No. 15-2443

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

DAMIAN PATRICK,
Defendant-Appellant.

On appeal from the United States District Court

for the Eastern District of Wisconsin

Case No. 13-CR-234

Honorable Rudolph T. Randa, United States Judge, Presiding.

APPELLANT'S BRIEF

CHRISTOPHER DONOVAN
PRUHS & DONOVAN, S.C.
757 N. Broadway, Suite 401
Milwaukee, Wisconsin 53202
Phone: (414) 221-1950
Fax: (414) 221-1959

ORAL ARGUMENT REQUESTED

DISCLOSURE STATEMENT

The undersigned, counsel for Defendant-Appellant, furnishes the following list in compliance with Circuit Rule 26.1:

1. The full name of every party or amicus that attorneys represent in the case: Damian Patrick.

2. Said party is not a corporation.

3. The name of all law firms whose partners or associates have appeared for a party in the district court or are expected to appear for the party in the case: Christopher Donovan, Pruhs & Donovan, S.C., 757 N. Broadway, Suite 401, Milwaukee, WI 53202; Joseph Bugni and Anderson Gansner, Federal Defender Services of Wisconsin, 517 E. Wisconsin Ave., Room 182, Milwaukee, WI 53202.

Dated: January 15th, 2016

Christopher Donovan
CHRISTOPHER DONOVAN

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JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Wisconsin originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States, and Fed. R. Crim. P. 18. The underlying indictment in this case charged appellant, Damian Patrick, with one count of possessing a forearm as a felon, in violation of Title 18, United States Code, § 922(g)(1). (CR[1] 1).

This appeal is from a sentence imposed by the district court on June 25th, 2015 and reflected in a written judgment dated June 29th, 2015. The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294, and 18 U.S.C. §§ 3742(a)(1) and (2) and is based on the following particulars:

i. Date of entry of judgment sought to be reviewed: June 29th, 2015 (CR 64; App. 1-6).

ii. Filing date of motion for new trial: N/A

iii. Disposition of motion and date of entry: N/A

iv. Filing date of Notice of Appeal: July 8th, 2015. (CR 66; App. 7).

[1] "CR" is used as an abbreviation for the district court clerk's record of Mr. Patrick's case.

ISSUES PRESENTED

1. Whether, due to the party presentation principle, this Court should assume without deciding that tracking an individual's cell phone is search under the Fourth Amendment and requires the government to obtain a warrant supported by probable cause?
2. Whether the state court order at issue in this case established adequate probable cause to justify tracking Mr. Patrick's cell phone to locate and arrest him? If not, then the fruits of the tracking- the gun located at his feet when he was arrested- must be ordered suppressed.
3. If this Court elects to address the issue on the merits, whether tracking an individual's cell phone is a search under the Fourth Amendment that requires the government to obtain a warrant supported by probable cause?

STATEMENT OF THE CASE AND FACTS

This is a direct appeal of a sentence imposed pursuant to a guilty plea.

Mr. Patrick was charged in an indictment with one count of being a felon in possession of a firearm. (CR 1). He was arrested on October 28th, 2013 after being stopped as a passenger in a vehicle based on a Wisconsin Department of Corrections' warrant for violating terms of his supervision. (CR 47:2; App. 9). As he exited the vehicle, police saw a firearm at his feet on the floor of the vehicle. *See id*. On January 11th, 2014, Mr. Patrick filed a motion by his first attorney to suppress the gun, arguing that information the police received from an anonymous or unknown source was insufficient for the police to stop him and then arrest him. (CR 12:2). A hearing was held on his motion on February 4th, 2014, where it was revealed for the first time that the police had not located Mr. Patrick based on information obtained from an anonymous source, but rather from tracking the location of his cellular phone. (CR 47:3; App. 10; CR 32:34). Based upon this new information, Mr. Patrick withdrew his motion to suppress, conceding that the cell phone tracking provided the police reasonable suspicion to stop him and then arrest him once the gun was located in plain view. (CR 32:37). For reasons placed under seal, Mr. Patrick's first attorney then moved to withdraw, which was granted by the Court on April 30th, 2014. (CR 31). Undersigned counsel was thereafter appointed to represent Mr. Patrick. (CR 34).

On July 3rd, 2014, Mr. Patrick filed a motion for leave to file a new suppression motion based upon the following question:

> Did law enforcement violate Mr. Patrick's Fourth Amendment right to be free from unreasonable searches when it tracked or "pinged" the location of his cell phone in real time in order to locate his person, thereby requiring suppression of all resulting evidence found as fruit of the poisonous tree?

(CR 41:2). With no objection from the government to decide the issues raised in the motion (CR 42), the Court granted Mr. Patrick's motion for leave to file his new suppression motion via a text-only order on July 15th, 2014 and set a briefing schedule. (CR 43). In his opening brief, Mr. Patrick alerted the Court to the fact that the government agreed that in order for law enforcement to track Mr. Patrick's cell phone, it had to obtain a warrant supported by probable cause. (CR 44:1). The government later confirmed this and expressly conceded cell phone tracking must be based upon a warrant supported by probable cause. (CR 45:5). Hence, the parties' briefing and the district court's ultimate decision all rested on the assumption that probable cause was the standard that law enforcement must meet to track an individual's cell phone in real time. Accordingly, the only issue that was briefed and decided was whether the state court order issued to track Mr. Patrick's phone was indeed a warrant supported by probable cause.

The district court denied Mr. Patrick's motion to suppress because the magistrate judge who issued the recommendation that it be denied "utilized precedent that is more cogent than that relied upon by Patrick," and it adopted the recommendation in full. (CR 54; App. 22). Therefore, it is the magistrate judge's recommendation (CR 47) that is now subject to challenge on this appeal. The recommendation did a fair job characterizing the contents of the state court order issued in this case.[2] The order was based upon the affidavit of Milwaukee Police Officer Mark Harms and an application submitted by Milwaukee Assistant District Attorney (ADA) Christopher Ladwig on October 27th,

[2] The order and supporting affidavit and application are contained in the record at Exhibit A to the government's response to Mr. Patrick's motion for leave to file a new suppression motion. (CR 42) (hereafter referenced as "Ex. A at __"). These documents are also included in the appendix to this brief. (App. 23-32).

2013. (CR 47:3: App. 10). The affidavit and application sought three orders related to Mr. Patrick's cell phone: one for a trap and trace device, one for a pen register, and one for cell-site location information (i.e. tracking the location of the phone). *See id*. Officer Harms stated that he was "conducting or assisting with a criminal investigation involving the offense(s) of Violation of Probation as detailed in Wisconsin Statute §§ 973.10," and that the tracking information sought "would be useful to investigators." *Id.; see also* Ex. A at 6, ¶ 2; App. 28. He also provided information related to his training, experience, and knowledge concerning electronic surveillance. *See id.; see also* Ex. A at 6-7, ¶¶ 3(a)-(k); App. 28-29.

As to the factual basis for the request for the three orders, Officer Harms relayed that the Wisconsin Department of Corrections (DOC) entered a valid warrant for Mr. Patrick for violation of parole that was still pending as of the date of the requests; that he and two FBI Special Agents met with a cooperating witness who placed a call to Mr. Patrick's number [414-484-9162] and had a conversation with him over speakerphone; and that the number in question listed to Sprint. *See id.* at 4; App. 11*; see also* Ex. A at 8, ¶ 3(l); App. 30. He concluded his affidavit by asserting that "the information likely to be obtained by the installation and use of the pen register and trap and trace device is relevant to an ongoing criminal investigation, related to the offense(s) of Violation of Probation in violation of Wisconsin Statute § 973.10," and further "there is probable cause to believe that the physical location of the cellular telephone will reveal evidence of the crime of Violation of Probation in violation of Wisconsin Statute § 973.10." *See id.; see also* Ex. A at 8, ¶ 3(n); App. 30.

ADA Ladwig's application for the requested orders referenced Officer Harm's affidavit and attempted to beef up the requests with citation to several state and federal statutes. *See id.; see also* Ex. A. at 9-10; App. 31-32. He asserted that there was "reasonable grounds to believe" that the requested information is "relevant and material to this [§ 973.10] ongoing criminal investigation," *see id.; see also* Ex. A at 10, ¶ 2(b); App. 32, and concluded that "probable cause exists for an order approving the release of cellular tower activity, cellular tower location, cellular toll information and cellular global positioning system (GPS) location information, if available, that will permit identification of the physical location of the target cellular phone." *Id.* at 4-5; App. 11-12; *see also* Ex. A at 10, ¶ 2(c); App. 32.

Milwaukee County Circuit Judge Carolina Maria Stark signed the order the same day the affidavit and application were submitted, finding that Mr. Patrick was believed to be utilizing the cell phone number recited in the affidavit; that he was the subject of an investigation; that the location of the cell phone was unknown; that the affidavit offered "specific and articulable facts showing that there are reasonable grounds to believe that the records and information sought… are relevant and material to an ongoing criminal investigation"; and that there was "probable cause to believe that the physical location of the target cellular telephone will reveal evidence of the Violation of Parole in violation of Wisconsin Statutes § 973.10." *Id.* at 5; App. 12; *see also* Ex. A. at 1-2, ¶¶ 1-5; App. 23-24. The court approved the installation and use of a trap and trace device, a pen register, and the release of cell-site location information related to Mr. Patrick's cell phone. *See id.; see also* Ex. A at 2-3, ¶¶ 1-3; App. 24-25. The order was served on Sprint the same day, law enforcement agents began obtaining data on the location of Mr. Patrick's cell

phone and eventually established physical surveillance of him the next day by using that data. *See id*. at 5-6; App. 12-13. He was ultimately arrested as described above.

The magistrate judge accepted the parties' agreement that in order to track the location of an individual's cell phone in real time, law enforcement must obtain a warrant supported by probable cause. *See id*. at 7-8; App. 14-15. Appropriately, then, the magistrate framed the issue to be decided as: "Did law enforcement officers violate the Fourth Amendment when they determined Patrick's location by tracking his cell phone in real time pursuant to a state court order?" *Id*. at 8; App. 15. The magistrate judge found that his analysis began and ended with the Fourth Amendment's "warrant clause," which the Supreme Court has held requires only three things: (1) that warrants be issued by neutral, disinterested magistrates; (2) those seeking the warrant demonstrate to the magistrate probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense; and (3) the warrant particularly describes the things to be seized as well as the place to be searched. *See id*. at 9; App. 16, *citing Dalia v. United States*, 441 U.S. 238, 255 (1979) (internal citations omitted). The magistrate correctly found that Mr. Patrick did not contest the first and third requirements; that is, he did not contend the order was issued by a biased or interested judge, or failed to specify the thing to be searched or seized (the data locating Mr. Patrick's cell phone). *See id*. Hence, the magistrate confined his analysis to whether the state court order in question satisfied the requisite probable cause showing under the Fourth Amendment. *See id*.

The magistrate credited Mr. Patrick's reliance on *Illinois v. Gates*, 462 U.S. 213 (1983), for what the Fourth Amendment's probable cause standard requires: whether

under all the circumstances it has been shown that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *See id.* at 10; App. 17. The magistrate further credited Mr. Patrick's arguments that in this case "contraband" would not be found because his person (despite the DOC warrant) was not contraband[3], and further that "evidence of a crime" would not be found in a particular location because "violating one's probation is not a crime," Wisconsin Statute § 973.10 "is not a criminal statute," and "having an outstanding violation warrant is not a crime either." *Id*. However, the magistrate found that Mr. Patrick's reliance on *Gates* for the probable cause standard was incomplete: he found that *Warden v. Hayden*, 387 U.S. 294 (1967) extended the scope of searches to "obtaining evidence which would aid in apprehending and convicting criminals." *Id*. at 306. Finding that law enforcement was attempting to locate and apprehend Mr. Patrick on the DOC warrant when the state court order was issued, and based on the facts put forth in Officer Harms' affidavit, the magistrate found that "it would be impractical if the government were unable to obtain search warrants for information that would aid in the execution of a valid violation warrant merely because the object to be seized does not constitute 'evidence of a crime' in the technical sense." (CR 47:12; App. 19).

The magistrate judge also likened the search here of tracking Mr. Patrick's cell phone to search warrants used to assist law enforcement officers in executing an arrest warrant. *See id., citing Steagald v. United States*, 451 U.S. 204, 214 (1981). Reciting that *Steagald* allows the government to obtain a warrant to search for a defendant subject to an arrest warrant in a particular place (even in private third-party homes), the

[3] Defined by Black's Law Dictionary, 9th Ed. 2009, as "goods that are unlawful to import, export, produce or possess."

magistrate reasoned that the government should also be allowed to obtain a search warrant for data that would achieve the same thing. *See id*. at 12-13; App. 19-20. The magistrate found that any "distinction [between the two] would defy common sense," and that the facts of this case were "sufficient to sustain a search warrant for information that reasonably could facilitate the capture of Patrick," that is, the information sought would "aid in a particular apprehension." *Id*. at 13; App. 20 (internal citation omitted).

As mentioned earlier, the district court adopted the magistrate judge's recommendations in full, (CR 54; App. 22), and Mr. Patrick then pled conditionally guilty to Count 1 of the indictment, preserving his right to appeal the adverse ruling on his motion to suppress in his plea agreement with the government. (CR 57:1, ¶ 2; CR 60). Mr. Patrick was sentenced to 57 months in prison to be followed by 3 years of supervised release and a $100 special assessment. (CR 64; App. 1-6). He filed a notice of appeal on July 8th, 2015 (CR 66; App. 7), and this appeal now follows.

SUMMARY OF ARGUMENT

Tracking an individual's cell phone is a search for and seizure of data under the Fourth Amendment and requires the government to obtain a warrant supported by probable cause. Here, the government relied on a state court order that did not establish sufficient probable cause to track Mr. Patrick's cell phone, and therefore the fruits of the search must be ordered suppressed (a gun that was found at his feet when he was arrested). Specifically, the order failed to establish that there was a fair probability that contraband or evidence of a crime would be found in a particular location by tracking Mr. Patrick's cell phone. This is because despite the existence of a probation violation warrant issued for him, his person was not "contraband" and having a probation violation warrant issued (or even violating the terms of probation) does not constitute a crime under Wisconsin or federal law. Further, the search cannot be saved with the argument that the order was issued to "aid in apprehending" Mr. Patrick because that still requires a connection be shown between the item to be seized and criminal behavior, which is absent in this case. Because the government failed to meet any of the aforementioned standards, the search in this case was illegal and the fruits of it must be ordered suppressed.

ARGUMENT

I. Standard of Review

This Court reviews a district court's denial of a suppression motion under a dual standard of review: legal conclusions are reviewed *de novo*, while factual findings are reviewed for clear error. *See United States v. Kelly*, 772 F.3d 1072, 1077 (7th Cir. 2014).

II. Based on the party presentation principle, this Court should assume without deciding that tracking an individual's cell phone is a search under the Fourth Amendment and requires the government to obtain a warrant supported by probable cause.

The government below expressly agreed with Mr. Patrick that in order to track an individual's cell phone, it had to obtain a warrant supported by probable cause. (CR 45:5). The magistrate judge (and ultimately the district court judge by adopting the magistrate's recommendation in full) also decided the issue on a probable cause standard. (CR 47:7-9; App. 14-16; CR 54; App. 22). That probable cause was the applicable standard was never at issue below; therefore, neither party briefed it and the district court had no reason to decide it. However, this Court has yet to rule on whether tracking an individual's cell phone is a search under the Fourth Amendment, thereby requiring the government to obtain a warrant supported by probable cause. *See United States v. Daniels*, 803 F.3d 335, 351 (7th Cir. 2015).

Given the unique procedural background of this case, this Court should assume without deciding that the government is required to obtain a warrant supported by probable cause to track an individual's cell phone based on the following: the Supreme Court has held that "in our adversary system, in both civil and criminal cases, in the first instance *and on appeal*, we follow the principle of party presentation… we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of

matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (emphasis added). This is because "our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id*. at 244. Courts therefore "normally decide only questions presented by the parties." *Id*. (internal citation omitted). A corollary to the party presentation principle is the cross-appeal rule, which holds that "an appellate court may not alter a judgment to benefit a nonappealing party… it takes a cross-appeal to justify a remedy in favor of an appellee." *Id*. at 244-45. This rule is "inveterate and certain," and serves to advance the important institutional interests in "fair notice and repose." *Id*. at 245. The Supreme Court noted that in more than two centuries, not one of its holdings ever recognized an exception to the cross-appeal rule. *See id*.

Here, the government has not cross-appealed, which clearly shows that it does not intend to alter its position below that a warrant supported by probable cause is required to track an individual's cell phone. Because of its express concession below and its failure to file a cross-appeal here, this Court may not alter the judgment below to benefit the government, a non-appealing party; for example, by finding that a standard less than probable cause could have been shown to track Mr. Patrick's cell phone. *See id*. at 244-45. Additionally, when confronted with a similar procedural history in the district court, the Tenth Circuit assumed without deciding that tracking a cell phone is a search and must be supported by probable cause. *See United States v. Barajas*, 710 F.3d 1102, 1108 (10th Cir. 2013). This Court should follow the path taken by its sister court under similar circumstances.

III. The state court order at issue in this case did not establish adequate probable cause to justify tracking Mr. Patrick's cell phone to locate and arrest him. The fruits of this illegal tracking- the gun located at his feet when arrested- must be ordered suppressed.

The Fourth Amendment's guarantee against unreasonable searches and seizures is effectuated by its warrant clause: "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." As the magistrate judge noted below, the Supreme Court has found that the warrant clause requires three things: (1) that warrants be issued by neutral, disinterested magistrates; (2) those seeking the warrant demonstrate to the magistrate probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense; and (3) the warrant particularly describes the things to be seized as well as the place to be searched. *See Dalia v. United States*, 441 U.S. 238, 255 (1979) (internal citations omitted). The first and third requirements are not at issue in this case: there is no indication the state court judge who issued the order in question was biased or otherwise had an interest in the case, and the order particularly described the data to be seized from Mr. Patrick's cell phone. The dispute here centers on the second requirement of whether law enforcement demonstrated sufficient probable cause for the judge to issue the order. To obtain a warrant, the Supreme Court has held that law enforcement must convince a court that "there is a fair probability, given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The magistrate judge in this case credited Mr. Patrick's argument that the two requirements of *Gates* were not shown. First, Mr. Patrick was not considered contraband

("goods that are unlawful to import, export, produce or possess")[4] even though he had a Wisconsin Department of Corrections' warrant issued for violating his supervision at the time police were looking for him and then arrested him. (CR 47:10; App. 17). Second, there was no showing that evidence of a crime would be found in a particular place: having an outstanding supervision warrant is not a state or federal crime, and the "crime" referenced in the affidavit, application and order (Wis. Stat. § 973.10[5]) is not actually a crime at all. *See id*. Wis. Stat. § 973.10 is not a criminal statute and does not define a crime[6], but merely discusses how probationers are deemed to be in the custody of the department of corrections; can be ordered to perform community service; and describes revocation procedures to be used in the event a probationer violates conditions of probation. No other crimes were alleged in the affidavit, application or order.

Even had an actual crime been alleged, there was no showing that evidence of it would be found in a particular place because the object of the search (Mr. Patrick's cell site location data) was needed to locate his phone, and therefore him, in the first place. Hence, law enforcement officers- by the very act of seeking this data- established that they could not show a fair probability that evidence of a crime (or contraband) would be found in a particular place. In short, none of the *Gates* requirements were established here to justify issuance of the state court order: there was no prospect of finding any contraband or evidence of a crime in a particular place, much less a fair probability of doing so.

[4] *See* fn. 3, *infra, citing* Black's Law Dictionary, 9th Ed. 2009.
[5] Referred to as "Violation of probation or parole," depending on which document is referenced, but in actuality is titled "Control and supervision of probationers."
[6] In Wisconsin, a crime "is conduct which is prohibited by state law and punishable by fine or imprisonment or both." Wis. Stat. § 939.12.

While finding that Mr. Patrick's recitation of the probable cause standard under *Gates* was not "inaccurate," the magistrate judge nonetheless found it incomplete: he found in *Warden v. Hayden*, 387 U.S. 294 (1967), the Supreme Court stated that in addition to seeking contraband or evidence of a crime "it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals." (CR 47:11; App. 18); *see also Hayden* at 306. The question presented in *Hayden* was whether searches and seizures under the Fourth Amendment were limited to the instrumentalities of crime, fruits of crime, and contraband, or also included the ability of law enforcement to search for and seize "merely evidentiary materials." *Hayden* at 295-96. In that case, the police had seized from the defendant's home some clothing (including a cap, a jacket and trousers) that matched the description of clothing worn by an individual who committed an armed robbery. *See id*. at 296. The Supreme Court held that nothing in the Fourth Amendment prohibited searching for and seizing evidence "simply for the purpose of proving" a crime- i.e. "mere evidentiary materials." *See id*. at 306. As noted by the magistrate judge, the Supreme Court held it is reasonable to conduct searches and seizures to obtain evidence which would aid in apprehending and convicting criminals. *See id*.

This "aid in apprehension" language is what the magistrate judge relied upon when recommending Mr. Patrick's motion to suppress be denied because he found that Officer Harm's affidavit "demonstrated that law enforcement was attempting to apprehend Patrick" based on the DOC warrant. (CR 47:11; App. 18). Further finding that Officer Harms swore that the DOC warrant was still valid and unexecuted, that cell

site data would help them apprehend Mr. Patrick, and that the phone number they wanted to track was linked to him, the magistrate judge said "it would be impractical if the government were unable to obtain search warrants for information that would aid in the execution of a valid violation warrant merely because the object to be seized does not constitute 'evidence of a crime' in the technical sense." *Id*. at 11-12; App. 18-19. But this finding ignores a key limit *Hayden* placed on its own holding: that there "must, of course, be a nexus- automatically provided in the case of fruits, instrumentalities, or contraband- between the item to be seized and criminal behavior." *Hayden* at 307.

Thus, even when trying to apprehend an individual rather than searching for contraband or evidence of a crime, there still has to be some connection shown between the object of the search or seizure and criminal behavior. In *Hayden,* a connection existed because the clothing recovered from the defendant's house matched the description of that worn by the armed robber police were looking for, so therefore they "could reasonably believe that the items would aid in the identification of the culprit." *Id*. Here, there was no connection shown between the items to be searched or seized (the cell site data) and any criminal behavior. In fact, the magistrate judge found that there was *not* any connection between the data and criminal behavior because "violating one's probation is not a crime," Wis. Stat. § 973.10 is "not a criminal statute," and "having an outstanding violation warrant is not a crime either." (CR 47:10; App. 17). Thus, the magistrate judge's finding that Mr. Patrick's citation to *Gates'* probable cause requirement was "incomplete" because it did not account for *Hayden's* "aid in apprehension" language is itself incomplete: under both *Gates* and *Hayden*, some connection to a crime must be established to justify a search under the Fourth

Amendment.[7] No such connection exists in this case because no fair probability was shown that contraband or evidence of a crime would be found in a particular place (*Gates*), nor was any connection established between the cell site data and any criminal behavior (*Hayden*). It was therefore an unreasonable search and seizure of the data under the Fourth Amendment and all evidence derived therefrom must be suppressed.

The magistrate judge also relied upon *Steagald v. United States*, 451 U.S. 204 (1981) when he recommended denying relief to Mr. Patrick. (CR 47:12; App. 19).[8] He reasoned that because *Steagald* allows law enforcement officers to obtain a search warrant to search for an individual subject to an arrest warrant in a particular place- even the home of a third party- that they must be allowed to obtain one to search for a person subject to an arrest warrant based on cell-site data generated by his or her cell phone. *See id*. But the reliance on *Steagald* is misplaced for several reasons. *First*, the information sought here is extremely broad and concerns an individual's ongoing location, which is not known to law enforcement and is the reason it wants the information in the first place. *Steagald* and *Payton* (*see* fn. 8, *infra*) represent narrow exceptions to general Fourth Amendment constraints, however, in that they require law enforcement to establish that there is reason to believe that the subject of an arrest warrant is located *at a particular place*- for *Payton* in his or her home, for *Steagald* in the home of a third party. *See In the Matter of an Application of the United States of America for an Order Authorizing*

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[7] Additionally, the "aid in apprehension" language of *Hayden* can fairly be considered *dicta* because the facts of *Hayden* actually related to the use of the seized items to convict the defendant, not to apprehend him. *See Hayden* at 307.

[8] While it is not cited by the magistrate judge, *Payton v. New York*, 445 U.S. 573 (1980) is also relevant. *Payton* held that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the *limited authority* to enter a dwelling in which a suspect lives when *there is reason to believe the suspect is within*." *Id*. at 602-03 (emphasis added).

Disclosure of Location Information of a Specified Wireless Telephone, 849 F.Supp.2d 526, 563 (D. Maryland 2011). Thus, these cases do not "absolve the government from having a reasonable belief that the suspect is in a particular location before it may enter" a constitutionally protected area to execute an arrest warrant. *See id.* at 545. In cases like Mr. Patrick's where law enforcement seeks a court order to track a person's cell phone precisely because they do not know where the person is, this threshold requirement of both *Payton* and *Steagald* is not met and therefore reliance on either is misplaced.

Second, implicit in the magistrate judge's citation to *Steagald* is a belief that because a search warrant can be obtained to effectuate an arrest warrant in a third party's home, obtaining one to track an individual by their cell phone is justified because it is considered a lesser intrusion. But this does not automatically follow- *Wireless Telephone* found that tracking someone by their cell phone "does arguably infringe upon the privacy rights of the subject of an arrest warrant more than a [home] search would and certainly does provide more information." *Id.* at 551. The search requested in these types of cases "informs the government on an almost continual basis where the subject is, at places where the government *lacked* probable cause to believe he was, and with persons about whom the government may have no knowledge." *Id.* (emphasis in original). Accordingly, the Supreme Court's approval of a "limited" intrusion into the home under *Payton* and *Steagald* "cannot reasonably be interpreted to endorse other infringements of privacy, that is, the constitutional right to location and movement privacy." *Id.* at 552; *see also id.* at 538-543 (discussing that individuals have a reasonable expectation of privacy in their location and movements); *see also* Argument Section IV, *supra* (same). The government below did not argue that the subject of an arrest warrant enjoys less of

an expectation of privacy in their location and movements than an uncharged person, and *Wireless Telephone* found that such expectations are maintained for individuals subject to an arrest warrant for many of the reasons already discussed. *See id*. at 543-44. Thus, the magistrate's judge reliance on *Steagald* to deny relief to Mr. Patrick should be rejected by this Court.

Further underscoring the lack of probable cause to track Mr. Patrick's cell phone is the reliance the affidavit, application, and order placed on statutes that do not require a showing of probable cause for law enforcement to take certain actions. For example, to obtain an order for a pen register (which reveals numbers dialed from a phone) or a trap and trace device (which reveals numbers dialed to a phone), law enforcement need only present "a certification… that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted…" 18 U.S.C. § 3122(b); *see also In the Matter of the Application of the United States of America For an Order Authorizing the Disclosure of Prospective Cell Cite Information*, 2006 WL 2871743 (E.D. Wis. 2006) at 2 (finding that this showing is lower than probable cause for a warrant) (hereafter "*E.D. Wis.*"). Also, to obtain certain phone records (not including the contents of communications) the government need only establish "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (part of the "Stored Communications Act"); *see also E.D. Wis*. at 2 (finding that this statute imposes an "intermediate" standard on the government higher than that under 18 U.S.C. § 3122(b), but less than probable cause).

Here, the underlying state court documents relied heavily on language closely tracking the standards laid out in 18 U.S.C. §§ 2703(d) and 3122(b) rather than trying to establish probable cause:

- In Officer Harms' affidavit, he stated he was "conducting or assisting with a criminal investigation" under the [non-existent] offense of "Violation of Probation as detailed in Wisconsin Statute §§ 973.10," and that the tracking information sought "would be useful to investigators." *See* Ex. A at 6, ¶ 2; App. 28.
- ADA Ladwig's application asserted there were "reasonable grounds to believe" that tracking Mr. Patrick's cell phone would be "relevant and material to this ongoing criminal investigation" into the non-existent crime under Wis. Stat. § 973.10. *See id.* at 10, ¶ 2(b); App. 32.
- The Milwaukee County Circuit Court's order found that Mr. Patrick was the subject of an investigation and that Officer Harms' affidavit offered "specific and articulable facts showing that there are reasonable grounds to believe that the records and information sought… are relevant and material to an ongoing criminal investigation." *Id.* at 1-2, ¶¶ 2 and 4; App. 23-24.

The affidavit, application and order lumped together requests for a pen register and trap and trace device (neither of which require law enforcement to establish probable cause) with a request to track Mr. Patrick's cell phone (which for all the reasons argued herein requires showing probable cause). By relying so heavily on 18 U.S.C. §§ 2703(d) and 3122(b), it is clear that the state court approved the tracking of Mr. Patrick's cell phone on a standard less than probable cause and did not fulfill requirements of *Gates* and

Hayden; therefore the subsequent tracking violated Mr. Patrick's Fourth Amendment right to be free from unreasonable searches and seizures. This Court must reverse the district court's order denying Mr. Patrick's motion to suppress, and order that the evidence seized after the police illegally tracked his cell phone and arrested him be suppressed.

IV. Tracking an individual's cell phone is a search under the Fourth Amendment and requires the government to obtain a warrant supported by probable cause.

As this Court observed recently, whether the government tracking an individual's cell phone is a search under the Fourth Amendment requiring a warrant supported by probable cause is an evolving and difficult issue that courts across the country are grappling with. *See Daniels* at 351 (collecting cases). Should this Court elect to decide the issue and now "take sides" on it, *see id.*, it should find that such tracking is a search that requires the government to obtain a search warrant supported by probable cause. The most recent and comprehensive treatment by a federal court of appeals on this issue is the Fourth Circuit in *United States v. Graham*, 796 F.3d 332 (4th Cir. 2015), *reh'g en banc granted* (hereafter referred to as *Graham I*). The Fourth Circuit held that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical[9] cell site data to trace the movements of the phone and its user across public and private spaces. *See id.* at 344-45. However, indicative of the evolving and difficult dimensions of this issue, the Fourth Circuit granted the

[9] The Court in *Graham* found no "constitutional distinction" between historical cell site data and real-time tracking data like that at issue in Mr. Patrick's case, stating "a person's expectation of privacy in information about where she has been is no less reasonable, or less deserving of respect, than that regarding where she is or where she is going." *Id.* at 349, n. 7; *see also id.* at 350. For the purposes of this brief, Mr. Patrick follows that reasoning and does not differentiate between historical and real-time tracking.

government's petition for rehearing *en banc*, with oral argument tentatively calendared for the Court's March 22-25, 2016 session. *See United States v. Graham*, 2015 WL 6531272 at * 1 (4th Cir. October 28th, 2015). While the status of *Graham I* is now uncertain pending *en banc* review, its reasoning is still persuasive and its treatment still authoritative. For the following reasons, this Court should adopt its reasoning and find that tracking an individual's cell phone is a search under the Fourth Amendment requiring the government to obtain a search warrant supported by probable cause. *See* Fed. R. App. P. 32.1 (restricting courts from prohibiting the citation of federal judicial opinions that have been designated "non-precedential" or the like and issued after January 1st, 2007).

In *Graham I*, the Court began its analysis in the familiar territory of *Katz's*[10] "reasonable expectation of privacy that society is willing to recognize as reasonable" formulation. *See Graham I* at 344. The Court ultimately held that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's cell site data to trace the phone/user's movements across public and private spaces, thereby discovering the private activities and personal habits of the user. *See id*. at 344-45. The Court found that cell phone users have an objectively reasonable expectation of privacy in this information that requires the government to obtain a warrant supported by probable cause (unless an established exception to the warrant requirement applies). *See id*. at 345. The Court came to this conclusion based primarily on the following two broad reasons, which Mr. Patrick asks this Court to adopt:

First, it found that the Supreme Court has "recognized an individual's privacy interests in comprehensive accounts of her movements, in her location, and in the

[10] *Katz v. United States*, 389 U.S. 347, 353 (1967).

location of her personal property in private spaces, particularly when such information is available only through technological means not in use by the general public." *See id.* at 345-350 (*citing and discussing United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Karo*, 468 U.S. 705 (1984); *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Jones*, 132 S.Ct. 945 (2012); and *Riley v. California*, 134 S.Ct. 2473 (2014)). The *Graham I* Court found that the holdings of these Supreme Court decisions, along with two state supreme court decisions, *see Commonwealth v. Augustine*, 467 Mass. 230 (2014) and *State v. Earls*, 214 N.J. 564 (2013), lead to the conclusion that the privacy interests affected by the technologies employed by the government in those cases "apply with equal or greater force" to cell phone tracking data because that information "can reveal both a comprehensive view and specific details of the individual's daily life." *See Graham I* at 348. Quoting the D.C. Circuit, it stated:

> A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups- and not just one fact about a person, but all such facts.

Id., citing United State v. Maynard, 615 F.3d 544, 561-62 (D.C. Cir. 2010), *aff'd sub. nom. Jones*, 132 S.Ct. 945. The Court further noted that cell phone tracking could very well provide even more private information about an individual than the GPS tracking at issue in *Maynard/Jones* because "a cell phone is a small hand-held device that is often hidden on the person of its user and seldom leaves her presence… users regularly carry these devices into their homes and other private spaces" which can "permit the government to track a person's movements between public and private spaces, impacting at once her interests in both the privacy of her movements and the privacy of her home."

Id. Bolstered by the decisions of other courts to have considered the issue, the Fourth Circuit found that the government conducts a search and "invades a reasonable expectation of privacy when it relies upon technology not in general use to discover the movements of an individual," with cell phone tracking being one such technology. *See id*. at 349.

Second, the Court found that the Supreme Court's "third-party doctrine," which holds a person has "no legitimate expectation of privacy in information he voluntarily turns over to thirds parties," does not apply to cell phone tracking records and does not defeat a user's reasonable expectation of privacy in the content of those records. *See id*. at 353, *citing United States v. Miller*, 425 U.S. 435, 442 (1976) and *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979). The Court found that *Miller* and *Smith* "do not categorically exclude third-party records from Fourth Amendment protection." *Id*. at 354. The key focus is whether the information held by a third party was voluntarily conveyed to it because "it is that voluntary conveyance- not the mere fact that the information winds up in the third party's records- that demonstrates an assumption of risk of disclosure and therefore the lack of any reasonable expectation of privacy." *Id*. The Court found that cell site location information is automatically, intangibly, and passively calculated and recorded by the cellular network and therefore the user does not "convey" cell site location data "at all- voluntarily or otherwise- and therefore does not assume any risk of disclosure to law enforcement." *Id*. The Court stated it "cannot impute to a cell phone user the risk that information about her location created by her service provider will be disclosed to law enforcement when she herself has not actively disclosed that information." *Id*. at 355.

The Court found that the third-party doctrine is increasingly in tension with "the primacy Fourth Amendment doctrine grants our society's expectations of privacy," but found the former must give way to the latter because the "third-party doctrine is intended to delimit Fourth Amendment protections where privacy claims are not reasonable- not to diminish Fourth Amendment protections where new technology provides new means for acquiring private information." *Id*. at 360. The Fourth Circuit neatly summed up the important and difficult questions raised by cell phone tracking by the government with this observation and ultimate holding:

> It turns out the proliferation of cellular networks has left service providers with a continuing stream of increasingly precise information about the locations and movements of network users. Prior to this development, people generally had no cause for concern that their movements could be tracked to this extent. That new technology has happened to generate and permit retention of this information cannot by itself displace our reasonable privacy expectations; nor can it justify inspection of this information by the government in the absence of judicially determined probable cause.

Id. at 360-61. For all the reasons articulated by *Graham I*, this Court should find that tracking an individual's cell phone is a search under the Fourth Amendment and the government is required to obtain a warrant supported by probable cause before obtaining such information.

CONCLUSION

For all the reasons argued herein, this Court should assume without deciding that tracking an individual's cell phone is a search that requires the government to obtain a warrant supported by probable cause; that the state court order in question here did not establish adequate probable cause to track Mr. Patrick's phone; and that the fruits of this illegal search must be ordered suppressed, specifically the gun that was found laying at his feet when he was arrested.

Respectfully submitted

Christopher Donovan
CHRISTOPHER DONOVAN
COUNSEL FOR DEFENDANT-APPELLANT
Pruhs & Donovan, S.C.
757 North Broadway – Suite 401
Milwaukee, Wisconsin 53202
Tel: (414) 221-1950
Fax: (414) 221-1959

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)

The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32 in that it contains 7,476 words as shown by Microsoft Word in preparing this brief.

Christopher Donovan
CHRISTOPHER DONOVAN
Pruhs & Donovan, S.C.
757 North Broadway – Suite 401
Milwaukee, Wisconsin 53202
Tel: (414) 221-1950
Fax: (414) 221-1959

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned, counsel for Defendant-Appellant, hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format.

Christopher Donovan
CHRISTOPHER DONOVAN
Pruhs & Donovan, S.C.
757 North Broadway – Suite 401
Milwaukee, Wisconsin 53202
Tel: (414) 221-1950
Fax: (414) 221-1959

Dated: January 15th, 2016

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. Appeal Number: 15-2443

DAMIAN PATRICK,

Defendant-Appellant.

NOTICE OF FILING AND PROOF OF SERVICE

TO: Clerk, United States Court of Appeals, 219 S. Dearborn St., Chicago IL 60604

Bridget Domaszek, Assistant U.S. Attorney, Room 530, 517 E. Wisconsin Avenue, Milwaukee, WI 53202

Damian Patrick (#13024-089), USP Big Sandy, P.O. Box 2068, Inez, KY 41224

PLEASE TAKE NOTICE that on January 15th, 2016, the undersigned attorney filed an electronic copy of Appellant's Brief in digital media, formatted in PDF, with the Clerk of the United States Court of Appeals for the Seventh Circuit. All counsel of record are served copies of same via electronic filing. Mr. Patrick will be served one copy of the brief by enclosing it in a mailing package addressed as indicated above with postage prepaid, and by depositing said package in the United States Mail in Milwaukee, Wisconsin.

Christopher Donovan
CHRISTOPHER DONOVAN
Christopher Donovan
Pruhs & Donovan, S.C.
757 N. Broadway, Suite 401
Milwaukee, Wisconsin 53202
Phone: (414) 221-1950
COUNSEL FOR DEFENDANT-APPELLANT