
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

UNITED STATES,

Petitioner,

v.

RACHEL VARGO,

Respondent.

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR THE RESPONDENT

September 18, 2011

Rudy Burshnic and Steven Harkins

Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether the use of a GPS tracking device without a timely warrant constituted a search within the meaning of the Fourth Amendment.
- II. Whether the government violated Respondent's Fourth Amendment rights by attaching the GPS tracking device to her vehicle with an expired warrant and without her consent.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Use of the GPS Tracking Device Without a Timely Warrant Was a Search Under the Fourth Amendment	3
A. <i>Knotts</i> Is Not Controlling.....	3
B. The Information Obtained from Prolonged GPS Tracking Violates an Individual’s Reasonable Expectation of Privacy	6
1. Vargo’s Locations Were Not Exposed to the Public	6
i. Vargo’s Locations Were Not Actually Exposed.....	6
ii. Vargo’s Locations Were Not Constructively Exposed.....	7
iii. Vargo’s Privacy Expectations Are Reasonable	8
2. Information Obtained by a Warrantless Search Is Inadmissible.....	8
II. Attaching a GPS to Vargo’s Jeep Was an Unlawful Seizure, and All Evidence Obtained by It Is Inadmissible	9
A. Vargo Has a Recognized Fourth Amendment Interest in Her Automobile	9
B. Attaching a Tracking Device to Vargo’s Automobile Without a Warrant or Vargo’s Consent Violates the Fourth Amendment.....	10
1. Installation of the Tracking Device Is a Fourth Amendment Seizure	11
2. The Location Information Obtained Is Inadmissible	12

CONCLUSION.....	13
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TABLE OF AUTHORITIES

Cases:	Pages:
<i>Alderman v. United States</i> , 394 U.S. 165 (1969)	13
<i>Chapman v. United States</i> , 365 U.S. 610 (1961)	11
<i>Johnson v. United States</i> , 333 U.S. 10 (1948)	11
<i>Jones v. United States</i> , 362 U.S. 257 (1960)	10
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	2, 6, 8, 9
<i>Michigan v. DeFillippo</i> , 443 U.S. 31 (1979)	12
<i>Oliver v. United States</i> , 466 U.S. 170 (1984)	2, 9
<i>People v. Weaver</i> , 909 N.E.2d 1195 (N.Y. 2009)	3, 4, 5, 8
<i>Silverman v. United States</i> , 365 U.S. 505 (1961)	9
<i>Soldal v. Cook Cnty., Ill.</i> , 506 U.S. 56 (1992)	9, 11, 12
<i>United States v. Butts</i> , 729 F.2d 1514 (1984)	11
<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	3, 12
<i>United States v. Garcia</i> , 474 F.3d 994 (7th Cir. 2007)	2, 10, 11
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984)	11

<i>United States v. Jones</i> , 451 F. Supp. 2d 71 (D.D.C. 2006)	11
<i>United States v. Karo</i> , 468 U.S. 705 (1984)	10, 11
<i>United States v. Knotts</i> , 460 U.S. 276 (1983)	3, 4, 5, 10, 11
<i>United States v. Leon</i> , 468 U.S. 897 (1984)	13
<i>United States v. McIver</i> , 186 F.3d 1119 (9th Cir. 1999)	12
<i>United States v. Pineda-Moreno</i> , 591 F.3d 1212 (9th Cir. 2010)	11
<i>United States v. Ventresca</i> , 380 U.S. 102 (1965)	10
<i>Vargo v. United States</i> , 200 F.3d 1 (12th Cir. 2010)	5, 7, 8, 11, 12
Constitution:	
U.S. Const. amend. IV	2, 6, 8
Miscellaneous:	
Renée McDonald Hutchins, <i>Tied Up in Knotts? GPS Technology and the Fourth Amendment</i> , 55 UCLA L. Rev. 409 (2007)	4
Notes, <i>The Fourth Amendment's Third Way</i> , 120 Harv. L. Rev. 1627 (2007)	8

STATEMENT OF THE CASE

In 2004, Rachel Vargo drew the attention of law enforcement looking into possible narcotics violations. Agents from the Federal Bureau of Investigation obtained a warrant authorizing the installation of a global positioning system (GPS) device on Vargo's Jeep Grand Cherokee. The warrant required the agents to install the device within 10 days. Eleven days later, Agent Hannapel found Vargo's Jeep on a public street in Lexington and installed the GPS despite her then-invalid warrant. Through this warrantless installation the government was able to track the movement of Vargo's car for a total of 28 days. The GPS device provided location information accurate within 50 to 100 feet whenever the Jeep was in motion.

The government used this information to obtain search warrants for Vargo's Jeep and for a house in Sydney Lewis, Lexington. Based on evidence obtained during these searches, a federal grand jury charged Vargo with conspiring to distribute narcotics.

Before trial, Vargo moved to suppress the data obtained from the GPS tracking device. Relying on this Court's holding in *United States v. Knotts*, the district court denied her motion. At trial in October of 2006, the government relied solely on the information derived from the GPS. A jury found Vargo guilty. Vargo appealed to the United States Court of Appeals for the Twelfth Circuit on November 1, 2009. On August 2, 2010, the Twelfth Circuit overturned Vargo's conviction, holding that the use of the GPS evidence violated Vargo's Fourth Amendment rights. The Government now appeals to this Court.

SUMMARY OF THE ARGUMENT

The Fourth Amendment protects Vargo “against unreasonable searches and seizures.” U.S. Const. amend. IV. A search or seizure has occurred only if the government has violated Vargo’s “reasonable expectation of privacy.” *United States v. Katz*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Contrary to the position of the district court, *Knotts* cannot control this case because it could not and did not contemplate the extensive tracking GPS technology is now capable of. This Court, with new facts before it, must discard *Knotts* and analyze Vargo’s Fourth Amendment rights through a straightforward application of the *Katz* test for a reasonable expectation of privacy.

Vargo had a reasonable expectation of privacy. Her movements were not actually or constructively exposed to the public. The privacy of this level of location information is an expectation that society recognizes as objectively reasonable. Therefore, the GPS tracking is a Fourth Amendment search and the location information obtained without a valid warrant is inadmissible.

Further, seizure of “effects” without a warrant or consent of the property’s owner violates the Fourth Amendment, and the Supreme Court has consistently recognized that an automobile is an “effect” for Fourth Amendment purposes. *See Oliver v. United States*, 466 U.S. 170, 186 n.2 (1984). Vargo had a property interest in her automobile. The GPS device was attached to her automobile without a valid warrant. “The Supreme Court has created a presumption that a warrant is required, unless infeasible, for a search [or seizure] to be reasonable.” *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007) (Posner, J.). Thus, installation of the GPS device without a warrant violated Vargo’s Fourth Amendment rights.

Precluding the use of facially defective warrants to conduct searches and seizures

will have a dramatic and necessary deterrent effect, and the evidence obtained in this case was a direct result of the constitutional violation. Therefore, the exclusionary rule also requires that this evidence be suppressed. *United States v. Calandra*, 414 U.S. 338, 354 (1974).

ARGUMENT

I. The Use of the GPS Tracking Device Without a Timely Warrant Was a Search Under the Fourth Amendment

A. *Knotts* Is Not Controlling

Petitioner argues that this Court’s decision in *United States v. Knotts*, 460 U.S. 276 (1983) is controlling. *Knotts* held that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” 460 U.S. at 281.

The primary reason *Knotts* does not control this case is because the decision—issued almost 30 years ago—was based on surveillance technology that can only be regarded as primitive when compared to the GPS technology used on Vargo. *See People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009) (“*Knotts* involved the use of what we must now, more than a quarter of a century later, recognize to have been a very primitive tracking device.”). *Knotts* must now be revisited because the introduction of advanced GPS technology has raised new and serious privacy concerns yet to be addressed by this Court.

At issue in *Knotts* was a beeper; “a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver.” *Knotts*, 460 U.S. at 277. In stark contrast, government agents tracked Vargo’s Jeep with the latest GPS technology, monitoring her movements via orbital satellites that established her position within 50 to 100

feet. The beeper in *Knotts*, on the other hand, was far from that precise. “Beepers do not determine with any great degree of accuracy where a tracked subject is located. Rather, they enable agents to discern when the beeper is nearby.” Renée McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. Rev. 409, 435 (2007) (analyzing the beeper technology in *Knotts*).

The *Knotts* Court specifically did not decide whether a warrant is required for GPS tracking capable of 24-hour surveillance. Indeed, “if such dragnet type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” *Knotts*, 460 U.S. at 284. That time is now.

Knotts relied heavily on the fact that the beeper did not vastly improve upon what police could do *without* the technology: “Visual surveillance from public places along Petschen’s route or adjoining Knotts’ premises would have sufficed to reveal all of these facts to the police.” *Id.* at 282. No doubt this was because the Court was aware that for the beeper to work the police must also physically follow the device. “[E]ffective use of a beeper requires law enforcement’s presence in the vicinity, for the signal emitted by the beeper is neither sufficiently strong nor sufficiently precise to permit truly remote tracking.” Hutchins, *supra*, at 435 (noting the beeper technology in *Knotts*).

The *Knotts* Court noted that “[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.” *Knotts*, 460 U.S. at 282. *See also Weaver*, 909 N.E.2d at 1199 (“[T]he beeper was fairly described by the Court as having functioned merely as an enhancing adjunct to the surveilling officers’ senses; the officers actively followed the vehicle and used the beeper as a means of maintaining and regaining actual visual contact

with it.”).

The government’s GPS technology no longer simply “augments” the human sensory capabilities—GPS technology allows law enforcement to track a person’s every move by simply attaching a small device to the underside of a vehicle. In *People v. Weaver*, the New York Court of Appeals recognized this difference when it held the use of warrantless GPS to be an illegal search under the state’s constitution:

GPS is not a mere enhancement of human sensory capacity [A]ny object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or “seeing” by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp.

909 N.E.2d 1195, 1199 (N.Y. 2009). Vargo could not have been monitored by a beeper with the same ease she was tracked with GPS. The beeper in *Knotts* was used to observe a single cross-state trip; the GPS tracked Vargo for 28 days, 24 hours a day. *Knotts* did not decide, indeed it specifically refused to decide, whether this amplified surveillance violated the Fourth Amendment. *Knotts* “explicitly distinguished between the limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case.” *Vargo v. United States*, 200 F.3d 1, 2 (12th Cir. 2010).

Knotts cannot control this case because it did not consider the privacy issues that accompany the extensive tracking GPS technology is now capable of. This Court, with new facts before it, must discard *Knotts* and analyze Vargo’s Fourth Amendment rights through a straightforward application of the *Katz* test for a reasonable expectation of privacy.

B. The Information Obtained from Prolonged GPS Tracking Violates Vargo’s Reasonable Expectation of Privacy

The Fourth Amendment protects Vargo “against unreasonable searches and seizures.” U.S. Const. amend. IV. A search or seizure has occurred only if the government has violated Vargo’s “reasonable expectation of privacy.” *United States v. Katz* 389 U.S. 347, 360 (1967) (Harlan, J., concurring). If Vargo did not have a reasonable expectation of privacy, then there was no Fourth Amendment search.

Whether a reasonable expectation of privacy exists depends on this Court’s test in *Katz*, as stated by Justice Harlan in his concurrence: “[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring).

1. Vargo’s Locations Were Not Exposed to the Public

Whether Vargo’s expectation of privacy is reasonable depends, in part, on whether her movements were “exposed to the public.” *Id.* at 351. This analysis requires inquiry into whether Vargo’s movements were “actually” or “constructively” exposed to the public.

i. Vargo’s Locations Were Not Actually Exposed

If Vargo’s actions and locations were “actually” exposed to the public, she could not argue that she had a reasonable expectation of privacy. *See id.* at 352 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”) (citations omitted).

Whether Vargo’s actions were exposed to the public depends on her subjective

expectation of what an observer might actually see. *See Vargo v. United States*, 200 F.3d 1, 3 (12th Cir. 2010). Certain movements by Vargo were visible to onlookers, this much is obvious. But there is little to no chance that a stranger would observe the body of her movements over a 28-day period. *See id.* (“[T]he likelihood a stranger would observe all [of Vargo’s] movements is not just remote, it is essentially nil.”).

ii. Vargo’s Locations Were Not Constructively Exposed

Petitioner may argue that because Vargo’s individual movements were in public view, that, as a whole, they were constructively exposed to the public. This argument fails to recognize that “the whole reveals far more than the individual movements it comprises.” *Id.* at 4. A simple example: *A* travels to his local bar at five pm every day for 28 days. *A* imbibes. *A* is seen by a different observer every day for 28 days doing the same. What each observer sees on his own is rather innocuous—*A* is simply enjoying a few drinks. If the observers merge what they see a very different story emerges—*A* is a bar fly who cannot go a day without a cocktail. Thus, just because Vargo’s movements were observable in isolation to members of the public it does not follow that her movements as a whole were exposed to the public. The two are very different things. *See Vargo v. United States*, 200 F.3d 1, 4 (12th Cir. 2010) (“Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly and what he does not do.”).

iii. Vargo’s Privacy Expectations Are Reasonable

The *Katz* test requires that Vargo’s expectation also “be one that society is prepared to recognize as ‘reasonable.’” *Katz*, 389 U.S. at 361. There is nothing unreasonable about Vargo’s expectation that her every movement over the course of 28 days is not being recorded by government authorities without a valid warrant. Contrary to the view expressed by the Judge

Lester in her circuit court dissent, analyzing the totality of the alleged Fourth Amendment violation is precisely what should be done to determine whether an individual possessed a reasonable expectation of privacy. *See* Notes, *The Fourth Amendment's Third Way*, 120 Harv. L. Rev. 1627, 1634–36 (2007) (describing *Katz*'s “totality of the circumstances” approach and noting that the benefit of the test is its ability to “incorporate[e] social norms and thus to protect privacy in a changing, modern world”). *Contra Vargo*, 200 F.3d at 7–8. The fact that this tracking information, when looked at as a whole, violates Vargo's reasonable expectation of privacy exposes the limited value of *Knotts*, not the illegitimacy of the Twelfth Circuit's reasoning.

When Vargo stepped into her vehicle that day she did not “effectively consent to the unsupervised disclosure to law enforcement authorities of all that GPS technology can and will reveal.” *People v. Weaver*, 909 N.E.2d 1195, 1200 (N.Y. 2009). Our society would presumably agree. The information obtained therefore violated Vargo's expectation of privacy that society recognizes as objectively reasonable.

2. Information Obtained by a Warrantless Search Is Inadmissible

For the above reasons, the evidence against Vargo was obtained in violation of the Fourth Amendment and is thus inadmissible.

II. Attaching the GPS to Vargo's Jeep Was an Unlawful Seizure, and All Evidence Obtained by It Is Inadmissible

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV.

In the landmark case of *Katz v. United States*, 389 U.S. 347 (1967), the Court noted that the Fourth Amendment protects more than just property, but the Court has never retreated from

the proposition that the Fourth Amendment also protects property interests. *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 64 (1992); *Katz*, 389 U.S. at 352–53. “Unauthorized physical encroachment within a constitutionally protected area,” though not the exclusive measure of a Fourth Amendment claim, is still sufficient to establish a constitutional violation. *Silverman v. United States*, 365 U.S. 505, 510 (1961). *Katz* did not eliminate this test, but rather expanded on it in Justice Harlan’s famous two-prong test: (1) whether the individual claiming the right exhibited a subjective expectation of privacy; and (2) whether the expectation of privacy is one society views as objectively reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). *Katz* clarified that physical boundaries were not the definitive measure of protected Fourth Amendment space, but that this test encompasses the *Silverman* standard because “[u]nauthorized physical encroachment into a constitutionally protected area” violates an objectively reasonable expectation of privacy.

A. Vargo Has a Recognized Fourth Amendment Interest in Her Automobile

Search or seizure of effects without a warrant or consent of the property’s owner violates the Fourth Amendment. The Supreme Court has consistently recognized that an automobile is an “effect” for Fourth Amendment purposes. *See Oliver v. United States*, 466 U.S. 170, 186 n.2 (1984).

This case presents an issue not resolved in this Court’s previous decisions. For example, *Knotts* and *Karo* did not have to grapple with the issue of a defendant’s Fourth Amendment interest in the tracked property itself. In both of those cases the tracking device was installed in a chemical container with the consent of the current owner (the chemical seller), prior to the container being acquired by the defendant. *United States v. Karo*, 468 U.S. 705, 708 (1984); *Knotts*, 460 U.S. 276, 278 (1983). Vargo, on the other hand, was the lawful owner of her

automobile at the time Agent Hannapel installed the GPS tracking device. As the Court stated in *Soldal v. Cook County, Illinois*, 506 U.S. 56, 62 (1992), “our cases unmistakably hold that the [Fourth] Amendment protects property as well as privacy.” An unreasonable search or seizure of respondent’s automobile therefore violates Vargo’s constitutional possessory interest in that property.

B. Attaching a Tracking Device to Vargo’s Automobile Without a Warrant or Vargo’s Consent Violates the Fourth Amendment

Agent Hannapel installed a GPS tracking device on Respondent Vargo’s Jeep Grand Cherokee without a warrant and without Vargo’s consent. This Court has long expressed that the preferred avenue for a search and seizure is a valid warrant. “[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” *United States v. Ventresca*, 380 U.S. 102, 109 (1965) (citing *Jones v. United States*, 362 U.S. 257, 270 (1960)). One prominent jurist has interpreted this line of cases to mean that “[t]he Supreme Court has created a presumption that a warrant is required, unless infeasible, for a search to be reasonable.” *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007) (Posner, J.).

Because the device was installed without a valid warrant, this case should be resolved on the principle that Respondent’s Fourth Amendment rights were violated if the installation amounted to a “search” or “seizure.” *Chapman v. United States*, 365 U.S. 610 (1961); *Johnson v. United States*, 333 U.S. 10 (1948).

1. Installation of the Tracking Device Is a Fourth Amendment Seizure

The government’s attaching the GPS to Vargo’s Jeep was an unconstitutional Fourth Amendment seizure. A “seizure” of property “occurs ‘when there is some meaningful

interference with an individual's possessory interests in that property.” *Soldal*, 506 U.S. at 61 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Fourth Amendment scrutiny applies to seizures regardless of whether a search has taken place within the meaning of the amendment. *Id.* at 68.

In other cases with superficially similar facts, courts did not have cause to address the property seizure issue because the tracked individual did not have a possessory interest in the property the tracking device was attached to. *Karo*, 468 U.S. at 708; *Knotts*, 460 U.S. at 278; *United States v. Butts*, 729 F.2d 1514, 1529–21 (Garwood, J., concurring). Further, in the cases of *United States v. Jones* and *United States v. Pineda-Moreno*, the defendants failed to raise the issue, and the courts declined to address it sua sponte. *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010); *United States v. Jones*, 451 F. Supp. 2d 71 (D.D.C. 2006).

Here, in contrast, Vargo has a possessory interest in her own car, and Vargo has raised this issue with the Court. The most detailed discussion of this issue in the appellate circuits is found in *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007). There, the Seventh Circuit concluded that installation of a tracking device had not seized the defendant's car because “[t]he device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room . . . [or] alter the car's appearance.” *Garcia*, 474 F.3d at 996.

Function, however, is not the only parameter that should be used for analyzing whether there was “some meaningful interference with [her] possessory interest in that property.” *Soldal*, 506 U.S. at 61 (citation omitted). The ability to track respondent's movement via the GPS device effectively converted her automobile into an ankle bracelet. Just as the *Garcia* court took an overly narrow view of what constituted meaningful interference with a possessory interest, ignoring the practical implications of placing location information as broad as that obtained by

GPS tracking of an individual's automobile outside the ambit of the Fourth Amendment is a shortsighted, narrow approach, as recognized by several circuit judges. *Vargo v. United States*, 200 F.3d 1, 6–7 (12th Cir. 2010) (Mackenzie, J., concurring); *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir. 199) (Kleinfeld, J., concurring).

Vargo's possessory interest extends not only to the expectation that the car may be used as she desires, but also that it will not be used in a manner she has not, would not, and was not even given the opportunity to consent to. Just as Vargo is entitled to prohibit the government or anyone else from sitting on her car while it is not in use, she is entitled to prohibit the government from using her car as a tracking device, whether or not this interferes with her physical ability to make use of the car. Installation of the tracking device meaningfully interfered with Vargo's possessory interest in her property and was therefore a "seizure" under the Fourth Amendment.

2. The Location Information Obtained Is Inadmissible

The location information is inadmissible under the exclusionary rule. The exclusionary rule is a judicially created remedy that bars the admission of evidence obtained in violation of Fourth Amendment rights even though the Supreme Court has noted that use of the evidence obtained via an unlawful search or seizure "work[s] no new Fourth Amendment wrong." *United States v. Calandra*, 414 U.S. 338, 354 (1974). To determine whether the exclusionary rule should apply, it is necessary to balance the competing goals of "deter[ri]ng official misconduct and removing inducements to unreasonable invasions of privacy" against "establish[ing] procedures under which criminal defendants are 'acquitted or convicted upon the basis of all the evidence which exposes the truth.'" *United States v. Leon*, 468 U.S. 897, 900–01 (1984) (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)).

In this case, it is undisputed that Agent Hannapel installed the tracking device after the authorizing warrant had expired. There is no evidence that Agent Hannapel was unaware of the warrant's expiration date, and even if this were shown there can be no good-faith reliance on a facially defective warrant. *Cf. Leon*, 468 U.S. at 922–23. The Court's decisions in this area have focused on warrants and statutes that were subsequently defective, not those that were obviously defective at the time of the Fourth Amendment violation. *Id.*; *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Precluding the use of facially defective warrants to conduct searches and seizures will have a dramatic and necessary deterrent effect, and the evidence obtained in this case was a direct result of the constitutional violation. On balance, the deterrent benefit strongly outweighs the evidentiary cost of suppressing the tracking information.

Because the initial seizure violated respondent's Fourth Amendment rights, the location evidence obtained as a direct and proximate result of this violation is not admissible.

CONCLUSION

For the foregoing reasons, Respondent requests that this Honorable Court affirm the decision of the 12th Circuit.

Respectfully submitted,

Rudy Burshnic and Steve Harkins