in the Town of Whitewater for a female who called about a man approaching her residence. Ennis spoke to the woman who identified herself as Bonnie J. Treder. Treder said that she was home on October 2, 2007, and a man knocked on her door. When she answered the door, he asked her if 'Bill Massey' was there. She said no as she does not know anyone by that name. The man then asked if 'Massey' ever lived there. She said no. The unknown male thanked her and left. Treder described the vehicle the male was driving as a 'teal colored' GM product, possibly a Grand AM or Grand Prix. She observed a second person in the vehicle. Detective Shannon Illingworth later showed Treder a photo line up containing the photo of James G. Brereton. Illingworth reports that Treder identified Brereton as the subject who knocked on her door and asked to speak with Bill Massey on October 2, 2007.

7) Complainant reports that he on October 3, 2007 spoke to Detective Daryl Knutson of the Rock County Sheriff's Department. Detective Knutson advised that Rock County has received numerous reports of burglaries on their border next to Walworth County. When complainant advised of the teal colored car, Detective Knutson said that a citizen informant reported seeing a 'light blue' car further described as 'robin's egg blue' being operated by a white male driver and Hispanic passenger. The male driver approached the citizen's residence and knocked on the door. When the homeowner answered the door, the subject asked if 'Billie Massey' lived there. The homeowner reported that no one of that name lives at his residence. Complainant reports he later spoke with Detective Kamholz of the Rock County Sheriff's Department who advised complainant that one of their detectives had shown a photo lineup containing the photo of James G. Brereton to the residence where a subject came to the door and asked to speak with Billy Massey. Kamholz stated that this person identified Brereton as the person that came to their door and asked to speak with Billy Massey.

8) On October 3, 2007 at approximately 4:10 pm Deputy Jason Hintz and Jason Rowland report that they were dispatched to W9402 Christie Road in the Town of Darien, Walworth County, Wisconsin, which complainant knows is approximately 7 miles from Wade's home. Deputy Rowland met with Sue Ann Gray who identified herself as the home owner. Gray reported that she returned home after having been gone from her residence for several hours, and observed that someone had forcefully entered her residence without permission. Gray observed that the door had damage and the wooden frame was away from the door opening consistent with forcible entry. She further reported that she was missing a Nebalung exotic domestic cat. While Deputy Rowland was talking to Gray, a neighbor who identified himself as Peter Hiemstra was listening to Gray's statement. Hiemstra reported that somewhere around 1:45 to 2:00 pm, he noticed a "bright blue" older model sedan pull out of Gray's driveway and pull into a residence across the street that is

for sale. Hiemstra watched the vehicle then leave the property that is for sale and drive towards the county line in a westbound direction. Shortly thereafter, Rowland reports Gray's roommate, Nancy Weber, arrived on the scene and reported that the following items were missing from the residence and that no one had permission to take them: a 380 Browning pistol firearm loaded with a 13 round clip; a black leather fanny pack the gun was located in; a laptop computer; a digital camera; two lithium ion batteries; and several memory cards.

9) Complainant has reviewed the reports of Deputy Jason Hintz which reflect that on October 3, 2007, he conducted a neighborhood canvas and went to W9497 Christie Road and spoke to Michael Nelson, a citizen. Hintz advised Nelson of the burglary in the area between 1:00 and 3:00 pm that same afternoon. Nelson said that he was aware from a friend that there had been a rash of burglaries in the Rock County area, which is less than a mile from his home in Walworth County. Nelson said that as he came home today, he was on Bradford Town Hall Road, coming around the corner into Walworth County from Rock County; when he observed a "light blue" late model either Grand Prix or Grand Am turn around in front of him. He said the vehicle went slowly and then turned into one of the driveways on the Rock County side. He also stated that as he was about to pass the vehicle, he saw a male in the back seat who was looking at Nelson as he drove by. Nelson thought this was suspicious so he wrote the license plate number in pen on his hand. He later wrote it from his hand onto a piece of paper. Nelson went to his truck and retrieved the paper and gave it to Hintz. The numbers written on the paper are 8643511 and had Illinois plates. The paper Hintz observed saw had the words "light blue late model Grand Am or Grand Prix." Hintz went to W9528 Christie Road and spoke to the resident, Sharon Wheeler. Hintz asked Wheeler if anyone had approached her house anytime between 1:00 and 3:00 pm that day. Wheeler stated that after lunch, she saw an older "light blue" vehicle drive by her residence really slowly. Wheeler observed two males in the vehicle and that the passenger waived to her while she was sitting outside. She described them as 18-20 years of age just driving slowly. She also noted that the vehicle had a louder exhaust.

10) Complainant reports that on October 5, 2007, the vehicle bearing Illinois registration 8643511 was located in Rock County parked at a residence located at 1411 Keeler Avenue in Beloit, Wisconsin. Detective Kamholz stated that this is the residence of Miranda McKichen. Complainant spoke to Detective Knutson and Detective Kamholz who both assisted Deputy Rossmiller of the Rock County Sheriff's Department. Deputy Rossmiller conducted a pretext traffic stop of the vehicle as part of the investigation. The deputy observed the vehicle to have expired plates and no rear view mirror. Deputy Rossmiller further noted the vehicle had a louder muffler than normal. Detective Knutson arrived on the scene and observed the vehicle and described the vehicle as a "medium blue" car which he said could also reasonably be described as teal or robin's egg blue. Detective Knutson reports that the VIN on the stopped vehicle did not match the registration VIN number connected to the plates displayed on the vehicle. Detective Kamholz verbally advised complainant that he observed two white male occupants in the vehicle and that one of the two males had darker skin and could be reasonably described as an Hispanic male. Rock County Sheriff's Detective Meister reports that the driver of the vehicle was identified as James G. Brereton and the only passenger in the vehicle was identified as Brian J. Conaway. Detective Meister further reports that Brereton and Conaway matched the descriptions of suspects seen in the area of burglaries committed in

Rock and Walworth County on 10/2/07 and 10/3/07. Detective Schiltz obtained a court order to install a GPS tracking device on the vehicle Brereton and Conaway were driving, which was later installed. During the placing of the GPS unit, complainant observed that the tire tread pattern of the tires on the vehicle closely resembled that of the tire tread pattern complainant observed left in the dirt in the driveway at the Wade residence burglary scene.

11) On Tuesday, October 9, 2007 at approximately 11:44 a.m., Detective Sharp along with the assistance of Rock County Detectives tracked the vehicle in question by the GPS unit as it traveled around rural Rock County. Detective Sharp reports that at approximatley12:13 p.m., the vehicle stopped near the 2400 block of West Stark Road, in the Town of Janesville, Rock County, Wisconsin. The vehicle stopped for approximately 10 minutes before it began moving again.

12) Detective Meister and Detective Yoerger, of the Rock County Sheriff's Department, then checked the residences in the 2400 block and found 2453 West Stark Road had the front door kicked in. Detectives Meister and Detective Yoerger found that a computer monitor was missing from a desk in the master bedroom of the house, several drawers had been pulled out, and contents of a jewelry type box had been spilled onto the bed in the master bedroom.

13) Detective Kamholz reports that the vehicle in question was then stopped as it approached the intersection of Highway 14 and Milton Avenue, in Janesville. Two white males were taken into custody at gunpoint. The driver of the motor vehicle was later identified as James G. Brereton, defendant and the front seat passenger was identified as Brian J. Conaway, defendant.

14) The detective reports that the vehicle was searched incident to arrest and a Westinghouse flat screen computer monitor was found in the back seat of the vehicle. The detective further reports that Mr. Conaway, when he was exiting the vehicle, had his hands clenched, and when he opened his hands, several $100.00 bills fell from his palms and were blown into the ditch. A total of $1,300.00 in United States currency was recovered.

15) The detective reports that the owner of the residence at 2453 West Stark Road, Raymond Marden, was contacted by telephone and returned to his residence. Mr. Marden advised that he was missing a Westinghouse flat screen computer monitor and approximately $1,500.00 in United States currency in $100.00 denominations.

16) Deputy Rossmiller, of the Rock County Sheriff's Department, reports that Mr. Marden stated that he gave no one permission to break into his house, to take the $1,500.00 in United States currency, or to take his computer monitor.

17) Detective Kamholz reports that he and Detective Knutson met with Brereton in an interview room. After Brereton was read his Miranda Rights and waived same, Brereton was asked about the computer monitor and cash. Brereton stated that the computer monitor and cash were found on the side of the road, although he could not remember where he found them.

18) On October 9, 2007 Detectives from the Rock and Walworth County Sheriff's Departments executed a search warrant at 1411 Keeler Avenue in the City of Beloit. During the execution of the search warrant a dark blue 1988 Ford F-150 pickup truck, which was parked in front of the residence was seized. A resident of the Keeler Avenue home, Miranda McKichan, advised that the truck belonged to Brereton, who brought the truck to the residence to haul junk. McKichan further advised that both Brereton and Conaway were temporarily staying at her residence this past weekend. Detective Sharp observed that the truck matched the description of the truck leaving the scene of a burglary on Creek Road. The truck was impounded and later inventoried. During the inventory of this vehicle, Detective Sharp located a pair of Nike tennis shoes, and a floral button up shirt, which matched the description of the shirt worn by the suspect in the Creek Road burglary. Sharp reports that mail and other documentation belonging to Brereton was also located inside the truck.

19) On October 12, 2007 Detective Sharp reports he independently showed both Deputy Kampas and Sergeant Otterbacher pictures of the footwear pattern on the sole of the Nike tennis shoes recovered from Brereton's truck. Deputy Kampas and Sergeant Otterbacher both advised that the footwear pattern matched the footwear impressions left on the door at the Creek Road burglary.

20) Complainant has also reviewed the reports from the Rock County Sheriff's Department, which that on October 9, 2007 Detective Meister spoke with Heather Medley and her mother Joyce Smith. Medley advised that she is Brian Conaway's ex-girlfriend. Medley and Smith further advised that they both know James Brereton and that Conaway and Brereton are always together and are inseparable.

Subscribed and sworn to before me,
and approved for filing on:

This 10 day of Oct, 2008.

Complainant

Assistant District Attorney

State Bar No. for Assigned DA/ADA: 1018090

STATE OF WISCONSIN :	CIRCUIT COURT :	WALWORTH COUNTY

STATE OF WISCONSIN, Plaintiff	**DEFENDANT'S NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE**
v.	
BRIAN CONAWAY Defendant	Case No. 08-CF-412

The defendant, appearing specially by his attorney and reserving his right to challenge the court's jurisdiction, moves the court for an order excluding all evidence obtained in violation of his constitutional rights, including but not limited to GPS location data and evidence obtained through the use of said data. The defendant brings this motion pursuant to Section 971.31(2) and (5) of the Wisconsin Statutes on the grounds that the evidence was seized in violation of the rights guaranteed the defendant under the 4th, 5th, and 14th Amendments to the United States Constitution; article I, sections 1, 2, 9, and 11 of the Wisconsin Constitution; chapter 968 of the Wisconsin Statutes; and *Chimel v. California*, 395 U.S. 752 (1969), *Terry v. Ohio*, 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

Further, the defendant moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

IN FURTHER SUPPORT, the defendant asserts:

That he was a passenger in a vehicle illegally seized by the Rock County Sheriff's Department and towed to an impound lot on October 5, 2007.

That during this illegal seizure, Walworth County Sheriff's Department personnel illegally placed on the vehicle a GPS unit impermissibly beyond the scope of an already impermissibly broad court order.

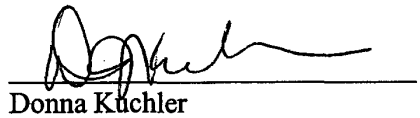
That evidence obtained from this illegally placed GPS unit directly led to the defendant's arrest and further seizure of property.

That the order, its supporting affidavit, and its returns were illegally sealed upon request of an Assistant District Attorney, in violation of Section 968.17 of the Wisconsin Statutes.

The defendant refers the court to the accompanying Defendant's Brief in Support of Motion to Suppress Evidence for further discussion and argument.

Dated this 23rd day of July, 2009.

KUCHLER & COTTON LAW OFFICES



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STATE OF WISCONSIN : CIRCUIT COURT : WALWORTH COUNTY

STATE OF WISCONSIN,
Plaintiff

v.

BRIAN CONAWAY Case No. 08-CF-412
Defendant

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

Defendant Brian Conaway has been charged with several counts, including Burglary, Theft, and Criminal Damage to Property. These charges followed his arrest subsequent to a traffic stop conducted on the basis of evidence illegally obtained by the Walworth County and Rock County Sheriff's Departments. Because this evidence was illegally obtained, and because key documents relating to said evidence was illegally sealed, all such evidence must be suppressed.

During its investigation of several burglaries, the Walworth County Sheriff's Department obtained a description of a blue or teal Pontiac Grand Prix or Grand Am, with Illinois license plate number 8643511. According to Walworth County Detective Robert Sharp's report, a Rock County detective located and began surveillance on the vehicle in question before 11:00 AM on October 5th, 2007. By 11:12 AM, Detective Sharp and four other detectives had decided to place a GPS unit on the vehicle. At 11:27 AM, the Walworth County Sheriff's Department decided to contact Assistant District Attorney Diane M. Donohoo to assist in an application for a court order allowing for the placement of the GPS unit. At 12:56 PM, an hour and a half later, a Rock County patrol

deputy decided to conduct a traffic stop of the vehicle. According to Rock County Detective Kamholz's report, both occupants, including the defendant, had revoked driver's licenses. At 1:30 PM, Detective Sharp was advised that the deputy gave the vehicle's two occupants a ride, and that the occupants planned to make arrangements to pick up the vehicle. However, Detective Kamholtz advised Detective Sharp that the department "decided to have the vehicle towed instead," and that the vehicle had since been towed to Davis Towing's impound lot. It was not until 3:35 PM that the officers were notified that the court order had been signed. After the order was signed, a GPS unit was installed, and the vehicle was towed back to the location where it was originally stopped. The occupants were never notified that the vehicle was moved.

After the GPS unit was installed, Detective Sharp was able to track the vehicle's movement in real time on a computer, and received text messages on a cell phone attached to the GPS unit. Detective Sharp followed the vehicle on the computer over the next several days. Based on the GPS unit's readings, officers were dispatched to the scene of a burglary, and a felony traffic stop was subsequently conducted on the vehicle based on the GPS unit's indication that the vehicle had stopped at the scene of the burglary. Both occupants of the vehicle, including the defendant, were arrested at this time.

A. Illegal Seizure of Vehicle

The towing of the vehicle clearly constitutes an illegal seizure. No arrest took place at the scene, so the seizure was not incident to arrest. Officer Sharp's report indicates that the occupants intended to have the vehicle picked up through their own arrangements, indicating that the occupants had affirmatively denied the officers

permission to tow the vehicle. In *State v. Friday*, 147 Wis.2d 359, 434 N.W.2d 85 (1989), the Wisconsin Supreme Court said, "Nor can there be doubt that [police] 'seized' Friday's car . . . when [they] told Friday that the police would be holding Friday's vehicle while they applied for a search warrant. Although the police did not immediately physically remove Friday's vehicle, Friday was unambiguously told that he would not be allowed to enter or move it." *Id.* at 374, 434 N.W.2d at 91. Clearly, a seizure occurs when officers actually move a vehicle after its occupants have been removed from the scene and told that the vehicle would not be removed. The Rock County Sheriff's Department's policy that "[d]eputies shall attempt to honor all reasonable requests by the owner or driver of a vehicle for a specific towing and recovery service" further emphasizes the egregiousness of the officers' deception. In fact, Detective Sharp indicates in his report that the he and his fellow officers intended to lie to the occupants if the occupants discovered that the vehicle had been towed without their consent.

There was also no probable cause to tow the vehicle. This is made evident by the officers' conduct during the seizure of the vehicle. Detective Sharp makes sure to clearly indicate in his report that "[a]t no time was the vehicle searched by any officer on scene," and emphasizes the limited scope of his inspection of the vehicle in detail. The failure to search the vehicle is clear evidence of the belief of all of the officers that there was no probable cause to search the vehicle, especially considering the Walworth County Sheriff's Department's policy on "Seizure and Inventory of Motor Vehicles" that "[a]ll vehicles that are seized or towed for *any* legal purpose and stored by this department shall be inventoried" (emphasis in original), as well as the Rock County Sheriff's Department's policy on "Impoundment of Vehicles – Inventory Searches," which deems

"proper and justified" "the routine practice of securing and inventorying [the] contents" of a vehicle that is either "seized or legitimately impounded." Insofar as the vehicle in this case was "seized or towed" by the Walworth County Sheriff's Department, either the Department's procedure was not followed or the vehicle was not towed for a "legal purpose." The Rock County Sheriff's Department's inventory search policy, which applies to vehicles both "seized or legitimately impounded," clearly was not followed either.

Even if probable cause had existed to seize the vehicle, the exigent circumstances traditionally associated with vehicle searches and seizures do not apply in this situation. In *Chambers v. Maroney*, 399 U.S. 42 (1970), the United States Supreme Court noted that "if an effective search is to be made [of a vehicle] at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search." *Id.* at 51. The Court supported this assertion in a footnote, noting that "[f]ollowing the car until a warrant can be obtained seems an impractical alternative since, among other things, the car may be taken out of the jurisdiction. Tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search." *Id.* Since no search of the vehicle was conducted, the removal of "instruments or fruits of crime" was of no concern to the officers in the present case. Because "a search warrant may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state," Wis. Stat. § 968.12(4), the vehicle's leaving Walworth County was of no effect; in fact, the traffic stop occurred in Rock County, and the vehicle was towed to an impound lot also located in Rock

County. The vehicle had already been monitored for two and a half hours before it was stopped, and the officers knew both that the order was being sought and that the occupants would not be able to drive the vehicle away after the traffic stop. For the State to argue that there was no opportunity to seek a court order to seize the vehicle would be inconsistent with the detectives' having sought a court order to seize the vehicle, and actually having received one after the seizure had already occurred.

Inventory searches are another exception to the warrant requirement, but this police action clearly was not an inventory search. Particularly, the inventory search is not an investigation tool.

> When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, . . . ; the protection of the police against claims or disputes over lost or stolen property, . . . ; and the protection of the police from potential danger.

State v. Callaway, 106 Wis.2d 503, 515, 317 N.W.2d 428, 435 (1982) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976)). Inventory searches are not subject to the warrant requirement because they are conducted by the government as part of a "community caretaking" function, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State v. Kramer*, 2009 WI 14, ¶ 23, 315 Wis.2d 414, 429, 759 N.W.2d 598, 606 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). The vehicle in this case was clearly not towed for the purposes of an inventory search. Even if the vehicle had been towed with these purposes in mind, that no search of the vehicle took place once the vehicle was in the impound lot clearly indicates that the officers were not concerned with the contents of the vehicle at all. In no way was the towing of the vehicle "divorced from the detection,

investigation, or acquisition of evidence relating to the violation of a criminal statute." None of the detectives' reports indicate who made the decision to tow the vehicle, nor is any explicit reason stated. However, it is clear that the only reason the vehicle was towed was to allow for the installation of the GPS unit.

In the case of inventory searches, "[t]he relevant standard to be applied . . . is whether the search was reasonable. . . . [T]here are two aspects of the question of reasonableness to be considered in determining the constitutionality of an inventory search . . . whether the intrusion was reasonable in the first instance, and . . . whether the scope of the intrusion is reasonable." *State v. Callaway*, 106 Wis.2d 503, 510, 317 N.W.2d 428, 432-433 (1982) (citing *State v. McDougal*, 68 Wis.2d 399, 410, 228 N.W.2d 671 (1975)). "[A] vehicle is lawfully impounded if the owner or driver gives his or her informed consent or if there is shown to be a reasonable police need to impound the vehicle." *Id.* at 513, 317 N.W.2d at 434. The court in *Callaway* listed several examples of cases where impoundment was improper:

> For example, in *State v. Bales*, 15 Wash.App. 834, 552 P.2d 688 (1976), the impoundment was found unconstitutional because the defendant indicated that a friend could arrive in a short time to pick up the car and, thus, the impounding of the car was unnecessary. Similarly, in *State v. Goodrich*, 256 N.W.2d 506 (Minn. 1977), the defendant arranged to have his brother pick up the car. In *Granville v. State*, 348 So.2d 641 (Fla. App.1977), the car could have been left where it was parked in a friend's driveway and in *People v. Miller*, 7 Cal.3d 219, 101 Cal.Rptr. 860, 496 P.2d 1228 (1972), the defendant expressly stated that he preferred to assume the risk of leaving his property in the car.

106 Wis.2d at 514, 317 N.W.2d at 434. In the present case, the occupants' stated intent to make arrangements to have the vehicle picked up makes impoundment unreasonable, and therefore unconstitutional. Had they known that the officers could and would decide to have the vehicle towed instead, the occupants may have chosen to stay with the vehicle.

That the officers planned to lie to the occupants if they later asked why the vehicle was towed indicates a complete lack of good faith in the officers' conduct regarding this interaction.

The officers in this case clearly did not believe that probable cause existed to conduct a search of the vehicle. Nor did they follow either department's procedures regarding inventory searches. Even more egregiously, the officers indicated to the vehicle's occupants that the vehicle would remain in its then-current location until the occupants arranged to have it picked up, and, after towing the vehicle, discussed among themselves what lies they would tell the occupants if they discovered that the vehicle had in fact been towed. When determining whether to suppress evidence as the fruits of an illegal seizure, courts consider "(1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *State v. Phillips*, 218 Wis.2d 180, 205, 577 N.W.2d 794, 805 (1998).

In this case, the GPS unit was attached during the illegal seizure of the vehicle; there is no temporal difference between the misconduct and the seizure of evidence, as the GPS unit was immediately operational. The signing of the court order, while an intervening circumstance, was an event the officers expected to occur and planned into their illegal conduct. Also, the order that was eventually signed allows for the vehicle to be moved only "for the required time," but the vehicle was away from its original location at least seven times longer than was necessary to install the GPS unit. The misconduct here is especially flagrant, considering the officers lied to the vehicle's occupants in order to remove them from the scene, towed the vehicle with knowledge

that they lacked probable cause to do so, ignored both the Walworth County and Rock County Sheriff's Departments' search and seizure procedures, and planned further lies to tell the occupants in case their illegal acts were discovered. Therefore, the evidence obtained as a result of the illegal seizure, including both all evidence viewed by the officers during the seizure the results obtained as a result of the GPS unit's installation during the illegal seizure, and all evidence obtained through the use of the GPS data must be suppressed.

B. Invalid Order

In his Affidavit and Request for Authorization to Place and Monitor Electronic Tracking Devices, Walworth County Detective Robert Schiltz states that he "has relied on the authority related to cases addressing the instillation of tracking devices and transponders such as *United States v. Karo*, 468 U.S. at 718, 104 S.Ct. at 3305 and *United States v. Michael*, 645 F.2d 252, 256 (5th Cir. 1981), for the proposition that a court order is required to install a monitoring device on private property." In *Karo*, 468 U.S. 705, 104 S.Ct. 3296 (1984), the Supreme Court, in analyzing whether a warrant was required "prior to monitoring a beeper when it has been withdrawn from public view, . . . discern[ed] no reason for deviating from the general rule that a search of a house should be conducted pursuant to a warrant." 468 U.S. at 718, 104 S.Ct. at 3305. In *Michael*, the court held that "the minimal intrusion involved in the attachment of a beeper to Michael's van, parked in a public place, was sufficiently justified so as to satisfy any of Michael's fourth amendment expectation of privacy concerns." 645 F.2d at 256. Detective Schiltz also notes that "the standard used to determine the need for a trap and trace device in the

State of Wisconsin under § 968.35 is that the information likely to be obtained is relevant to an on-going investigation."

None of these three authorities do not support the proposition in question. *Karo* states that a warrant is required to install a beeper on private property, and *Michael* states that a warrant is not required to install a beeper on a car in a public place. The trap and trace device statute, which also regulates pen registers, requires that the application be made by the attorney general or a district attorney, not an officer. It is equally unclear how Detective Schiltz's request can be, as the order states, "granted based on the authority granted in" *Karo*, as *Karo* specifies merely that a warrant is necessary before police may search inside a house. The affidavit admits that "the State of Wisconsin has no explicit statute in Wisconsin Statutes which addresses the issue of installing tracking devices on private property."

The order itself is impermissibly broad. The order grants "[t]he Walworth County Sheriff's Department . . . or other law enforcement agencies acting on its behalf" authorization to place a GPS unit on the vehicle in question. It also grants authority to enter and re-enter the car and any buildings or property on which the car is located in order to conduct surveillance. Even if Detective Schiltz's affidavit demonstrates probable cause sufficient for placement of the GPS unit, the affidavit certainly does not demonstrate probable cause to justify allowing the Walworth County Sheriff's Department "or other law enforcement agencies acting on its behalf" to "enter and re-enter . . . any buildings and structures containing the vehicles [*sic*] [to] conduct surveillance and monitoring of the . . . vehicle[, including] private residences and other locations not open to visual surveillance." Even if "the vehicles are [*sic*] being or have

been used in the commission of the crime of burglary," to allow officers to follow said vehicle into any building, including a private residence, such as a garage in the vehicle owner's home, without even some showing that the residence is owned by a suspect, or even slightly related to the burglaries in question, is unheard of, and clearly beyond the scope of judicial authority. The surveillance allowed by this order exceeds even the scope of GPS surveillance, which would not reveal, for example, the identities of individuals and content of discussions taking place in a garage in which the vehicle is located, or even the identities of individuals and content of discussions taking place in a parking garage in which the vehicle is located.

The affidavit also significantly understates the surveillance power of the technology behind the GPS unit installed in the vehicle. "The general rule is that items seized within the scope of the warrant need not be suppressed simply because other items outside the scope of the warrant also were seized, unless the entire search was conducted in 'flagrant disregard for the limitations' of the warrant." *State v. Petrone*, 161 Wis.2d 530, 548, 468 N.W.2d 676, 682 (1991) (quoting *United States v. Lambert*, 771 F.2d 83, 93 (6th Cir. 1985)). "A search warrant's execution must be conducted reasonably, and the search and seizure must be limited to the scope that is permitted by the warrant." *State v. LaCount*, 310 Wis.2d 85, 107, 750 N.W.2d 780, 792 (2008) (citing *State v. Andrews*, 201 Wis.2d 383, 390, 549 N.W.2d 210 (1996)).

According to the affidavit, the GPS unit to be installed, "when programmed, periodically records at specified times, the latitude, longitude, date and time of readings and stores these readings until they are downloaded to a computer interface unit and overlaid on a computerized mapping program for analysis." In the affidavit, Detective

Schiltz describes a unit that records its position at infrequent intervals and merely stores this information until another "computer interface unit" retrieves the data for analysis. This data would "lead to evidence of the aforementioned criminal violation, as well as the location where the fruits of the crimes are being stored and the identification of associates assisting in the aforementioned crimes." The affidavit does not contemplate use of the data to catalog the routes travelled by the vehicle, or to locate the vehicle for purposes of making an arrest.

In his report, however, Detective Sharp describes how he was shown "how to use the GPS computer to do live tracking," and within an hour of his training he received a text message on a cell phone alerting him that the GPS unit was moving. Detective Sharp's account makes clear that the unit installed did much more than "periodically record[] and store[] readings until they are downloaded," but instead allowed Detective Sharp to "live track" the vehicle's movements. Such additional capabilities would allow, and in fact did allow, for live monitoring of the vehicle at all times, whereas the affidavit supporting the Order clearly described the unit in question as only storing periodical readings "until they are downloaded to a computer interface unit and overlaid on a computerized mapping program for analysis." Had the unit installed conformed to the description in the affidavit upon which the court based its decision to approve of the Order, Detective Sharp would not have been able to watch the vehicle's movements on the night of the defendant's arrest, and no arrest could have taken place.

The requirement that readings taken by the GPS unit be retrieved by a "computer interface unit" is consistent with, and perhaps the only possible justification for, the order's allowing the Walworth County Sheriff's Department "or other law enforcement

agencies acting on its behalf" to "enter and re-enter . . . any buildings and structures containing the vehicles [*sic*] [to] conduct surveillance and monitoring of the . . . vehicle[, including] private residences and other locations not open to visual surveillance." Entering such "buildings and structures" would presumably be necessary to allow the "computer interface unit," which is not particularly described, to download the readings. Because the court relied on the information provided in Detective Schiltz's affidavit to find probable cause, evidence obtained through the use of technology beyond the scope described in Detective Schitz's affidavit, i.e. "real time" monitoring of the vehicle's location, must be suppressed.

C. Invalid Sealing of Order

Five days after the Order was granted, and after the defendant's arrest, Assistant District Attorney Donohoo filed a motion "for an order providing that the order, affidavit and returns . . . be sealed by the Clerk of Court and not opened to public inspection until criminal complaints are filed in this matter, or until further order of the Court." Assistant District Attorney Donohoo indicated that the motion was made "pursuant to *State v. Cummings*, 645 [*sic*] N.W.2d 406 (1996)." However, *Cummings*, 199 Wis.2d 721, 546 N.W.2d 406 (1996), provides no authority for the request made in Assistant District Attorney Donohoo's motion, and in fact makes a specific finding that there is no authority for such a request.

In *Cummings*, the Wisconsin Supreme Court sought to "collectively address questions concerning the interpretation of Wis. Stat. § 968.26 (1993-94), the statute authorizing Wisconsin's John Doe proceeding." *Id.* at 729, 546 N.W.2d at 408-409. In a John Doe proceeding, an individual complains to a judge that a crime has been

committed, and the judge examines the individual, the individual's witnesses, and other witnesses requested by the district attorney. Wis. Stat. § 968.26. Such proceedings may be kept secret. *Id.* The court in *Cummings* held that a John Doe judge has the same power to issue a search warrant granted by Wis. Stat. § 968.12 to all judges. 199 Wis.2d at 733-735, 546 N.W.2d at 410-411. The court also held that a John Doe judge must also have the power to seal such a search warrant. *Id.* at 735-736, 546 N.W.2d at 411. The court noted that this power was implied by the John Doe statute, and that "there is no statutory authority in Wisconsin granting judges this ability." *Id.* The court found it "only logical that when a John Doe judge determines that it is necessary to keep the proceedings secret . . . , he should be able to keep the warrant and supporting documents secret too." *Id.* at 737, 546 N.W.2d at 412.

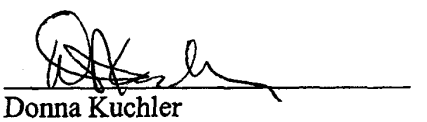
The court's holding in *Cummings* that judges have the power to seal warrants is, therefore, clearly and explicitly limited to instances where a judge in a John Doe proceeding has already determined that the proceedings themselves should be kept secret. In non-John Doe proceedings, "there is no statutory authority in Wisconsin granting judges this ability." *Id.* at 735-736, 546 N.W.2d at 411. In this instance, the Order requested and granted was not part of a John Doe proceeding. Contrary to the assertion in Assistant District Attorney Donohoo's application, there was therefore no statutory authority granting the court the ability to seal the order, affidavit, or returns in this matter. Rather, statutory authority requires that "[u]pon request, the clerk shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the search warrant," Wis. Stat. § 968.17(1), and that "[a]n affidavit or complaint made in support of the issuance of the warrant and the transcript of

any testimony taken shall be filed with the clerk within 5 days after the date of the execution of any search warrant," Wis. Stat. § 968.17(2).

The State's egregious reliance on procedures specifically limited to John Doe proceedings in a non-John Doe situation requires suppression of all evidence obtained and sealed, in order to prevent the State from profiting by its misconduct and to ensure that prosecutors strictly confine their use of John Doe procedures to John Doe proceedings under the standards imposed by Wis. Stat. § 968.26. Sealing the affidavit and order in this case affirmatively allowed the State to evade the statutes governing the public filing and disclosure of search documents. The requirement that the person whose property is taken be able to obtain a copy of the inventory upon request of the clerk 48 hours after the order is executed was revoked in this case, as was the legal requirement that the affidavit be available to the public (and, necessarily, to the target of the search) within five days after the order is executed. The limited secrecy rule of § 968.21 similarly was ignored and violated. Accordingly, this Court should suppress all evidence obtained as a result of the sealed order, the only effective remedy for the State's improper use of John Doe procedures to avoid disclosure.

Dated this 23rd day of July, 2009.

KUCHLER & COTTON LAW OFFICES



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STATE OF WISCONSIN : CIRCUIT COURT : WALWORTH COUNTY
BRANCH IV

STATE OF WISCONSIN,		
	Plaintiff,	MOTION HEARING
-vs-		CASE NO: 08-CF-411
JAMES G. BRERETON,		
	Defendant,	
-and-		
STATE OF WISCONSIN,		
	Plaintiff,	MOTION HEARING
-vs-		CASE NO: 08-CF-412
BRIAN J. CONAWAY,		
	Defendant.	

Proceedings had before the HONORABLE MICHAEL S. GIBBS, Circuit Judge-Branch IV, of Walworth County, Elkhorn, Wisconsin, on the 12th day of August, 2009.

APPEARANCES

DIANE DONOHOO, Assistant District Attorney, Walworth County, Walworth County Judicial Center, P.O. Box 1001, Elkhorn, Wisconsin 53121, appearing on behalf of the State of Wisconsin.

LESLIE JOHNSON, Attorney at Law, 135 W. Geneva Street, Elkhorn, Wisconsin 53121, appearing on behalf of the Defendant, James Brereton, who appears in proper person.

KUCHLER & COTTON LAW OFFICES, Attorneys at Law, by Ms. Donna Kuchler, 1535 E. Racine Avenue, Waukesha, Wisconsin 53187, appearing on behalf of the Defendant, Brian Conaway, who also appears in proper person.

PROCEEDINGS PREPARED BY: Diana Joaquin, RMR

T A B L E O F C O N T E N T S

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E X H I B I T I N D E X

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P R O C E E D I N G S

THE COURT: This is State of Wisconsin versus James G. Brereton and State of Wisconsin versus Brian J. Conaway.

Appearances, please.

MS. DONOHOO: Diane Donohoo for the State.

MS. KUCHLER: Good morning, Your Honor.

Donna Kuchler appears with Mr. Conaway.

MR. JOHNSON: James Brereton appears in custody, and in person, and by Attorney Les Johnson.

THE COURT: We are here on Defendant's motion to suppress. And I couldn't really tell from the motion itself if this is going to require any kind of testimony.

MS. DONOHOO: Well, we were trying to discuss that a little bit, Judge. In Ms. Kuchler's brief, her first and second page, up to the point of A -- sub. A, Illegal Seizure of Vehicle, the statements alleged previous to that we both agree are factually correct. I'd like to supplement the record with some additional facts because I'm going to ask the

Court to also make a ruling whether there was probable cause to seize the vehicle at the time anyway, but I think we can stipulate at least to those facts.

I don't know that Attorney Johnson was part of that discussion.

MR. JOHNSON: I would agree to stipulate to that.

THE COURT: Stipulate to the facts set forth in Defendant's brief on Pages 1 and 2.

MS. DONOHOO: Up to Part A.

THE COURT: All right. Is that correct then, Ms. Kuchler?

MS. KUCHLER: If they want to stipulate, that's great.

THE COURT: Okay. All right. Then, Ms. Donohoo, call your first witness.

MS. DONOHOO: And then I will ask the Court to mark as an exhibit the original order. It had been actually in a previous file. I don't know how much familiarity the Court has with the history of this case, but this case started out with a different case number. There was a preliminary hearing. There was no bind

over, and it was reissued.

So the Clerk's Office is bringing up the 2008-CF-149 and 150, because we're believing that the orders were actually left in that file.

So has the Court seen that order previously?

THE COURT: No.

MS. DONOHOO: Okay. And I do want to call a witness. Are you ready for that at this point?

THE COURT: Yes.

MS. DONOHOO: Thank you.

Detective Rich Kamholz.

MS. CLERK: Please state your name for the record?

THE WITNESS: Richard A. Kamholz.

MS. CLERK: Would you please spell your last name?

THE WITNESS: K-A-M-H-O-L-Z.

MS. CLERK: Raise your right hand.

RICHARD KAMHOLZ, called herein as a witness on behalf of the State, being first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as

follows:

THE WITNESS: I do.

MS. CLERK: Thank you.

DIRECT EXAMINATION BY MS. DONOHOO:

Q Sir, you are Rich Kamholz?

A That's correct.

Q How are you employed?

A I'm a detective with the Rock County Sheriff's Department.

Q How long have you worked in that capacity?

A I've been a detective for approximately three and a half years.

Q How long have you worked as a police officer in total?

A About eleven years.

Q What is your educational background?

A Beyond high school, I have an Associate Degree in Criminal Justice, Law Enforcement, and several training classes I've attended through my years as employment with the Sheriff's Department.

Q Have you had training in obtaining search warrants?

A Yes.

Q Have you had training in obtaining orders to install a GPS unit on a vehicle?

A No, I have not.
Q And were you involved with the Walworth County Sheriff's Department back in October of 2007 in a joint investigation?
A Yes.
Q What was the general subject matter of that joint investigation?
A It was, ah, a series of burglaries that occurred in Walworth and Rock County during late summer, early fall of 2007.
Q And for the record, Walworth County and Rock County share a common border, correct?
A That's correct.
Q The burglaries that had been reported were along this common border on both sides of the border?
A Yes.
Q In your investigation and collectively with the other officers, have you developed any leads regarding were these burglaries committed by people just walking on foot, arriving in some sort of a vehicle, or what was their mode of transportation if any is known?
A It was in a vehicle.
Q And what did you learn about this vehicle, this suspect vehicle?

A That it was a light color or what was described as a Robin's egg blue colored vehicle, possibly a Grand Am or Grand Prix or something similar to that. At one point a license plate was obtained, Illinois plate on the vehicle.

Q And prior to taking the stand today, you had occasion to take a look at the first 3 pages of the Defendant's motion, correct, their brief rather?

A That's correct.

Q And you had a chance to review it as far as the facts that are contained in those first few pages?

A Yes.

Q And you agree and you heard that stipulated in court that we agree to those facts -- were agreed to by both parties, correct?

A Yes.

Q And on Page 1, the defense brief refers to a blue or teal Pontiac Grand Prix or Grand Am with Illinois license plate 8643511; is that the vehicle that we're talking about?

A Yes.

Q Prior to October 5th, the date the GPS unit was installed, did you already know that license

plate?

A I believe, yes, the license plate was known to us before that date.

Q And how is it that that license plate was brought to the attention of law enforcement? How did that come to be known?

A We received the information from the Walworth County Sheriff's Department. We were told that a citizen saw that vehicle in the area of the burglaries and actually got the license plate.

MS. KUCHLER: Objection; hearsay.

MS. DONOHOO: This is an evidentiary motion; hearsay is allowed, Judge.

THE COURT: I agree.

BY MS. DONOHOO:

Q Had you finished your answer, sir?

A Yes.

Q Okay. And in -- After obtaining that information, did a Rock County Sheriff's Department deputy obtain -- I'm sorry -- maintain visual surveillance of that vehicle?

A Yes.

Q Was that vehicle observed prior to the GPS unit being installed?

A Yes, it was.
Q And on October 5th of 2007, a traffic stop was conducted of that vehicle, correct?
A That's correct.
Q And I think we all agree that Mr. Brereton and Mr. Conaway were in that vehicle at the time it was stopped?
A Yes.
Q Prior to that time when that vehicle was stopped on the side of the road, and that was in Rock County, correct?
A That's correct.
Q Prior to this deputy conducting this traffic stop of the vehicle with both defendants in it on October 5th, had that vehicle been observed at locations where -- either where Mr. Brereton or Mr. Conaway had previously been residing or staying?
A Yes.
Q And in the investigation of the burglaries, approximately how many of them were there in total that you believed were by a common person or persons?
A Approximately, thirty-five.
Q And in how many of these reports was a blue or

teal or Robin's egg blue or some substantially similar color descriptor given as being in the area where the burglary occurred?

A I don't have an exact number on the number of incidents that the vehicle was actually seen in the area. I know that there was more than one. It was several.

Q And in -- it was in one of these observations that it was a citizen who took down the license plate number?

A Ah, that's my understanding. That was in Walworth County though. I don't believe that occurred in Rock County.

Q When you participated on October 5th of 2007, were you present when the vehicle was at this tow lot?

A Yes.

Q And was any search of the interior conducted of this vehicle at any time?

A Not while I was present, no.

Q Any search of the trunk?

A Nope.

Q And the GPS unit was installed while at this tow lot?

A Yes. That's correct.

Q Is it -- Am I using the right term? Is it your impound lot or was it just a tow facility?
A It was the impound lot of the tow company, Davis Towing (phonetic).
Q After the GPS order was -- I'm sorry. After the GPS unit was installed, what happened with the vehicle?
A It was returned to the location where it was stopped.
Q And allowed to be taken away by somebody other than law enforcement, correct?
A Yes.
Q So on the day of October 5th of 2007, was any item taken out of that vehicle?
A No.
Q Was any person from the time it was impounded -- I know -- We've already established Mr. Brereton and Mr. Conaway had been taken out of the vehicle and taken somewhere, correct?
A That's correct.
Q Other than those two people, was anything else ever taken out from the moment it was at the side of the road, taken to the impound lot and brought back, was there ever anything taken from that vehicle?

A No.

MS. DONOHOO: Judge, can I have the exhibits from the prelim, please. I would like to use a few of those yet today.

THE COURT: These two orders? Is that what you're talking about?

MS. DONOHOO: That as well as, but there should be a packet of exhibits. They were photos and -- mainly the photos are what I'm after.

MS. CLERK: I can go through it to see if I can find them for you, Judge?

THE COURT: Okay. We can also check in the exhibit room. They are somewhere, so the search is on.

MS. DONOHOO: I'm sorry. I should have asked ahead of time. They are usually in the file.

(Whereupon, there was a pause in the proceedings.)

THE COURT: Okay. At this point let's just proceed with what we have.

Ms. Donohoo, please continued.

MS. DONOHOO: Thank you, Judge.

I can go through them with my next witness, so I would have no further questions of this witness.

THE COURT: All right. Cross, Ms. Kuchler.

MS. KUCHLER: Thank you.

CROSS-EXAMINATION BY MS. KUCHLER:

Q Detective Kamholz, were you one of the officers who stopped the car on October 5th?

A I did not stop the vehicle, no.

Q Okay. Now, you were asked some questions about whether the car was searched, and you said that it wasn't; isn't that right?

A That's correct.

Q You were asked whether the trunk was opened, and you said it wasn't?

A That's correct.

Q But, in fact, isn't it true that the hood was opened?

A Yes. The hood was opened.

Q And isn't it true that the car door was opened in order to press the button to release the hood?

A I do not know if that was actually opened. I don't recall that it was or it wasn't.

Q Now --

A I'm not sure what type of mechanism opens that hood because some hoods have an -- it's outside the actual interior of the vehicle where you can unlatch the hood. So it could have been. I'm not sure one way or the other.

Q So when you're giving testimony about what was done to the car, really then you would -- you really don't have knowledge? You weren't watching; is that correct?

A No, I was there. I have knowledge as to what was done. I saw the GPS placed on the vehicle.

Q Okay. So isn't it true that in order to open the hood, you had to open the car door because the hood release was in the glove box?

A That is possible. Like I said, I don't recall that happening, but that is possible.

Q Now, when this vehicle -- you said that it had been stopped. What highway had this vehicle been stopped on?

A Highway 51.

Q And isn't it true that when the vehicle was stopped on Highway 51, the two passengers that were in the vehicle were removed from the vehicle; the driver and the passenger were removed?

A Yes, yes.
Q So that would be Mr. -- from your reading of the report, that would be Mr. Conaway and Mr. Brereton; isn't that right?
A Yes.
Q And they were taken out of the vehicle by the police department?
A Yes. They were given a ride to Janesville.
Q And they were given a ride to a shopping mall; isn't that right?
A I believe it was the Dollar Store if I remember correctly.
Q So when you say that nothing was removed from the vehicle, that's not accurate. People were removed from the vehicle; isn't that right?
A Well, I was asked if anything was removed from the vehicle from the time after they were taken to Janesville. So it's accurate to say that nothing was removed from the time they were given a ride until the time that, ah, I was with the vehicle.
Q Okay. So that we're clear though, when the vehicle was stopped, ah, the two people that were in the car were removed and taken to the Dollar Store?

A Yes.
Q And then a tow truck was called and towed the vehicle to what is called the impound lot; is that right?
A Yes.
Q And it's accurate to say that neither the driver of the car nor the passenger gave permission for the car to be seized?
A Yes, that would be accurate to say.
Q And, in fact, you had developed a plan that day that you were going to seize the vehicle and tow it away, correct?
A We hadn't necessarily developed a plan to seize the vehicle and tow it away. We developed a plan to place the GPS unit on it. As it turned out, we ended up seizing it and towing it away.
Q So at some point you developed a plan to seize the vehicle and tow it to the impound lot?
A I wouldn't characterize it as a plan. I would say it was more of an immediate decision given the location of the vehicle. That it wouldn't be safe to place a GPS unit on it along the side of a busy highway.
Q And at the time that you -- your department seized the vehicle, you didn't have a warrant to

seize the vehicle, did you?

A No.

Q You didn't have any type of search warrant at that time that you towed the vehicle?

A No.

Q And isn't it true that once -- when your department had dropped off the subjects, that the subjects were told that they needed to try and make arrangements to have somebody come pick up the vehicle?

A I don't know if they were told that or not. It's possible.

Q Okay. And isn't it true that when -- Isn't it true that around one o'clock or so you met with other detectives at the Janesville DMV office?

A That's correct.

Q Okay. And when you met with the detectives at the DMV office, then you followed them to Davis Towing; isn't that right?

A Yes.

Q And when you arrived at Davis Towing, the Pontiac Grand Am was already there?

A That's correct.

Q And isn't it true that during your discussions with the detectives, that a decision was made to

have the -- Mr. Brereton or Mr. Conaway discovered that the vehicle had been towed, that an excuse was going to be given to them that it was -- must have been an accident, correct?

A Yeah, that is certainly possible. I'm not sure if that was the nature of the conversation; but, yes, some sort of an excuse would have be been --

Q Because the plan was to tow the vehicle to Davis Impound, correct?

A Again, that was more of an on-the-spot decision, but, yes, if you want to call it a plan, okay. Yes.

Q And then to -- at Davis Impound, the plan was to install a GPS, correct?

A Yes.

Q And then the next part of the plan involved towing it back to the spot where it had been stopped on the highway?

A Ah, that's ultimately what happened. I don't know if that was actually the plan or not, but, yes.

Q And that was Highway 51?

A Right.

Q And you had -- well, all the detectives had a discussion, ah, about this when you met at Davis

Towing; isn't that true?

A Yes. We discussed what would be done with the vehicle.

Q And isn't it true at that time that it was discussed that if they called, they would be told that the vehicle had been towed by accident?

A Again, I don't recall if it was specifically that they would be told that it was towed by accident or what the excuse was going to be, but some sort of excuse would be offered. Again, I just don't remember for sure. It's possible. I'm not saying that it didn't happen.

Q And while you were there, all of the detectives had further conversation discussed -- and discussed what you would call your game plan for the rest of the weekend and how you were going to monitor the GPS; isn't that right?

A Again, I don't remember that conversation. It's, ah -- It was a given that once the GPS was on there that it was going to be tracked.

Q Isn't it true that your department made a decision that they were going to conduct a pretextual traffic stop on this vehicle in order to be able to get a hold of it and ultimately tow it away?

MS. DONOHOO: I'm going to object. I think that's beyond the issues for today. I don't know how that's relevant.

THE COURT: Well, that was not raised before. So I want you to point out to me where it was.

MS. KUCHLER: Well, I think what -- the entire incident involving the stop and the ultimate towing is all relevant to the -- to the issues today, Your Honor.

MS. DONOHOO: But I understood the question to be after the car was brought back, the GPS unit is placed, several days pass and the final arrest and seizure of the car and the two occupants was done. That's what I was objecting to. That final event that was -- is that what you're talking about?

MS. KUCHLER: I'm sorry if I wasn't clear. Could I have my question read back. I don't believe I was talking about that.

THE COURT: Well, the question was, wasn't the stop -- the pretextual stop for the purpose of towing the car and putting the GPS unit on.

MS. KUCHLER: I meant on

October 5th.

THE COURT: Oh.

MS. KUCHLER: I didn't mean October 10th. I'm sorry. I meant October 5th.

THE COURT: All right.

BY MS. KUCHLER:

Q Wasn't that a pretextual stop, sir?

A Ah, yes.

Q Okay. So when you towed the vehicle to the impound lot -- Strike that.

When your department seized the vehicle and towed it to the impound lot, you did not conduct an inventory search of the vehicle, did you?

A No.

MS. KUCHLER: And let me have an exhibit marked (pausing).

BY MS. KUCHLER:

Q Isn't true, sir, that you had a general order in Rock County Sheriff's Department that when you impounded or when you impound -- seize and impound a vehicle, that you're required to conduct an inventory search?

A I don't know if it's required or if it's suggested. If you have a copy of the order, I can look at it.

Q Sure. I'll show you what's marked as D-2. I'd just ask you to take a look and tell me if that is one of your Rock County Department orders?

A (No audible response.)

Q Does that appear to be an order from your department?

A Yes.

Q Okay. Isn't it true that pursuant to your department order that once a vehicle is seized, that it's to be inventoried -- that the contents are to be inventoried?

A It states that it's a routine practice.

Q And in your duties as a, ah, ah, law enforcement officer in Rock County, when you seize a vehicle, that is the routine policy that you follow; isn't it?

A It would be a routine practice; however, that is not a set-in-stone rule. I mean, there are other circumstances that come into play. That's why they're general orders for policy and procedures. They're not, ah -- They are guidelines. They are not set-in-stone rules that you have to do this every single time.

Q And you did not, ah, in this particular case conduct an inventory search; isn't that correct?

A That's correct.
Q Now, this is a type of general order; isn't it?
A Yes, it is.
Q But it's your position here today that it is not an order; it's a suggestion?
A I say it's a general order, which means that it's a guideline or procedural order that generally that's how things are done, but not every single situation is covered by policy and procedure in general orders.
Q And you agree that when Mr. Brereton and Mr. Conaway were stopped by your department, they weren't arrested?
A No, they weren't arrested.
Q And you indicated previously that you didn't -- you didn't and no one else that you observed every searched the vehicle when it was brought to the impound lot; isn't that true?
A That's true.
Q And the reason it wasn't searched is because you didn't have probable cause to conduct a search at that time; isn't that true?
A No. I wouldn't say that we didn't have probable cause. I'm just saying we didn't search it.
Q And you or anyone -- neither you nor anyone from

your department ever obtained any type of search warrant in this case; isn't that true?

A No. We didn't obtain a search warrant.

Q And it's true that your officers went -- when they gave Mr. Brereton and Mr. Conaway a ride to the Dollar Store, told those gentlemen that the car would remain on the side of the road on Highway 51?

A I don't know if that was said to them or not. I didn't give them the ride. So could it have been said, yes, but I don't know.

Q Well, you agreed before that the Defendants were told that they needed to make phone calls from the Dollar Store in order to obtain another person to come pick up the car; isn't that right?

A I don't know if they were told that. Again, I didn't give them a ride. So whatever the deputy said to them unless it was in a report somewhere that I would have read, I -- I wouldn't know what was said.

Q So you haven't read all the reports in this case?

A I've read the reports, but I don't -- I don't recall seeing that anywhere in the reports that it was told to them that it was going to be left there or that they could make arrangements to

come pick it up later.

Q Did you read the reports from, um, all detectives that were there that day, including the ones from Walworth County?

A I read the reports that I received at some point, not recently. Yes, I've read the reports.

Q Okay. Now, it was one of the Rock County detectives that was the lead detective on this case?

A Not a lead detective. It was just a joint effort. Ah, since we had so many burglaries, each of the detectives in the bureau were assigned a certain amount of cases, kind of split them up, kind of share the workload.

Q I am going to hand you what is marked as Exhibit D-3, which is a report from Walworth County from Detective Sharp -- Sharp from October 5th, and I think there's a couple pages at the end that might be October 7th -- October 6th. Do you want to take a look at that and see if that's one of the reports that you would have seen in this case?

A (Pausing.)

MS. DONOHOO: And, Judge, I'm willing to stipulate to the reports if that helps

move things along.

MS. KUCHLER: Okay.

BY MS. KUCHLER:

Q Have you seen that report before without taking the time to read the entire thing?

A Yeah, it seems familiar. Like I said, it's been a while. The case is a couple years old, so, yeah; but I believe I have read it before.

Q Sure, I understand. And maybe I can just direct you to certain parts of that.

A Okay.

Q If you look at Page 6, and the page numbers are at the top in the center.

A Okay.

Q At 1:30 P.M., at the bottom, isn't it true that, ah, the deputy gave the two subjects a ride, that they had been dropped off and were going to make arrangements to try to pick up the vehicle?

A Yes, that what is in his report.

Q And that's Detective Kamholz, and that's you, right?

A Yes.

Q That's what's referred to in the next line; advised that they decided to have the vehicle towed instead; isn't that correct?

A Yes.
Q And that's accurate information?
A Yes.
Q Okay. And that as a matter of fact, the car was seized, towed to the impound lot, all before the signing of an order of the -- from Walworth County by Judge Carlson; isn't that right?
A Yes.
Q You received -- you received word that the order had been signed by Judge Carlson while you were sitting or standing -- while you were at the impound lot with the vehicle?
A I'm not sure if we were actually at the impound lot, but, yes, at some point I received the word that the order was signed.
Q But the order was signed after the car had been seized, correct?
A Yes.
Q And after it had been towed?
A Yes, I believe so.
Q If you look at Page 9, sir, at 3:56 P.M., isn't it true that you detectives discussed among yourselves that if Brereton and Conaway called wondering where the vehicle was and why it had been towed, that they were going to be told that

the vehicle had been towed by accident?

A Ah, that's what the report says, yes.

Q And that's true, isn't it?

A Again, I don't recall us saying specific by accident, but Detective Sharp's report indicates that and I have no reason to believe it's not true.

Q Okay. Now, that goes on further to state that, ah, that you would tell them that once you had -- all had learned that it had been told -- towed, you took it upon yourselves to call the tow company and request that it be returned to the original location; isn't that correct?

A Yes.

Q And then that's the point that you all talked among yourselves in reference to your game plan for the rest of the weekend; is that right?

A Yes. That's what the report says, yes.

Q Now, you had said that you weren't certain if a car door had been opened, ah, in order to, ah, open the hood. Could you -- I direct you to Page 8, please.

A Okay.

Q And the sixth line or the seventh line, is it true that it indicates, The only time the vehicle

was opened was when the door of the vehicle was opened by Detective Bana -- Banaszynski, B-A-N-A-S-Z-Y-N-S-K-I, so he could open the hood to apply --

A The --

Q -- the GPS unit?

A Yes, that's what it says here.

Q And that would be accurate?

A Again, I don't recall that specifically happening, but if that's what his report indicates, then I have no reason to believe that it's not, ah, fruitful. If Detective Sharp had that in his report, then I have no reason to doubt that.

MS. KUCHLER: Okay. Just a minute, please (pausing).

Okay. Nothing else for this detective at this time.

THE COURT: Cross, Mr. Johnson?

MR. JOHNSON: Yes.

CROSS-EXAMINATION BY MR. JOHNSON:

Q Detective, after the stop -- traffic stop, the two Defendants were not arrested; am I correct?

A That's correct.

Q And at that time you already had, um, at some point after they were stopped and they weren't under arrest, were they specifically towed -- told that the vehicle would not be towed?

A Again, I don't know if they were specifically told that or not by the deputy that actually stopped them. Myself and the other detectives were not present at the site of the vehicle stop. We were in the area, but we were not there; and I, again, don't know what that deputy told them.

Q Do you know -- At that time did you have any specific intent to tow the vehicle even though they had not been told it was going to be towed?

A I believe it was discussed whether or not we would tow it and ultimately it was decided to be towed because it wouldn't be safe to further our investigation alongside a busy highway and obviously we wouldn't want them to be present while we were installing the GPS on it.

Q And they had at some -- the Defendants had at some point in time at the stop told you it was their intent to make arrangements to have the vehicle towed, correct?

A I don't know if they ever said that to the deputy. It wasn't relayed to me that that was

said. That they had intentions to tow it.

Q Did they ever state that they had intentions to make some arrangements with regard to picking up the vehicle?

A That's certainly possible that they -- I would assume that they would make some arrangements, but I don't know if that was specifically said or not. Again, I wasn't there.

Q Okay. And you don't -- You're not aware that anyone ever told them specifically that the vehicle was to be towed?

A Yeah. I don't know if anyone specifically told them that it was going to be towed.

Q So they never had an opportunity to object to having the vehicle towed because they didn't know you were going to tow it, right?

A Yes, that's correct.

Q And also they did not have an opportunity to make a decision whether to stay with that vehicle, ah, because -- knowing that it was going to be towed because that was never told to them, right?

A That's correct.

Q So when they were taken to the Dollar Store, ah, at that point all they knew was the vehicle was there and they were going to be given an

opportunity to make arrangements to have it picked up, correct?

A Correct.

Q And, ah, the fact that it was going to be towed was totally unknown to them and was without any permission given by them at the time it was towed, correct?

A Correct.

MR. JOHNSON: Correct.

THE COURT: Any redirect?

MS. DONOHOO: None of this witness.

THE COURT: You may step down.

(Whereupon, the witness was excused.)

THE COURT: Your next witness.

MS. DONOHOO: Detective Sharp, Judge, and he will be very brief.

THE COURT: Okay.

MS. DONOHOO: Did the Court get that GPS order and the order for sealing marked, ah, State's 1?

THE COURT: Yes.

MS. DONOHOO: I would move that as part of the record.

THE COURT: Any objection?

MS. KUCHLER: No, and I would move Defendant's 2 and 3.

THE COURT: Any objection to that?

MS. DONOHOO: No.

THE COURT: All right. Those will be received.

(Whereupon, the pending exhibits, S-1, D-2, and D-3, were received into evidence.)

THE COURT: Next witness.

MS. DONOHOO: Detective Sharp.

MS. CLERK: Please state your name for the record.

THE WITNESS: Robert E. Sharp, S-H-A-R-P.

ROBERT SHARP, called herein as a witness on behalf of the State, being first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE WITNESS: Yes.

MS. CLERK: Thank you.

MS. DONOHOO: Judge, just for a little housekeeping, what I have pulled out is a group exhibit. It was State's 2 at the prelim. I only want to have one of the photos today. So if I can just turn to that page and have that marked with a sticker with today's date in the proper sequence, would that be acceptable for the record?

THE COURT: That will work.

MS. DONOHOO: Thank you.

DIRECT EXAMINATION BY MS. DONOHOO:

Q Sir, you are Robert Sharp?

A Yes, I am.

Q You are a detective with the Walworth County Sheriff's Department?

A Yes, I am.

Q How long have you been a police officer for the entirety of your career?

A Fifteen years.

Q Were you involved in investigating a series of burglaries that are the subject of these cases?

A Yes.

Q Were you involved in the contact with the vehicle on October 5th that ultimately led to the GPS

unit being attached?

A Yes.

Q Prior to October 5th of 2007, did the Walworth County Sheriff's Department receive several complaints of burglaries in that Rock County and Walworth County border area?

A Yes.

Q And in investigating those cases, did you have repeated information involving a light blue or Robin's egg blue Grand Prix or Grand Am?

A Yes.

Q Was it on October 3rd, two days before the GPS order was signed and the GPS unit was placed on the car that the citizen reported the vehicle in the area of one of those burglaries?

A Yes.

Q And the citizen gave the license plate number?

A Yes.

MS. DONOHOO: Counsel, as you heard, this IS State's 4 now out of the packet from the prelim.

MS. KUCHLER: Yes.

MR. JOHNSON: Okay.

BY MS. DONOHOO:

Q Detective Sharp, I'm showing you what has been

marked as State's Exhibit No. 4. Is that a photograph of that vehicle that we're talking about today?

A Yes.

Q And what is the license plate on it?

A Illinois license plate 8643511.

Q That photo would have been taken when the vehicle was at the impound lot, correct?

A That's correct.

Q It appears that there is a male person peering into a window of that vehicle; is that a correct statement?

A That's correct.

Q Do you know who that person is?

A Yep.

Q Who?

A That would be me.

Q Did you ever go in the vehicle to search it?

A No, I did not.

Q Did you take any objects out of the vehicle?

A No, I did not.

Q From the time that vehicle was taken from the side of the road in Rock County to the time that it was put back, did any of the police officers to your knowledge take any items out of that

vehicle?

A No.

Q You're aware that the door would have been opened to pop the hood so the GPS could be attached, correct?

A Correct.

Q And was any physical evidence taken out of the vehicle when that door was opened?

A No.

Q On October 5th of 2007, at the time that the vehicle was towed to this lot, did you have that -- Strike that.

Approximately, how many burglaries was that car involved in or suspected to be involved in as the mode of transportation for the burglaries?

A Ah, five that I'm aware of in our county, and I know that there were some in Rock County as well.

Q While the vehicle was known, was the identities of the burglars known at that point?

A No.

Q Were they suspected?

A Yes, based off of the follow-up information off the license plate number that was given to us, Rock County did some investigation and found Mr. Conaway and Mr. Brereton's names associated with

that plate.

Q You heard Detective Kamholz testify that he believed the -- that the police had probable cause to believe the car was evidence of the crime as of October 5th, correct?

A Correct.

Q Would you agree with that?

A Yes.

Q Why did you not seize, search, and keep that vehicle on October 5th of 2007? Why put it back out there?

A At the time there -- there was no reason to at the time. We wanted to put a GPS on the vehicle to, ah, I guess, ah, track their travels.

Q Were you still seeking more information to identify the actual burglars themselves?

A That's correct, yes.

Q If you had taken that vehicle and kept it, might that have compromised the investigation to obtain more information about the burglars' identity?

A That's correct.

MS. DONOHOO: Nothing further.

MR. JOHNSON: I'm going to object. I think that calls for speculation on

his part, Your Honor.

THE COURT: Well, it's the motivation for their decisions. So overruled.

Is that it?

MS. DONOHOO: That's it.

THE COURT: Cross, Ms. Kuchler.

MS. DONOHOO: And I would move that exhibit in, Judge.

THE COURT: Any objection to the photo?

MR. JOHNSON: No, Your Honor.

MS. KUCHLER: No.

THE COURT: It will be received.

(Whereupon, the pending exhibit, No. S-4, photograph, was received into evidence.)

CROSS-EXAMINATION BY MS. KUCHLER:

Q Sir, was that -- when you had a description of the vehicles involved in the burglaries, you had various descriptions of vehicles, didn't you? They weren't all consistent, were they?

A Ah, there were -- I recall a pickup truck, ah, in one of the burglaries in our county on Creek

Road, and I recall several descriptions of a Robin's egg blue, light blue, late model Grand Am or Grand Prix seen in the areas of the burglaries.

Q And some of the descriptions would describe the car as light blue and other people described it -- the vehicle as dark blue; isn't that true?

A I believe so, yes.

Q And some people described the vehicle as a Ford -- as a black Ford pickup truck; isn't that right?

A There was a dark blue Ford pickup truck used in one of the burglaries; that's correct, ah, on Creek Road in our county.

Q No. I said black Ford. A black Ford truck; isn't that right?

A I -- It was a dark colored Ford truck. I know it's a blue one because we seized it.

Q Okay. Now, isn't it true that that license plate number on the exhibit that you just looked at came back registered to a woman?

A I believe that's correct, yes.

Q Okay. And I -- You were the -- the officer -- Are you a detective or an officer?

A A detective.

Q Okay. Detective, did you -- are you the person who suggested installing a GPS unit in this vehicle?

A Ah, I don't know what you mean by suggested. It was discussed that we have GPS equipment and that we have it available to install on the vehicle.

Q Was it your idea?

A No, it was not actually.

Q Who idea was it?

A Other detectives in our detective bureau and one of our lieutenants.

Q What are their names, please?

A Ah, Kevin Williams and Detective Bob Schiltz. Those are listed in my report.

Q Did you meet the detectives in Rock County at the impound lot?

A Yes.

Q Did you install the GPS unit?

A No, I did not.

Q Did you witness the car door being opened so that the hood could be opened?

A Yes.

Q And, in fact, the release for the hood was in the glove box; isn't that true?

A I do not recall where it was at.

Q You were maintaining pretty regular radio or telephone contact with Walworth County on the progress of having an order signed by Judge Carlson; isn't that right?

A No, that is not correct; because I am with Walworth County. So I'm assuming you mean Rock County.

Q No, no. Judge Carlson in Walworth County signed the order; didn't he?

A I believe so.

Q And weren't you maintaining contact with fellow officers or the District Attorney to determine when the order was actually signed?

A Yes, that's true.

Q Okay. And it's also true that the vehicle was seized and towed to the impound lot prior to obtaining the signed order, correct?

A Correct.

Q And isn't it true that when the Defendants were driven to the Dollar Store, that they were told that the vehicle -- that their vehicle would remain along the side of the road awaiting them obtaining someone else to drive it?

A I have no idea what was said. I was not involved in that traffic stop.

Q But you read the reports in this case, right?
A I'm sure I have, yes.
Q You were part of the group of detectives that developed the plan that if Mr. Conaway or Mr. Brereton made a phone call wondering where the car was, they would be told that it was towed accidently, right?
A That's what's in my report, correct.
Q And that's what happened, right?
A I guess, yeah. That's correct; it's in my report.
Q Okay. So you were part of the group of detectives that were making up that story. That wasn't true, was it?
A As far as the vehicle being towed by accident?
Q Right.
A That was true.
Q It was towed by accident?
A No.
Q It was towed on purpose, correct?
A It was towed to put the GPS on it; that's correct.
Q So the story that was being concocted that would be told to the Defendants that it was towed by accident, that was not true, was it?

A That's correct.
Q You -- you -- you officers devised the lie that you would tell, correct?
A That's correct.
Q And after the GPS had been installed, you detectives discussed your game plan for the rest of the weekend and in monitoring the GPS, right?
A Yes. We discussed what we would do.
Q Well, you called it a game plan, didn't you?
A Yes, that's the -- I -- Yes, that's correct. You could use that terminology I guess. It was a plan, yes, or discussion.
Q Sir, I'm just asking whether or not your words were, the game plan?
A Apparently, so. It's in my report, yes.
Q And you looked at your report before coming here to court today, didn't you?
A Ah, one report, yes, I did.
Q Did you look at your report from October 5th?
A I believe that's the one that I looked at sitting right there (indicating).
Q Well, I'm just going to get you the one that we've marked as an exhibit just see -- to make sure we're on the same page here.
MR. KUCHLER: Where did that

exhibit go?

MS. DONOHOO: And I will stipulate that it was, Judge. I've compared what counsel marked as the exhibit with what Detective Sharp had next to him. So if she wants to use it with him, that's fine.

THE COURT: All right.

BY MS. KUCHLER:

Q Sir, I'm going to show you D-3. Is that your report and did you look at it today?

A Yes, it's my report; and, yes, this is the report that I looked at today.

Q And is everything in this report accurate?

A Yes.

Q And you took care in preparing your report to make sure it was accurate; didn't you?

A Correct.

Q And as you sit here today, is there any correction that you want to make of any sort to your report that I've just shown you?

A I don't believe so, no.

Q You didn't conduct an inventory search of the vehicle at the impound lot, did you?

A No, I did not.

Q Isn't it true that Walworth County has a policy

on procedure and inventory of motor vehicles?

A Yes, that's correct.

Q I will show you what's been marked as Exhibit D-5, and I'm giving a copy to the State. Can you look at this and tell me whether that is the Walworth County policy and procedure for seizure and inventory of motor vehicles?

A Yes, it appears it is.

Q Okay. Isn't it true that your procedure requires that all vehicles that are seized or towed for any legal purpose shall be inventoried?

A Yes, if it's our department that seizing the vehicle.

Q Pardon me?

A Yes, if it's our department that's seizing the vehicle, that is correct; but we didn't seize the vehicle in this action. So it doesn't apply.

Q You were working hand in hand with the Rock County detectives on this case, were you not?

A Correct.

Q And you share a common border, did you not?

A That's correct.

Q And you have an actual policy in your department that you will assist -- both counties will assist one another; isn't that true, because you share

that common border?

A Ah, I don't know if there's anything specific about that, but I'm sure we have a mutual aid type of agreement --

Q Okay.

A -- in place.

Q Okay. The only reason the vehicle was towed in this particular case was to install the GPS unit; isn't that right?

A That's correct.

MS. KUCHLER: Thank you. Nothing else.

THE COURT: Mr. Johnson.

CROSS-EXAMINATION BY MR. JOHNSON:

Q Detective Sharp, so if I understand your interpretation of your department's policy, you -- even though two jurisdictions are working hand and glove together in seizing a vehicle for a common purpose, if the other county seizes the vehicle, it's your interpretation and your policy then exempts you from following that policy and doing a search; is that correct?

A My understanding is that if our agency is the one that seizes the vehicle, then our policy would apply. If another agency seizes it, then their

policy would apply.

Q Ah, you indicated that this vehicle was registered -- during your investigation and follow-up, was registered to a woman; is that correct?

A That's correct.

Q And then I also believe you said that during your investigation that, ah, these two Defendants' names were associated with the plates on the vehicle. If it wasn't registered to them or registered to woman, how were their names associated with the plates?

MS. DONOHOO: Your Honor, I am going to object. I think that's a mischaracterization. They were associated with the car, not with the plates. I believe that was the testimony.

THE COURT: Well, that's true.

MR. JOHNSON: I'll withdraw my question.

That's all I have.

THE COURT: Any redirect?

MS. DONOHOO: I have no redirect.

THE COURT: Okay. You may --

MS. DONOHOO: Judge, on the first exhibit, I just want to make sure that all three parts were attached; the GPS order, the sealing order, and Detective Schiltz' affidavit in support of the GPS.

THE COURT: Well, I don't have the order itself from Judge Carlson. I have the sealing order. I don't have the --

MS. KUCHLER: I'm going to move Exhibit D-5 at this time.

MS. DONOHOO: Okay. This one has it attached. I wasn't sure of the order. These are duplicates. The first page here is the order for lifting the seal. The second page is the order for sealing. The third is the order for the GPS, and then the last is the affidavit of Detective Schiltz.

THE COURT: I only have parts of that.

MS. DONOHOO: And once all of that is received, I have nothing further as far as evidence, Judge.

THE COURT: All right. And that will be received. And then D-5 will also be

received.

MS. KUCHLER: Thank you.

(Whereupon, the pending exhibits, Exhibit S-1 and D-5, were received into evidence.)

THE COURT: Anything else, then?

MS. DONOHOO: Not as far as evidence from the State. Just argument.

THE COURT: You may step down.

(Whereupon, the witness was excused.)

THE COURT: Okay. Ms. Kuchler, do you have any witnesses?

MS. KUCHLER: No.

THE COURT: Mr. Johnson, do you have any witnesses?

MR. JOHNSON: No, witnesses, Judge.

THE COURT: Okay. All right. Then, Ms. Kuchler, your argument.

MS. KUCHLER: Thank you, Your Honor.

I think frankly the evidence that has been

elicited today supports in entirety the brief I filed. I have laid out my entire argument in that brief, and if the Court has had a chance to read it, I don't really have anything more to offer. I think we supported every statement in that brief, and I would rely on that.

THE COURT: All right.

MS. KUCHLER: And ask that because -- and just as a final note, because there was an illegal seizure of this vehicle, that then everything that the police did subsequent to that, including the installation of the GPS unit, and all the information derived from that should be suppressed.

THE COURT: Mr. Johnson.

MR. JOHNSON: Your Honor, I would simply join in the motion and argument of Ms. Kuchler, and ask that the Court based on the testimony and based on the brief and the motion, ah, suppress any and all testimony deriving from this -- what we believe to be an illegal search, including the GPS and anything derived from the GPS being installed and the result thereof.

THE COURT: Ms. Donohoo.

MS. DONOHOO: Your Honor,

first of all, I'm going to ask the Court to make a finding that there was probable cause to seize that vehicle on October 5th of 2007.

As the Court can see in the affidavit of Detective Schiltz for the GPS order, substantially, it's Paragraphs 5 through 11 inclusive that articulate the facts known to law enforcement as of the time that GPS order was signed. There are multiple victims who refer to the vehicle as a light blue or a teal blue or Robin's egg blue car, either a Grand Am or a Grand Prix, which are similar makes. The Court has the exhibits with the photographs. All of those descriptors or uses of color terms would be accurate for that vehicle.

However, most importantly, on October 3rd, two days before the GPS issue arose, the vehicle was seen in an area where the burglaries were occurring and an actual license plate number was observed, written down, and given to law enforcement. That is the same license plate number that we see in that vehicle -- or on that vehicle in that photo.

So on October 5th of 2007, there was probable cause plus for the police to seize that

car as evidence of the crime. The issue still nailing down who the actual burglars were. And that is why the investigation continued. Just because the police chose not to seize the vehicle does not negate probable cause. They just chose to wait in this case to continue the investigation and it was a surreptitious investigation. I grant you we did not tell these Defendants we were placing a GPS unit on it and we led them to believe that that vehicle was going to be remaining in its present place, in its present state as when they left it. Again, that does not negate probable cause.

On October 5th of 2007, no evidence was seized. There is nothing subject to suppression. Even if evidence had been seized because there's probable cause, it wouldn't be suppressible under the Fourth Amendment; but, again, we both agree there was no evidence seized.

In the GPS affidavit, an additional fact is that the vehicle identification number did not match the registration. Again, additional probable cause to seize that vehicle aside from the burglary matter.

When we look at the case law, it is clearly

in favor of the State. The United States Supreme Court and more recently our State Court in State v. Sveum, ruled that a GPS unit does not require any court order. The court rejected the very argument that defense is making in this case that the GPS device was -- the order was overly broad.

In these cases because we don't even need an order to put the GPS unit on, we can't be held to have violated what we didn't need to have done in the first place.

So I would ask the Court to deny the motion because,

(a), there was probable cause,

(b), there was no need for court intervention in placing that order, but we even had a signed valid order from the Court, and I don't know that there was a whole lot of argument on the sealing issue. But a county clearly can seal and request that the Court seal an order if there's a legitimate concern of law enforcement not to have that available to the public during an investigation. The seal was lifted when the case was commenced. So the Defendants have always had access to that information.

And, again, they cannot cite any prejudice

nor any case law that says suppression of evidence would be a remedy.

So I would ask this Court to deny all of the Defendants' motions.

Thank you.

THE COURT: Well, I am going to find based on the information that was known to the police at the time of the stopping of the car that there was probably cause to seize the car because of the description of the car, which this car fit, it was seen in the area where burglaries had been committed, and there was a license plate that was written down by a citizen witness that went along with this blue car and there it was on this particular car.

So there was grounds to stop the vehicle and seize the vehicle. And in an investigation, the police need not put all their cards face up on what they are doing to investigate. It continued by way of investigation to determine the identification of potential people who were involved in the burglaries, and that was the method of operation that the police elected to employ. There's nothing wrong with what they did. There was no evidence seized from the

vehicle and no one argues that there was on this October 5th date. There was simply a GPS unit placed in it and the vehicle was tracked.

There is no requirement of a court order for placement of a GPS unit, but there was one obtained anyway, a belt and suspenders here to make sure that it was okay.

So I find that there is no basis to suppress any evidence that was probable cause to the stop and there was nothing wrong with continuing the investigation.

There really wasn't an argument made outside the brief with regard to sealing the warrant, but there's been no showing of prejudice because the warrant was unsealed at the time the charges were filed. So there's no prejudice to either Defendant; and in any event, suppression is not a proper remedy.

Motions are denied.

MS. DONOHOO: We will need trial dates, Judge.

THE COURT: How many days will be necessary?

MS. DONOHOO: I think three to four. They are joined and also I have a new

complaint on Brian Conaway for bail jumping. I don't know if the Court wants to -- because counsel is here, I don't know if she's going to be assigned to it. I can file my complaint now and serve the Defendant, or we can put it on for tomorrow's call. Whatever the Court wishes.

THE COURT: Why don't we put it on for tomorrow's call, unless, Ms. Kuchler, you want to go ahead and take a look at that. Are you going to be on that case?

MS. KUCHLER: I have no idea if I will be on the case or not, Your Honor.

THE COURT: We'll put it on for tomorrow then and see what happens.

MS. DONOHOO: Very good.

MS. KUCHLER: I had wanted to make a record before, so I will ask to do it now. I wanted to comment that with regard to the Sveum case, the new 2009 case, that the court in that situation ruled that the GPS could be attached because there had not been a seizure of the vehicle and what distinguishes this case is the fact that there had been here.

THE COURT: Noted. How many days for trial?

MS. CLERK: November 16th --

MS. KUCHLER: Are we just looking at a trial date or can we just have another further proceedings right now?

THE COURT: Well, do you want another pretrial at this point?

MS. DONOHOO: We are so far beyond that, Judge, can we just get it on the trial calendar?

THE COURT: Sure.

MS. CLERK: November 16th, 17th, 18th, and 19th.

MS. KUCHLER: No.

THE COURT: December 7th, 8th, 9th, and 10th.

MS. DONOHOO: December you said?

MS. CLERK: Yes.

MS. KUCHLER: Okay.

THE COURT: December 7th, 8th, 9th, and 10th for trial.

If anything needs to come up before then, just call the clerk and we'll put you on.

MS. KUCHLER: Okay.

MS. DONOHOO: Thank you.

THE COURT: We're adjourned.

(Whereupon, the proceedings were concluded.)

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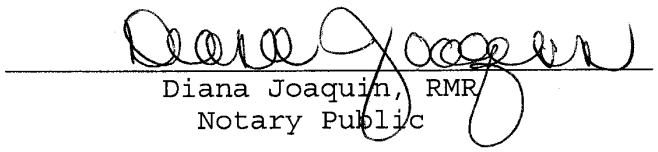
STATE OF WISCONSIN)
) SS
WALWORTH COUNTY)

I, Diana Joaquin, Official Court Reporter, in and for Circuit Court, Branch IV, Walworth County, Elkhorn, Wisconsin, do hereby certify that the foregoing pages, 1 - 61, of proceedings have been carefully compared by me with my original stenographic notes taken upon the hearing and that the same is a true and correct transcript of all such proceedings taken on the 12th day of August, 2009.

Dated this 5th day of October, 2009.



Diana Joaquin, RMR
Notary Public

STATE OF WISCONSIN: CIRCUIT COURT: WALWORTH COUNTY:

COPY

ORIGINAL

IN THE MATTER OF THE APPLICATION OF
DETECTIVE ROBERT SCHILTZ FOR AUTHORIZING
THE PLACING AND MONITORING OF
AN ELECTRONIC TRACKING DEVICE

ORDER

This matter came before the court at the request of Detective Robert Schiltz to place and monitor an electronic tracking device on a vehicle that may enter private areas. The request is for a time period not to exceed sixty (60) days. Based on the information provided in the affidavit submitted by Detective Robert Schiltz, the Court finds there is probable cause to believe that the installation of tracking devices in the below-listed vehicle is relevant to an on-going criminal investigation and that the vehicles are being or have been used in the commission of the crime of burglary, contrary to §943.10(1m), Wisconsin Statutes. The court hereby orders that:

The State's request to install and monitor a tracking device on the below listed vehicle is granted based on the authority granted in *United States v. Karo*, 468 U.S. at 718, 104 S.Ct. at 3305 (1984).

22) The Walworth County Sheriff's Department, located in Elkhorn, Wisconsin, or other law enforcement agencies acting on its behalf, are authorized to place an electronic tracking device on: a 1993 blue Pontiac Grand Am SE 4 door registered to Sherry Bloyer of Clinton, Wisconsin, vehicle identification # 1G2NE543N7PM605764, and they are hereby authorized to surreptitiously enter and re-enter the vehicle, any buildings and structures containing the vehicles or any premises on which the vehicles are located to install, use, maintain and conduct surveillance and monitoring of the location and movement of the target vehicle in all places within or outside the jurisdiction of

Walworth County. This includes, but is not limited to private residences and other locations not open to visual surveillance, to accomplish the installation. Officers are authorized to obtain and use keys to operate and move the vehicles for the required time to a concealed location and are authorized to open the engine compartments and trunk areas of the vehicles to install the devices.

It is further ordered that Detective Robert Schiltz, or other law enforcement officers, shall remove the electronic tracking device as soon as practicable after the objectives of the surveillance are accomplished or not later than sixty (60) days from the date this order is signed unless extended by this court or another court of competent jurisdiction.

That this order and supporting Affidavit be maintained under seal until further Order of this Court.

Signed and dated this

5th day of October, 2007

Judge, Circuit Court, Branch II
Walworth County, Wisconsin

AFFIDAVIT AND REQUEST FOR AUTHORIZATION TO PLACE AND MONITOR *ELECTRONIC TRACKING DEVICES*

STATE OF WISCONSIN
} SS
WALWORTH COUNTY

AFFIDAVIT OF DETECTIVE ROBERT SCHILTZ

ORIGINAL

1) Affiant, being first duly sworn on oath, states as follows:

2) That the Affiant is a State of Wisconsin certified law enforcement officer employed by the Walworth County Sheriff's Department located in Elkhorn, Wisconsin, and is currently assigned to the Detective Bureau. Affiant has worked as a law enforcement officer for approximately sixteen (16) years.

3) That the Affiant has had formal training and experience in the investigation of a variety of criminal activities, including the crime of burglary, in violation of §943.10(1m), Wisconsin Statutes.

4) Affiant has relied on reports maintained in the ordinary course of business at the Walworth County Sheriff's Department prepared by affiant and fellow deputies Jason Hintz, John Ennis, Jason Rowland, Kirk Dodge and Timothy Otterbacher. Affiant deems these deputies reliable based on prior professional contacts with them during multiple criminal investigations.

5) Sgt. Tim Otterbacher and Deputy Kirk Dodge report that on October 2, 2007, Sgt. Timothy Otterbacher responded to W8918 Territorial Road located in the Town of Richmond, Walworth County, Wisconsin, regarding a report of a burglary in progress. En route to the call, Otterbacher was advised by the dispatcher that the female citizen complainant who identified herself as Mindy Wade and the owner of the residence, had run out of the residence after a door of the residence was kicked in. She further advised that there a 'teal' colored vehicle in the driveway and that the vehicle was not known to her. Upon arrival, deputies observed that the 'teal' vehicle was no longer on the

premises. During the investigation, Wade reported that she watched the teal vehicle pull into her drive which is a remote farming area, her closest neighbor is 500 yards away. She observed two male occupants in the teal vehicle, one believed to be a white male, the other a Hispanic or Asian male. She reported that she feared what they may do and left her residence and hid in a cornfield as she heard the door being kicked in. Based upon Wades' report to the police and her conduct in fleeing her home, affiant concludes that Wade had not given anyone permission to enter her residence. Otterbacher reports that Wade described the 'teal' vehicle as an late 80's to early 90's General Motors product similar to a Grand Am or Grand Prix.

6) On October 3, 2007, Deputy Jason Hintz and Jason Rowland report that on October 3, 2007, at 4:10 pm, they were dispatched to W9402 Christie Road in the Town of Darien, Walworth County, Wisconsin, which affiant knows is approximately 7 miles from Wade's home. Deputy Rowland met with Sue Ann Gray who identified herself as the home owner. Gray reported that she returned home after having been gone from her residence for several hours, and observed the garage service door to be open. She reports knowing that the door was locked when she left. Gray entered the residence and observed that the hallway closet was open. Gray walked further into the kitchen, and she was able to see that the front door was partially open. Gray reported seeing the lights on in her roommates room and the door open. She stated that her roommate's name is Nancy Weber. Gray observed that the door had damage and the wooden frame was away from the door opening consistent with forcible entry. She further observed that there were other lights on the house which she had not left on when she left her home earlier. While Deputy Rowland was talking to Gray, a neighbor who identified himself as Peter Hiemstra, was listening to Gray's statement. Hiemstra reported that somewhere around 1:45 to 2:00 pm, he noticed a "bright blue" older model sedan pull out of Gray's

driveway and pull into a residence across the street that is for sale. Hiemstra watched the vehicle then leave the property that is for sale and drive towards the countyline in a westbound direction. Gray reported that no one had permission to enter her home. She further reported that she was missing a Nebalung exotic domestic cat. Weber arrived on the scene and reported that her browning pistol firearm was missing from her room and that no one had permission to take it.

7) Affiant has reviewed the reports of Deputy Jason Hintz which reflect that on October 3, 2007, he conducted a neighborhood canvas and went to W9497 Christie Road, and spoke to Michael Nelson, a citizen. Hintz advised Nelson of the burglary in the area between 1:00 and 3:00 pm that same afternoon. Nelson said that he was aware from a friend that there had been a rash of burglaries in the Rock County area, which is less than a mile from his home in Walworth County. Nelson said that as he came home today, he was on Bradford Town Hall Road, coming around the corner into Walworth County from Rock County, he observed a "light blue" late model either Grand Prix or Grand Am turn around in front of him. He said the vehicle went slowly and then turned into one of the driveways on the Rock County side. He also stated that as he was about to pass the vehicle, he saw a male in the back seat who was looking at Nelson as he drove by. Nelson thought this was suspicious so he wrote the license plate number in pen on his hand. He later wrote it from his hand onto a piece of paper. Nelson went to his truck and retrieved the paper and gave it to Hintz. The numbers written on the paper are 8643511 and had Illinois plates. The paper Hintz observed saw had the words "light blue late model Grand Am or Grand Prix." Hintz went to W9528 Christie Road and spoke to the resident, Sharon Wheeler. Hintz asked Wheeler if anyone had approached her house anytime between 1:00 and 3:00 pm that day. Wheeler stated that after lunch, she saw an older "light blue" vehicle drive by her residence really slowly. Wheeler observed two

males in the vehicle and that the passenger waived to her while she was sitting outside. She described them as 18-20 years of age just driving slowly. She also noted that the vehicle had a little bit louder exhaust.

8) Affiant has reviewed Deputy Ennis' report which reflects that on October 2, 2007, at 11:45 am, Ennis was dispatched to N6989 Chapel Hill Drive in the Town of Whitewater for a female who called about a man approaching her residence. Ennis spoke to the woman who identified herself as Bonnie J. Treder. Treder said that she was home on October 2, 2007, and a man knocked on her door. When she answered the door, he asked her if 'Bill Massey' was there. She said no as she does not know anyone by that name. The man then asked if 'Massey' ever lived there. She said no. The unknown male thanked her and left. Treder observed a vehicle at the stop sign that she believes was the vehicle that had just been in her driveway. She described it as a 'teal colored' GM product, possibly a Grand AM or Grand Prix. She observed a second person in the vehicle.

9) Affiant reports that on 10/3/07, at 5:51 pm, he spoke to Det. Daryl Knutson of the Rock County Sheriff's Department. Det. Knutson advised that Rock County has received numerous reports of burglaries on their border next to Walworth County. When affiant advised of the teal colored car, Det. Knutson said that a citizen informant reported seeing a 'light blue' car further described as 'robin's egg blue' had been observed being operated by a white male driver and Hispanic passenger. The male driver approached the citizen's residence and knocked on the door. When the homeowner answered the door, the subject asked if 'Billie Massey' lived there. The homeowner reported that no one of that name lives at his residence.

10) Affiant reviewed the Illinois Department of Transportation (DOT) records which are the type of record commonly kept by such a public agency in the ordinary course of their

business. Affiant reports having used Illinois Department of Transportation records in the past and found them to be reliable and accurate. According to the Illinois DOT records, the Illinois registration for 8643511 comes back as registered to a 1996 Pontiac Coupe to Nicholas K. Klabacha, at 1510 Willowbrook Drive, Belvidere, Illinois. Affiant reports that he and fellow Detective Kilpin went to that address on October 3, 2007, and found it to be an empty home with no one living there.

11) Affiant reports that on October 5, 2007, the vehicle bearing Illinois registration 8643511 was located in Rock County. Affiant spoke to Det. Knutson and Det. Kamholz who both assisted Deputy Rossmiller of the Rock County Sheriff's Department. Deputy Rossmiller conducted a pretext traffic stop of the vehicle as part of the investigation. The deputy observed the vehicle to have expired plates and no rear view mirror. Deputy Rossmiller further noted the vehicle to have a little louder muffler than normal. Det. Knutson arrived on the scene and observed the vehicle and described the vehicle as a "medium blue" car which he said could also reasonably be described as teal or robin's egg blue. Det. Knutson reports that the VIN on the stopped vehicle does not match the registration VIN number connected to the plates displayed on the vehicle. Det. Kamholz verbally advised affiant that he observed two white male occupants in the vehicle, and that one of the two males has darker skin and could be reasonably described as an Hispanic male.

12) Affiant states that based on his training and experience and the experiences of fellow – law enforcement officers, one of many key factors in solving property crimes is the similar modus operandi (MO) between crimes. MO factors include, but are not limited to, time of offense, location, proximity of other offenses, method of entry, types of articles stolen, the method of arriving and departing from the scene as well as what kind of vehicle is used. Similar MO's at various scenes may indicate common actor(s).

13) That the Affiant knows from discussions with Assistant District Attorney Diane M. Donohoo, that the State of Wisconsin has no explicit statute in Wisconsin Statutes which addresses the issue of installing tracking devices on private property. Affiant has relied on the authority related to cases addressing the installation of tracking devices and transponders such as *United States v. Karo*, 468 U.S. at 718, 104 S.Ct. at 3305 and *United States v. Michael*, 645 F.2d 252, 256 (5th Cir. 1981), for the proposition that a court order is required to install a monitoring device on private property. In addition, the standard used to determine the need for a trap and trace device in the State of Wisconsin under §968.35, Wisconsin Statutes, is that the information likely to be obtained is relevant to an on-going investigation. Affiant states the information gained from the tracking device is relevant to the on-going investigation and is not more intrusive than the request for a trap and trace device on a telephone.

14) That the Affiant states there is probable cause to believe, based upon information obtained through these investigations, the target vehicle has been utilized in the commission of a crime, to wit: burglary in violation of §943.10(1m), Wisconsin Statutes. Affiant further states that there is probable cause to believe the installation of a GPS tracking device on the target vehicles in conjunction with the monitoring, maintenance and retrieval of information from that GPS tracking device, will lead to evidence of the aforementioned criminal violation, as well as the location where the fruits of the crimes are being stored and the identification of associates assisting in the aforementioned crimes.

15) Affiant states that the GPS tracking device, which is covertly placed on a criminal suspect's automobile, is equipped with a satellite radio receiver, which, when programmed, periodically records at specified times, the latitude, longitude, date and time

of readings and stores these readings until they are downloaded to a computer interface unit and overlaid on a computerized mapping program for analysis.

16) Affiant states that Affiant, or other law enforcement officers assigned to this investigation, has been trained in the installation, monitoring, maintenance, and retrieval of similar GPS tracking devices on automobiles.

17) That based upon the Affiant's experience and/or the experiences of other law enforcement officers, the GPS tracking device's internal battery pack has limited use, but will not be drawing power from the suspect vehicle's battery. The Affiant requests permission to do the above acts in order to covertly install the device.

18) Affiant is aware that persons involved in criminal activities or conspiracies often store and/or dispose the fruits of their crimes in homes, garages, storage sheds outlying fields or other remote locations. The locations of the fruits of the crimes are not easily obtained by using standard investigatory techniques.

19) Affiant believes the installation of the GPS tracking devices onto the target vehicle and the monitoring thereof will enable law enforcement officers to identify locations and associates currently unknown to law enforcement officers. Furthermore, Affiant believes the installation of the GPS tracking device has been shown to be a successful supplement to visual surveillance of the vehicle. There is an increased inherent risk of detection by suspects when law enforcement personnel use visual surveillance techniques. The GPS tracking device lessens the risk of visual detection by the suspects and is generally considered more reliable since visual surveillance often results in the loss of sight of the target vehicle.

20) The vehicle for which authorization is sought to install and monitor an electronic tracking device is VIN 1G2NE543N7PM605764. Affiant reports that according to the Wisconsin Department of Transportation records which affiant has relied on in the past and found to

be accurate and reliable. The VIN in this paragraph is 1993 blue Pontiac Grand Am SE 4 door registered to Sherry Bloyer in Clinton, Wisconsin.

21) Affiant believes the aforementioned information demonstrates that a GPS application could provide relevant information to this criminal investigation of the crime of burglary, in violation of §943.10(1m), Wisconsin Statutes.

The Affiant is requesting the order be authorized for a period of time not to exceed sixty (60) days from the date the order is signed.

Robert Schmitz, Affiant

Subscribed and sworn to before me this
5th day of October, 2007

Notary Public
My commission is permanent.

WALWORTH COUNTY SHERIFF'S DEPARTMENT

CASE: 07-34351 DATE: 10/5/07 OFFICER: Robert SHARP

9:56 AM Approximate time, above date, I, Detective SHARP of the Walworth County Sheriff's Department, placed a call to the NCIC Investigations Center. I spoke with a subject. I identified myself to them and requested they do an offline search for our agency. The subject asked me if there was a lot of queries I was going to request them to do. I informed them I had four subjects and a vehicle that I wanted them to do an offline search for he past six months. The clerk advised I would need to either fax or e-mail my request to them so this specific information would not be lost in translation. I obtained the e-mail address for this subject and then advised I would e-mail this information to them shortly.

9:58 AM Approximate time, I concluded my call. I then drafted the offline search request. After doing this, I printed off a copy of this for the file. I requested offline searches for Steven M. KLABACHA Jr., m/w, dob 1/22/88, Nicholas K. KLABACHA, m/w, dob 2/19/86, Armando BELLOWS, m/w, dob 8/4/80, Ryan A. PANCYRZ, m/w, dob 7/9/88, and a 1996 Pontiac Coup bearing Illinois license plates 8643511 expiring in August of 07. (Please see e-mail for specifics.)

11:00 AM Approximate time, I concluded doing this. I then placed a call to Detective Rich KAMHOLTZ of the Rock County Sheriff's Department. I informed KAMHOLTZ I was calling to touch base with him to see if they have had any burglaries on yesterday's date in their county similar to the ones they and our departments have been covering in the past several weeks. KAMHOLTZ advised that yesterday in the north central part of their county they had two daytime residential burglaries with the same MO in which doors were kicked in. KAMHOLTZ advised other then that, they had nothing else. I then spoke with KAMHOLTZ in reference to the suspects we were working on. I informed him of the offline search request and advised him I would fax this

EXHIBIT D-3

information to him. KAMHOLTZ advised one of their detectives did a query in their records and found the Illinois license plate of 8643511, expiring 8/07, at one time was on a Buick vehicle with a subject by the name of Brian CONAWAY and a female subject and other male subject was in the vehicle that he did not recall. He advised that information was from a traffic stop that had been done by one of their deputies and was documented in their in-house records. While speaking with KAMHOLTZ, he advised one of their detectives, who was out looking for the suspect vehicle, which was a blue or teal colored vehicle Pontiac Grand AM or Grand Prix with the Illinois plates 8643511 on it, located the vehicle parked outside of a residence at 1411 Keeler Street in Beloit. KAMHOLTZ advised this is the residence of Miranda MCKUTCHEN (phonetic), dob-8/17/78. KAMHOLTZ advised their officer was going to setup surveillance on the vehicle and that they may do a traffic stop on the vehicle once the vehicle was moving. KAMHOLTZ advised when the vehicle moved he would let me know.

11:10 AM Approximate time, I concluded my conversation with him. I spoke with fellow detectives BANASZYNSKI and SCHILTZ in reference to this along with Lieutenant Kevin WILLIAMS, who was the acting IC of the Detective Bureau, and Undersheriff Kurt PICKNELL of the Walworth County Sheriff's Department. It was at this time, it was suggested I contact KAMHOLTZ back and advise him we had GPS and we were willing to apply it to the vehicle.

11:12 AM Approximate time, I returned to the Detective Bureau and placed a call to KAMHOLTZ. I informed him we were willing to apply GPS to the vehicle. He advised he was en route to the location on Keeler Street in the City of Beloit, and once he was there, he would advise and let us know if it was possible to apply GPS to the vehicle without being detected.

11:15 AM Approximate time, I concluded my conversation with KAMHOLTZ.

11:25 AM Approximate time, KAMHOLTZ placed a call back to me and advised the vehicle is parked on a street by a residence and it is in an area where several people are in the street walking around and the vehicle is out in the open. He advised in its current location, it would be pretty hard to install a GPS unit; however, they would keep surveillance on it. He advised he wanted us to respond in case there was an opportunity to apply the GPS.

11:27 AM Approximate time, I concluded my conversation with KAMHOLTZ. I spoke with Detective SCHILTZ of the Walworth County Sheriff's Department. He advised he would contact Assistant District Attorney Diane DONOHOO of the Walworth County District Attorney's Office and work with her in applying for a court order allowing us to apply the GPS unit on the suspect's vehicle.

11:36 AM Approximate time, prior to concluding my conversation with SCHILTZ, he requested I contact KAMHOLTZ to get a specific description of the vehicle so he could apply this information to the court order. I placed a call to KAMHOLTZ and asked him for the vehicle description. He advised me he would call me back, as he needed to contact the officer that was watching the vehicle to get this information and then let me know.

11:38 AM Approximate time, I concluded my conversation with KAMHOLTZ. I then faxed the offline search request to KAMHOLTZ, returned to the Detective Bureau, accessed Map Quest on the Internet and printed off driving directions and maps showing the location of the address at 1411 Keeler Street in the City of Beloit, Rock County, Wisconsin. I secured this information in the file for future reference.

11:45 AM Approximate time, I concluded doing this. I received a call from Detective SCHILTZ. He advised that Detective BANASZYNSKI requested I locate one of our undercover vehicles, get it

prepared and ready to go so we could use it to go to Janesville to apply the GPS unit to the suspect vehicle. I informed SCHILTZ I would take care of this. I then tracked down the undercover vehicle and made sure it was ready to go.

11:50 AM Approximate time, I concluded doing this. I then placed a call to Detective KAMHOLTZ. He advised since we last spoke, the vehicle left the location from in front of Keeler Street in Beloit. He advised the vehicle now is parked outside of a restaurant in the City of Janesville. He advised their plan is to stop the vehicle when the subjects leave, as the license plates on the vehicle are expired and the vehicle has a loud exhaust. He advised possibly a state trooper would be doing this stop for them. He advised once the vehicle stopped, they would identify the subjects and they would ultimately be released unless some other type of law enforcement action needed to be taken. KAMHOLTZ advised according to the detectives that were doing surveillance, the two male/white occupants in the vehicle fit the description perfectly of the suspicious subjects that had been witnessed by a complainant in our county on the day that several of their daytime residential burglaries started. KAMHOLTZ advised he would keep me informed.

12:36 PM Approximate time, I concluded my conversation with him. I then started to do follow up in the Detective Bureau, preparing to head to Janesville to work on this case. While doing this, I received a call from Detective SCHILTZ. He advised he needed some information from a report that Detective ENNIS took on Tuesday, October 2, 2007, the day of the residential burglary/home invasion at W8918 Territorial Road, Richmond Township, Walworth County, Wisconsin. I located ENNIS' dictated report in his mailbox in the Detective Bureau. I read through the report in reference to ENNIS speaking with a female subject with an address of

N6989 Chapel Hill Drive in the Town of Whitewater. This subject was identified as Bonnie J. TREDER, f/w, dob 8/25/72. ENNIS reports while speaking with TREDER, she witnessed a subject walking up to her house. She said she looked through the front door and saw a male standing at the door, knocking. She said this subject looked kind of "scruffy." She stated she answered the door and this subject asked to speak with Bill MASSEY (phonetic). ENNIS reports TREDER stated no Bill MASSEY lived there. He then asked if the subject ever lived there, and she said "no." The subject said "thanks" and then turned around and walked away. SCHILTZ advised this information was important, as he had been previously told by Detective KNUDTSON of the Rock County Sheriff's Department in one of their complaints reference these suspicious subjects that a subject matching the same description walked up to the door of a residence, knocked on the door, and when the subject answered, they asked if Bill MASSEY lived there. SCHILTZ requested I contact KNUDTSON to request a copy of his report so I could fax it to him at the District Attorney's Office, as he needed that information for the completion of the affidavit for the court order, for the application of the GPS. SCHILTZ also requested I fax ENNIS' report to him. I informed him I would do this. After speaking with SCHILTZ on the phone, I faxed this report to him at the DA's Office.

12:56 PM Approximate time, I placed a call to Detective KNUDTSON. He advised he had not done his report yet reference to the Bill MASSEY information; however, he did confirm the information SCHILTZ relayed to me. KNUDTSON advised it was interesting the subjects in our county and their county asked to speak with Bill MASSEY and the descriptions of both subjects matched; therefore, leading us to believe we are dealing with the same subjects operating in both counties. While speaking with KNUDTSON, he advised one of their patrol deputies was making a traffic

stop on the suspect vehicle. I stood by on the phone while this was being done. While doing this, KNUDTSON relayed to me that the deputy ran the two occupants of the vehicle, James G. BRERETON, m/w, dob 12/12/65 and Bryan J. CONAWAY, m/w, dob 8/11/67. KNUDTSON advised he would call me back in approximately 15 minutes to give me further information.

1:04 PM Approximate time, I concluded my conversation with him.

1:08 PM Approximate time, I received a call from Detective KAMHOLTZ. KAMHOLTZ advised the same information KNUDTSON just told me. I informed KAMHOLTZ I had just been on the phone with KNUDTSON and he relayed this information to me already. KAMHOLTZ advised the vehicle was parked along Highway 51 by the Rock County Airport, just south of the City of Janesville. KAMHOLTZ advised the vehicle would probably be at that location. We informed him we were getting a court order for the application of the GPS for the vehicle and that another detective and I would be en route shortly to meet with them.

1:13 PM Approximate time, I concluded my conversation with KAMHOLTZ.

1:14 PM Approximate time, I placed a call to Detective SCHILTZ and ADA DONOHOO. I passed on the information to them reference the suspect's identity, the vehicle information, and advised them BANASZYNSKI and I were en route to Rock County to meet with their detectives to apply the GPS to the vehicle. I informed SCHILTZ to contact BANASZYNSKI or me to inform us once the court order was signed allowing us to apply the GPS. He advised he would do this.

1:16 PM Approximate time, I then concluded my conversation with him. BANASZYNSKI and I then cleared the Sheriff's Department and headed to meet with the Rock County detectives.

1:30 PM Approximate time, while en route, I placed a call to Detective KAMHOLTZ. He advised the deputy gave the two subjects a ride, they had been dropped off and were going to make

arrangements to try to pickup the vehicle. KAMHOLTZ advised they decided to have the vehicle towed instead. They advised the vehicle was towed to Davis Towing Lot and that they would meet with BANASZYNSKI and me at the Janesville, Wisconsin Department of Motor Vehicle's Office and we would then follow them to the DMV Office. I concluded my conversation with KAMHOLTZ and continued onto Janesville.

1:16 PM Approximate time, BANASZYNSKI and I arrived at the Janesville, Wisconsin DMV Office. We met with the Rock County detectives, KAMHOLTZ, KNUDTSON, and Detective Brian MIESTER.

2:05 PM Approximate time, after speaking with the detectives, we followed them to Davis Towing, which was just down the road from the DMV Office.

2:06 PM Approximate time, we arrived at the towing lot. Upon arriving there, I observed a tow truck backed in along the buildings on the property with a light blue colored Pontiac Grand AM four door bearing Illinois plates of 8643511 attached to the back of it. I observed the vehicle matched the description given by Mindy WADE, who is a victim of a burglary/home invasion I am investigating that took place on October 2, 2007 at her residence at W8918 Territorial Road, Richmond Township, Walworth County, Wisconsin. I looked at the tires on the vehicle. I observed the rear tires on the vehicle seemed to be newer then the front tires due to the tread wear on them and the amount of weather cracking and wear on the sidewalls of the tires. I noted all four tires were Firestone Supreme SI whitewalls, which were model P185/75R14M+S tires. I noted the tread pattern on the tires closely resembled the tread wear left in the dirt and mud in front of WADE'S residence, of which I photographed and made a casting of. The tire mark left in the mud at WADE'S residence would have been from the driver's side rear or front tire of the

vehicle. I examined the tread wear. By looking at both, the driver's side front and rear of the vehicle, I noted the tread wear was consistent with that of the tread wear pattern I observed in the mud at WADE'S residence on October 2, 2007. Detective KAMHOLTZ of the Rock County Sheriff's Department took pictures of the tires and their tread wear for all the tires on the vehicle along with pictures of the exterior of the vehicle and pictures of the interior contents of the vehicle through the windows of the vehicle. At no time was the vehicle searched by any officers on scene. The only time the vehicle was opened was when the door of the vehicle was opened by Detective BANASZYNSKI so he could open the hood to apply the GPS unit. Also of note, while looking through the glass windows of the vehicle from the exterior of the vehicle, I observed a brown denim type material, button down shirt lying on top of some items sitting on the backseat of the vehicle. I am familiar with the observation by WADE on one of the subjects involved in a burglary/home invasion to a residence on October 2 in which she reported a subject was wearing a long sleeved, button down tan colored shirt. Also of note, I observed a blue and white colored Nokia cell phone lying in the center counsel of the vehicle. There was also a Dale Emhardt St. #3, black colored duffle bag along with what appeared to be a maroon colored sleeping bag and various other clothing items such as blue jeans and socks, etc. also lying in the backseat of the vehicle. Also, while making observations of the vehicle, I observed the VIN number through the glass windshield of the vehicle to be 1G2NE54N7PM605764. I also observed the driver's side mirror door had duct tape on it. I also observed the vehicle had a Bergstrom dealer sticker on the trunk of the vehicle and also in the rear window, there was a parking permit for Watertown High School for a student from 2002-2003 number 0492.

3:30 PM Approximate time, I placed a call to our dispatch and requested they run the VIN number and also advise who the VIN number comes back to. Dispatch advised the VIN number comes back on a 1993 blue Pontiac Grand AM SE four door sedan to Sherry L. BLOYER, f/w, dob 3/28/60, showing an address of 9421 South Gustafson Road, Clinton, Wisconsin 53525. I asked the dispatcher to run BLOYER. The dispatcher did this and advised she has a valid Wisconsin driver's license showing the same address on Gustafson Road in Clinton, Wisconsin. I requested the dispatch save this information.

3:33 PM Approximate time, I concluded my conversation with the dispatcher.

3:35 PM Approximate time, BANASZYNSKI received a call from SCHILTZ advising the court order was signed and that we had the go ahead to install the GPS unit on the suspect vehicle. I minimally assisted with the installation of the GPS, as BANASZYNSKI did a majority of the installation.

3:45 PM Approximate time, while he was doing the installation, I placed a call to our dispatch center and request they run criminal histories on BRERETON and CONAWAY and secure that information for the file.

3:47 PM Approximate time, I concluded my conversation with the dispatcher.

3:56 PM Approximate time, BANASZYNSKI cleared the installation. The other detectives and I stood by and waited for the tow truck operator to return to the garage so he could tow the vehicle back out to the scene on Highway 51 and drop the vehicle there. It was discussed amongst the detectives that if the two subjects that were in the vehicle, BRERETON and CONAWAY, called wondering where the vehicle was and why it had been towed that they were going to be told the vehicle had been towed by accident and once it was learned it had been towed, the Sheriff's Department

contacted the tow company and requested the vehicle be returned to its original location it was towed from. Also, while waiting for the tow truck operator to return, we talked amongst ourselves in reference to our "game plan" for the rest of the weekend in monitoring the GPS.

4:20 PM Approximate time, BANASZYNSKI and I concluded our conversation with detectives at the tow company and then cleared and started to head back to the Sheriff's Department.

5:25 PM Approximate time, we arrived back to the Sheriff's Department. I then placed the GPS equipment on BANASZYNSKI desk in the bureau.

5:36 PM Approximate time, I received a call from Detective KAMHOLTZ. KAMHOLTZ advised he e-mailed the suspect photos from their jail booking photos of BRERETON and CONAWAY and that he had also e-mailed me the vehicle photos that he took out at the tow company of the suspect vehicle. He advised there are approximately 40 photos. I accessed my e-mail account and pulled up the e-mail containing the attached photos KAMHOLTZ sent me. I was able to access the two booking photos of BRERETON and CONAWAY; however, when I opened the attachment for the vehicle photos, only one photo would appear. I passed this information onto KAMHOLTZ. He advised he would try to resend this information, as he was having problems with sending the e-mail.

5:40 PM Approximate time, I concluded my conversation with him.

5:41 PM Approximate time, I placed a call to IC Lieutenant Kevin WILLIAMS of the Walworth County Sheriff's Department. I passed on the information to him in reference to the application _____(inaudible) the suspect vehicle. The suspect's connected to this vehicle being identified etc. I also discussed with him about sending out photos of the suspects along with their vehicle along with information to all the patrol deputies

and dispatch advising them I would monitor the GPS on a laptop and a cell phone this weekend from my residence and that I would contact detectives, patrol, or the IC sergeants on duty to inform them of the activity. WILLIAMS advised this was OK and requested to be kept informed.

5:46 PM Approximate time, I concluded my conversation with him.

5:53 PM Approximate time, I received a call from Detective KAMHOLTZ. He advised he would try to send the e-mail to me again. I checked my e-mail and found I had not received another e-mail from him. He advised he would try and work on sending all the photos to me in another e-mail. KAMHOLTZ then asked me if I needed all the reports tonight or if it was OK for them to forward them to me tomorrow or at a later date. I informed him a later date was fine.

5:55 PM Approximate time, I concluded my conversation with him. I then printed off the e-mail photos from KAMHOLTZ and then drafted an e-mail to all the sworn deputies at the Sheriff's Department along with the dispatchers containing the photos of the suspects in the vehicle and information reference the GPS and what would be taking place now that the GPS was applied to the vehicle. I also placed a copy of this e-mail along with the photos of the subjects and the vehicle on the patrol clipboard. I also spoke with the on-duty second shift patrol sergeant Robert HALL of the Walworth County Sheriff's Department and passed this information onto him in person.

6:25 PM Approximate time, I concluded doing this.

6:30 PM Approximate time, I received a call from Mindy WADE. WADE advised she was calling to see if I needed to meet with her and her husband, Steve, tonight to take elimination fingerprints from them. I informed her I would not be able to do it tonight and there are no other detective

available to meet with her tonight to do this, and I would contact her in the near future to setup a time to meet with her and her husband to take these prints. WADE asked me for any status into the investigation, specifically involving the one at her residence this past week. I informed her we received some good information recently that I could not go into detail with her at this time about and advised her we were actively following up on this information at this time. She stated she understood and requested to keep her informed if any subjects were taken into custody. I informed her we would let her know this.

6:35 PM Approximate time, I concluded my conversation with her. I met with fellow detective Robert CRAIG of the Walworth County Sheriff's Department, who sat down and showed me how to use the GPS computer to do live tracking, as I have never used this equipment before.

6:50 PM Approximate time, I concluded this training.

7:47 PM Approximate time, I was notified by a text message on the cell phone that is attached to the GPS unit that the GPS unit was moving. At this time, I accessed the computer and did a live track. It showed the vehicle moved from its location parked on Highway 51, in the area of the Rock County Airport in Rock County, Wisconsin, and now was south of that location in a subdivision to the southeast of there and the vehicle was now stopped at what was believed to be a residence along a street called Sandy Lane. This subdivision is in the area of County Highway G.

8:00 PM Approximate time, I saved this live track and then logged off the system. Shortly after this, I received another text message on the cell phone advising the unit ended movement, which indicated the vehicle may be parked at this location for a period of time. I then later dictated this report of the file.

SHARP/2337:jlh

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WALWORTH COUNTY SHERIFF'S DEPARTMENT

CASE: 07-34351 DATE: 10/06/07 OFFICER: Robert SHARP

On the above date, I, Detective SHARP, Walworth County Sheriff's Department, while conducting an interview on an unrelated case received two phone calls from Detective Rich KAMHOLTZ of the Rock County Sheriff's Department on my cell phone. I did not answer these calls at this time due to the interview that I was conducting.

PM Approximate time, above date, I did return a call to KAMHOLTZ who advised that he had the photo lineups I requested that he prepare for Brian J. CONAWAY, male/white, DOB 08/11/1967 and James G. BRERETON, male/white, DOB 12/12/1965. KAMHOLTZ advised that he could meet me at our county lines so he could turn the lineup over to me. I advised him that would be fine and I would be en route shortly to meet with him. I then passed on to KAMHOLTZ the information about the location of the vehicle that we had placed a GPS unit on was currently located in their county. KAMHOLTZ advised that this would be in the Rockdale Trailer Park area. I concluded my conversation with KAMHOLTZ at approximately 1:09 PM. I then headed to the Countryside Restaurant located at the Rock and Walworth County lines off of Highway 14 and County Line Road, as this was the location KAMHOLTZ agreed with me to meet at. I arrived at this location at approximately 1:30 PM. KAMHOLTZ turned over the two photo lineups for BRERETON and CONAWAY to me. I then spoke with him in reference to the GPS tracking information and he advised that he would check the Rockdale Trailer Park on his way back to the Sheriff's Department to see if he could locate where the vehicle was parked and get that address information. He advised he would inform at a later date of this information if he is able to find the vehicle. I concluded my conversation with KAMHOLTZ at approximately 1:44 PM. We then both cleared and I headed back to the Sheriff's Department. I arrived back to the Sheriff's Department at approximately 2:15 PM, secured the photo lineups in the file for future

use reference this case and some other ones that are believed to be related and later dictated this report for the file.

SHARP/2337:vab

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* JONES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10–1259. Argued November 8, 2011—Decided January 23, 2012

The Government obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

Held: The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. Pp. 3–12.

(a) The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Here, the Government's physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted. Pp. 3–4.

(b) This conclusion is consistent with this Court's Fourth Amendment jurisprudence, which until the latter half of the 20th century was tied to common-law trespass. Later cases, which have deviated from that exclusively property-based approach, have applied the

Syllabus

analysis of Justice Harlan's concurrence in *Katz* v. *United States*, 389 U. S. 347, which said that the Fourth Amendment protects a person's "reasonable expectation of privacy," *id.*, at 360. Here, the Court need not address the Government's contention that Jones had no "reasonable expectation of privacy," because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo* v. *United States*, 533 U. S. 27, 34. *Katz* did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test. See *Alderman* v. *United States*, 394 U. S. 165, 176; *Soldal* v. *Cook County*, 506 U. S. 56, 64. *United States* v. *Knotts*, 460 U. S. 276, and *United States* v. *Karo*, 468 U. S. 705—post-*Katz* cases rejecting Fourth Amendment challenges to "beepers," electronic tracking devices representing another form of electronic monitoring—do not foreclose the conclusion that a search occurred here. *New York* v. *Class*, 475 U. S. 106, and *Oliver* v. *United States*, 466 U. S. 170, also do not support the Government's position. Pp. 4–12.

(c) The Government's alternative argument—that if the attachment and use of the device was a search, it was a reasonable one—is forfeited because it was not raised below. P. 12.

615 F. 3d 544, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and SOTOMAYOR, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in the judgment, in which GINSBURG, BREYER, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE SCALIA delivered the opinion of the Court.

We decide whether the attachment of a Global-Positioning-System (GPS) tracking 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.

I

In 2004 respondent Antoine Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics and was made the target of an investigation by a joint FBI and Metropolitan Police Department task force. Officers employed various investigative techniques, including visual surveillance of the nightclub, installation of a camera focused on the front door of the club, and a pen register and wiretap covering Jones's cellular phone.

Based in part on information gathered from these sources, in 2005 the Government applied to the United States District Court for the District of Columbia for a warrant authorizing the use of an electronic tracking device on the Jeep Grand Cherokee registered to Jones's

wife. A warrant issued, authorizing installation of the device in the District of Columbia and within 10 days.

On the 11th day, and not in the District of Columbia but in Maryland,[1] agents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period.

The Government ultimately obtained a multiple-count indictment charging Jones and several alleged co-conspirators with, as relevant here, conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U. S. C. §§841 and 846. Before trial, Jones filed a motion to suppress evidence obtained through the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence. 451 F. Supp. 2d 71, 88 (2006). It held the remaining data admissible, because "'[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'" *Ibid.* (quoting *United States* v. *Knotts*, 460 U. S. 276, 281 (1983)). Jones's trial in October 2006 produced a hung jury on the conspiracy count.

In March 2007, a grand jury returned another indict-

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[1] In this litigation, the Government has conceded noncompliance with the warrant and has argued only that a warrant was not required. *United States* v. *Maynard*, 615 F. 3d 544, 566, n. (CADC 2010).

ment, charging Jones and others with the same conspiracy. The Government introduced at trial the same GPS-derived locational data admitted in the first trial, which connected Jones to the alleged conspirators' stash house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base. The jury returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. *United States* v. *Maynard*, 615 F. 3d 544 (2010). The D. C. Circuit denied the Government's petition for rehearing en banc, with four judges dissenting. 625 F. 3d 766 (2010). We granted certiorari, 564 U. S. ___ (2011).

II

A

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. *United States* v. *Chadwick*, 433 U. S. 1, 12 (1977). We hold that the Government's installation of a GPS device on a target's vehicle,[2] and its use of that device to monitor the vehicle's movements, constitutes a "search."

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[2] As we have noted, the Jeep was registered to Jones's wife. The Government acknowledged, however, that Jones was "the exclusive driver." *Id.*, at 555, n. (internal quotation marks omitted). If Jones was not the owner he had at least the property rights of a bailee. The Court of Appeals concluded that the vehicle's registration did not affect his ability to make a Fourth Amendment objection, *ibid.*, and the Government has not challenged that determination here. We therefore do not consider the Fourth Amendment significance of Jones's status.

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. *Entick* v. *Carrington*, 95 Eng. Rep. 807 (C. P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law'" with regard to search and seizure. *Brower* v. *County of Inyo*, 489 U. S. 593, 596 (1989) (quoting *Boyd* v. *United States*, 116 U. S. 616, 626 (1886)). In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

> "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." *Entick, supra,* at 817.

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. *Kyllo* v. *United States*, 533 U. S. 27, 31 (2001); Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 816 (2004). Thus, in *Olmstead* v. *United States*, 277 U. S.

438 (1928), we held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because "[t]here was no entry of the houses or offices of the defendants," *id.*, at 464.

Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz* v. *United States*, 389 U. S. 347, 351 (1967), we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy," *id.*, at 360. See, *e.g.*, *Bond* v. *United States*, 529 U. S. 334 (2000); *California* v. *Ciraolo*, 476 U. S. 207 (1986); *Smith* v. *Maryland*, 442 U. S. 735 (1979).

The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, *supra*, at 34. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates.[3] *Katz* did not repudiate

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[3]JUSTICE ALITO's concurrence (hereinafter concurrence) doubts the wisdom of our approach because "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case." *Post*, at 3 (opinion concurring in judgment). But in fact it posits a situation that is not far afield—a constable's concealing himself

that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between *other* people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no Fourth Amendment violation "unless the conversational privacy of the homeowner himself is invaded."[4] *Alderman* v. *United States*, 394 U. S. 165, 176 (1969). "[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home . . . ." *Id.*, at 180.

More recently, in *Soldal* v. *Cook County*, 506 U. S. 56 (1992), the Court unanimously rejected the argument that although a "seizure" had occurred "in a 'technical' sense" when a trailer home was forcibly removed, *id.*, at 62, no Fourth Amendment violation occurred because law enforcement had not "invade[d] the [individuals'] privacy," *id.*, at 60. *Katz*, the Court explained, established that "property rights are not the sole measure of Fourth

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in the target's coach in order to track its movements. *Ibid.* There is no doubt that the information gained by that trespassory activity would be the product of an unlawful search—whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled.

In any case, it is quite irrelevant whether there was an 18th-century analog. Whatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

[4] Thus, the concurrence's attempt to recast *Alderman* as meaning that individuals have a "legitimate expectation of privacy in all conversations that [take] place under their roof," *post*, at 6–7, is foreclosed by the Court's opinion. The Court took as a given that the homeowner's "conversational privacy" had not been violated.

Amendment violations," but did not "snuf[f] out the previously recognized protection for property." 506 U. S., at 64. As Justice Brennan explained in his concurrence in *Knotts*, *Katz* did not erode the principle "that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." 460 U. S., at 286 (opinion concurring in judgment). We have embodied that preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota* v. *Carter*, 525 U. S. 83, 88 (1998) (internal quotation marks omitted). *Katz* did not narrow the Fourth Amendment's scope.[5]

The Government contends that several of our post-*Katz* cases foreclose the conclusion that what occurred here constituted a search. It relies principally on two cases in

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[5] The concurrence notes that post-*Katz* we have explained that "'an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation.'" *Post*, at 6 (quoting *United States* v. *Karo*, 468 U. S. 705, 713 (1984)). That is undoubtedly true, and undoubtedly irrelevant. *Karo* was considering whether a seizure occurred, and as the concurrence explains, a seizure of property occurs, not when there is a trespass, but "when there is some meaningful interference with an individual's possessory interests in that property." *Post*, at 2 (internal quotation marks omitted). Likewise with a search. Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information.

Related to this, and similarly irrelevant, is the concurrence's point that, if analyzed separately, neither the installation of the device nor its use would constitute a Fourth Amendment search. See *ibid*. Of course not. A trespass on "houses" or "effects," or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.

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. 460 U. S., at 278. 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.[6] *Id.*, at 281–282. 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 Knotts' possession, with the consent of the then-owner. 460 U. S., at 278. Knotts did not challenge that installation, and we specifically declined to consider its effect on the Fourth Amendment analysis. *Id.*, at 279, n. *Knotts* would be relevant, perhaps, if the Government were making the argument that what would otherwise be an unconstitutional search is not such where it produces only public information. The Government does not make that argument, and we know of no case that would support it.

The second "beeper" case, *United States* v. *Karo*, 468 U. S. 705 (1984), does not suggest a different conclusion. There we addressed the question left open by *Knotts*, whether the installation of a beeper in a container

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[6] *Knotts* noted the "limited use which the government made of the signals from this particular beeper," 460 U. S., at 284; and reserved the question whether "different constitutional principles may be applicable" to "dragnet-type law enforcement practices" of the type that GPS tracking made possible here, *ibid.*

amounted to a search or seizure. 468 U. S., at 713. As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. 468 U. S., at 708. Thus, the specific question we considered was whether the installation "*with the consent of the original owner* constitute[d] a search or seizure . . . when the container is delivered to a buyer having no knowledge of the presence of the beeper." *Id.*, at 707 (emphasis added). We held not. The Government, we said, came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. See *id.*, at 712. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location. Cf. *On Lee* v. *United States*, 343 U. S. 747, 751–752 (1952) (no search or seizure where an informant, who was wearing a concealed microphone, was invited into the defendant's business). Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.

The Government also points to our exposition in *New York* v. *Class*, 475 U. S. 106 (1986), that "[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id.*, at 114. That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did *more* than conduct a visual inspection of respondent's vehicle," Brief for United States 41 (emphasis added). By attaching the device to the Jeep, officers encroached on a protected area. In *Class* itself we suggested that this would make a difference, for we concluded that an officer's momentary reaching into the interior of a vehicle did constitute a

search.[7] 475 U. S., at 114–115.

Finally, the Government's position gains little support from our conclusion in *Oliver* v. *United States*, 466 U. S. 170 (1984), that officers' information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search even though it was a trespass at common law, *id.*, at 183. Quite simply, an open field, unlike the curtilage of a home, see *United States* v. *Dunn*, 480 U. S. 294, 300 (1987), is not one of those protected areas enumerated in the Fourth Amendment. *Oliver, supra*, at 176–177. See also *Hester* v. *United States*, 265 U. S. 57, 59 (1924). The Government's physical intrusion on such an area—unlike its intrusion on the "effect" at issue here—is of no Fourth Amendment significance.[8]

B

The concurrence begins by accusing us of applying "18th-century tort law." *Post*, at 1. That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at*

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[7] The Government also points to *Cardwell* v. *Lewis*, 417 U. S. 583 (1974), in which the Court rejected the claim that the inspection of an impounded vehicle's tire tread and the collection of paint scrapings from its exterior violated the Fourth Amendment. Whether the plurality said so because no search occurred or because the search was reasonable is unclear. Compare *id.*, at 591 (opinion of Blackmun, J.) ("[W]e fail to comprehend what expectation of privacy was infringed"), with *id.*, at 592 ("Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable . . . ").

[8] Thus, our theory is *not* that the Fourth Amendment is concerned with "*any* technical trespass that led to the gathering of evidence." *Post*, at 3 (ALITO, J., concurring in judgment) (emphasis added). The Fourth Amendment protects against trespassory searches only with regard to those items ("persons, houses, papers, and effects") that it enumerates. The trespass that occurred in *Oliver* may properly be understood as a "search," but not one "in the constitutional sense." 466 U. S., at 170, 183.

a minimum the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively Katz*'s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.

The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. *Post*, at 9. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

In fact, it is the concurrence's insistence on the exclusivity of the *Katz* test that needlessly leads us into "particularly vexing problems" in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. See *Kyllo*, 533 U. S., at 31–32. We accordingly held in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U. S., at 281. Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4-week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," *post*, at 12, our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that "relatively short-term monitoring of a person's movements

on public streets" is okay, but that "the use of longer term GPS monitoring in investigations *of most offenses*" is no good. *Post*, at 13 (emphasis added). That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4-week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. See *post*, at 13–14. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

III

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." Brief for United States 50–51. 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. See 625 F. 3d, at 767 (Ginsburg, Tatel, and Griffith, JJ., concurring in denial of rehearing en banc). We consider the argument forfeited. See *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002).

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The judgment of the Court of Appeals for the D. C. Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE SOTOMAYOR, concurring.

I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." *Ante,* at 6, n. 3. In this case, the Government installed a Global Positioning System (GPS) tracking device on respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection. See, *e.g., Silverman* v. *United States*, 365 U. S. 505, 511–512 (1961).

Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property. See, *e.g., Kyllo* v. *United States*, 533 U. S. 27, 31–33 (2001). Rather, even in the absence of a trespass, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id.,* at 33; see also *Smith* v. *Maryland*, 442 U. S. 735, 740–741 (1979); *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). In *Katz*, this Court enlarged its then-prevailing focus on property rights by announcing

that the reach of the Fourth Amendment does not "turn upon the presence or absence of a physical intrusion." *Id.,* at 353. As the majority's opinion makes clear, however, *Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it. *Ante,* at 8. Thus, "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *United States* v. *Knotts*, 460 U. S. 276, 286 (1983) (Brennan, J., concurring in judgment); see also, *e.g., Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12 (1978). JUSTICE ALITO's approach, which discounts altogether the constitutional relevance of the Government's physical intrusion on Jones' Jeep, erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control. See *post,* at 5–7 (opinion concurring in judgment). By contrast, the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.

Nonetheless, as JUSTICE ALITO notes, physical intrusion is now unnecessary to many forms of surveillance. *Post,* at 9–12. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones. See *United States* v. *Pineda-Moreno*, 617 F. 3d 1120, 1125 (CA9 2010) (Kozinski, C. J., dissenting from denial of rehearing en banc). In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals without trespass

would *remain* subject to *Katz* analysis." *Ante,* at 11. As JUSTICE ALITO incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. *Post,* at 10–11. Under that rubric, I agree with JUSTICE ALITO that, at the very least, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Post,* at 13.

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. See, *e.g., People* v. *Weaver*, 12 N. Y. 3d 433, 441–442, 909 N. E. 2d 1195, 1199 (2009) ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"). The Government can store such records and efficiently mine them for information years into the future. *Pineda-Moreno*, 617 F. 3d, at 1124 (opinion of Kozinski, C. J.). And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility." *Illinois* v. *Lidster*, 540 U. S. 419, 426 (2004).

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net

result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society." *United States* v. *Cuevas-Perez*, 640 F. 3d 272, 285 (CA7 2011) (Flaum, J., concurring).

I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. See *Kyllo*, 533 U. S., at 35, n. 2; *ante,* at 11 (leaving open the possibility that duplicating traditional surveillance "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy"). I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance," *United States* v. *Di Re*, 332 U. S. 581, 595 (1948).*

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* *United States* v. *Knotts*, 460 U. S. 276 (1983), does not foreclose the conclusion that GPS monitoring, in the absence of a physical intrusion, is a Fourth Amendment search. As the majority's opinion notes, *Knotts* reserved the question whether "'different constitutional principles may be applicable'" to invasive law enforcement practices such as GPS tracking. See *ante,* at 8, n. 6 (quoting 460 U. S., at 284).

United States v. *Karo*, 468 U. S. 705 (1984), addressed the Fourth

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g., Smith*, 442 U. S., at 742; *United States* v. *Miller*, 425 U. S. 435, 443 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as JUSTICE ALITO notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," *post,* at 10, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases

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Amendment implications of the installation of a beeper in a container with the consent of the container's original owner, who was aware that the beeper would be used for surveillance purposes. *Id.,* at 707. Owners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements. To the contrary, subscribers of one such service greeted a similar suggestion with anger. Quain, Changes to OnStar's Privacy Terms Rile Some Users, N. Y. Times (Sept. 22, 2011), online at http://wheels.blogs.nytimes.com/2011/09/22/changes-to-onstars-privacy-terms-rile-some-users (as visited Jan. 19, 2012, and available in Clerk of Court's case file). In addition, the bugged container in *Karo* lacked the close relationship with the target that a car shares with its owner. The bugged container in *Karo* was stationary for much of the Government's surveillance. See 468 U. S., at 708–710. A car's movements, by contrast, are its owner's movements.

to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. See *Smith*, 442 U. S., at 749 (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes"); see also *Katz*, 389 U. S., at 351–352 ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

Resolution of these difficult questions in this case is unnecessary, however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision. I therefore join the majority's opinion.

SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE ALITO, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, concurring in the judgment.

This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device[1] to the underside of the vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels.[2] And for this reason, the Court concludes, the installation and use of the GPS device constituted a search. *Ante*, at 3–4.

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[1] Although the record does not reveal the size or weight of the device used in this case, there is now a device in use that weighs two ounces and is the size of a credit card. Tr. of Oral Arg. 27.

[2] At common law, a suit for trespass to chattels could be maintained if there was a violation of "the dignitary interest in the inviolability of chattels," but today there must be "some actual damage to the chattel before the action can be maintained." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 87 (5th ed. 1984) (hereinafter Prosser & Keeton). Here, there was no actual damage to the vehicle to which the GPS device was attached.

This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.

I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

I

A

The Fourth Amendment prohibits "unreasonable searches and seizures," and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms. The Court does not contend that there was a seizure. A seizure of property occurs when there is "some meaningful interference with an individual's possessory interests in that property," *United States* v. *Jacobsen,* 466 U. S. 109, 113 (1984), and here there was none. Indeed, the success of the surveillance technique that the officers employed was dependent on the fact that the GPS did not interfere in any way with the operation of the vehicle, for if any such interference had been detected, the device might have been discovered.

The Court does claim that the installation and use of the GPS constituted a search, see *ante,* at 3–4, but this conclusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of Fourth Amendment analysis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. On the contrary, the Court

accepts the holding in *United States* v. *Knotts*, 460 U. S. 276 (1983), that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search. See *ante*, at 7.

The Court argues—and I agree—that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Ante*, at 5 (quoting *Kyllo* v. *United States*, 533 U. S. 27, 34 (2001)). But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?[3]) The Court's theory seems to be that the concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect. At common law, any unauthorized intrusion on private property was actionable, see Prosser & Keeton 75, but a trespass on open fields, as opposed to the "curtilage" of a home, does not fall within the scope of the Fourth Amendment because private property outside the curtilage is not part of a "hous[e]" within the meaning of the Fourth Amendment. See *Oliver* v. *United State*s, 466 U. S. 170 (1984); *Hester* v. *United States*, 265 U. S. 57 (1924).

B

The Court's reasoning in this case is very similar to that in the Court's early decisions involving wiretapping and electronic eavesdropping, namely, that a technical trespass followed by the gathering of evidence constitutes a

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[3] The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.

search. In the early electronic surveillance cases, the Court concluded that a Fourth Amendment search occurred when private conversations were monitored as a result of an "unauthorized physical penetration into the premises occupied" by the defendant. *Silverman* v. *United States*, 365 U. S. 505, 509 (1961). In *Silverman*, police officers listened to conversations in an attached home by inserting a "spike mike" through the wall that this house shared with the vacant house next door. *Id.,* at 506. This procedure was held to be a search because the mike made contact with a heating duct on the other side of the wall and thus "usurp[ed] . . . an integral part of the premises." *Id.,* at 511.

By contrast, in cases in which there was no trespass, it was held that there was no search. Thus, in *Olmstead* v. *United States*, 277 U. S. 438 (1928), the Court found that the Fourth Amendment did not apply because "[t]he taps from house lines were made in the streets near the houses." *Id.*, at 457. Similarly, the Court concluded that no search occurred in *Goldman* v. *United States*, 316 U. S. 129, 135 (1942), where a "detectaphone" was placed on the outer wall of defendant's office for the purpose of overhearing conversations held within the room.

This trespass-based rule was repeatedly criticized. In *Olmstead*, Justice Brandeis wrote that it was "immaterial where the physical connection with the telephone wires was made." 277 U. S., at 479 (dissenting opinion). Although a private conversation transmitted by wire did not fall within the literal words of the Fourth Amendment, he argued, the Amendment should be understood as prohibiting "every unjustifiable intrusion by the government upon the privacy of the individual." *Id.,* at 478. See also, *e.g.*, *Silverman*, *supra*, at 513 (Douglas, J., concurring) ("The concept of 'an unauthorized physical penetration into the premises,' on which the present decision rests seems to me beside the point. Was not the wrong . . . done when the

intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury"); *Goldman*, *supra*, at 139 (Murphy, J., dissenting) ("[T]he search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment").

Katz v. *United States*, 389 U. S. 347 (1967), finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation. *Katz* involved the use of a listening device that was attached to the outside of a public telephone booth and that allowed police officers to eavesdrop on one end of the target's phone conversation. This procedure did not physically intrude on the area occupied by the target, but the *Katz* Court "repudiate[ed]" the old doctrine, *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978), and held that "[t]he fact that the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance," 389 U. S., at 353 ("[T]he reach of th[e] [Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure"); see *Rakas*, *supra*, at 143 (describing *Katz* as holding that the "capacity to claim the protection for the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Kyllo, supra,* at 32 ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property"). What mattered, the Court now held, was whether the conduct at issue "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Katz, supra*,

at 353.

Under this approach, as the Court later put it when addressing the relevance of a technical trespass, "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation." *United States* v. *Karo,* 468 U. S. 705, 713 (1984) (emphasis added). *Ibid.* ("Compar[ing] *Katz* v. *United States*, 389 U. S. 347 (1967) (no trespass, but Fourth Amendment violation), with *Oliver* v. *United States*, 466 U. S. 170 (1984) (trespass, but no Fourth Amendment violation)"). In *Oliver,* the Court wrote:

> "The existence of a property right is but one element in determining whether expectations of privacy are legitimate. 'The premise that property interests control the right of the Government to search and seize has been discredited.' *Katz*, 389 U. S., at 353, (quoting *Warden* v. *Hayden*, 387 U. S. 294, 304 (1967); some internal quotation marks omitted)." 466 U. S., at 183.

II

The majority suggests that two post-*Katz* decisions—*Soldal* v. *Cook County*, 506 U. S. 56 (1992), and *Alderman* v. *United States*, 394 U. S. 165 (1969)—show that a technical trespass is sufficient to establish the existence of a search, but they provide little support.

In *Soldal*, the Court held that towing away a trailer home without the owner's consent constituted a seizure even if this did not invade the occupants' personal privacy. But in the present case, the Court does not find that there was a seizure, and it is clear that none occurred.

In *Alderman,* the Court held that the Fourth Amendment rights of homeowners were implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home. See 394 U. S., at 176–180. *Alderman* is best understood to

mean that the homeowners had a legitimate expectation of privacy in all conversations that took place under their roof. See *Rakas*, 439 U. S., at 144, n. 12 (citing *Alderman* for the proposition that "the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment"); 439 U. S., at 153 (Powell, J., concurring) (citing *Alderman* for the proposition that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable); *Karo*, *supra*, at 732 (Stevens, J., concurring in part and dissenting in part) (citing *Alderman* in support of the proposition that "a homeowner has a reasonable expectation of privacy in the contents of his home, including items owned by others").

In sum, the majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.

III

Disharmony with a substantial body of existing case law is only one of the problems with the Court's approach in this case.

I will briefly note four others. First, the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law. See Prosser & Keeton §14, at 87 (harmless or trivial contact with personal property not actionable); D. Dobbs, Law of Torts 124 (2000) (same). But under the Court's reasoning, this conduct

may violate the Fourth Amendment. By contrast, if long-term monitoring can be accomplished without committing a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the Court's theory would provide no protection.

Second, the Court's approach leads to incongruous results. If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

In the present case, the Fourth Amendment applies, the Court concludes, because the officers installed the GPS device after respondent's wife, to whom the car was registered, turned it over to respondent for his exclusive use. See *ante*, at 8. But if the GPS had been attached prior to that time, the Court's theory would lead to a different result. The Court proceeds on the assumption that respondent "had at least the property rights of a bailee," *ante*, at 3, n. 2, but a bailee may sue for a trespass to chattel only if the injury occurs during the term of the bailment. See 8A Am. Jur. 2d, Bailment §166, pp. 685–686 (2009). So if the GPS device had been installed before respondent's wife gave him the keys, respondent would have no claim for trespass—and, presumably, no Fourth Amendment claim either.

Third, under the Court's theory, the coverage of the Fourth Amendment may vary from State to State. If the events at issue here had occurred in a community property State[4] or a State that has adopted the Uniform Marital

[4] See, *e.g.*, Cal. Family Code Ann. §760 (West 2004).

Property Act,[5] respondent would likely be an owner of the vehicle, and it would not matter whether the GPS was installed before or after his wife turned over the keys. In non-community-property States, on the other hand, the registration of the vehicle in the name of respondent's wife would generally be regarded as presumptive evidence that she was the sole owner. See 60 C. J. S., Motor Vehicles §231, pp. 398–399 (2002); 8 Am. Jur. 2d, Automobiles §1208, pp. 859–860 (2007).

Fourth, the Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked. For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. See Restatement (Second) of Torts §217 and Comment *e* (1963 and 1964); Dobbs, *supra*, at 123. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. See, *e.g., CompuServe, Inc.* v. *Cyber Promotions*, *Inc.* 962 F. Supp. 1015, 1021 (SD Ohio 1997); *Thrifty-Tel, Inc.* v. *Bezenek*, 46 Cal. App. 4th 1559, 1566, n. 6 (1996). But may such decisions be followed in applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the Fourth

[5] See Uniform Marital Property Act §4, 9A U. L. A. 116 (1998).

Amendment, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?

IV

A

The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, see *Kyllo*, 533 U. S., at 34, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. See *Minnesota* v. *Carter*, 525 U. S. 83, 97 (1998) (SCALIA, J., concurring). In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.[6]

On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping. After *Katz*, Congress

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[6] See, *e.g.*, NPR, The End of Privacy http://www.npr.org/series/114250076/the-end-of-privacy (all Internet materials as visited Jan. 20, 2012, and available in Clerk of Court's case file); Time Magazine, Everything About You Is Being Tracked—Get Over It, Joel Stein, Mar. 21, 2011, Vol. 177, No. 11.

did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, see 18 U. S. C. §§2510–2522 (2006 ed. and Supp. IV), and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law.[7] In an ironic sense, although *Katz* overruled *Olmstead*, Chief Justice Taft's suggestion in the latter case that the regulation of wiretapping was a matter better left for Congress, see 277 U. S., at 465–466, has been borne out.

B

Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements. In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen.

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States.[8] For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which

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[7] See Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 850–851 (2004) (hereinafter Kerr).

[8] See CTIA Consumer Info, 50 Wireless Quick Facts, http://www.ctia.org/consumer_info/index.cfm/AID/10323.

are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road.[9] Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

V

In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance.[10] Only an investigation of unusual importance could have justified such an

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[9] See, *e.g.*, The bright side of sitting in traffic: Crowdsourcing road congestion data, Google Blog, http://googleblog.blogspot.com/2009/08/bright-side-of-sitting-in-traffic.html.

[10] Even with a radio transmitter like those used in *United States* v. *Knotts*, 460 U. S. 276 (1983), or *United States* v. *Karo,* 468 U. S. 705 (1984), such long-term surveillance would have been exceptionally demanding. The beepers used in those cases merely "emit[ted] periodic signals that [could] be picked up by a radio receiver." *Knotts*, 460 U.S., at 277. The signal had a limited range and could be lost if the police did not stay close enough. Indeed, in *Knotts* itself, officers lost the signal from the beeper, and only "with the assistance of a monitoring device located in a helicopter [was] the approximate location of the signal . . . picked up again about one hour later." *Id.*, at 278.

expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. See, *e.g.*, Kerr, 102 Mich. L. Rev., at 805–806. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.

To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that 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. But the use of longer term GPS monitoring in 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—secretly 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 surveil

lance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant.[11] We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

* * *

For these reasons, I conclude that the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed.

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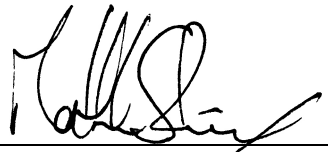
[11] In this case, the agents obtained a warrant, but they did not comply with two of the warrant's restrictions: They did not install the GPS device within the 10-day period required by the terms of the warrant and by Fed. Rule Crim. Proc. 41(e)(2)(B)(i), and they did not install the GPS device within the District of Columbia, as required by the terms of the warrant and by 18 U. S. C. §3117(a) and Rule 41(b)(4). In the courts below the Government did not argue, and has not argued here, that the Fourth Amendment does not impose these precise restrictions and that the violation of these restrictions does not demand the suppression of evidence obtained using the tracking device. See, *e.g.*, *United States* v. *Gerber*, 994 F. 2d 1556, 1559–1560 (CA11 1993); *United States* v. *Burke*, 517 F. 2d 377, 386–387 (CA2 1975). Because it was not raised, that question is not before us.

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(13)(F)

In accordance with Wis. Stat. § (Rule) 809.19(13)(f), I hereby certify that I have submitted an electronic copy of this Defendant-Appellant-Petitioner's Appendix via the Wisconsin Appellate Court eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(13). I further certify that the content of the electronic copy of this Defendant-Appellant-Petitioner's Appendix is identical to the content of the paper copy of the Defendant-Appellant-Petitioner's Appendix. A copy of this certification will be served with the paper copies of this Defendant-Appellant-Petitioner's Appendix to be filed with the court and served on all opposing parties.

Dated this 26th day of April, 2012.



Matthew S. Pinix
Attorney for the Defendant-Appellant-Petitioner

STATE OF WISCONSIN

IN SUPREME COURT

No. 2010AP1366-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES G. BRERETON,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A SUPPRESSION MOTION, PURSUANT TO WIS. STAT. § 971.31(10), ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, HONORABLE MICHAEL S. GIBBS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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IN SUPREME COURT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did Brereton have Fourth Amendment "standing" to challenge the seizure and search of a car registered to a woman in Clinton, Wisconsin, and displaying expired license plates for a different car registered to a man in Belvedere, Illinois?

This issue was not raised by the state in either the trial court or the court of appeals.

2. Did police lawfully move the car without a warrant after the traffic stop to a nearby impound lot to install, pursuant to judicial authorization, a GPS device in the car's engine compartment?

The trial court held that police had probable cause to move the car without a warrant to an impound lot a short distance from the scene of the traffic stop to install, pursuant to court order, the GPS device before returning the car to Brereton and his cohort.

The court of appeals agreed that it was reasonable, based on the probable cause they had, for police to move the car temporarily to the nearby impound lot to install the GPS device.

3. Did police exceed the scope of the warrant authorizing GPS tracking of the car when they used a "real time" GPS device rather than the GPS device specified in the warrant that records tracking information which is then later downloaded to a computer?

The trial court held that the use of a "real time" GPS device was reasonable and did not exceed the scope of the warrant.

The court of appeals agreed that the "real time" device used by police did not exceed the scope of the warrant.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state assumes that, in deciding to grant review, this court has deemed this case appropriate for oral argument and publication.

STATEMENT OF THE CASE

Brereton was charged in a criminal complaint filed October 13, 2008, with fourteen crimes, both felonies and misdemeanors, all arising out of a burglary spree engaged in by Brereton and his cohort Brian Conaway in late September and early October 2007 (2; Pet-Ap. 4-12).

On July 23, 2009, counsel for co-defendant Conaway filed a motion to suppress evidence obtained as the result of GPS surveillance of the car he and Brereton were travelling in (43; Pet-Ap. 13-14).[1] Brereton did not file his own suppression motion, but joined Conaway's motion instead (39:3; 40:52; Pet-Ap. 80). The cases were joined for purposes of the suppression motion only and a joint suppression hearing was held August 12, 2009 (40; Pet-Ap. 29-88).

The trial court denied the suppression motion at the close of the hearing. It held that police had probable cause to seize the blue Pontiac carrying Brereton and Conaway; and, although it held that a court order was not required to do so, police obtained a valid court order issued on probable cause to install the GPS device into the engine compartment of the Pontiac (40:56-57; Pet-Ap. 84-85). The court filed a written order denying the suppression motion November 5, 2009 (45).

Brereton pled guilty to five counts of burglary, party to the crime, at a hearing held November 25, 2009 (41:2-8). The remaining charges were dismissed but read into the record for purposes of sentencing and the state

[1]In an order issued September 10, 2010, the court of appeals granted Brereton's motion to supplement the record with the suppression motion filed by Conaway's attorney (42). The court of appeals also on its own motion ordered the record supplemented with the brief in support of Conaway's motion and the trial court's order of November 5, 2009, denying the suppression motion in Conaway's case (*id.*). Those documents appear in the record as Documents 44 and 45, respectively.

agreed to recommend concurrent twelve-year sentences, consisting of seven years of initial confinement followed by five years of extended supervision for each count. The court accepted the recommendation and imposed the concurrent twelve-year sentences (41:2-3, 8). A judgment of conviction (as corrected) was entered January 7, 2010 (25; Pet-Ap. 1-3).

Brereton appealed, pursuant to Wis. Stat. § 971.31(10), from the judgment of conviction entered upon his guilty plea and from the order denying his suppression motion (28). The Wisconsin Court of Appeals, District II, affirmed in a decision issued August 10, 2011. *State v. Brereton*, 2011 WI App 127, 337 Wis. 2d 145, 804 N.W.2d 243.

The court of appeals noted that Brereton did not challenge the legality of the traffic stop. It then held that, based on probable cause to believe the car had been used in the recent area burglaries, it was lawful for police to move the car to a nearby impound lot to install the GPS device in the car's engine compartment, as judicially authorized. *Id.* ¶¶ 9-10.

The court then concluded that the warrant was valid and the manner of its execution by police did not exceed its scope. *Id.* ¶¶ 12-15. The court specifically rejected the argument that the "real time" GPS tracking device actually used impermissibly exceeded the scope of the warrant that had authorized the use of a GPS device which records tracking information that must later be downloaded to a computer. *Id.* ¶¶ 14-15. The court summarized its reasoning as follows:

> We hold that the police were operating reasonably and within their discretion when they attached a GPS device to Brereton's car. They took the time to obtain a warrant. The warrant authorized them to put a GPS device on the car to monitor the car's whereabouts. Unlike the device used in *Sveum I* and *II*, the GPS device in this case was only in use for four days (until the police obtained information

> they could use). And the fact that there was a warrant and that the device was in play for only four days is what distinguishes the facts of this case from *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *cert. granted, United States v. Jones*, [__ U.S. __,] 131 S. Ct. 3064 (June 27, 2011), a case heavily relied on by Brereton. In that case, the court emphasized the level of intrusion involved when the police, without a warrant, attached a GPS device to the defendant's car and monitored his whereabouts "24 hours a day for four weeks." *Id.* at 555, 562-64. Under the facts of this case, however, we see no reason to find that the police overstepped their bounds simply because they were able to monitor the movements in real time rather than needing to continually return to the car, remove the device, and download its information to a computer. Though we can envision scenarios where prolonged use of this device might be unreasonable under the Fourth Amendment, we do not believe this case crosses the line.

Id. ¶ 15.

Brereton petitioned for review. The state opposed review. This court issued an order January 24, 2012, directing the parties to submit letter briefs addressing the impact of *United States v. Jones*, __ U.S. __, 132 S. Ct. 945 (2012), on the issues raised in the petition for review. Both parties agreed that *Jones*, involving warrantless GPS tracking for four weeks, did not directly impact the issues presented here. Brereton maintained, however, that review was appropriate to determine whether the use of a "real time" GPS device exceeded the scope of the warrant.

This court granted review March 15, 2012.

STATEMENT OF FACTS RELEVANT TO THE SEARCH AND SEIZURE ISSUES.

The "probable cause" alleged in the complaint.

The "probable cause" portion of the criminal complaint set forth the facts authorizing police to stop and then seize the car in which Brereton and Conaway were riding (2:4-9; Pet-Ap. 7-12).

In the early afternoon of October 5, 2007, Walworth County sheriff's deputies executed a traffic stop of the car containing Brereton and Conaway for an expired license plate, no rear-view mirror and a loud muffler. Earlier that day, police had located this blue Pontiac bearing an expired Illinois license plate at a residence on Keeler Avenue in the City of Beloit, Rock County (2:7; Pet-Ap. 10). The late 1980s or early 1990s model light or robin's egg blue—or teal—Pontiac Grand Prix or Grand Am with this specific Illinois license plate number and its two male passengers matched the description of the car driven by two men observed by several citizen witnesses in the vicinity of several burglaries committed by two men in Walworth and adjoining Rock Counties on October 2 and 3, 2007 (2:5-7; Pet-Ap. 8-10; *see* 12:Exhibit 5-2).

When they executed the traffic stop, police quickly learned that the Vehicle Identification Number (VIN) on the car did not match the registered VIN for the expired license plates displayed on it (2:7; Pet-Ap. 10). Brereton was the driver; Conaway the passenger. Police seized the car because of the expired plates and the non-matching VIN. Police did not place the two men under arrest at that point. Instead, they had the car towed to a lot where, upon issuance of a court order later that afternoon authorizing it, they installed a GPS tracking device inside the car (2:7-8; Pet-Ap. 10-11). They then returned the car to the two men who had to arrange for someone to pick up the car since neither of them had a valid driver's license.

The GPS tracking device bore fruit. Four days later, on October 9, 2007, the GPS device pinpointed the location of the Pontiac near the scene of another burglary in rural Rock County. Police stopped the car in Janesville and found proceeds of that burglary. When questioned at the scene, Brereton told police he and Conaway found these items on the side of the road but could not remember where (2:8; Pet-Ap. 11).

The proof of probable cause at the suppression hearing.

The proof of probable cause at the suppression hearing closely tracked what was alleged in the complaint.

Rock County Detective Kamholz testified that citizens had provided detailed descriptions of the blue Pontiac and its two male occupants near the scene of several recent burglaries in Rock County, and one citizen provided the Illinois license plate number on the car. This information was made known to Walworth County authorities before they executed the traffic stop of the Pontiac on October 5th (40:7-10; Pet-Ap. 35-38).

Kamholz testified that the car was stopped on busy Highway 51 in Rock County (40:15; Pet-Ap. 43). The officers decided it was too unsafe to install the GPS device on the side of the busy highway and, so, the decision was made to tow the car to a private lot instead (40:17, 31; Pet-Ap. 45, 59). It was towed to an impound lot owned by a private towing company where police later installed the GPS device under the hood, before the car was returned to Brereton and Conaway (40:11-12, 14; Pet-Ap. 39-40, 42).

Kamholz readily admitted that police had not obtained consent from the two men and did not yet have a warrant when the decision was made to tow the car (40:17-18; Pet-Ap. 45-46). He also admitted that the traffic stop was a pretext to enable police to install the GPS device on the car (40:21-22; Pet-Ap. 49-50). The decision was made not to arrest the two men at that time

(40:24; Pet-Ap. 52). Instead, police took the two men to a nearby "Dollar Store" ostensibly to let them make arrangements for someone to come and pick up the car since neither of them had a valid driver's license. The men were unaware that police intended to have the car towed (40:32-33; Pet-Ap. 60-61).

The GPS device was installed after Walworth County Circuit Judge Carlson issued an order authorizing it later that afternoon (40:28, 43; Pet-Ap. 56, 71). Police had to enter the car's passenger compartment in order to release the hood so that the device could be installed in the engine compartment (40:29-30; Pet-Ap. 57-58).

Walworth County Sheriff's Detective Sharp testified that the car and its license plate number matched the description of a car seen in the vicinity of several recent burglaries in both Walworth and Rock Counties. Police obtained the Illinois license plate number for the car on October 3rd, two days before it was stopped (40:36-38; Pet-Ap. 64-66). Follow-up investigation revealed that Brereton's and Conaway's names were associated with the Pontiac which was registered to a woman (40:38-39, 41, 49; Pet-Ap. 66-67, 69, 77).

Sharp testified that, when the decision was made to stop the Pontiac on October 5th, police felt they had probable cause to believe the car was itself evidence of the recent burglaries in the area. Police believed, therefore, that they were authorized to seize the car without a warrant (40:39; Pet-Ap. 67). Police decided to install the GPS device and return the car rather than retain it in order to continue their investigation of the two men's activities with the aid of GPS technology (40:39; Pet-Ap. 67).

Sharp confirmed Kamholz's testimony that the car was towed to a private lot for installation of the GPS device and that police had to enter the passenger compartment in order to release the hood (40:38, 42, 44, 48; Pet-Ap. 66, 70, 72, 76).

Counsel for Conaway relied entirely on the arguments in his brief filed before the hearing (40:51-52; Pet-Ap. 79-80). He argued in the brief that police lacked probable cause to seize the car, they lacked probable cause to later search it and the court order authorizing installation of the GPS device was invalid (40:52; 45; Pet-Ap. 80).[2]

The prosecutor argued that police had probable cause to seize the Pontiac without a warrant based on the description and the license plate number provided by the citizen witnesses. That probable cause was enhanced by the discovery during the traffic stop that the Pontiac's VIN did not match the registration for the expired Illinois license plates. Police reasonably chose to have the GPS device installed and return the car to the two men, rather than arrest them and keep the car, in order to continue their burglary investigation using the GPS device (40:53-54; Pet-Ap. 81-82).

The prosecutor argued that police obtained a valid court order based on probable cause for installation of the GPS device but, relying on the court of appeals' decision in *State v. Sveum*, 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53, no court order was even required (40:55; Pet-Ap. 83).

The trial court ruled that police had probable cause to seize the car when they executed the traffic stop based on the citizens' detailed descriptions of the car and its license plate number. It was proper for police to decide to release the men and later return the car to them in order to continue their investigation. No court order was required for police to install the GPS device, but in this case, police obtained one anyway: "a belt and suspenders here to make sure that it was okay" (40:56-57; Pet-Ap. 84-85).

[2]Counsel for Brereton joined in the arguments of counsel for Conaway (40:52; Pet-Ap. 80).

The probable cause set forth in the affidavit in support of the application for judicial authorization to install the GPS device.

Walworth County Detective Robert Schiltz submitted an affidavit in support of his application for judicial authorization to install the GPS device on Brereton's car October 5, 2007 (12:Exhibit 5-1; Pet-Ap. 92-99).

Detective Schiltz related the detailed information provided by citizen witnesses to the October 2-3 burglaries describing the blue or teal Pontiac, its Illinois license plate number and its two male occupants (Pet-Ap. 92-95).[3] A check of Illinois DOT records revealed that the license plate was registered for a 1996 Pontiac Coupe owned by a man in Belvedere, Illinois, who was no longer living at that location (Pet-Ap. 96).[4] Schiltz then described the traffic stop of the two men in the blue Pontiac with those expired plates earlier that day, October 5th, for invalid plates, no rear-view mirror and a loud muffler. The stop also revealed that the VIN did not match the registered VIN connected to the license plates (Pet-Ap. 96, 98-99). Wisconsin Department of Transportation records revealed that the VIN for this particular car identified it as a 1993 blue Pontiac Grand Am SE 4-door sedan registered to a Sherry Bloyer of Clinton, Wisconsin (Pet-Ap. 98-99; *see id.* at 108).

Based on this information, Schiltz alleged there was probable cause to believe that the Pontiac had been

[3]Because the Schiltz affidavit is one of several documents included under Record Document 12, for ease of reference, the state will only refer to the pages of that affidavit as they appear in the appendix to Brereton's brief.

[4]Further police investigation revealed that this particular license had been on a Buick and had expired in August of 2007 (Pet-Ap. 101, 103). Conaway was a passenger in that Buick when it was stopped by Illinois police (Pet-Ap. 101).

used in the commission of burglaries and there was probable cause to believe that installation of a GPS tracking device in the car would lead to evidence of a burglary and to the location where "fruits" of burglaries are being stored (Pet-Ap. 97).

Schiltz described how the GPS device would work (Pet-Ap. 97-98), and asked for authorization to do GPS surveillance not to exceed sixty days (Pet-Ap. 99).

Judicial authorization for installation of the GPS device.

Walworth County Circuit Court Judge Carlson issued a court order October 5, 2007, authorizing installation of the GPS device. He found there was "probable cause to believe" that installation of the GPS device in the described Pontiac "is relevant to an on-going criminal investigation" and that this car is "being or [has] been used in the commission of the crime of burglary" (12:Exhibit 5-1; Pet-Ap. 90-91). After so finding, Judge Carlson authorized police to install the GPS tracking device on the car, to enter the car and any buildings where the car is stored, or any premises on which the car is located, to install the device and maintain surveillance of the car. He specifically authorized police to enter private property to install the GPS device, to use keys to enter and move the car, and to enter the car's engine compartment and trunk to install the device. The authorization for the surveillance was not to exceed sixty days unless extended by court order (*id.*).

ARGUMENT

I. BRERETON LACKS STANDING TO CHALLENGE THE SEIZURE AND SEARCH OF THE PONTIAC THAT WAS REGISTERED TO A WOMAN IN CLINTON, WISCONSIN, AND DISPLAYED EXPIRED LICENSE PLATES FOR A DIFFERENT PONTIAC REGISTERED TO A MAN IN BELVEDERE, ILLINOIS.

A. The standard for review of a Fourth Amendment challenge.

The following standard for review applies to this and all of the Fourth Amendment issues raised on this appeal.

The issue whether police violated the constitutional protection against unreasonable searches and seizures is one of constitutional fact subject to independent appellate review. In making that determination, the appellate court independently reviews the legality of the search or seizure based on the trial court's not clearly erroneous findings of fact. *State v. Sveum,* 2010 WI 92, 328 Wis. 2d 369, ¶ 16, 787 N.W.2d 317, *cert. denied*, __ U.S. __, 131 S. Ct. 803 (2010); *State v. Carroll*, 2010 WI 8, ¶ 17, 322 Wis. 2d 299, 778 N.W.2d 1; *State v. Popke*, 2009 WI 37, ¶ 10, 317 Wis. 2d 118, 765 N.W.2d 569; *State v. Bruski*, 2007 WI 25, ¶ 19, 299 Wis. 2d 177, 727 N.W.2d 503.

B. The requirement that a defendant prove standing to bring a Fourth Amendment challenge.

Brereton bears the burden of proving that his Fourth Amendment rights were violated. *State v. Bruski*, 299 Wis. 2d 177, ¶ 20. Brereton must prove by a

preponderance of the evidence that he had a legitimate expectation of privacy in the Pontiac. This is otherwise known as "standing" to challenge the legality of the seizure and search under the Fourth Amendment. A legitimate expectation of privacy is an expectation of privacy that society is prepared to recognize as reasonable. *State v. Duchow*, 2008 WI 57, ¶ 20, 310 Wis. 2d 1, 749 N.W.2d 913; *State v. Bruski*, 299 Wis. 2d 177, ¶¶ 22-23; *State v. Neitzel*, 2008 WI App 143, ¶ 12, 314 Wis. 2d 209, 758 N.W.2d 159; *State v. Fox*, 2008 WI App 136, ¶ 10, 314 Wis. 2d 84, 758 N.W.2d 790. *See State v. Carroll*, 322 Wis. 2d 299, ¶ 27.

There are two issues to be addressed in determining whether Brereton had a reasonable expectation of privacy in the Pontiac: (1) Did Brereton show he had an actual, subjective expectation of privacy in the car; and (2) Is society willing to recognize that expectation of privacy as a reasonable one. *State v. Neitzel*, 314 Wis. 2d 209, ¶ 12; *State v. Fox*, 314 Wis. 2d 84, ¶ 16.

To resolve the question of standing to challenge a search or seizure, the reviewing court looks to the totality of the circumstances. *State v. Duchow*, 310 Wis. 2d 1, ¶ 21. In evaluating the totality of the circumstances, the court looks to a number of factors including: whether the person had a property interest; whether he was lawfully on the premises; whether he had complete dominion and control and the right to exclude others; whether he took precautions customarily taken by those who seek privacy; whether the person put the property to some private use; and whether the claim of privacy is consistent with historical notions of privacy. *State v. Bruski*, 299 Wis. 2d 177, ¶ 24; *State v. Neitzel*, 314 Wis. 2d 209, ¶ 15. In short, Brereton must prove his *personal* rights—not the rights of a third party—were violated. *See generally Rakas v. Illinois*, 439 U.S. 128, 133-34, 140 (1978).

C. Brereton did not have a legitimate expectation of privacy in a car that was registered to someone else with expired license plates for another car registered to yet another person.

In *United States v. Jones*, 132 S. Ct. 945, the Court held that the warrantless attachment of a GPS device to the undercarriage of a suspect's vehicle for the purpose of tracking its movements on public roads was a Fourth Amendment "search" because it involved a technical "trespass" on the vehicle. 132 S. Ct. at 949.[5] "The Government physically occupied private property for the purpose of obtaining information." *Id.* at 949. *Also see id.* at 950 n.3.

There was a technical trespass, the Court held, because a car is deemed to be a personal "effect" subject to Fourth Amendment protection from unreasonable searches and seizures. "It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. *United States v. Chadwick,* 433 U.S. 1, 12, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977)." *Id.* at 949.

Only when there is no such trespass does the *Katz* "reasonable expectation of privacy" test still control. "Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." *Id.* at 953. As Justice Alito stated in his opinion concurring in the judgment: "By contrast, if long-term monitoring can be accomplished without committing

[5]Having concluded that there was a "search" due to the technical trespass, the majority did not reach the separate question whether the suspect had a reasonable expectation of privacy – the test adopted by the Court in *Katz v. United States,* 389 U.S. 347 (1967) - in the undercarriage of the car to which the GPS device was attached or in the subsequent movement of the car on public roads. *Jones,* 132 S. Ct. at 949-54.

a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the Court's theory would provide no protection." *Id.* at 961 (Alito, J., concurring).

The Court did not address the separate question whether or to what extent the warrantless tracking of a car's movements on public roads, but without a technical trespass, might also violate the Fourth Amendment. *Id.* at 954. *See id.* at 955 (Sotomayor, J., concurring); *id.*, at 962-63 (Alito, J., concurring).

The opinion for the majority, written by Justice Scalia, steered the analysis away from the *Katz* "reasonable expectation of privacy" test in favor of traditional property interests that the framers of the Fourth Amendment sought to protect from government intrusion. "The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *Id.* at 949.

It is now plain after *Jones* that the issue whether police may attach a GPS device to a car is inextricably bound up with an individual's property rights in the car trespassed upon. If the individual has no property interest in that car, *his* right to prevent the government from trespassing upon *his* personal "effects" has not been violated.

As noted above, the only connection Brereton had to the blue 1993 Pontiac Grand Am SE four-door sedan was that he was driving it when stopped by police. His mere status as a non-owner driver is not enough to confer standing. *State v. Bruski*, 299 Wis. 2d 177, ¶ 30 (and cases cited therein). The car was registered to a Sherry Bloyer of Clinton, Wisconsin (12; Pet-Ap. 98-99, 108; 40:38-39, 41, 49; Pet-Ap. 66-67, 69, 77). Brereton had

no connection to her other than that he was driving her car. *See State v. Bruski*, 299 Wis. 2d 177, ¶¶ 6, 25-29 (no standing where defendant was found passed out behind the wheel of a car registered to a Ms. Smith whose daughter he knew only by her first name). Illinois records revealed that the 1993 Pontiac Grand Am's expired license plates were for another Pontiac (a 1996 Coupe) registered to a man in Belvedere, Illinois (12; Pet-Ap. 96). Those plates expired in August of 2007 and were observed by Illinois police on a *Buick* they had previously stopped in which Conaway was a passenger (12; Pet-Ap. 100-01).

Previous police contacts with the Pontiac Grand Am noted two different drivers: Conaway and Miranda McKichon, who lives at 1411 Keeler Avenue in Beloit (34:43). Police had connected this car to Conaway and McKichon at the Keeler Avenue address (34:42-44; Pet-Ap. 101). The Pontiac was indeed observed by the police parked in front of the Keeler Avenue address in Beloit on October 5, 2007, before it drove off and was later stopped by police (34:44; Pet-Ap. 103).

It is true that, as its driver on October 5th, Brereton "possessed" the Pontiac when it was stopped by police. But beyond his association with Conaway, whose own connection with this car is nebulous at best, Brereton had no other connection to the Pontiac. Brereton also had no business driving the car because he did not have a driver's license; he could provide only a Wisconsin identification card when stopped on October 5th (34:47, 58, 62). Further, the address Brereton gave for where he lived was not the Keeler Street address in Beloit where the car was initially found, or the address of Ms. Bloyer in Clinton, but the address of his girlfriend, Leah Frye, at 4208 Northwest River Drive in Janesville (34:60-61, 199-200). There is nothing to indicate that Ms. Frye had any connection to this car.

Brereton had no ownership interest in this car. He had no legal right to operate this or any other car on October 5, 2007, because he did not have a valid driver's

license. Someone illegally attached expired plates for another Pontiac registered to an Illinois man; plates that had previously been illegally attached to a Buick in which Conaway was a passenger. There is nothing to indicate Brereton exercised dominion and control over the car, or had the right to exclude others, including its registered owner (Bloyer). There is nothing to indicate Brereton put the car to private use and took precautions to protect his privacy in the car. His claim of privacy in a car registered to another person with expired plates from another car registered to someone else is inconsistent with historic notions of privacy. It is an expectation of privacy that society is not prepared to recognize as reasonable. *See State v. Bruski*, 299 Wis. 2d 177, ¶¶ 25-30. Brereton's status *vis-a-vis* Ms. Bloyer's Pontiac is no different than the status of Mr. Bruski passed out behind the wheel of Ms. Smith's car. *Id.*

This situation is no different than that of the suspect who drives, and thereby "possesses," a stolen car with stolen plates. The framers of the Fourth Amendment took pains to protect one's personal "effects," to be sure, but those framers would not at that time have reasonably deemed a stolen carriage to be the personal "effect" of the criminal who stole it from its rightful owner. Therefore, Brereton lacked standing to challenge the seizure and search of a car that, yes, he "possessed" but, by all accounts, was not his. *See United States v. Marquez*, 605 F.3d 604, 609 (8th Cir. 2010); *People v. Lacey*, 69 A.D.3d 704, 887 N.Y.S.2d 158, 160-61 (2009) (failure to establish a legitimate expectation of privacy where the evidence, "merely demonstrated that the subject vehicle, which had been identified by multiple eyewitnesses as to make, model, license plate number, and color, as the vehicle used in the commission of a series of burglaries beginning in July 2002, was registered to the defendant's girlfriend as of August 29 or 30, 2002, when the GPS was placed on the vehicle." *Id.* at 160). Because Brereton had no reasonable expectation of privacy in the Pontiac, it follows that he had no reasonable expectation of privacy in the Pontiac's movement on public roads. He, therefore,

had no standing to complain about GPS tracking of its movements.[6]

D. This court should review the question of Brereton's standing even though it was not raised below.

Brereton will likely argue that this court should not consider the issue of his standing because the state did not raise it in the trial court or in the court of appeals. This court could reasonably take that position but, the state contends, it should not do so for the following reasons.

The importance of establishing Brereton's standing to challenge the seizure and search of the Pontiac did not come into sharp focus until the *Jones* decision with its unanticipated emphasis on traditional property rights and the attendant significance of protecting one's personal "effects" from government "trespass." *See United States v. Walker*, 771 F. Supp. 2d 803, 812-13 (W.D. Mich. 2011) (rejecting the argument that attachment of a GPS device, even if a technical "trespass," amounts to a Fourth Amendment violation). It is now of paramount importance after *Jones* to establish what property right or *valid* possessory interest a defendant has in the personal "effect" being searched and/or seized. In this case, it is

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[6]Recent federal district court decisions, both pre- and post-*Jones*, have also held under circumstances similar to those presented here that a defendant lacked standing to challenge GPS tracking of a car to which he lacked sufficient personal connection. *United States v. Luna-Santillanes*, No. 11-20492, 2012 WL 1019601, *6 (E.D. Mich. Mar. 26, 2012); *United States v. Guevara*, No. 8:11CR135, 2012 WL 553356, *4 (D. Neb. Feb. 21, 2012); *United States v. Love*, No. 4:11CR424 HEA, 2012 WL 414287, *1 (E.D. Mo. Feb. 9, 2012); *United States v. Hanna*, No. 11-20678-CR, 2012 WL 279435, *3-5 (S.D. Fla. Jan. 30, 2012); *United States v. Okafor*, No. 11-87(8) (MJD/JJK), 2011 WL 4640883, *2 (D. Minn. Aug. 18, 2011). *See generally*, 6 Wayne R. LaFave, *Search and Seizure*, § 11.3(e) (4th ed. 2004 & Supp. 2011-12).

now necessary to establish that Brereton had some property interest in the Pontiac, and a right to exercise dominion and control over it, beyond his mere driving it without a license and with expired plates when pulled over on October 5th. *See United States v. Hanna*, 2012 WL 279435, *3-5.[7]

Furthermore, this court reviews *de novo* the issue whether the search or seizure violated the Fourth Amendment in light of the not clearly erroneous relevant facts. *State v. Bruski*, 299 Wis. 2d 177, ¶ 19. Because the underlying facts are established that Brereton had no ownership interest in this car, and had no right to even be operating it when it was stopped on October 5, 2007, this court may resolve the constitutional question of Brereton's standing without further development of the facts and without the normally desired input from the lower courts. Moreover, this court is free to affirm on an independent basis not raised or relied upon below. *State v. Alles*, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982); *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985). This court should, therefore, take up and decide the issue of Brereton's standing.[8]

[7]The government in *Jones* did not contest his standing to challenge the attachment of a GPS device to the Jeep registered to his wife and of which he was the "exclusive driver," giving him the status of a "bailee." The Court, therefore, did not address the issue of his standing. 132 S. Ct. at 949 n.2.

[8]If this court believes the record needs further development, it could choose to remand to the trial court for further proceedings.

II. POLICE HAD PROBABLE CAUSE TO SEIZE THE PONTIAC AFTER THE LAWFUL TRAFFIC STOP AND COULD MOVE IT TEMPORARILY TO THE NEARBY IMPOUND LOT TO INSTALL, AS AUTHORIZED BY COURT ORDER, THE GPS DEVICE BEFORE RETURNING THE CAR TO BRERETON AND CONAWAY.

Brereton insists that police violated the Fourth Amendment's prohibition against unreasonable searches and seizures because they seized and moved his car without a warrant and without probable cause. This, he argues, required the suppression of any evidence they seized when the car was stopped on October 9th, and any derivative evidence obtained thereafter.

Brereton's arguments are without merit. Police lawfully stopped the car for traffic violations on October 5th. Police had ample evidence, exceeding the probable cause "fair probability" standard, to seize the car in connection with the recent rash of burglaries involving the Pontiac in Walworth and Rock Counties. Police later lawfully installed the GPS device inside the car at the nearby impound lot where it was towed because they were authorized to do so by judicial order issued on probable cause by a neutral magistrate. This order was of the same type as the order recently approved by this court in *State v. Sveum*, 328 Wis. 2d 369. The GPS technology bore fruit when it located the Pontiac near the scene of another burglary on October 9th. The car was later stopped and evidence of the burglary was found inside.

A. Evidence known before the lawful traffic stop, and obtained during it, gave police probable cause to believe the car was, or would contain, evidence of the recent burglaries.

Brereton did not challenge the legality of the traffic stop in the lower courts. *State v. Brereton*, 337 Wis. 2d 145, ¶ 9.[9] He contends, however, that police lacked

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[9]Brereton now, however, appears to be challenging the traffic stop for the first time in this court. Brereton's brief at 20-21. He contends the VIN information obtained during the traffic stop "was tainted by the illegal seizure of Brereton's vehicle." *Id.* at 21. If Brereton is indeed now challenging the stop, issues of waiver and estoppel aside, his understanding of the law was correct below.

A traffic stop is a "seizure" and, as such, is subject to the Fourth Amendment's reasonableness requirement. A traffic stop is reasonable if police have probable cause to believe a traffic violation has occurred, or grounds to reasonably suspect that a traffic violation is being or will be committed. *State v. Popke*, 317 Wis. 2d 118, ¶¶ 11, 13-14; *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996). *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

Brereton does not dispute that police knew when they stopped the car on October 5th that its license plates were expired, it did not have a rear-view mirror and its muffler was loud. The expired plates and bad muffler justified the traffic stop. *State v. Popke*, 317 Wis. 2d 118, ¶¶ 12-17. *See State v. Gaulrapp*, 207 Wis. 2d at 605 n.3 (traffic stop justified for noisy muffler).

Police conceded that this was a "pretext" traffic stop. While they were justified in executing the stop for reasons such as the expired plates and loud muffler, police were actually motivated to temporarily seize the car to install a GPS device to aid in their ongoing burglary investigation. Brereton did not argue below that it was unlawful for police to execute this "pretext" traffic stop based on the objective justification for it. His concession below was correct.

So long as the traffic stop was objectively reasonable, the officers' actual motivation for it was irrelevant. *Ohio v. Robinette*, (footnote continued)

probable cause to thereafter seize the Pontiac and to move it to the impound lot without a warrant. He believes it was unlawful for police to move his car to the nearby impound lot for the length of time it took to await judicial authorization to install the GPS device, before returning the car to Brereton and Conaway. He insists this all had to be done on the side of busy Highway 51. Brereton is wrong because, armed with probable cause, police could temporarily move the car to a safe location to execute the judicially authorized installation of the GPS device.

To satisfy the probable cause standard for the warrantless seizure of the car, the state had to only prove there was a "fair probability" under the totality of the circumstances that this car was, or that it would contain, evidence of the crime of burglary. *State v. Carroll*, 322 Wis. 2d 299, ¶ 28; *State v. Pallone*, 2000 WI 77, ¶¶ 74-76, 236 Wis. 2d 162, 613 N.W.2d 568. *See State v. Popke*, 317 Wis. 2d 118, ¶ 14 (probable cause exists when information leads a reasonable officer to believe guilt of a traffic violation is more than a possibility).

The traffic stop was reasonably limited in scope to the initial justification for the stop. *State v. Gaulrapp*, 207 Wis. 2d at 606 (citing *Terry v. Ohio*, 392 U.S. 1, 29 (1968)). After checking on the expired Illinois license plates, it was eminently reasonable for police to check the Pontiac's vehicle identification number. When police did so, they learned that the car's VIN did not match the VIN registered for the license plates. Moreover, because neither man had a valid driver's license, someone else would have to take custody of the car and move it from

519 U.S. 33, 38 (1996); *Whren v. United States*, 517 U.S. 806, 813 (1996); *Scott v. United States*, 436 U.S. 128, 138 (1978); *State v. Sykes*, 2005 WI 48, ¶ 29, 279 Wis. 2d 742, 695 N.W.2d 277; *State v. Gaulrapp*, 207 Wis. 2d at 609-10; *State v. Baudhuin*, 141 Wis. 2d 642, 651-52, 416 N.W.2d 60 (1987); *State v. Williams*, 2010 WI App 39, ¶ 26, 323 Wis. 2d 460, 781 N.W.2d 495.

the highway. That is why the two men were taken by police to the nearby "Dollar Store." They had to make arrangements for someone else to pick up the car that neither of them could legally drive.

The traffic stop was objectively reasonable, regardless of the officers' subjective motivation for it, and it was reasonably limited in scope up to and including the point when police learned that the car's VIN number did not match the VIN number registered for the expired plates. The number on the Illinois plates was the same as the license number provided by a citizen-witness who saw the Pontiac near the scene of one of the recent burglaries. This all added up to a "fair probability" that the Pontiac with that Illinois license number was connected to at least one of the recent burglaries.

Brereton contends that police were not permitted to check the VIN number without a warrant, Brereton's brief at 20-21, but does not explain why. He does not explain why it is unreasonable for police to check the VIN number of a lawfully stopped car bearing expired out-of-state plates that are registered to another car.[10]

Brereton insists that the Pontiac's mobility somehow diminished its connection to the recent burglaries but does not elaborate. Brereton's brief at 16. The court of appeals aptly disposed of this argument: "But if the car has been seen at prior similar crimes and has a VIN number that does not match the license plates, mobility becomes less the problem." *State v. Brereton*,

[10]Though he challenges probable cause, Brereton grudgingly acknowledges the "vehicle matched the description of a car witnessed at the scene of a few burglaries," Brereton's brief at 17-18, and the stop "netted individuals of similar description to those that witnesses had seen in the vicinity of various burglaries." *Id.* at 21. Just as 2 + 2 = 4, these two concessions add up to a "fair probability" the Pontiac was used in the burglaries and/or contained evidence of those burglaries.

337 Wis. 2d 145, ¶ 9. It makes sense for a burglar to use a car that cannot be readily traced to him.

Therefore, police had probable cause to stop the Pontiac for the enumerated traffic violations (not disputed by Brereton) and they had probable cause to believe it was, or it contained, evidence of the recent burglaries. This Pontiac, with its two male occupants, was seen in the vicinity of several unsolved burglaries as recently as two and three days before the traffic stop. The expired plates, coupled with the suspicious VIN number, only added to the probable cause police already had when they pulled the car over. The lower courts properly concluded, based on these undisputed facts, that there was a "fair probability" the Pontiac was evidence of the recent burglaries, and/or it would contain evidence of those recent burglaries (proceeds, burglary tools, a list of target homes, or the like), and/or it would soon be on its way to another burglary. This all gave police probable cause to believe, as alleged in Detective Schiltz's affidavit, that by keeping the car under surveillance with GPS technology, investigators would obtain evidence of the recent and future burglaries.

B. Police could lawfully move the car to the impound lot to await judicial authorization to install the GPS device.

Police seized the car for three hours from the initiation of the stop to when it was returned to Highway 51. The Pontiac was stopped at approximately 1:00 p.m. on October 5th (12:Exhibit D-3; Pet-Ap. 104-06). Rather than wait on the side of busy Highway 51 for judicial authorization to install the GPS device there, police wisely decided to have the car towed to the impound lot owned by a private towing service roughly an hour later at 2:05 p.m. (12:Exhibit D-3; Pet-Ap. 106). The trip to the tow lot "just down the road" took one minute (*id.*). The court order signed by Judge Carlson

authorizing installation of the GPS device came through an hour-and-a-half after the car was towed, at 3:35 p.m. (12:Exhibit D-3; Pet-Ap. 108). The GPS installation was completed at 3:56 p.m. (*id.*). The car was then towed back out to where it had been stopped on Highway 51 with the GPS device inside the engine compartment (*id.).*

Armed as they were with probable cause, police were allowed to both seize and search the Pontiac *without a warrant* under the "automobile exception" to the warrant requirement. *United States v. Ross*, 456 U.S. 798, 824-25 (1982); *Carroll v. United States*, 267 U.S. 132, 147-59 (1925); *State v. Matejka*, 2001 WI 5, ¶¶ 19, 22-27, 241 Wis. 2d 52, 621 N.W.2d 891; *State v. Pallone*, 236 Wis. 2d 162, ¶¶ 30, 58, 64-71. *See Arizona v. Gant*, 556 U.S. 332, 347 (2009) ("*Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader"); *State v. Miller*, 2002 WI App 150, ¶ 15, 256 Wis. 2d 80, 647 N.W.2d 348 (the probable cause police had to search the vehicle for controlled substances gave them probable cause to search the purse found therein without a warrant). Therefore, police were authorized to seize the car, move it the short distance to the impound lot, and search it without a warrant on probable cause to believe the car was, or it contained, evidence of the crime of burglary. Instead, they moved the car without a warrant based on probable cause, but waited to search it (install the GPS device) until they got a warrant.

Although police could have waited for authorization to install the GPS on the side of the busy highway, they wisely moved the car the short distance to the safety of the impound lot and only long enough to obtain judicial authorization to install the GPS device. When the warrant came through, police entered the passenger compartment only to release the hood, and entered the engine compartment only to install the GPS device. They then returned the car to Brereton and Conaway.

The seizure of the car for those three hours was reasonable and necessary to execute the traffic stop, move the car, request and obtain judicial authorization, install the GPS device and return the car. These actions by police were eminently reasonable in both scope and duration. *See State v. Quartana*, 213 Wis. 2d 440, 446-51, 570 N.W.2d 618 (Ct. App. 1997) (permitting police to move a suspect some distance when reasonably necessary to continue an investigation though they only had reasonable suspicion); *State v. Wilkens*, 159 Wis. 2d 618, 628, 465 N.W.2d 206 (Ct. App. 1990) (detention of a suspect for "an hour to an hour and twenty minutes did not ripen into an illegal arrest" because police were diligently pursuing their criminal investigation at the same time).

Brereton does not explain why it would have been preferable for police to install the GPS device on the busy highway rather than move it to a safer location a minute or so away. Whatever expectation of privacy Brereton had in the Pontiac, *see* "I" above, was lost once police obtained probable cause to believe the car was, and would contain, evidence of the recent burglaries. Brereton's expectation of privacy in the car was not violated merely because police installed the GPS device pursuant to the warrant at the impound lot rather than on the side of the busy highway.

Brereton complains, nonetheless, that police manufactured the need to move the car when they decided to execute the traffic stop on the busy highway. Brereton's brief at 19-20. Brereton conveniently ignores the fact that it was his decision to drive the Pontiac with its loud muffler, missing mirror and expired Illinois plates down Highway 51, and to do so without a driver's license. Brereton did not challenge below the right of police to execute a pretext stop for these undisputed traffic violations, *but see* n.9 above, yet insists police could not decide where to execute that pretext stop. He cites no law that prohibits police from deciding where to execute a valid traffic stop. More to the point, he cites no law that

prohibits police from executing a traffic stop on the road where the violator has chosen to drive.[11]

Police were authorized to take custody of the Pontiac because they had probable cause to believe it was used in the recent rash of burglaries and neither Brereton nor Conaway could drive the car. Even absent probable cause, and if this was nothing more than a routine traffic stop, it was reasonable for police to move the car off the busy highway to a nearby lot for the amount of time it would take for the two men to find someone else to come for the car.

The court of appeals properly held that police could reasonably move the car because they obtained probable cause to believe it was, and might contain, evidence of the recent rash of burglaries.

C. Brereton's substantial rights were not harmed by moving the car without a warrant.

Finally, Brereton fails to explain how his substantial rights were harmed. Wis. Stat. § 968.22. Shortly after the traffic stop, Judge Carlson specifically authorized police to move the Pontiac "for the required time to a concealed location" in order "to accomplish the installation" of the GPS device (12; Pet-Ap. 91). Brereton does not challenge this provision in the warrant. The car would, therefore, have been moved shortly thereafter pursuant to the warrant.

Brereton does not explain how his substantial rights were harmed by the decision of the officers to move the

[11]Police also decided not to install the GPS device when the car was parked in front of the Keeler Street residence because there were too many people around in this residential area who might observe the installation (34:42-44; Pet-Ap. 102). Also, the car eventually drove off from Keeler Street, leading to the traffic stop on Highway 51 (Pet-Ap. 103).

car a little sooner than what the judge later authorized. He fails to explain how his substantial rights would have been furthered by making the officers stand with the car by the side of the busy highway and await authorization to move it rather than immediately move the car the short distance to the impound lot to await judicial authorization to install the GPS device. Brereton does not claim that any incriminating evidence was discovered by police while the car was being moved. He suffered no harm. Wis. Stat. § 968.22. *State v. Sveum*, 328 Wis. 2d 369, ¶¶ 57, 71-72.

III. POLICE DID NOT EXCEED THE SCOPE OF THE COURT ORDER WHEN THEY INSTALLED A "REAL TIME" GPS DEVICE INSTEAD OF ONE THAT STORES TRACKING INFORMATION TO BE LATER DOWNLOADED TO A COMPUTER.

Brereton insists that police exceeded the scope of the warrant in violation of the Fourth Amendment because they used a "real time" GPS device in executing the warrant instead of the GPS device, as described in the warrant application, which records tracking information to be later downloaded to a computer for analysis after the device is removed from the car.

A. The scope of the warrant application and the warrant as issued.

The following is what the search warrant affidavit prepared by Detective Schiltz requested:

> Affiant states that the GPS tracking device, which is covertly placed on a criminal suspect's automobile is equipped with a satellite radio receiver, which, when programmed, periodically records at specified times, the latitude, longitude, date and time of readings and stores these readings

> until they are downloaded to a computer interface unit and overlaid on a computerized mapping program for analysis.
>
> . . . .
>
> Affiant believes the installation of the GPS tracking devices onto the target vehicle and the monitoring thereof will enable law enforcement officers to identify locations and associates currently unknown to law enforcement officers. Furthermore, Affiant believes the installation of the GPS tracking device has been shown to be a successful supplement to visual surveillance of the vehicle. There is an increased inherent risk of detection by suspects when law enforcement personnel use visual surveillance techniques. The GPS tracking device lessens the risk of visual detection by the suspects and is generally considered more reliable since visual surveillance often results in the loss of sight of the target vehicle.

(12; Pet-Ap. 97-98).

The following is what Judge Carlson authorized when he issued the warrant:

> Based on the information provided in the affidavit submitted by Detective Robert Schiltz, the Court finds there is probable cause to believe that the installation of tracking devices on the below-listed vehicle is relevant to an on-going criminal investigation and that the vehicles [sic] are being or have been used in the commission of the crime of burglary . . . . The court hereby orders that:
>
> . . . .
>
> The Walworth County Sheriff's Department . . . [is] authorized to place an electronic tracking device on a 1993 blue Pontiac Grand Am SE 4 door registered to Sherry Bloyer of Clinton, Wisconsin . . . and they are hereby authorized to surreptitiously enter and re-enter the vehicle . . . to install, use, maintain and conduct surveillance and monitoring of the location and movement of the target vehicle in all places within or outside the jurisdiction of Walworth County. . . . .

> It is further ordered that Detective Robert Schiltz, or other law enforcement officers, shall remove the electronic tracking device as soon as practicable after the objectives of the surveillance are accomplished or not later than sixty (60) days from the date this order is signed unless extended by this court or another court of competent jurisdiction.

(12; Pet-Ap. 90-91).[12]

B. The installation and tracking of the "real time" GPS device did not exceed the broad purpose and scope of the warrant.

The purpose of the warrant request, and the judicial authorization given, was for GPS tracking of the car's movements for up to 60 days "in all places within or outside the jurisdiction of Walworth County" to obtain information relevant to the ongoing burglary investigation. The type of GPS device actually used was only a secondary consideration. The warrant essentially allowed for installation of any "electronic tracking device" that would achieve "the objectives of the surveillance." The GPS device used here served that valid investigative purpose to the proverbial "T" and did so 56-days short of the time authorized in the warrant.

> Even if a court determines that a search warrant is constitutionally valid, the manner in which the warrant was executed remains subject to

[12]A comparison of the affidavit submitted by Detective Schiltz and the court order issued by Judge Carlson with the affidavit and order upheld as valid by this court in its *Sveum* decision shows that they are almost identical in factual support, detail and scope. They both satisfy the Fourth Amendment. *Compare* 12:Exhibit 5-1 and Pet-Ap. 90-99 *with* 328 Wis. 2d 369, ¶¶ 39-52. Both were reasonably executed and they substantially complied with the Wisconsin statutes governing search warrants. *Id.* ¶¶ 53-72.

> judicial review. *See State v. Andrews*, 201 Wis.2d 383, 390, 549 N.W.2d 210 (1996). "A search 'must be conducted reasonably and appropriately limited to the scope permitted by the warrant.'" *Id.* (quoting *Petrone*, 161 Wis.2d at 542, 468 N.W.2d 676). "[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by the warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Dalia*, 441 U.S. at 257, 99 S.Ct. 1682.

State v. Sveum, 328 Wis. 2d 369, ¶ 53.

In *Sveum*, the GPS device used was also different than the one described in the search warrant affidavit and was twice replaced during the surveillance period. *State v. Sveum*, 328 Wis. 2d 369, ¶ 6 n.3 and ¶ 8. That did not make a constitutional difference because the warrant was reasonably executed by police in a manner that did not exceed its scope. *See id.* ¶¶ 53-54, 58-72. The same reasoning applies here. The warrant was reasonably executed by police in a manner consistent with its scope even if the GPS device used, or the manner of its use, was somewhat different than what the warrant authorized. The court of appeals properly so held here. *State v. Brereton*, 337 Wis. 2d 145, ¶¶ 14-15.

The officers reasonably executed this warrant in a manner consistent with its purpose and scope. *See Dalia v. United States*, 441 U.S. 238, 257 (1979). They were authorized by the warrant to install a GPS device in the car and they did precisely that. The GPS device used accomplished the same purpose, albeit more efficiently, as would the GPS device described in the warrant application: it tracked the Pontiac's movement and showed that it was parked near the scene of the October 9th burglary. "[W]e see no reason to find that police overstepped their bounds simply because they were able to monitor the movements in real time rather than needing to continually return to the car, remove the device, and

download its information to a computer." *State v. Brereton*, 337 Wis. 2d 145, ¶ 15.

The court of appeals also properly so held in its decision in *Sveum*: "It is not rational to limit the admission of tracking information based on whether it is obtained in real time by a signal or at a later time by direct access to the device." *State v. Sveum*, 319 Wis. 2d 498, ¶ 30.

The constitutional reality remains, even after *Jones* and as the court of appeals held in *Sveum*, that absent an initial trespass police could have tracked the Pontiac's movements on public thoroughfares *even without a warrant* whether that be with their eyes, a beeper, "On-Star," a GPS device, or a "more sophisticated" GPS device because they had probable cause and Brereton had no *reasonable* expectation of privacy in the car's movements on public roads. *State v. Sveum*, 319 Wis. 2d 498, ¶¶ 11, 19. *See United States v. Knotts*, 460 U.S. 276, 281 (1983). Police should not be penalized because their ability to investigate what an individual exposes to public observation is technologically better now than it was one week, one year or one hundred years ago. "Of course the amendment cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth. *United States v. Knotts, supra*, 460 U.S. at 283-84, 103 S.Ct. 1081." *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir.), *cert. denied*, 552 U.S. 883 (2007).

Here, police obtained a warrant to install a GPS device and maintain electronic surveillance on the car for 60 days. The device they actually used, while technically less clunky than the device mentioned in the affidavit, better served the warrant's purpose. After all, the idea was to augment visual surveillance of the car's movements. Visual surveillance is done in "real time." A "real time" GPS tracking device will augment visual surveillance better than one that has to be repeatedly retrieved and its recorded tracking information downloaded to a computer

for analysis some time later on. Moreover, police needed to "trespass" on the Pontiac only twice in the 60-day period: once to install and once to remove the "real time" device. Conversely, police might have to "trespass" on the car a number of times to retrieve the recorded information from and to surreptitiously reinstall the GPS device that Brereton claims is less intrusive on his rights. *See United States v. Cuevas-Perez*, 640 F.3d 272, 275 (7th Cir. 2011), *vacated and remanded for further consideration in light of United States v. Jones*, 132 S. Ct. 1534; *United States v. Walker*, 771 F. Supp. 2d at 811; *Foltz v. Commonwealth*, 698 S.E.2d 281, 289-90 (Va. Ct. App. 2010). *Also see* Justin P. Webb, Note, *Car-ving Out Notions of Privacy: The Impact of GPS Tracking and Why Maynard is a Move in the Right Direction*, 95 Marq. L. Rev. 751, 776 (Winter 2011-12).

Brereton complains, however, that the "real time" device is so efficient it conveys more than his location; it conveys a "mosaic" of his activities over time. Brereton's brief at 29-33. *See* Webb, 95 Marq. L. Rev. at 784. Maybe so, but the warrant authorized police to compose such a "mosaic" with the aid of GPS tracking because they provided Judge Carlson with probable cause to believe one significant component of that "mosaic" would be Brereton's commission of burglaries using the Pontiac. This is in sharp contrast to the cases relied on by Brereton, including *Jones*, where police created the "mosaic" after weeks of surveillance *without a warrant and without probable cause*, and after trespassing onto a vehicle *without a warrant and without probable cause* by attaching the GPS device that enabled them to create the mosaic. *See State v. Zahn*, No. 25584, 2012 WL 862707, at *8, ¶¶ 31-32 (S.D. 2012) (police must obtain a warrant

to attach and track a GPS device to monitor an individual's activities over an extended period of time).[13]

C. Brereton's substantial rights were not violated if the "real time" device exceeded the scope of the warrant.

Finally, if the execution of the search technically exceeded the scope of what Judge Carlson authorized, suppression is not permitted because Brereton's substantial rights were not violated. Wis. Stat. § 968.22. *State v. Sveum,* 328 Wis. 2d 369, ¶¶ 57, 71-72. The result would have been the same regardless of the type of GPS technology used. Whether the tracking information was obtained "real time" or after being later downloaded from a computer, police would have learned that the Pontiac was at the scene of the rural Rock County burglary on October 9th, providing police with the same probable cause to arrest Brereton and to seize and search the Pontiac as the "real time" device had provided. Brereton would still have been charged and, in all likelihood, would still have pled guilty to burglary.

[13]The hypothetical examples at pp. 34-37 of Brereton's brief are inapt. The information gathered by the GPS device here did not exceed the scope of what the warrant authorized police to gather. And even if it did, contrary to the argument at pp. 47-48 of Brereton's brief, a court is to suppress only that evidence seized in excess of the warrant's scope; it is not to suppress evidence seized, as here, within the warrant's scope. *State v. Noll,* 116 Wis. 2d 443, 454-55, 343 N.W.2d 391 (1984); *State v. Sveum,* 319 Wis. 2d 498, ¶ 18.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the decision of the court of appeals be AFFIRMED.

Dated at Madison, Wisconsin this 30th day of May, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,146 words.

Dated this 30th day of May, 2012.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of May, 2012.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2010AP001366 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

JAMES G. BRERETON,
Defendant-Appellant-Petitioner.

ON APPEAL FROM THE CORRECTED JUDGMENT OF CONVICTION AND THE ORDER DENYING MOTION TO SUPPRESS EVIDENCE ENTERED BY THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL GIBBS PRESIDING, AND FROM THE COURT OF APPEALS DISTRICT II DECISION AFFIRMING THE JUDGMENT OF CONVICTION AND ORDER ON SUPPRESSION

Walworth County Case No. 2008-CF-411

DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF

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ARGUMENT

Upon review of the State's brief, Brereton offers the following in reply.

I. THE STATE FORFEITED ITS ARGUMENT THAT BRERETON LACKS STANDING TO CHALLENGE THE SEARCH AND SEIZURE IN THE INSTANT CASE.

In its brief to this Court, the State has, for the first time throughout the entire history of this case, argued that Brereton is not entitled to challenge the propriety of the seizure and search that he endured prior to his arrest. (St.'s Br. at 12-19.) It is only now that the State asserts that Brereton has no possessory interest in the vehicle and cannot complain that his Fourth Amendment rights were violated. (*Id.* at 16-18.)

The State did not make that claim at the circuit court, and it did not present it to the Court of Appeals. (*See id.* at 18 ("the state did not raise it in the trial court or in the court of appeals"). Nor was the claim offered in response to Brereton's petition to this Court. The State stayed similarly silent about it when this Court asked for briefing regarding the effect of *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012), on Brereton's petition. Insofar as the State's failed to raise the standing argument at any point in this proceeding until the very last moment, giving Brereton the opportunity to respond to it only

in reply and with a limited record, he believes that "issues of fairness and notice, and judicial economy" favor the conclusion that it has been forfeited. *See State v. Caban*, 210 Wis. 2d 597, 605, 563 N.W.2d 501, 505 (1997).

This Court has recently expressed its displeasure with parties' attempts to assert claims for the first time on appeal. *See State v. Dowdy*, 2012 WI 12, ¶ 5, 338 Wis. 2d 565, 808 N.W.2d 691. Earlier this year, when explaining why it would not reach a defendant's issue that had not been raised below, this Court wrote, "As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal." *Id.* (quoting *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980)). Likewise, in *State v. Caban*, this Court agreed that the defendant had forfeited a never-before-raised claim, writing, "when a party seeks review of an issue that it failed to raise before the circuit court, issues of fairness and notice, and judicial economy are raised." 210 Wis. 2d at 600, 605, 563 N.W.2d at 503, 505.

Brereton argues that what's good for the goose is good for the gander. The State, like the defendants in the aforementioned cases, should be held to the rule that deems forfeited issues raised for the first time on appeal. Treatment of the search and seizure issue below suggests that all parties to the

action believed that Brereton had standing. (*See* R.40:52-56, APP080-APP084 (State makes no mention of lack of standing as ground for denying motion).) Had the State given Brereton notice that it was challenging his standing at or before the motion hearing, he would have been in a better position to flesh out the issue in the record and elicit facts relevant to rebutting the claim. That the State did not provide Brereton with notice of its claim at the trial court so that he could address it at the appropriate evidentiary hearing supports the conclusion that the issue has been forfeited. *See United States v. Emens*, 649 F.2d 653, 656 n.4 (9th Cir. 1980) (deeming forfeited the government's standing argument because although raised in pleadings, not pursued at evidentiary hearing and no factual record made on point).

The State seeks to justify its earlier failure to adduce the standing argument by suggesting that it "did not come into sharp focus until the *Jones* decision with its unanticipated emphasis on traditional property rights and the attendant significance of protecting one's personal 'effects' from government 'trespass.'" (St.'s Br. at 18.) Brereton has two responses to that. First, contrary to the State's assertion, *Jones* did not so change the rules of search and seizure law that the

State's standing argument would have been clear only in its wake. The authority cited by the State is proof of that point. Namely, the State supports its standing argument by citing to cases in its brief that both pre-dated *Jones* and concluded that a defendant lacked standing in a GPS case. (*See, e.g., id.* at 17 (citing *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010), *People v. Lacey*, 66 A.D.3d 704 (N.Y. App. 2009)).) What is more, those cases were decided before the State filed its brief in the Court of Appeals.

Second, even if *Jones* had some groundbreaking effect, the State had an opportunity to earlier assert its standing argument when this Court ordered the parties to brief the effect of *Jones* on Brereton's petition. (Ct.'s Jan. 24, 2012 Order.) Despite having been given the opportunity to espouse the complaint that it now levels against Brereton *before* this Court granted his petition, the State stood mute on the point. It said nothing even though it now asserts cases in support of its position that predated not only this Court's January 24th order, but also briefing to the Court of Appeals. (*See, e.g.,* St.'s Br. at 18 n.6 (collecting cases).) Thus, the State's shot at salving its argument from forfeiture misses the mark because, in spite of *Jones*, the State had ample opportunity to both identify the claim

and present it to a reviewing court. And yet, the State chose not to assert it until the very last moment in its brief to this Court.

At every prior stage in this proceeding, the State could have challenged Brereton's possessory interest in the vehicle. The facts on which the State currently relies to conclude that Brereton lacks standing have been known to it since before the hearing on his motion to suppress. (*See* St.'s Br. at 16 (citing to Preliminary Hr'g Trans.).) Still, until now, the State has never argued that Brereton had no legitimate Fourth Amendment interest in the Pontiac. Instead, the State has consistently asserted that law enforcement's actions did not violate Brereton's Fourth Amendment rights, addressing the issue on its merits and not on the alternate theory it now presents to this Court. (*See* R.40:52-56, APP080-APP84; St.'s COA Br. at 10-18.)

The State's attempt to resolve this case by arguing an issue that was not presented to the trial court or Court of Appeals is akin to the maneuver the Government attempted in *Jones*. *See* 132 S. Ct. at 954. After having concluded that use of the GPS device constituted a search, the Supreme Court refused to reach the government's alternative theory of reversal. *Id.* It explained:

> 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. We consider the argument forfeited.*

Id. (cited authority omitted) (emphasis added). Similarly, in the instant case, the State offers its standing argument as an alternative to its contention that that the search and seizure were valid. Like the *Jones* Court, this Court should similarly "have no occasion to consider [the State's standing] argument. The [State] did not raise it below, and the [Court of Appeals] therefore did not address it." *Id.* Brereton urges this Court to "consider the argument forfeited." *Id.*

Nonetheless, even if this Court chooses to reach the merits of the State's standing claim, Brereton can show—based on the limited record before the Court—that he had a legitimate Fourth Amendment interest in the Pontiac.

II. THE STATE'S STANDING ARGUMENT FAILS ON THE MERITS.

Although the issue of standing was not argued at the circuit court, the facts elicited at the various hearings in the case show that Brereton had a connection to the vehicle that

demonstrates that he was using it with the owner's permission. Thus, he had a reasonable expectation of privacy in it.

Officers "did some investigation and found Mr. Conaway and Mr. Brereton's names associated with" the license plate affixed to the Pontiac. (R.40:38, APP066.) Additionally, the Pontiac had "been observed at locations where - - either where Mr. Brereton or Mr. Conaway had previously been residing or staying." (R.40:10, APP038.) The record shows that Brereton had connections to the residence at which the vehicle was registered. Another vehicle that belonged to Brereton and contained his property was seen parked outside of the residence where the Pontiac was registered. (R.34:219-225.) Law enforcement had witnessed Brereton and Conaway exiting the same residence together and getting into the Pontiac. (R.34:45-48.) Additionally, a search of the residence at which the Pontiac was registered turned up Brereton's property inside. (R.34:220.) Brereton's use of the vehicle further demonstrates his connection to it. On the day of the traffic stop, Brereton was driving the car (R.34:46-47), and he was again driving it on the day of the arrest (R.2:8, APP011). After law enforcement seized the car to install the GPS tracking device, they found his property inside of it. (R.34:219-225, 231-23 (testimony of

detective describing the same items of Brereton's property found, at different times, in both the Pontiac and another vehicle, which included "the Brereton wedding video").) Taken together, all of the aforementioned details demonstrate Brereton connection to the residence of registration and the Pontiac, as well as his repeated use of the vehicle.

The State's reliance on *State v. Bruski*, 2007 WI 25, 299 Wis. 2d 177, 727 N.W.2d 503, to contend Brereton lacked standing is misplaced; for, that case is distinguishable on its facts. *Bruski* involved an individual who apparently had come to possess a vehicle through some nefarious means and had stowed drugs and drug paraphernalia in it thereafter. *See id.* ¶ 16. When the defendant was found passed out in the vehicle, he informed the police that he had no idea how he had gotten into the car. *Id.* ¶ 25. When later the police began to search the car with the owner's permission, the defendant "did nothing to indicate that he expected privacy related to the vehicle." *Id.* In fact, "[h]is only connections to the vehicle were that he passed out in it and claimed to know the owner's daughter," which claim proved unsustainable, given that "did not even know [the owner's] daughter's last name." *Id.* ¶ 27.

Given Brereton's connection to both the residence at which the vehicle was registered and the vehicle itself, as well as his use of the vehicle simultaneously with another individual who lived at that address of registration, the record indicates that Brereton was using the car with permission of the owner. His case is thus distinguishable from *Bruski*, where the defendant had no meaningful connection to the vehicle or its owner whatsoever.

Wisconsin's prior case law has held "that a person who borrows a car and drives it with the owner's permission has an expectation of privacy which society is willing to recognize as reasonable." *State v. Dixon*, 177 Wis. 2d 461, 470, 501 N.W.2d 442, 446 (1993). In support of that holding, *Dixon* cited fifteen cases from different jurisdictions that had reached the same holding. *See id.* at 471-72, 501 N.W.2d at 446-47 (collecting cases). So too should be the holding in the instant case.

The State's newest attempt at scuttling Brereton's Fourth Amendment claim thus fails on its merits. Even if this Court chooses to consider the State's standing argument, Brereton's Fourth Amendment claim can weather the storm given its

mooring in *Dixon*, 177 Wis. 2d at 470, 501 N.W.2d at 446, and the like.[1] He urges this Court to reach the same conclusion.

III. THE SEIZURE OF BRERETON'S VEHICLE WAS UNREASONABLE.

As Brereton noted in his first brief to this Court, searches and seizures "are constitutionally and analytically distinct." *State v. Arias*, 2008 WI 84, ¶ 25, 311 Wis. 2d 358, 752 N.W.2d 748. Seizures involve the deprivation of property in which a person has a possessory interest, *id.*, and it is with the seizure of his car that Brereton is initially concerned. He contends that law enforcement acted unreasonably in the manner with which they interfered with his possessory interest in his vehicle following the valid traffic stop. (*See* Brereton's 1st Br. at 18-20.) The State takes the contrary position. (St's Br. at 21-27.)

As a threshold matter, Brereton must answer the State's misunderstanding with regard to the seizure to which Brereton objects. The State informs this Court that the stop was done

[1] If the record is insufficient for this Court to decide who was the owner of the vehicle or whether Brereton was operating it with the permission thereof, then remand to the circuit court for an evidentiary hearing may be appropriate. However, that outcome adds support to Brereton's earlier contention that the standing claim should be deemed forfeited. *Supra* at 1-6. If this case is remanded for an evidentiary hearing, it will again wind its way through the appellate courts regardless of the victor below, which would waste judicial resources. The case is already before this Court following a published decision, petition for review, and subsequent briefing purposed on aiding this Court in its decision whether to grant review.

with the adequate reasonable suspicion to believe that a traffic violation had occurred and rightly points out that Brereton has never before challenged the propriety of the stop. (*See* St.'s Br. at 21-22.) However, in a lengthy footnote, the State expresses its confusion as to why Brereton is now challenging the stop when he has heretofore not done so. (*Id.* at 21 n.9.) That confusion would be fair if it were true that Brereton is now challenging the stop; for, as Brereton argued above with regard to the State's standing claim, raising new issues for the first time to this Court is disfavored and, generally, disallowed. *See, e.g., Dowdy*, 2012 WI 12, ¶ 5. Nonetheless, as described herein, the State's confusion is of its own making and not important to Brereton's claim; he asks this Court to look past it.

Brereton has never before and does not now contend that law enforcement acted impermissibly in their traffic stop. *See State v. Brereton*, 2011 WI App 127, ¶ 9, ___ Wis. 2d ___, 804 N.W.2d 243 (Court of Appeals explaining, "Brereton does not waste time arguing that he was stopped illegally."). The record is clear that officers identified a traffic violation, which they used as subterfuge to justify the actual purpose behind the stop. As the State has been quick to point out—despite the limited relevance to Brereton's claim—the subjective reasons for the

stop do not matter. *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."). The proper inquiry regarding the traffic stop is an objective one, and there is no question that law enforcement acted appropriately in conducting the initial traffic stop in the instant case based on their perceived traffic violations. *See Florida v. Royer*, 460 U.S. 491, 498 (1983) (noting that person "may not be detained even momentarily without reasonable, *objective grounds*, for doing so").

But it is not the traffic stop of which Brereton complains. It is the subsequent interference with his possessory interest in his personal property with which he takes umbrage. Specifically, he complains about (1) his removal from the scene while (2) law enforcement maintained possession of his vehicle, and then (3) clandestinely towed it to an impound lot (4) prior to obtaining judicial authorization for that purpose and (5) with a clear intent to lie to him should he inquire into car's whereabouts. That interference was not reasonably justified by his car's expired plates, missing mirror, and noisy muffler. To seize the car *after* the stop and interfere with it as they did, law enforcement needed more than just the belief that a traffic

violation had occurred. *See Arizona v. Gant*, 556 U.S. 332, 343-44 (2009) (search incident to traffic stop after occupant removed from scene limited to circumstances in which "it is reasonable to believe evidence relevant to the *crime of arrest* might be found in the vehicle" (emphasis added)).

It is important to note that the seizure of Brereton's car was not simply the holding of private property until a warrant issued to allow law enforcement to search it. *See United States v. Place*, 462 U.S. 696, 701 (1983) (allowing for temporary seizure of personal property on probable cause to await a warrant allowing search). That would be an accurate description of the seizure had law enforcement remained with Brereton and the vehicle at the location of the stop while awaiting judicial authorization to do with the vehicle what they pleased. However, law enforcement's actions far exceeded the mere detainer of Brereton's car until granted permission to tow it. Instead, they took the extraordinary steps of removing Brereton from the scene and then enlisting a private towing company to move his vehicle a significant distance to a private lot—not some secure government property—without judicial authorization. By those actions, law enforcement did more than simply hold onto some bit of seized evidence while awaiting a

warrant: they exercised exclusive dominion and control over private property and manipulated it to their benefit without a warrant authorizing their actions. What is more, they took all those actions knowing that a warrant—which was specifically purposed on eventually allowing them to do what they did—had been applied for, but not granted. (R.40:17-18, APP045-APP046.) As the United States Supreme Court has recognized,

> The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

United States v. Chadwick, 433 U.S. 1, 9 (1977). Given that law enforcement was engaged in ferreting out crime at the time that they seized Brereton's vehicle, the reasonable course would have been to wait until they had a warrant authorizing its seizure before they removed Brereton from the scene and then exerted control over his private property without his permission.

According to the State, law enforcement's actions were reasonable because "police were authorized to seize the car, move it the short distance to the impound lot, and search it without a warrant on probable cause." (St.'s Br. at 25.) Whereas this Court is to consider the totality of the circumstances when ascertaining whether law enforcement acted reasonably in

seizing Brereton's car without a warrant, *State v. Friday*, 147 Wis. 2d 359, 376-77, 434 N.W.2d 85, 92 (1989), what was done with his car following the traffic stop is of significant importance. Insofar as the State has highlighted the "short" distance that the vehicle was towed as a mitigating factor weighing in favor of reasonableness, (St.'s Br. at 24-25), Brereton believes it necessary to clarify what appears to be more confusion on the State's part; this time regarding just how "short" a distance the vehicle was towed.

When reasoning to its conclusion regarding the propriety of the seizure, the State informs this Court that "[t]he trip to the tow lot 'just down the road' took one minute." (*Id.* at 24 (quoting R.12:Exhibit D-3; Pet-Ap. 106).) However, a close read of the police report on which the State bases that assertion demonstrates the inaccuracy of its claim. (*See* R.12; APP105-APP106.) According to the police report, Brereton's car was stopped "along Highway 51 by the Rock County Airport, just south of the City of Janesville." (R.12; APP105.) It was from that location that "the vehicle was towed to Davis Towing Lot . . ., which was just down the road from the [Janesville, Wisconsin] DMV Office." (R.12; APP106.) The Southern Wisconsin Regional Airport in Janesville, Wisconsin, is

approximately seven miles from the Janesville DMV office.[2] While Rock County is admittedly a rural area, it is still a stretch of the phrase to suggest that seven miles is "just down the road." (*See* St.'s Br. at 24.) Furthermore, unless Brereton's vehicle was towed at speeds in excess of 400 miles-per-hour, the trip between the location of the stop and the impound lot certainly took more than the one minute the State believes that it did. (*See id.*) According to an online mapping program, thirteen minutes between the two places is a more reasonable duration for the trip.[3]

Thus, it can hardly be said that the vehicle was towed a short distance about one minute down the road from the stop. The State's argument concerning the reasonableness of the seizure is therefore based on a flawed premise and its conclusion is unsound. Rather than supporting the State's contention, the distance and duration of the tow highlight how significantly law enforcement interfered with Brereton's private property for their purposes. It is the significance of that

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[2] The addresses for both locations can be found at their respective websites. The airport's website is http://www.jvlairport.com. The DMV information can be found at http://www.dot.wisconsin.gov/about/locate/dmv/rock.htm#janesville.

[3] Google Maps estimates the distance between the two addresses to be 7.2 miles with a thirteen-minute duration of travel. Even if the point of origin is moved to be directly on Highway 51 at the midpoint of the airport, the trip is still 6.9 miles and eleven minutes. Either way, it's hard to see how one could describe that trip as just down the road and lasting about a minute.

intrusion and interference—unsupported by a warrant—that makes law enforcement's actions unreasonable.

In response to Brereton's claim that law enforcement created the exigency that led to their claimed need to tow the car to an impound lot, the State attempts to level blame on Brereton. (St.'s Br. at 26-27.) The State explains that Brereton chose to drive his car on Highway 51, and thus he is responsible, not law enforcement, for creating the exigency. (*Id.*) How can an individual who sets out on a trip with no idea that law enforcement plans to seize his car be held responsible for the place that law enforcement elects to stop a car to effectuate that seizure? Officers could have stopped Brereton at any point in their pursuit, but they did not. (*See* R.34:45-46 (vehicle followed into town where it stopped at library prior to its trip down Highway 51).) Instead, they decided to pull him over as he was driving on a busy road.

Brereton had no choice in where he was stopped. By law, he was required to pull over whenever law enforcement directed him to do so. *See* Wis. Stat. § 346.04(2t) (mandating stop upon signal from traffic officer). Law enforcement, on the other hand, had a choice where to conduct the stop. It was thus law enforcement that voluntarily selected the location of the

stop, and it was Brereton who, pursuant to the law, acceded to law enforcement's show of authority. Responsibility for creating the exigency thus lies with law enforcement, not Brereton. The voluntary decision to stop a vehicle on a dangerous, busy road for the purpose of installing a GPS tracking device should preclude law enforcement from later complaining that the vehicle had to be moved to install the GPS device because the road on which it was stopped was dangerous and busy.

The State likewise complains that Brereton has offered no explanation regarding why it would have been preferable for the police to install the GPS device on the busy highway. (St.'s Br. at 26.) That assertion is somewhat surprising, given that Brereton has not once argued that police were required to install the GPS device on the highway. Instead, he has consistently asserted that law enforcement should have waited for the warrant that they had thought it necessary to obtain before interfering with private property. That they did not wait, and instead exerted exclusive control over Brereton's vehicle and manipulated it for their own purposes, further demonstrates the unreasonableness of their actions.

For all those reasons, as well as those set forth in his first brief to this Court, Brereton argues that law enforcement acted

unreasonably, and thus unconstitutionally, when they seized his car. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (seizure based on probable cause that was executed unreasonably can violate Fourth Amendment).

IV. USE OF THE DIFFERENT GPS TRACKING DEVICE WAS AN UNREASONABLE EXECUTION OF THE WARRANT.

Along with his complaint about the unreasonableness of the seizure of his vehicle, Brereton has also argued that law enforcement's subsequent search violated his Fourth Amendment rights. To Brereton, the use of a more technologically sophisticated GPS tracking device constituted an unreasonable execution of the warrant officers obtained in the instant case. The Fourth Amendment was implicated in that search because the GPS tracking device cataloged his personal history, in which he had a reasonable expectation of privacy.

The State makes three main points in response: (1) regardless of the device that was used, the constitution permits GPS tracking on public thoroughfares (*id.* at 32), (2) *Sveum* decided the issue of differing technological devices against Brereton's position (*id.* at 31), and (3) the warrant entitled law enforcement to install any electronic device so long as it was a

GPS tracking device (St.'s Br. at 30). Brereton offers the following in reply.

A. Society is Willing to Accept as Reasonable Brereton's Expectation of Privacy in his Personal History, Which GPS Tracking Invades.

The State contends that Brereton's call for this Court to recognize as reasonable his expectation of privacy in his personal history is not in keeping with the current "constitutional reality." (St.'s Br. at 32.) To that end, the State argues that "even after *Jones* and as the court of appeals held in *Sveum*, . . . Brereton had no *reasonable* expectation of privacy in the car's movements on public roads." (*Id.* (emphasis in original).) Brereton disagrees. And he is not alone.

Five justices of the United States Supreme Court have likewise reached the contrary conclusion. *See Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., concurring), 964 (Alito, J., concurring) (joined by three other justices). So too have courts in numerous other jurisdictions. (*See* Brereton's 1st Br. at 25 (collecting cases).) The constitutional reality of today is that courts throughout the country have recognized as a qualified assertion *United States v. Knotts*'s statement that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to

another," 460 U.S. 276, 281 (1983). *See, e.g., People v. Weaver*, 909 N.E.2d 1195, 1200 (N.Y. 2009). That proposition has been read as limited to the facts of the case in which it occurred and of little guidance to the realities of 21st century GPS surveillance techniques. *See, e.g., United States v. Maynard*, 615 F.3d 544, 556-57 (D.C. Cir. 2010). In light of the aforementioned authority, the Court of Appeals' reliance on *Knotts* is no longer viable. *See State v. Sveum*, 2009 WI App 81, ¶ 11, 319 Wis. 2d 498, 769 N.W.2d 53 (concluding that use of GPS tracking on public thoroughfares does not implicate Fourth Amendment).

The State's continued assertion of *Knotts* and *Sveum*'s reliance on it as demonstrative of the realities of today's constitutional jurisprudence is in direct conflict with the majority of Supreme Court justices who wrote separately in *Jones* to highlight the obsolete nature of the government's reliance on *Knotts* as an impediment to concluding the defendant's Fourth Amendment rights had been violated. Justice Alito even anticipated and responded to the State's assertion that "the [Fourth] amendment cannot be sensibly read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth." (St.'s Br. at 32 (quoted authority omitted).) He wrote:

> The Court argues—and I agree—that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Ante*, at 950. But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?)

Jones, 132 S. Ct. at 958 (Alito, J., concurring) (cited authority omitted). Brereton thus urges this Court to join the other jurisdictions that have recognized the limited relevance of *Knotts* in GPS cases. From that position, it follows that Brereton had a reasonable expectation of privacy in his personal history and that the GPS monitoring in the instant case invaded it. He asks this Court to reach the same conclusion.

B. The use of a More Intrusive GPS Tracking Device Than Described in the Search Warrant Affidavit was an Unconstitutional Search.

In addition to its position that Brereton had no legitimate expectation of privacy in his movements across public thoroughfares, the State also argues that the difference between the two tracking devices does not make an unconstitutional result. (St.'s Br. at 31.) To that end, the State suggests that *State v. Sveum*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317, is controlling. According to the State, whereas the police in *Sveum* used a GPS tracking device "different than the

one described in the search warrant affidavit" and that variance did not result in a finding of unconstitutionality, the result should be the same in the instant case. (St.'s Br. at 31.) Thus, reasons the State, Brereton's complaint about the different devices used in the instant case has already been decided against him. (*Id.*)

The State's reliance on *Sveum* is inapt. Brereton complains in the instant case that the device that law enforcement actually used was *more* intrusive than the device that was described in the search warrant affidavit. He takes the position that the search was unreasonable and unconstitutional because of the *more* intrusive nature of the device actually used, as opposed to the one that was described to the reviewing magistrate. However, in *Sveum*, the device that was actually used was *less* intrusive than the one described in the affidavit: the police originally informed the court that the GPS device would be affixed to the car's battery; the device actually installed had its own power source and was never attached to the car's battery. *Sveum*, 2010 WI 92, ¶ 6 n.3.

Thus, the difference between the devices in *Sveum* presents the reverse of the situation about which Brereton complains in the instant case. Insofar as it is Brereton's position

that using a device that is more intrusive than the one described in the search warrant affidavit is unconstitutional, *Sveum*'s reasoning is of little assistance to resolving his issue.

This Court should instead look to decisions in which law enforcement's intrusion has been deemed unconstitutional when a less intrusive method was available. *See, e.g., Royer*, 460 U.S. at 500-01, *State v. Davis*, 2011 WI App 74, ¶¶ 14-15, 333 Wis. 2d 490, 798 N.W.2d 902. In such cases, courts have consistently held that the scales tip in favor of the person being searched or seized. *See, e.g., Royer*, 460 U.S. 501. Those conclusions are all based on the balance that must be had between the individual's Fourth Amendment interests and the government's need to intrude. *See, e.g., Davis*, 2011 WI App 74, ¶¶ 14-15. Searches that are more intrusive than a less intrusive alternative are often found unconstitutional because the reasonableness calculus favors the least intrusive search necessary to achieve the government's asserted interests. *See id.*

The parallel in the instant case is that the government informed a neutral magistrate of a less intrusive search that would fulfill its interests—the device described in the affidavit—but nonetheless executed a more intrusive search—the device actually attached. It is that unreasonable execution of

the warrant about which Brereton complains, and he asks this Court to conclude that the search was therefore unconstitutional.

C. The Warrant did not Allow Law Enforcement to use Any Electronic Tracking Device.

Finally, Brereton has argued that law enforcement's description of the GPS tracking device in the search warrant affidavit limited the sort of device that could be used in the execution of any warrant issued upon it. He made that contention because of his concern that unless the allowable device was so limited, a warrant like the one in the instant case would grant blanket authority to law enforcement to utilize any type of electronic device, so long as it also included a GPS tracking component.

In response, the State suggests that "[t]he warrant essentially allowed for installation of *any* 'electronic tracking device' that would achieve 'the objectives of the surveillance.'" (St.'s Br. at 30 (emphasis added).) In other words, the State has taken the position that Brereton argued directly against. (*Id.*) And yet, the State has done little to explain why a more intrusive search should be allowed under a warrant that was issued based on law enforcement's representation that a limited search would be conducted. (*See id.* at 30-33.)

Following the State's position through to its logical conclusion leads to absurd results. Officers in the instant case would have been justified in using a GPS device that not only tracked Brereton, but also recorded his conversations while inside the vehicle. (*See id.* at 30.) That electronic device would thus do more than just track Brereton, and its additional capacities would result in a more intrusive search than the one authorized by the warrant. But, at the same time, the device would have "achieve[d] 'the objectives of the surveillance,'" and thus would pass the State's test for constitutionality. (*Id.*)

If law enforcement is not limited to using a device of the same technological capabilities as the one that it describes to the reviewing magistrate, then why should it be required to obtain a warrant in the first place? A search with a more intrusive electronic device should not be allowed to pass constitutional muster simply because one, but not all, of its capabilities were described in the search warrant affidavit.

The State admits in its brief that the GPS device used in the instant case was more intrusive than the device described in the search warrant affidavit. (*Id.* at 32.) As the State explains, the real time GPS tracking device was able to augment the officers' senses in a way that was unavailable to them with the device

that they described in the affidavit. (*Id.*) The State seeks to defend the device actually used by saying that it "better served the warrant's purpose." (*Id.*) That very well may be, but the same argument could be made for a GPS tracking device with an attached listening device. And yet, as described above, that device would have unquestionably been more intrusive than the one described in the affidavit.

As Brereton described in his first brief, use of a more sophisticated device resulted in the collection of evidence that otherwise would have been unavailable to law enforcement with the device described in the warrant affidavit. Access to that additional evidence demonstrates the more intrusive nature of the search than the one that had been described to the reviewing magistrate. The execution of the warrant was thus unreasonable. Brereton asks this Court to reach the same conclusion.

CONCLUSION

For the aforementioned reasons and those offered in his first brief to this Court, Brereton respectfully requests that this Court hold that his Fourth Amendment rights were violated. He asks that this Court remand his case to the circuit court for proceedings consistent with that holding.

Dated this 27th day of June, 2012.

Matthew S. Pinix
Attorney for the Defendant-Appellant-Petitioner

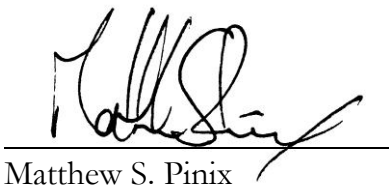
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. I further certify that the length of this brief conforms to this Court's June 8, 2012, Order, and is 5,999 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 27th day of June, 2012.



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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Defendant-Appellant-Petitioner's Reply Brief will be deposited in the United States mail for delivery to the Clerk of the Supreme Court, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on June 27, 2012. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 27th day of June, 2012.

Matthew S. Pinix
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