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Content Analysis of Pre- and Post-Jones Federal Appellate Cases: Implications of Jones for Fourth Amendment Search Law

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CONTENT ANALYSIS OF PRE- AND POST-*JONES* FEDERAL APPELLATE CASES: IMPLICATIONS OF *JONES* FOR FOURTH AMENDMENT SEARCH LAW

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Abstract

This study examines the state of Fourth Amendment search law in relationship to the decision in the recent, landmark case of *United States v. Jones*. This study focused on the effects of the *Jones* decision, trespass doctrine, relative to the former precedent of *Katz v. United States*, reasonable expectation of privacy doctrine, and the rates of searches being found under these two tests (or a combination of both). This study used a qualitative content analysis of federal appellate cases which cited *Jones* and/or *Katz* to answer the following questions: Which tests were being used in federal appellate cases where a search was in question? And; Depending on the test being used, was a search more or less likely to be found? This study concluded, through the analysis of 34 cases pre-*Jones* decision and 38 cases post-*Jones* decision, that both tests are still being used, depending upon the parameters within the case itself (as *Jones* has very specific criteria for determining a search). This study also concluded that since the *Jones* decision, cases citing solely *Jones* found more searches to have occurred (100%, 11 cases) than did cases citing solely *Katz* (27.2%, 3 out of 11 cases) or cases which cited both (37.5%, 6 out of 16 cases).

Chapter 1 - Introduction

Understanding and defining a police search is a basic, crucial task for the criminal justice system. A search aids in gathering evidence for cases and holding criminals responsible for their actions. Without police searches, there would be large gaps in evidentiary support for case convictions. The framers of the Constitution and in particular the authors of the Bill of Rights highlighted the importance of these searches when they wrote into this vital document protection for citizens against "unreasonable" searches and seizures. This protection is contained specifically in the Fourth Amendment of the Bill of Rights as a protection guaranteed to the American people.[1] It is necessary to be clear on this topic: the Fourth Amendment does not prohibit searches, just unreasonable ones. Therefore, a legal search (what is referred to as a 'search' for this study) is one which triggers Fourth Amendment protections.

As time has progressed, the question of what defines a police search has been asked repeatedly by the courts and other criminal justice institutions. Originally, a search was found to have occurred when law enforcement officers had physically trespassed onto a citizen's property or person (the trespass doctrine).[2] As time moved forward and technology changed, this physical trespass requirement became antiquated and in need of reform. In 1967, a case came before the United States Supreme Court that would fundamentally change Fourth Amendment search law. . In this landmark case (*Katz v. United States*) involving a phone booth, it was decided that a search would be found if there was a reasonable expectation of privacy for the person being searched, and if that reasonable expectation of privacy had been violated.[3] This decision was a drastic move away from the trespass test and ushered in a new era of search inquiries by courts in the United States. (Katz is explained in more detail at the end of this Introduction section).

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[1] U.S.C.A. Const.Amend. 4.
[2] *Olmstead v. United States,* 277 U.S. 438, 456, 48 S.Ct. 564, 72 L.Ed. 944 (1928.
[3] *Katz v. U.S,* 389 U.S. 347, 88 S.Ct. 507 (1967).

For forty-five years, *Katz* and the reasonable expectation of privacy test had stood as the sole test for deciding if a search under the Fourth Amendment had occurred. *Katz* is widely applicable, as it is by itself a rather nebulous, general idea without concrete terminology or specifics about what is or is not a search (though courts over the years had certainly provided the privacy concept with more specific meaning, or content, through case law).[4]

Overall, though, as technology has grown and become more sophisticated since 1967, questions are beginning to arise about specific instances where the *Katz* privacy notion is not necessarily adequate, in and of itself, to address whether or not a police search has occurred. Specifically, in 2012, the United States Supreme Court decided another landmark Fourth Amendment search case that built upon the *Katz* decision, and has helped to develop more specific parameters for defining a search. In particular, *United States v. Jones* reintroduced a physical trespass concept to define searches under the Fourth Amendment while also retaining the Katz privacy concept (to define searches). Significantly, *Jones* involved the physical attachment by police of a Global Positioning Satellite (GPS) device to a vehicle and subsequent monitoring of that vehicle through the device.[5] (*Jones* is explained in more detail at the end of this section). Since it was decided, *Jones* has had an impact on federal appellate court case law, both in those instances when these courts now use the trespass criterion as the sole criterion to decide whether a police search has occurred and in those instances when these courts use the trespass test in conjunction with the Katz privacy test.[6]

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[4] See *U.S. v. Miller,* 425 U.S. 435, 96 S.Ct. 1619 (1976) for third party doctrine.

[5] *U.S. v. Jones,* 132 S.Ct. 945, 948 (2012). The United States Supreme Court held "the Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements; constitute a search under Fourth Amendment." *Id.*

[6] See *Grady v. North Carolina,* 132 S.Ct. 1368, 1369 (2015) as an example of the courts using solely the *Jones* test to answer the Fourth Amendment search inquiry. See *U.S. v. Castellano,* 716 F.3d 828, 830 (4th Cir. 2013) as an example of the courts using *Jones* test in conjunction with *Katz* test.

Since *Katz* was a foundational, familiar case for the courts, the shift into incorporating *Jones* has been more gradual but nonetheless noteworthy, at least for the federal appeals courts included in this study. *Jones* is a relatively new decision, and its full implications for Fourth Amendment search jurisprudence will certainly be further seen as time progresses. However, the changes in Fourth Amendment search law since Jones deserve further exploration and examination, both for their relevance to police investigatory practices and strategies under the law, and for their relevance to court actors and scholars. In general, this study examines how *Jones* has impacted the way federal appellate courts handle search inquiries. This research study first assesses whether federal appeals courts in the wake of Jones are using its trespass test to decide whether a police search has occurred or rather, these courts are using the Katz privacy test or a combination of the two tests. Second, this study analyzes the current impact of the *Jones* decision in terms of whether a federal appellate court finds a police search has occurred (for example, whether these courts are more likely to find a search has occurred after Jones using its trespass test , the Katz privacy test, or a combination of the two tests together). This latter inquiry allows comparisons to be made between the numbers of search findings after Jones under each permissible test/approach. Third, to assess the impact of Jones on search determinations by courts, this study evaluates and compares the number of police searches found to have occurred in federal appeals cases both pre- and post (i.e., following) the *Jones* decision. Finally, the study addresses overall implications for future Fourth Amendment search law.

This research is an important step in examining Fourth Amendment search laws. These inquiries facilitate being able to quantify the impact *Jones* is having on police search law and lay the groundwork for future study. This will also assist in identifying any patterns that may be used by police and future researchers interested in Fourth Amendment search inquiry procedures. In

regards to police practices and strategies, this research is important because courts determination of a search is crucial to criminal investigations. Courts finding no search before or after *Jones* would mean that police would generally not have to concern themselves with the judicial rules established by the Fourth Amendment. Conversely, if courts find a search, police must follow all the guidelines set forth by the Fourth Amendment, which could potentially limit investigative approaches. Additionally, this study can assist scholars of courts and criminal law and procedure because it gives them further empirical evidence with which to evaluate whether judges are currently more due process or crime control oriented in crafting their decisions (i.e., if courts are more frequently finding searches in period after Jones compared to period prior to Jones, then there might be evidence of the courts being in a more due process orientation).

This research study employed a comprehensive, content analysis approach to evaluating all significant federal appellate cases which cited *United States v. Jones* through May 31, 2015.[7] To obtain these cases, a legal research tool known as a citator was used (i.e., "KeyCite"). To have a more complete understanding of Fourth Amendment search law post-*Jones,* it was decided to also examine through the citator all of the significant federal appellate cases which referenced *Katz v. United States* (i.e., since *Jones* retained *Katz* as a possible test to decide whether a police search occurred under the Fourth Amendment). This examination was completed from the date *Jones* was decided (January 23, 2012) through May 31, 2015. Finally, to better understand the impact of Jones on police search law, it was decided to evaluate significant federal appeals cases through the citator which cited *Katz* prior to the *Jones* decision, and explore any possible changes in search trends between the period prior to and following

[7] Significant treatment refers to the federal appellate court cases providing substantial coverage to the case under examination (e.g., *Jones* or *Katz*). For a more in depth explanation, refer to the methodology section.

Jones. To have an adequate number of pre-*Jones* cases, it was decided to research cases from January 22, 2002-January 22, 2012.

In *Katz v. United States,* Charles Katz was charged and convicted in District Court for transmitting wagering information.[8] Federal Bureau of Investigation (FBI) agents obtained this information by attaching an electronic listening and recording device to the outside of a public telephone booth.[9] This device allowed the government to listen in on the calls made by Katz. The Court of Appeals affirmed the District Court's decision. The United States Supreme Court granted certiorari.[10] Justice Stewart wrote the majority opinion.

The United States Supreme Court held that Katz was entitled to Fourth Amendment protections when he placed the calls inside the telephone booth.[11] The Supreme Court famously stated, "The Fourth Amendment protects people, not places" and thus, "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."[12] The Supreme Court explained once Katz entered the phone booth and closed the door, Katz reasonably believed that his conversation would be kept private. The Supreme Court stated although the Katz was physically visible inside the phone booth, once Katz entered and closed the door, he took the necessary steps to prevent an "uninvited ear."[13] Additionally, the Supreme Court addressed the former trespass doctrine was no longer effective at determining Fourth Amendment search inquiries.[14] Thus, the Supreme Court concluded that Katz Fourth Amendment rights had been violated and reversed the

[8] *Katz. v. U.S.,* 389 U.S. 347, 348, 88 S.Ct. 507 (1967).
[9] *Id.*
[10] *Id.* at 349.
[11] *Id.* at 352.
[12] *Id.* at 351.
[13] *Id.* at 352.
[14] *Id.* at 353.

judgment.[15] It was Justice Harlan's concurring opinion who first explored the notion of a constitutionally protected reasonable expectation of privacy under the Fourth Amendment.[16]

In *United States v. Jones*, a joint taskforce of the Federal Bureau of Investigation and Metropolitan Police Department were investigating Antione Jones for trafficking narcotics.[17] Jones owned and managed a nightclub in the District of Columbia. Over the course of the investigation, the joint task force used a variety of methods to monitor Jones' movements, including visual surveillance, wiretaps, camera footage of the nightclub. This information led the taskforce to apply and obtain a warrant to use an electronic tracking device on the Jeep owned by Jones' wife.[18] This warrant was valid in the District of Columbia and expired after 10 days. The taskforce installed the Global Positioning Satellite (GPS) device to the Jeep on the 11th day, while it was parked in a public parking lot in Maryland.[19] The taskforce monitored Jones' movements for the next 28 days, producing more than 2,000 pages of data on Jones' whereabouts. Ultimately, Jones and several associates were indicted for conspiracy to distribute large quantities of cocaine.[20] As a result, Jones filed a motion in District Court to suppress the evidence obtained through GPS monitoring. The motion was granted by the District Court, but with some reservations. The District Court held that the information obtained while the vehicle was in the garage of Jones' residence should be suppressed.[21] The District Court held that the data obtained while the vehicle was out in the public should remain admissible because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of

[15] *Id.* at 359.
[16] *Id.* at 360-361.
[17] *U.S. v. Jones,* 132 S.Ct. 945, 948 (2012).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

privacy in his movements from one place to another."[22] Jones' trial resulted in a hung jury on the conspiracy charge. As a result, the government re-tried Jones and his accomplices at a second trial.[23] At the trial, the government introduced all the data obtained through the GPS which ultimately resulted in the jury finding Jones guilty.[24] Jones was sentenced to life in prison. The United States Court of Appeals for the District of Columbia Circuit reversed the conviction based on the government violating Jones' Fourth Amendment by producing evidence obtained from GPS device.[25]

The United States Supreme Court granted certiorari. The United States Supreme Court decided unanimously with Justice Scalia writing the opinion of the Court. The Supreme Court held 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.'"[26] However, the Supreme Court's rationale did not rely on the *Katz* reasonable expectation of privacy test. Instead, the Supreme Court explained when the government commits a physical intrusion onto private property with the explicit intention of obtaining information, this intrusion is tantamount to a search, thus implicating the Fourth Amendment.[27] The Supreme Court's rationale revolved around the original text of the Fourth Amendment which has close ties to idea of common-law trespass. Additionally, the Supreme Court explained the common-law trespass test does not overwrite *Katz.* Instead, the Supreme Court emphasized "*Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[28] As a result, the

[22] *Id.* (quoting *United States v. Knotts,* 460 U.S. 276, 281, 103 S.Ct. 1081. 75 L.Ed. 2d 55 (1983)).
[23] *Id.*
[24] *Id.* at 949.
[25] *Id.*
[26] *Jones,* 132 S.Ct. at 949.
[27] *Id.*
[28] *Id.* at 952.

Supreme Court affirmed the United States Court of Appeals for the District of Columbia Circuit decision.

Chapter 2 – Literature Review

This literature review begins by presenting historical cases which detailed the creation of the property based test to evaluate Fourth Amendment searches. Next, this literature review will explore two distinct, but important assessments among academics concerning the United Supreme Court decision in *Jones.* The first assessment describes *Jones* as being a crucial and significant change to Fourth Amendment search laws. The second assessment broadly views *Jones* as a missed opportunity to make any substantial change to Fourth Amendment search law with regards to modern technology.

Historic Cases

The definition of what constitutes a search has largely developed over time. Originally, the trespass doctrine was the governing jurisprudence on Fourth Amendment search law. One of the earliest cases known for upholding this idea of "trespass" was the case of *Olmstead v. United States (1928).*[29] Olmstead was known as a high profile bootlegger during the time of prohibition.[30] His sales of alcohol were significant, which warranted the attention of law enforcement. The defendant was eventually convicted of importing, possessing, and selling liquor unlawfully. The evidence was obtained through wire taps made by police, who believed they were not committing any form of trespass as the defendants did not own that specific property where the wire taps were placed. The United States Supreme Court held that police actions did not constitute a search because wiretaps on public telephone lines were not

[29] *Olmstead v. United States,* 277 U.S. 438, 456, 48 S.Ct. 564, 72 L.Ed. 944 (1928)
[30] Ryan Evaro, *THE COURT LOSES ITS WAY WITH THE GLOBAL POSITIONING SYSTEM: UNITED STATES V. JONES RETREATS TO THE "CLASSICAL TRESPASSORY SEARCH",* 19 Mich. J. Race & L. 113, 120 (2013)

considered a trespass into a constitutionally protected area (such as individual's private property).[31]

The United States Supreme Court would further rely upon the trespass doctrine in *On Lee v. United States (1952).*[32] In this case, the defendant, On Lee, had been living in a laundromat.[33] He was approached by an old acquaintance, Chin Poy, inside the area and the defendant made some incriminating statements during the conversation. Unbeknownst to the defendant, Chin Poy was working for the Bureau of Narcotics and was an undercover agent. Bureau of Narcotics agent Lawrence Lee had stationed himself outside and had been recording their conversation through a microphone on Chin Poy.[34] From his position, Lee was able to see the individuals and record the conversation through the electronic device attached to Chin Poy. Defendant On Lee argued that the evidence should have been deemed inadmissible because it was illegally obtained by police; therefore, police violated his Fourth Amendment rights against unlawful search and seizures. On Lee reasoned that the fraudulent hiding of the microphone violated his rights and had he been aware of his listening device he would not have consented to allowing Chin Poy inside.[35] The United States Supreme Court ruled that an unlawful search had not occurred because Chin Poy had been invited into the residence by defendant, and therefore no trespass had been committed.[36]

Law Review Journal Article

I. First Category

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[31]*Olmstead v. United States,* 277 U.S. 438, 464, 48 S.Ct. 564, 72 L.Ed. 944 (1928)
[32]*U.S. v. Jones,* 132 S. Ct. 945, 952 (2012)
[33]*On Lee v. United States,* 747, 749, 72 S.Ct. 967 (1952)
[34]*On Lee v. United States,* 747, 749, 72 S.Ct. 967 (1952)
[35] Ryan Evaro, *THE COURT LOSES ITS WAY WITH THE GLOBAL POSITIONING SYSTEM: UNITED STATES V. JONES RETREATS TO THE "CLASSICAL TRESPASSORY SEARCH",* 19 Mich. J. Race & L. 113, 123 (2013)
[36]*On Lee v. United States,* 747, 751-752, 72 S.Ct. 967 (1952)

The articles in this category generally accept the *Jones* decision as being a major milestone for Fourth Amendment search law, and these academics provide some critical assessment regarding the application of a physical trespass test in an era revolving around modern technology.

Richard Sobel, Barry Horwitz, and Gerald Jenkins explained how the *Jones* decision provided a more reliable form of Fourth Amendment protection.[37] Namely, the Court recognized the government's ability to collect, record, track, and analyze large amounts of information. Moreover, the *Jones* decision reflected an attempt by the Supreme Court's to uphold customary Fourth Amendment rights in an era where technology is rapidly advancing. This is extremely valuable as many academics point out the pitfall of the concept of reasonable expectation of privacy, namely, that society has none in such an interconnected society. Finally, the authors mention the notion of the "justifiable reliance test."[38] This proposed standard combines both the *Katz* and *Jones* tests to create a broader test: "(1) that the person relied on his Fourth Amendment privacy and/or property rights, and (2) that the reliance was justifiable under the circumstances."[39] The advantage of this test would be its increased applicability to our digital age while still maintaining the integrity of the Fourth Amendment protections.

Similarly, Sean Kilbane agreed that the *Jones* decision bolstered citizens' Fourth Amendment rights. Kilbane discussed that the former *Katz* reasonable-expectation-of-privacy

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[37] Richard Sobel, Barry Horwitz, and Gerald Jenkins, *The Fourth Amendment Beyond Katz, Kyllo And Jones: Reinstating Justifiable Reliance As A More Secure Constitutional Standard For Privacy*, 22 B.U. Pub. Int. L.J. 1, 3 (2013).

[38] Richard Sobel, Barry Horwitz, and Gerald Jenkins, *The Fourth Amendment Beyond Katz, Kyllo And Jones: Reinstating Justifiable Reliance As A More Secure Constitutional Standard For Privacy*, 22 B.U. Pub. Int. L.J. 1, 4 (2013).

[39] Richard Sobel, Barry Horwitz, and Gerald Jenkins, *The Fourth Amendment Beyond Katz, Kyllo And Jones: Reinstating Justifiable Reliance As A More Secure Constitutional Standard For Privacy*, 22 B.U. Pub. Int. L.J. 1, 43 (2013).

test failed to account for technologies involving aerial surveillance.[40] More commonly referred to as drones, these unmanned aerial vehicles have the ability to travel through public airspace with high-tech cameras and peer into private areas, such as the curtilage of a home. These drones have the ability to fly 1,000 feet into the sky, which is important as the courts had previously held any altitude above 400 feet is considered public.[41] However, due to the recent *Jones* decision, courts will need to analyze this form of Fourth Amendment protections from a trespass perspective instead of a reasonable-expectation-of-privacy perspective. As a result, *Jones* has provided citizens with more protections than *Katz* ever could in scenarios involving flyovers or other similar forms of advanced technology.[42]

Erica Goldberg argued that the *Jones* decision is more groundbreaking than most realize.[43] In particular, *Jones* has the potential to give courts an additional, analytical "framework" through which to evaluate a search under the Fourth Amendment. Furthermore, Goldberg claimed it is possible to see the *Jones*' property test ultimately replace the *Katz* inquiry as a "clearer, cleaner metric" for courts to analyze Fourth Amendment cases.[44]

Lauren Smith briefly discusses privacy as an antiquated notion that has no place in today's society.[45] Smith explains privacy protections are quickly becoming obsolete, namely because of the technology at the disposal of common individuals and law enforcement. This

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[40] Sean M. Kilbane, *NOTE: Drones And Jones: Rethinking Curtilage Flyover In Light Of The Revived Fourth Amendment Trespass Doctrine,* 42 Cap. U.L. Rev. 249, 249 (2014).
[41] Sean M. Kilbane, *NOTE: Drones And Jones: Rethinking Curtilage Flyover In Light Of The Revived Fourth Amendment Trespass Doctrine,* 42 Cap. U.L. Rev. 249, 249 (2014).
[42] Sean M. Kilbane, *NOTE: Drones And Jones: Rethinking Curtilage Flyover In Light Of The Revived Fourth Amendment Trespass Doctrine,* 42 Cap. U.L. Rev. 249, 282 (2014).
[43] Erica Goldberg, *How United States V Jones Can Restore Our Faith In The Fourth Amendment,* 110 Mich. L. Rev. First Impressions 62, 62 (2011).
[44] Erica Goldberg, *How United States V Jones Can Restore Our Faith In The Fourth Amendment,* 110 Mich. L. Rev. First Impressions 62, 69 (2011).
[45] Lauren Elena Smith, *PRIVACY LAW: Jonesing for a Test: Fourth Amendment Privacy in the Wake of United States v. Jones,* 28 Berkeley Tech. L.J. 1003, 1003 (2013).

advanced technology has diminished what many consider to be an expectation of privacy and has enabled law enforcement to obtain a plethora of digital information, such as email or GPS tracking information. The courts have been always been playing the game of catch up when trying to keep up with technology and the law, but many were hopeful of the decision in *Jones* to provide guidance and bolster our Fourth Amendment protections.[46] Prior to *Jones*, it was difficult to discern whether one had a reasonable expectation of privacy in this type of information under the *Katz* test. Although the *Jones* majority focused on the specific intrusion made by law enforcement and GPS devices, the concurring opinions did raise hope for future discussions on privacy in the digital age.[47] Furthermore, Smith concluded that *Katz's* reasonable-expectations-of-privacy test would become obsolete whenever there is a trespass (i.e., if courts find a trespass has occurred, a search has occurred, and at that point the analysis could end). Thus, Smith theorized the *Katz* test will only be applied when there is an absence of a governmental trespass.[48]

Related to privacy, Jennifer Arner examined the Fourth Amendment rights in digital information, namely e-mail. This article explained that the privacy of e-mail depends on where it is being stored: whether on a personal computer or with a third party.[49] The distinction may seem arbitrary at first glance; however, when email messages are stored on the computer (i.e. personal property), then the owner of the computer has full access to Fourth Amendment protections. However, if it is stored a web-based email, then it becomes unlikely that the rights will be

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[46] Lauren Elena Smith, *PRIVACY LAW: Jonesing for a Test: Fourth Amendment Privacy in the Wake of United States v. Jones,* 28 Berkeley Tech. L.J. 1003, 1004 (2013).
[47] *Id.*
[48] Lauren Elena Smith, *PRIVACY LAW: Jonesing for a Test: Fourth Amendment Privacy in the Wake of United States v. Jones,* 28 Berkeley Tech. L.J. 1003, 1032 (2013).
[49] Jennifer Arner, *Looking Forward By Looking Backward: United States v. Jones Predicts Fourth Amendment Property Rights Protections in E-mail,* 24 Geo. Mason U. Civ. Rts. L.J. 349, 349 (2014).

afforded to the individual.[50] To conclude, *Jones* did not provide clear cut rules for "intangible property," however, there does seem to be some hope for courts to recognize property rights in digital information.[51] If that does come to fruition, then *Jones* would have been a substantial change in Fourth Amendment search law.

John Stratford argued that under certain circumstances police searches have gone overboard with the use of warrantless GPS tracking and data retention.[52] Furthermore, Stratford claimed these types of surveillance, whether on the "infobahn or autobahn," are part of the same underlying problem, which involves "the assumption of risk" doctrine (i.e., the doctrine that in general one "assumes the risk" of disclosure of information to other individuals, including unintended individuals, when one shares his or her private information with others). Stratford concluded that this doctrine has become obsolete in the modern era and thus requires modification to reflect the realities of today's world.[53] For example, individuals expose private information about themselves online and in person on a regular basis in order to function properly in today's society. Therefore, Stratford supports a more specific test in this area where certain information voluntarily exposed is still nonetheless private and must be considered for Fourth Amendment protections.[54]

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[50] Jennifer Arner, *Looking Forward By Looking Backward: United States v. Jones Predicts Fourth Amendment Property Rights Protections in E-mail,* 24 Geo. Mason U. Civ. Rts. L.J. 349, 350 (2014).
[51] Jennifer Arner, *Looking Forward By Looking Backward: United States v. Jones Predicts Fourth Amendment Property Rights Protections in E-mail,* 24 Geo. Mason U. Civ. Rts. L.J. 349, 379 (2014).
[52] John A. Stratford, *Adventures On The Autobahn And Infobahn: United States V. Jones, Mandatory Data Retention, And A More Reasonable "Reasonable Expectation Of Privacy",* 103 J. Crim. L. & Criminology 985, 986 (2013).
[53] John A. Stratford, *Adventures On The Autobahn And Infobahn: United States V. Jones, Mandatory Data Retention, And A More Reasonable "Reasonable Expectation Of Privacy",* 103 J. Crim. L. & Criminology 985, 986 (2013).
[54] John A. Stratford, *Adventures On The Autobahn And Infobahn: United States V. Jones, Mandatory Data Retention, And A More Reasonable "Reasonable Expectation Of Privacy",* 103 J. Crim. L. & Criminology 985, 1014 (2013).

Looking more into advanced technology, Lon Berk discussed a similar concern with cloud computing and how the Fourth Amendment may have a difficult time protecting individual rights in this area.[55] With the introduction to smart phones, tablets, and social media applications (i.e., Facebook or Twitter), society has become more focused on sharing information. The government has access to an incredible wealth of information, sometimes referred to as "big data," and this information could contain an enormous amount of material about the individual. A major concern is focused on Cloud computing. The Cloud is a modern electronic storage device that has the capability to accumulate almost limitless amounts of information (i.e. pictures, documents, and data) at the discretion of the individual. This storage device is easily accessible by the general public and has become quickly integrated in other devices to ensure luxury. However, some may wish the information stored on the Cloud to be kept private. At the same time, the information stored on the Cloud has greatly increased the curiosity and the scope of data which the government may want to search and seize.[56]

This has resulted in some tension and confusion between what users wish to keep private and what the government is constitutionally allowed to search and seize. The Courts have had little success in providing a reliable and socially accepted method. In fact, Lon Berk claimed *Jones* is just another example of the fact that technology has quickly evolved and improved over a short period of time and that the law is having a difficult time keeping up. Lon Berk further

[55] Lon A. Berk, *After Jones, The Deluge: The Fourth Amendment's Treatment Of Information, Big Data And The Cloud,* 14 J. High Tech. L. 1, 2 (2014).
[56] Lon A. Berk, *After Jones, The Deluge: The Fourth Amendment's Treatment Of Information, Big Data And The Cloud,* 14 J. High Tech. L. 1, 2 (2014).

questioned whether returning to a property based approach in the face of modernity would facilitate the Fourth Amendment inquiry or create unforeseeable problems.[57]

Arnold Loewy argued that the trespass test is, overall, a more sensible inquiry for Fourth Amendment search questions compared to the reasonable expectation of privacy test.[58] Furthermore, Loewy claimed the *Katz* test was so malleable that it had become nearly useless in determining Fourth Amendment search questions. For example, courts had created a multitude of exceptions under the flexible and subjective expectation of privacy test.[59] Moreover, the *Jones* decision is a logical step forward in establishing a more specific and detailed form of analyzing Fourth Amendment searches.[60] According to Loewy, *Jones* also has the ability to tackle some of the more difficult Fourth Amendment questions, such as the use of modern technology and how it may affect an individual's privacy.[61]

Caleb Mason described *Jones* as the decision which dramatically expanded the scope of the *Katz* test in this new era of surveillance technology.[62] This "new" test was created by the Courts after analyzing what it is the threshold governing a search. Furthermore, Mason questioned how the exclusionary rule will apply under the newly decided *Jones* test, as thousands of pending GPS surveillance cases have the potential to be impacted by this decision. Briefly, the exclusionary rule eliminates any evidence which may have been obtained illegally and, is therefore, unusable in a court of law.[63] However, there are numerous exceptions to the

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[57] Lon A. Berk, *After Jones, The Deluge: The Fourth Amendment's Treatment Of Information, Big Data And The Cloud,* 14 J. High Tech. L. 1, 41 (2014).
[58] Arnold H. Loewy, *United States V. Jones: Return To Trespass-Good News Or Bad,* 82 Miss. L.J. 879, 880 (2013).
[59] Arnold H. Loewy, *United States V. Jones: Return To Trespass-Good News Or Bad,* 82 Miss. L.J. 879, 881 (2013).
[60] Arnold H. Loewy, *United States V. Jones: Return To Trespass-Good News Or Bad,* 82 Miss. L.J. 879, 888 (2013).
[61] *Id*.
[62] Caleb Mason, *New Police Surveillance Technologies and the Good-Faith Exception: Warrantless GPS Tracker Evidence After United States v. Jones,* 13 Nev. L.J. 60, 61 (2012).
[63] *Id.*

exclusionary rule, including the *Davis* exception. Six months prior to the *Jones* decision, the Court in *Davis v. United States* held that the exclusionary rule does not apply if law enforcement were acting in good faith reliance on governing appellate precedent at the time.[64] Mason posited that if courts adopted a "narrow" interpretation of *Davis*, then the Fourth Amendment will be able to adequately meet the ongoing balance between the potentially invasive use of technology at the disposal of law enforcement and citizens' Fourth Amendment privacy rights.[65]

After examining the rationale of *Jones*, Brian Davis argued that the government should not freely be able to obtain cell-phone location data without a warrant.[66] Davis discussed how tracking cell-phones is a violation of Fourth Amendment protections from both perspectives, or tests, including location-based test (i.e., trespass doctrine) and situation-based test (i.e., reasonable-expectation of privacy doctrine).[67] Furthermore, Davis argued, based on the location-based and situation-based tests within the Fourth Amendment, that these electronic searches should be deemed unreasonable without probable cause and a warrant.[68] Finally, Davis explained that Congress should pass legislation related to the disclosure of such data by third-party providers.[69] This bill could help fill the gap and explain how law enforcement is required to conduct electronic surveillance or other investigations relying upon advanced technology under Fourth Amendment principles.

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[64] Caleb Mason, *New Police Surveillance Technologies and the Good-Faith Exception: Warrantless GPS Tracker Evidence After United States v. Jones,* 13 Nev. L.J. 60, 62 (2012).
[65] Caleb Mason, *New Police Surveillance Technologies and the Good-Faith Exception: Warrantless GPS Tracker Evidence After United States v. Jones,* 13 Nev. L.J. 60, 94 (2012).
[66] Brian Davis, *Prying Eyes: How Government Access to Third-Party Tracking Data May Be Impacted by United States v. Jones,* 46 New Eng. L. Rev. 843, 843 (2012).
[67] Brian Davis, *Prying Eyes: How Government Access to Third-Party Tracking Data May Be Impacted by United States v. Jones,* 46 New Eng. L. Rev. 843, 865-867 (2012).
[68] Brian Davis, *Prying Eyes: How Government Access to Third-Party Tracking Data May Be Impacted by United States v. Jones,* 46 New Eng. L. Rev. 843, 875 (2012).
[69] Brian Davis, *Prying Eyes: How Government Access to Third-Party Tracking Data May Be Impacted by United States v. Jones,* 46 New Eng. L. Rev. 843, 847 (2012).

Brad Turner argued that, at one point, the third-party doctrine made sense when people understood that there was no expectation of privacy in information when it is knowingly exchanged and exposed to others; however, in today's society, it is not so simple.[70] For example, peoples' actions and words today literally become data which is shared with others, whether that data is knowingly volunteered or not. As a result, Turner posited that the third-party doctrine now threatens to eviscerate Fourth Amendment protections. However, according to Turner, courts should follow Justice Alito's reasoning in *Jones*; that is, when the government acquires "Big Data," a search under the Fourth Amendment has occurred.[71] This approach may help resolve some unsettled issues under the Fourth Amendment in light of recent advancements in technology.[72] Turner concluded by remarking that if the government conducts a search under *Jones* through the acquisition of GPS data, then surely it would be more intrusive to obtain "Big Data" (and hence it should also constitute a search when the government seeks to obtain this type of data).[73]

Stephen Henderson explained that the return of the property based approach in *Jones* along with the approach of *Katz* means that there is a higher likelihood courts will be able to more accurately determine the Fourth Amendment search question.[74] The combination of these two tests will allow courts the flexibility necessary to analyze Fourth Amendment search inquiries on a case-by-case basis. However, Henderson admitted that the *Jones* decision does leave some important questions unanswered (namely dealing with third-party doctrine and

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[70] Brad Turner, *When Big Data Meets Big Brother: Why Courts Should Apply United States v. Jones to Protect People's Data,* 16 N.C. J.L. & Tech. 377, 381 (2015).
[71] Brad Turner explains that he defines "Big Data" as the "entire ecosystem of data trackers, collectors, analyzers, shares, and sellers of people's data." Data is further defined as any type of information in an electronic form.
[72] Brad Turner, *When Big Data Meets Big Brother: Why Courts Should Apply United States v. Jones to Protect People's Data,* 16 N.C. J.L. & Tech. 377, 433 (2015).
[73] *Id.*
[74] Stephen E. Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine,* 14 N.C. J.L. & Tech. 431, 458 (2013).

whether this represents the Court's attempt to gradually remove the *Katz* test), and it will be interesting to witness how the lower courts react to this decision.

Fabio Arcila, Jr., explained that *Jones* has the potential to be groundbreaking, since *Katz* was decided approximately four decades ago.[75] One of the main reasons why *Jones* could be groundbreaking is because of the various rationales reflected in the justices' opinions in the case. Furthermore, these opinions are important because they will influence Fourth Amendment surveillance jurisprudence; thus, according to Arcila, these opinions are vastly more crucial to Fourth Amendment search questions than the holding itself of *Jones*. Additionally, this case was a crucial decision since the federal government had used approximately 3,000 warrantless GPS devices annually to monitor suspects and, therefore, the case provides some necessary guidance to the government in this area.[76] Arcila stated that *Jones* is also significant because it finally settles the relevant inquiry for Fourth Amendment search questions (i.e., property "versus" privacy).[77]

James Dempsey mentioned *Jones* was a momentous change for Fourth Amendment jurisprudence because it exposed how much focus the lower courts were giving to the third-party doctrine.[78] More interestingly, Dempsey pointed out that the *Jones* Court unanimously disagreed with the government's claim that citizens lack any privacy interest in information voluntarily disclosed. Dempsey posited that *Jones* will usher in a new era of Fourth Amendment law that

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[75] Fabio Arcila, Jr., *Tracking Out Of Fourth Amendment Dead Ends: United States V. Jones And The Katz Conundrum,* 91 N.C.L. Rev. 1, 5 (2012).
[76] Fabio Arcila, Jr., *Tracking Out Of Fourth Amendment Dead Ends: United States V. Jones And The Katz Conundrum,* 91 N.C.L. Rev. 1, 5 (2012).
[77] Fabio Arcila, Jr., *Tracking Out Of Fourth Amendment Dead Ends: United States V. Jones And The Katz Conundrum,* 91 N.C.L. Rev. 1, 77 (2012).
[78] James X. Dempsey, *Big Brother in the 21st Century?: Reforming the Electronic Communications Privacy Act: Speech: Keynote Address: The Path to ECPA Reform and the Implications of United States v. Jones,* 47 U.S.F. L. Rev. 225, 241 (2012).

will require courts to closely examine how the implications of their decisions affect the third-party doctrine.[79]

David Reichbach claimed that *Jones*' modification of what constitutes a search under the Fourth Amendment has strengthened privacy protections for the homeless.[80] Prior to *Jones,* the homeless were generally understood by the courts to be unprotected from police surveillance because they were seen as having their personal belongings out in public, which means they were not afforded the same rights of privacy under *Katz* as their home-owning counterparts.[81] Reichbach stated that the *Jones* decision remedies this lack of protection for the homeless by evaluating a Fourth Amendment search under the trespass test instead of the reasonable expectation of privacy test. Accordingly, *Jones*' trespass test and its focus on ownership or possession of personal belongings avoid omitting the homeless from the same protections all citizens should rightfully enjoy.[82]

The Honorable Garrison Hill explained several notable outcomes concerning the "legacy of *Jones.*"[83] First, the Court universally rejected the government's claim of no reasonable expectation of privacy in public. Second, the Court created another model for lower courts to follow in Fourth Amendment search analysis (i.e., the trespass test). Third, there was universal

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[79] James X. Dempsey, *Big Brother in the 21st Century?: Reforming the Electronic Communications Privacy Act: Speech: Keynote Address: The Path to ECPA Reform and the Implications of United States v. Jones,* 47 U.S.F. L. Rev. 225, 244 (2012).
[80] David Reichbach, *The Home Not the Homeless: What the Fourth Amendment has Historically Protected and Where the Law is Going After Jones,* 47 U.S.F. L. Rev. 377, 377 (2012).
[81] See *United States v. Ruckman*, 806 F.2d 1471, 1472-73 (10th Cir. 1986); *People v. Thomas*, 45 Cal. Rptr. 2d 610, 613 n.2 (Ct. App. 1995); *State v. Cleator*, 857 P.2d 306, 308 (Wash. Ct. App. 1993).
[82] David Reichbach, *The Home Not the Homeless: What the Fourth Amendment has Historically Protected and Where the Law is Going After Jones,* 47 U.S.F. L. Rev. 377, 397 (2012).
[83] Hon D. Garrison "Gary" Hill, *BACK TO THE FUTURE: UNITED STATES V. JONES AND THE SEARCH FOR FOURTH AMENDMENT COHERENCE,* 23 S. Carolina Lawyer 28, 31 (2012).

agreement among the justices in *Jones* that the trespass doctrine and the reasonable expectation of privacy doctrine are exclusive to Fourth Amendment law.[84]

Melanie Reid posited the *Jones* decision could be the end of the privacy inquiry for Fourth Amendment searches, as these searches are now being governed by the common law trespass test.[85] Moreover, this change may signal an end to society's subjective expectations of privacy as the shift to a trespass-based understanding of Fourth Amendment protections occurs. Reid theorized that it is highly likely to be able to predict an outcome when the facts of a case implicate both trespass and privacy notions, or tests, but it is harder to predict outcomes when one test is triggered and the other is not.[86] In a post-*Jones* era, this could cause some uncertainty and controversy as the lower courts attempt to tackle this critical scenario. Reid concluded, with an expression of hope, that either the United States Supreme Court or Congress will intervene to resolve this uncertainty.

Vikram Iyengar stated that although the justices agreed that a search occurred in *Jones*, their rationales were vastly different.[87] Looking specifically at Justice Alito's concurrence, Iyengar reasoned a search occurred because the government's conduct amounted to violating Jones' reasonable expectation of privacy. Additionally, Justice Sotomayor agreed with Justice Alito's argument on the risks and dangers of advanced technology for citizens' privacy rights.[88] Iyengar questioned the constitutional boundaries inherent in the government's ability to intrude

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[84] Hon D. Garrison "Gary" Hill, *BACK TO THE FUTURE: UNITED STATES V. JONES AND THE SEARCH FOR FOURTH AMENDMENT COHERENCE,* 23 S. Carolina Lawyer 28, 32 (2012).
[85] Melanie Reid, *UNITED STATES V. JONES: BIG BROTHER AND THE "COMMON GOOD" VERSUS THE FOURTH AMENDMENT AND YOUR RIGHT TO PRIVACY,* 9 Tenn. J. L. & Pol'y 7, 10 (2013).
[86] Melanie Reid, *UNITED STATES V. JONES: BIG BROTHER AND THE "COMMON GOOD" VERSUS THE FOURTH AMENDMENT AND YOUR RIGHT TO PRIVACY,* 9 Tenn. J. L. & Pol'y 7, 42 (2013).
[87] Vikram Iyengar, *U.S. v. Jones: Inadequate to Promote Privacy for Citizens and Efficiency for Law Enforcement,* 19 Tex. J. on C.L. & C.R. 335, 335 (2014).
[88] Vikram Iyengar, *U.S. v. Jones: Inadequate to Promote Privacy for Citizens and Efficiency for Law Enforcement,* 19 Tex. J. on C.L. & C.R. 335, 336 (2014).

on these rights in light of the vast amount of information available through social media and other third party sites.[89] Furthermore, rules on domestic drone surveillance are still unclear in the wake of *Jones*. Iyengar concluded both Congress and the United States Supreme Court will need to further define the limitations for government's use of these devices.

II. Second Category

The articles in this category describe how the *Jones* decision either didn't meet expectations or the Supreme Court missed an opportunity to make real headway in Fourth Amendment jurisprudence. These academics discuss that physical trespass has no real place in a digital society. Furthermore, they posit that former Fourth Amendment search criteria (i.e., *Katz* or Mosaic Theory) are more than adequate in guiding Fourth Amendment search jurisprudence.

Medinger discussed how at first, *Jones* was supposed to further change Fourth Amendment jurisprudence in the area of advanced technology, such as a GPS device.[90] However, instead of "breaking new ground," the Court turned to the common-law property based Fourth Amendment test. Furthermore, the Court left many unanswered questions with the *Jones* holding, such as whether it applies retroactively or whether there are certain circumstances which would make the warrantless attachment of a GPS device "reasonable."[91] This lack of clarity has resulted in lower courts needing to take it upon themselves to answer these vague questions. As a result, the district courts have turned to long-standing precedents. Furthermore, *Jones* may prove

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[89] Vikram Iyengar, *U.S. v. Jones: Inadequate to Promote Privacy for Citizens and Efficiency for Law Enforcement,* 19 Tex. J. on C.L. & C.R. 335, 348 (2014).

[90] Jason D. Medinger, *Privacy Rights & Proactive Investigations: 2013 Symposium on Emerging Constitutional Issues in Law Enforcement: Article: Post-Jones: How District Courts are Answering the Myriad Questions Raised by the Supreme Court's Decision in United States v. Jones,* 42 U. Balt. L. Rev. 395, 395 (2013).

[91] Jason D. Medinger, *Privacy Rights & Proactive Investigations: 2013 Symposium on Emerging Constitutional Issues in Law Enforcement: Article: Post-Jones: How District Courts are Answering the Myriad Questions Raised by the Supreme Court's Decision in United States v. Jones,* 42 U. Balt. L. Rev. at 398.

to change our understanding of Fourth Amendment searches. Medinger's post-*Jones* data proved that courts had not adapted to the change as of yet.[92]

Andrew Talai explained that law enforcement has the ability to send out drones throughout the country in order to conduct surveillance.[93] Talai pointed out a critical question on everyone's mind following *Jones*: whether drone surveillance is considered a search. Moreover, there is no clear answer from the Supreme Court on how advanced technology, such as drones, is governed by the United States Constitution. *Jones* has "splintered" the law into three main aspects: the trespass test, reasonable expectation of privacy test, and Mosaic Theory.[94] Mosaic Theory posits that the collection and subsequent analysis of information from non-searches could invoke Fourth Amendment protections.[95] The main idea is that this conglomeration of non-searches could become a Fourth Amendment search, after a certain point. Talia concluded that the Mosaic Theory is a good foundation for securing Fourth Amendment protections in public areas; however, it must be re-developed to account for police discretion.[96]

Jace Gatewood described that, prior to the development of modern technology, privacy was more practical in nature.[97] In today's world, however, modern technology has blurred what is considered private and what law enforcement is legally able to do. This advanced technology

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[92] Medinger examined district court cases and found that majority of them had turned to binding precedent to answer Fourth Amendment search questions revolving around law enforcement's use of modern technology. Jason D. Medinger, *Privacy Rights & Proactive Investigations: 2013 Symposium on Emerging Constitutional Issues in Law Enforcement: Article: Post-Jones: How District Courts are Answering the Myriad Questions Raised by the Supreme Court's Decision in United States v. Jones,* 42 U. Balt. L. Rev. at 444.

[93] Andrew B. Talai, *Drones and Jones: The Fourth Amendment and Police Discretion in the Digital Age,* 102 Calif. L. Rev. 729, 731 (2014).

[94] Andrew B. Talai, *Drones and Jones: The Fourth Amendment and Police Discretion in the Digital Age,* 102 Calif. L. Rev. 729, 733 (2014).

[95] Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment,* 111 Mich. L. Rev. 311, 320 (2012).

[96] Andrew B. Talai, *Drones and Jones: The Fourth Amendment and Police Discretion in the Digital Age,* 102 Calif. L. Rev. 729, 778 (2014).

[97] Jace C. Gatewood, *District of Columbia Jones and the Mosaic Theory – In Search of a Public Right of Privacy: The Equilibrium Effect of the Mosaic Theory,* 92 Neb. L. Rev. 504, 508 (2014).

has the capability to track and monitor anyone, regardless of time and place.[98] Gatewood suggested that the Mosaic Theory could help alleviate some issues in Fourth Amendment jurisprudence. Furthermore, this theory could create a balance between the practicality of the Fourth Amendment and law enforcement's need to control crime.[99] The Mosaic Theory refers to the notion that the aggregate collection of data from non-searches could invoke Fourth Amendment protections.[100] After a careful analysis by law enforcement, the aggregate data from these non-searches could become a Fourth Amendment search. Moreover, Gatewood posited that the Mosaic Theory has a unique capacity to meet and protect the real world expectations of privacy as opposed to merely responding to and safeguarding the alternative of what a person exposes to the public, knowingly or otherwise. Additionally, according to Gatewood, this theory would help to shed some light on the subject of advanced technology and privacy rights.[101]

Priscilla Smith argued that the Mosaic Theory was incomplete and further stated that the *Katz* reasonable expectation of privacy test remains adequate, despite certain criticisms that the test is ill-equipped to respond to modern technological advances.[102] Furthermore, the concurrences in the *Jones* decision viewed the warrantless GPS surveillance to be a violation of defendant's reasonable expectation of privacy based on the original notion of privacy protection and protections against abusive law enforcement tactics.[103]

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[98] *Id.*
[99] Jace C. Gatewood, *District of Columbia Jones and the Mosaic Theory – In Search of a Public Right of Privacy: The Equilibrium Effect of the Mosaic Theory,* 92 Neb. L. Rev. 504, 536 (2014).
[100] Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment,* 111 Mich. L. Rev. 311, 320 (2012).
[101] Jace C. Gatewood, *District of Columbia Jones and the Mosaic Theory – In Search of a Public Right of Privacy: The Equilibrium Effect of the Mosaic Theory,* 92 Neb. L. Rev. 504, 536 (2014).
[102] Priscilla J. Smith, *Much Ado About Mosaics: How Original Principles Apply to Evolving Technology in United States v. Jones,* 14 N.C. J.L. & Tech. 557, 562 (2013).
[103] Priscilla J. Smith, *Much Ado About Mosaics: How Original Principles Apply to Evolving Technology in United States v. Jones,* 14 N.C. J.L. & Tech. 557, 598 (2013).

Daniel Pesciotta explained that the *Katz* reasonable-expectation-of-privacy test can still protect citizens' Fourth Amendment rights in the post-*Jones* world.[104] Lower courts appear to be applying *Katz* tests when considering Fourth Amendment matters dealing with video surveillance and e-mail searches.[105] Furthermore, the courts seem to favor citizens' privacy rights while keeping law enforcement from gaining easy access to advanced technology. Pesciotta further claimed that in a post-*Jones* world, the *Katz* test was not "dead;" it will endure so long as both society and the court system continue to rely on citizens' reasonable privacy interests.[106]

William Kim argued that a "capability-based" warrant requirement would help alleviate some of the pitfalls with the *Jones* decision.[107] Kim described the "capability-based" procedure as law enforcement detailing the capabilities of the technology they are using in the warrant. For example, if a GPS solely transmits the pin point location of a vehicle, then law enforcement need only specify such; on the other hand, if the GPS device has the ability to record conversations, then law enforcement must specify this capability during the application of the warrant.[108] This would have many foreseeable advantages, including serving the dual purposes of safeguarding privacy protections without hindering the criminal investigations of the police.[109]

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[104] Daniel T. Pesciotta, *I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century,* 63 Case W. Res. 187, 190 (2012).
[105] Daniel T. Pesciotta, *I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century,* 63 Case W. Res. 187, 254 (2012).
[106] Daniel T. Pesciotta, *I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century,* 63 Case W. Res. 187, 255 (2012).
[107] William Y. Kim, *The Whole is Greater than the Sum of its Parts: Maynard, Jones, and the Integration of GPS and the Fourth Amendment,* 8 Crim. L. Brief 31, 31 (2013).
[108] William Y. Kim, *The Whole is Greater than the Sum of its Parts: Maynard, Jones, and the Integration of GPS and the Fourth Amendment,* 8 Crim. L. Brief 31, 41 (2013).
[109] William Y. Kim, *The Whole is Greater than the Sum of its Parts: Maynard, Jones, and the Integration of GPS and the Fourth Amendment,* 8 Crim. L. Brief 31, 31 (2013).

Kathryn Horwath states that the use of location-based technological applications and services compromise an individual's privacy.[110] Moreover, as citizens become more interconnected, it has left an open question as to what this means in the context of Fourth Amendment protections. Horwath suggests that users of these location-based applications and other electronic communications need to receive Fourth Amendment protections.[111] Overall, the Court in *Jones* had sidestepped the larger question of whether prolonged governmental electronic surveillance would violate individual privacy rights afforded by the Fourth Amendment.[112]

Ryan Birss explained the *Jones* decision caused much turmoil for the FBI as they had to deactivate nearly 3000 GPS devices tracking the whereabouts of persons of interest.[113] Birss explained in the post-*Jones* era, the Sixth Circuit's rationale in *Skinner* best illustrates the vast limitations found in a property-based, trespass approach to Fourth Amendment searches by police involving electronic surveillance.[114] For example, the *Skinner* court found a way around the implications of the physical trespass test by noting that police used cell phone location data to track the whereabouts of the suspect. Moreover, Birss stated based on Justice Alito's concurring opinion in *Jones*, courts would be able to protect privacy interests while also keeping more creative governmental intrusions in check.[115]

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[110] Kathryn Nobuko Horwath, *A Check-in on Privacy After United States v. Jones: Current Fourth Amendment Jurisprudence in the Context of Location-Based Applications and Service,* 40 Hastings Const. L.Q. 925, 925 (2013).
[111] Kathryn Nobuko Horwath, *A Check-in on Privacy After United States v. Jones: Current Fourth Amendment Jurisprudence in the Context of Location-Based Applications and Service,* 40 Hastings Const. L.Q. 925, 928 (2013).
[112] Kathryn Nobuko Horwath, *A Check-in on Privacy After United States v. Jones: Current Fourth Amendment Jurisprudence in the Context of Location-Based Applications and Service,* 40 Hastings Const. L.Q. 925, 965 (2013).
[113] Ryan Birss, *Alito's Way: Application of Justice Alito's Concurring Opinion in United States v. Jones to Cell Phone Location Data,* 65 Hastings L.J. 899, 900 (2014).
[114] Ryan Birss, *Alito's Way: Application of Justice Alito's Concurring Opinion in United States v. Jones to Cell Phone Location Data,* 65 Hastings L.J. 899, 927 (2014).
[115] Ryan Birss, *Alito's Way: Application of Justice Alito's Concurring Opinion in United States v. Jones to Cell Phone Location Data,* 65 Hastings L.J. 899, 927 (2014).

David Gray, Danielle Citron, and Liz Rinehart claimed that the decision in *Jones* has great potential for protecting citizens from unwanted intrusions while also helping law enforcement fight cybercrimes and health fraud.[116] *Jones* helps to guide, and at the same time place limits on, law enforcement as they attempt to use new types of surveillance technology. Moreover, the authors argued that law enforcement interests are at stake if police do not keep up with technological advances that are now at the disposal of those involved in cybercrimes. According to the authors, law enforcement officers must be allowed to use digital surveillance technology to prevent and prosecute various degrees of cybercrimes.[117]

Stephen Henderson further argued that the return of the property based approach in *Jones* along with the approach of *Katz* means that there is a higher likelihood courts will be able to more accurately determine the Fourth Amendment search question.[118] However, Henderson admitted that the *Jones* decision does leave some important questions unanswered, and it will be interesting to witness how the lower courts react to this decision. Henderson stated that the critical question is what restraints or regulations should be placed on the government to survey and record information.[119] This has been a gray area, which is why many scholars and critics were hopeful for *Jones* to establish some clear precedent. However, that did not necessarily happen. Henderson explained that the lack of guidance in the *Jones* decision is not surprising for a few reasons; first, the government did not raise certain issues such as the reasonableness of a police search using a GPS device and second, any precise guidance from the Supreme Court in

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[116] David Gray, Danielle Keats Citron, and Liz Clark Rinehart, *Symposium On Cybercrime: Fighting Cybercrime After Untied States V. Jones,* 103 J. Crim. L. & Criminology 745, 747 (2013).
[117] David Gray, Danielle Keats Citron, and Liz Clark Rinehart, *Symposium On Cybercrime: Fighting Cybercrime After Untied States V. Jones,* 103 J. Crim. L. & Criminology 745, 801 (2013).
[118] Stephen E. Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine,* 14 N.C. J.L. & Tech. 431, 458 (2013).
[119] Stephen E. Henderson, *Symposium On Cybercrime: Real-Time And Historic Location Surveillance After United States V. Jones: An Administrable, Mildly Mosaic Approach,* 103 J. Crim. L. & Criminology 803, 804 (2013).

the area of electronic surveillance would be difficult to formulate.[120] Furthermore, Justice Alito's concurring opinion in *Jones,* as well as other critics and legal scholars, have repeatedly argued Congress would be more suited to providing guidance in this area.[121]

Elizabeth Elliot argued that warrantless tracking of cell-site location data and warrantless GPS surveillance were common practices in law enforcement, but the recent *Jones* decision has created a "new" test for courts to apply to Fourth Amendment cases involving the use of this technology.[122] Furthermore, Elliot argued that the tracking of cell-site location data is vastly similar to GPS surveillance and thus, should also require law enforcement to obtain a warrant. Elliot concluded that law enforcement has too much power in being able to request this information acquired by technological devices on a whim, and that the Supreme Court needs to address the issue of the government or "Big Brother" being able to rather easily invade anyone's Fourth Amendment reasonable expectation of privacy in light of recent technological advancements.[123]

Ber-An Pan raised a similar issue in regards to information obtained from cell-phones.[124] Nearly everyone owns or has access to a cell-phone and a massive amount of information is stored on these phones using the various functions, such as GPS, texts, phone calls, and internet. The *Jones* Court determined that the government conducts a search when they attach a GPS device to track a suspect. However, Pan argued that the Court avoided addressing various

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[120] Stephen E. Henderson, *Symposium On Cybercrime: Real-Time And Historic Location Surveillance After United States V. Jones: An Administrable, Mildly Mosaic Approach,* 103 J. Crim. L. & Criminology 803, 809 (2013).
[121] Stephen E. Henderson, *Symposium On Cybercrime: Real-Time And Historic Location Surveillance After United States V. Jones: An Administrable, Midly Mosaic Approach,* 103 J. Crim. L. & Criminology 803, 838 (2013).
[122] Elizabeth Elliot, *United States V. Jones: The (Hopefully Temporary) Derailment Of Cell-Site Location Information Protections,* 15 Loy. J. Pub. Int. L.1, (2013).
[123] Elizabeth Elliot, *United States V. Jones: The (Hopefully Temporary) Derailment Of Cell-Site Location Information Protections,* 15 Loy. J. Pub. Int. L.1, 35 (2013).
[124] Ber-An Pan, *The Evolving Fourth Amendment: United States V. Jones, The Information Cloud, And The Right To Exclude,* 72 Md. L. Rev. 997, 997 (2013).

loopholes in Fourth Amendment protections caused by modern technology.[125] Furthermore, the recent *Jones* decision also raised quite a few legal uncertainties for law enforcement in the area of technology and the application of the Fourth Amendment. Moreover, Pan pointed to Justice Sotomayor and Alito's concurring opinions, which disapproved of returning to the property rights approach to Fourth Amendment searches.[126] It was reasoned that in this modern age, a substantial amount of information is no longer viewed as part of a "physical document," but instead consists of "intangible" data. Pan criticized *Jones* for sidestepping the Fourth Amendment issues related to this electronic data and thereby creating a degree of vagueness and uncertainty in this area.

Similarly, George Dery III and Ryan Evaro discussed how the Court in *Jones* missed an opportunity to drastically change the landscape of Fourth Amendment searches and instead returned to an outdated physical intrusion test for these searches.[127] Moreover, the authors argued that the Court in *Jones* appeared to forget that the *Katz* Court found that a search occurred because of the electronic interception of a conversation, not from the actual attachment of an electronic device to the outside of a telephone booth to obtain the information.[128] Hence, the *Jones* Court missed the opportunity to answer how far the government can go with advanced technology, such as a GPS device, before it invades an individual's expectation of privacy.

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[125] Ber-An Pan, *The Evolving Fourth Amendment: United States V. Jones, The Information Cloud, And The Right To Exclude,* 72 Md. L. Rev. 997, 998 (2013).
[126] Ber-An Pan, *The Evolving Fourth Amendment: United States V. Jones, The Information Cloud, And The Right To Exclude,* 72 Md. L. Rev. 997, 1037 (2013).
[127] George M. Dery III and Ryan Evaro, *The Court Loses Its Way With The Global Positioning System: United States V. Jones Retreats To The "Classic Trespassory Search",* 19 Mich. J. Race & L. 113, 115 (2013).
[128] George M. Dery III and Ryan Evaro, *The Court Loses Its Way With The Global Positioning System: United States V. Jones Retreats To The "Classic Trespassory Search",* 19 Mich. J. Race & L. 113, 151 (2013).

Kyle Robbins points out the major pitfall of the *Jones* decision in that it did not explain if warrantless GPS data obtained by police prior to this decision is admissible.[129] As a result, lower courts are forced to struggle with this decision, and must rely on available, appellant precedent. Furthermore, any evidence obtained by officers who acted reasonably under the circumstances prior to *Jones*, is generally protected from the exclusionary rule (i.e., under the good-faith exception).[130] Also, courts remain resistant in applying the exclusionary rule in this context because it would fail to meet its intended purpose of deterring corrupt police investigations infringing upon a citizen's Fourth Amendment rights.

Susan Freiwald described *Jones* as "anything but definitive" because it lacked a rule on how to govern cases which did not implicate a physical trespass element.[131] According to Freiwald, the Court in *Jones* left many questions unanswered, and it is up to the lower courts to interpret this new test and identify solutions. However, this process may take longer because of the *Davis* good-faith exception.[132] The Court in *Davis v. United States* held that the exclusionary rule does not apply if law enforcement were acting on governing appellate precedent at the time.

Tamara Lave pointed out that many scholars have criticized the rationale in *Jones* and its adoption of the trespass doctrine for Fourth Amendment search inquiries.[133] Only Justice Sotomayor's opinion in *Jones* was willing to question whether reasonable expectation of privacy has a place in the digital age where information is constantly voluntarily disclosed to third

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[129] Kyle Robbins, *Davis, Jones, And The Good-Faith Exception: Why Reasonable Police Reliance On Persuasive Appellant Precedent Precludes Application Of The Exlcusionary Rule,* 82 Miss. L.J. 1175, 1177 (2013).
[130] Kyle Robbins, *Davis, Jones, And The Good-Faith Exception: Why Reasonable Police Reliance On Persuasive Appellant Precedent Precludes Application Of The Exlcusionary Rule,* 82 Miss. L.J. 1175, 1204 (2013).
[131] Susan Freiwald, *The Davis Good Faith Rule and Getting Answers to the Questions Jones Left Open,* 14 N.C. J.L. & Tech. 341, 342 (2013).
[132] Susan Freiwald, *The Davis Good Faith Rule and Getting Answers to the Questions Jones Left Open,* 14 N.C. J.L. & Tech. 341, 379 (2013).
[133] Tamara Rice Lave, *Protecting Elites: An Alternative Take on How United States v. Jones Fits into the Court's Technology Jurisprudence,* 14 N.C. J.L. & Tech. 461, 463 (2013).

parties.[134] Furthermore, the *Jones* decision has caused a great deal of confusion in the realm of law enforcement; for instance, many agencies do not know what degree of electronic tracking is allowed, if any, before this tracking encroaches upon a suspect's Fourth Amendment rights.[135] As a result, the FBI had taken the drastic step of completely deactivating thousands of GPS devices across the nation. Lave further argued that the United States Supreme Court's history regarding technology appeared to reflect the protection of the interests of wealthy "elites," as binoculars and other forms of permissible police technology could be blocked with a house or taller fences.[136] However, with the recent advances in technology, both the privileged and disadvantaged have reason to fear the eye of "Big Brother" as society becomes more inter-connected with technology.

Thomas Clancy argued that the opinion of the Court, written by Justice Scalia, did not offer any novel approaches to Fourth Amendment search questions; thus, according to Clancy, *Jones* lacks significant precedential value.[137] Clancy explains that trespass is a Fourth Amendment concept from an earlier time which really never completely faded away. Additionally, the concurrences did not offer any specific guidance, but instead made vague observations regarding advanced technologies and Fourth Amendment privacy rights. Clancy argued these concurring opinions will only add to the confusion in this area rather than being a guide for lower courts in the post-*Jones* world.[138] Clancy concluded by stating that "*Jones* is but the most recent failure" and reasoned the United States Supreme Court in *Jones* did not develop

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[134] Tamara Rice Lave, *Protecting Elites: An Alternative Take on How United States v. Jones Fits into the Court's Technology Jurisprudence,* 14 N.C. J.L. & Tech. 461, 464 (2013).
[135] Tamara Rice Lave, *Protecting Elites: An Alternative Take on How United States v. Jones Fits into the Court's Technology Jurisprudence,* 14 N.C. J.L. & Tech. 461, 466 (2013).
[136] Tamara Rice Lave, *Protecting Elites: An Alternative Take on How United States v. Jones Fits into the Court's Technology Jurisprudence,* 14 N.C. J.L. & Tech. 461, 484 (2013).
[137] Thomas K. Clancy, *United States v. Jones: Fourth Amendment Applicability in the 21st Century,* 10 Ohio St. J. Crim. L. 303, 303 (2012).
[138] *Id.*

any framework for new technologies and Fourth Amendment rights.[139] However, *Jones* does provide a method regarding how lower courts should evaluate physical intrusions (i.e., trespasses).

Erin Murphy explained that *Jones* had forced the United States Supreme Court to answer a difficult question, one on which they have avoided confrontation for a period of time. The Supreme Court had a decision to make, one where they would decide where the line is to be drawn for Fourth Amendment protections.[140] However, Murphy claimed the majority of the justices fell short in their analysis which failed to address the critical question concerning the use of technology by law enforcement. Instead, the majority provided lower courts with a specific rule and returned to the trespass doctrine to govern Fourth Amendment search inquiries. But the issue of electronic surveillance which doesn't implicate a physical trespass was largely overlooked in Jones. Justice Sotomayor was the only justice who made any genuine attempt at tackling this difficult question.[141] Murphy concluded, Justice Sotomayor's opinion may be held in similar regard to Justice Harlan's concurring opinion in *Katz*, in that it could be held as a set standard.[142]

Benjamin Priester claimed that the *Jones* decision lacked clarity in its reasoning as three different rationales emerged from the various opinions in the case.[143] Additionally, Priester stated that the various opinions managed to avoid clarifying how Fourth Amendment rights apply in an

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[139] Thomas K. Clancy, *United States v. Jones: Fourth Amendment Applicability in the 21st Century,* 10 Ohio St. J. Crim. L. 303, 323 (2012).
[140] Erin Murphy, *Back to the Future: The Curious Case of United States v. Jones,* 10 Ohio St. J. Crim. L. 325, 325 (2012).
[141] Erin Murphy, *Back to the Future: The Curious Case of United States v. Jones,* 10 Ohio St. J. Crim. L. 325, 333 (2012).
[142] Erin Murphy, *Back to the Future: The Curious Case of United States v. Jones,* 10 Ohio St. J. Crim. L. 325, 340 (2012).
[143] Benjamin J. Priester, *Five Answers and Three Questions After United States v. Jones (2012), the Fourth Amendment "GPS case",* 65 Okla. L. Rev. 491, 492 (2013).

"Internet-interconnected age."[144] Although the United States Supreme Court in *Jones* managed to avoid this clarification, Priester claimed it is inevitable that the Court will be confronted with this question again, and the justices at that time will have to make significant changes to Fourth Amendment law in this area.[145]

Jace Gatewood compared the *Jones* decision to a child waking up on Christmas morning and expecting gifts under the tree from Santa, but instead finding that Santa had forgotten all the good stuff.[146] This feeling can be characterized as disappointment. This disappointment stems from the hope that the United States Supreme Court in *Jones* would have provided more direction and guidance in the area of Fourth Amendment rights and technologies used by law enforcement in the digital age.[147] Moreover, a plethora of data is constantly being stored about an individual (i.e., on Facebook, Twitter, etc.), and the possibility of law enforcement being able to access this information without any form of physical intrusion makes the *Jones* decision appear "illusionary."[148] Gatewood concluded by remarking that the Court in *Jones* missed a considerable opportunity to address the many questions regarding how the government is permitted to use advanced technology under the Fourth Amendment.[149]

Mary Leary claimed the opinion in *Jones* failed to yield any meaningful results in the area of technology and privacy expectations, but it did manage to expand the definition of a

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[144] *Id.*
[145] Benjamin J. Priester, *Five Answers and Three Questions After United States v. Jones (2012), the Fourth Amendment "GPS case",* 65 Okla. L. Rev. 491, 532 (2013).
[146] Jace C. Gatewood, *It's Raining Katz and Jones: The Implications of United States v. Jones-A Case of Sound and Fury,* 33 Pace L. Rev. 683, 683 (2013).
[147] Jace C. Gatewood, *It's Raining Katz and Jones: The Implications of United States v. Jones-A Case of Sound and Fury,* 33 Pace L. Rev. 683, 684 (2013).
[148] Jace C. Gatewood, *It's Raining Katz and Jones: The Implications of United States v. Jones-A Case of Sound and Fury,* 33 Pace L. Rev. 683, 685 (2013).
[149] Jace C. Gatewood, *It's Raining Katz and Jones: The Implications of United States v. Jones-A Case of Sound and Fury,* 33 Pace L. Rev. 683, 714 (2013).

Fourth Amendment search.[150] Leary also argued that due to "commercial conditioning," society no longer possess a true subjective expectation of privacy.[151] This "commercial conditioning" has come in the form of society being presented with devices and tools which allow it to easily exchange information with third-party businesses, including Facebook and Twitter, without any expectation of privacy. Cell-phones with GPS devices enabled are constantly gathering and aggregating massive amounts of data on a single individual and as a result of these forms of advanced technology, Leary claimed society has relinquished any opportunity it may have had to demonstrate an expectation of privacy.[152]

Angelique Romero argued that after the decision in *Jones*, the inquiry for courts to determine if a violation of Fourth Amendment rights has occurred has become more blurred.[153] This vagueness stems from *Jones*' adoption of two inquiries, or tests, to decide Fourth Amendment search questions: the common law trespass test and the reasonable expectation of privacy test. Although it failed to answer some of the more pressing questions within Fourth Amendment jurisprudence, Romero explained the trespass test may in fact have a place in the overall Fourth Amendment inquiry in the modern era. For example, if police obtain a suspect's DNA without a warrant or consent, the courts could easily rely on the trespass test to evaluate whether a violation of the individual's Fourth Amendment rights had occurred.[154]

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[150] Mary G. Leary, *The Missed Opportunity of United States v. Jones: Commercial Erosion of Fourth Amendment Protection in a Post-Google Earth World,* 15 U. Pa. J. Const. L. 331, 333 (2012).
[151] Mary G. Leary, *The Missed Opportunity of United States v. Jones: Commercial Erosion of Fourth Amendment Protection in a Post-Google Earth World,* 15 U. Pa. J. Const. L. 331, 376 (2012).
[152] Mary G. Leary, *The Missed Opportunity of United States v. Jones: Commercial Erosion of Fourth Amendment Protection in a Post-Google Earth World,* 15 U. Pa. J. Const. L. 331, 333 (2012).
[153] Angelique Romero, *IMPLICATIONS OF UNITED STATES V. JONES ON DNA COLLECTION FROM ARRESTEES: A TRESPASS PROHIBITED BY THE FOURTH AMENDMENT?,* 25 St. Thomas L. Rev. 244, 245 (2013).
[154] Angelique Romero, *IMPLICATIONS OF UNITED STATES V. JONES ON DNA COLLECTION FROM ARRESTEES: A TRESPASS PROHIBITED BY THE FOURTH AMENDMENT?,* 25 St. Thomas L. Rev. 224, 268 (2013).

The Honorable Kevin Emas and Tamara Pallas questioned whether the *Jones* decision may have been the death of *Katz.*[155] Based on the opinion of the Court as written by Justice Scalia, Emas and Pallas claimed that once the application of the trespass test does not result in a finding of a Fourth Amendment search, then courts are able to resort to the *Katz* test.[156] Additionally, Justice Scalia's opinion required using the *Katz* test to assess the "reasonability" of the search, not necessarily for whether the search had occurred. Emas and Pallas both agreed that the *Jones* trespass test is but the first step in a paradigm shift away from the *Katz* test in Fourth Amendment analysis.[157]

Michael Snyder mentioned that the Supreme Court's holding in *Jones* left a number of questions unanswered. One such question left unaddressed is whether police use of a GPS device to track the whereabouts of a suspect constitutes a search under the Fourth Amendment when there is no physical trespass present.[158] Additionally, the reasoning of the majority and concurring opinions in *Jones* does not address whether the police conduct in the case constitutes a seizure under the Fourth Amendment. Because of these lingering questions, critics and skeptics wonder if the Court's holding is extremely limited in both its applicability and utility.[159] Snyder concluded by claiming that due to the limited holding of *Jones*, there is no assurance of Fourth Amendment protection to individuals who carry cell-phone devices.

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[155] The Honorable Kevin Emas and Tamara Pallas, *LAW ISSUE: FEATURED CONTRIUBOTR: UNITED STATES V. JONES: DOES KATZ STILL HAVE NINE LIVES?,* 24 St. Thomas L. Rev. 116, 117 (2012).
[156] The Honorable Kevin Emas and Tamara Pallas, *LAW ISSUE: FEATURED CONTRIUBOTR: UNITED STATES V. JONES: DOES KATZ STILL HAVE NINE LIVES?,* 24 St. Thomas L. Rev. 116, 167 (2012).
[157] The Honorable Kevin Emas and Tamara Pallas, *LAW ISSUE: FEATURED CONTRIUBOTR: UNITED STATES V. JONES: DOES KATZ STILL HAVE NINE LIVES?,* 24 St. Thomas L. Rev. 116, 167 (2012).
[158] Michael Snyder, *KATZ-ING UP AND (NOT) LOSING PLACE: TRACKING THE FOURTH AMENDMENT IMPLICATIONS OF UNITED STATES V. JONES AND PROLONGED GPS MONITORING,* 58 S.D. l. Rev. 158, 160 (2013).
[159] *Id.*

Ebony Morris explained the holding in *Jones* failed to answer a crucial question: when the government uses a warrantless GPS device without accomplishing a physical trespass, does the person have a reasonable expectation of privacy in the information obtained (from the device)?[160] This is a critical question because in the modern age, physical intrusions are much less likely, and conversely, electronic or digital intrusions are much more common. Thus, the *Jones* Court missed an opportunity to help guide future cases involving advanced technology. However, as Justice Alito pointed out in his concurrence, Congress is fully capable of remedying this grey area.[161]

Brittany Boatman argued that the *Jones* decision was a disappointing one as the United States Supreme Court's revival of common law trespass will further complicate Fourth Amendment cases.[162] Boatman explained that while the Court's holding reflected societal changes, the Court nonetheless revived an outdated system instead of making the necessary, groundbreaking alterations to Fourth Amendment law. This approach is seen as especially foolish by Boatman because society is rapidly becoming more connected through advanced technologies. These technologies, according to Boatman, will only further blur the lines between the notions of privacy expectations and physical trespasses.

Kevin Bankston and Ashkan Soltani explained that the *Jones* decision produced three separate opinions; furthermore, as reflected in these opinions, four United States Supreme Court justices rejected the majority's notion of a trespass and argued that the prolonged electronic,

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[160] Ebony Morris, *ALWAYS EYES WATCHING YOU: UNITED STATES V. JONES AND CONGRESS'S ATTEMPTS TO STOP WARRANTLESS GOVERNMENT SURVEILLANCE,* 40 S.U. L. Rev. 489, 489 (2013).
[161] Ebony Morris, *ALWAYS EYES WATCHING YOU: UNITED STATES V. JONES AND CONGRESS'S ATTEMPTS TO STOP WARRANTLESS GOVERNMENT SURVEILLANCE,* 40 S.U. L. Rev. 489, 490 (2013).
[162] Brittany Boatman, *UNITED STATES V. JONES: THE FOOLISH REVIVAL OF THE "TRESPASS DOCTRINE" IN ADDRESSING GPS TECHNOLOGY AND THE FOURTH AMENDMENT,* 47 Val. U.L. Rev. 677, 688 (2013).

GPA monitoring of defendant Jones' vehicle violated his reasonable expectation of privacy.[163] Bankston and Soltani proposed a new supplementary tool, which they named "order-of-magnitude," to help courts decide if a privacy expectation exists in cases involving surveillance technologies.[164] This system uses cost as a metric to determine the privacy expectation of individuals under electronic surveillance. Bankston and Soltani explained one limitation of their tool includes how it might apply above and beyond tracking types of electronic surveillance. In addition, if their tool does gain acceptance, it will require much discussion and debate on the exact cost calculus.[165]

Dana Raigrodski explained that with the recent *Jones* decision it is time to rethink Fourth Amendment jurisprudence.[166] Raigrodski introduced a feminist argument that Fourth Amendment is not about privacy or property interests, but instead about the power and control inherent in police searches and seizures. Furthermore, according to Raigrodski, the Fourth Amendment was construed to protect the interests of white privileged men in order to perpetuate male ideology. Raigrodski concluded by stating that feminist jurisprudence is not limited by privacy or property, but instead re-conceptualizes the idea of power and offers multiple new perspectives.[167]

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[163] Kevin S. Bankston and Ashkan Soltani, *Tiny Constables and the Cost of Surveillance: Making Cents Out of United States v. Jones,* 123 Yale L.J. Online 335, 336 (2014).
[164] Kevin S. Bankston and Ashkan Soltani, *Tiny Constables and the Cost of Surveillance: Making Cents Out of United States v. Jones,* 123 Yale L.J. Online 335, 356 (2014).
[165] Kevin S. Bankston and Ashkan Soltani, *Tiny Constables and the Cost of Surveillance: Making Cents Out of United States v. Jones,* 123 Yale L.J. Online 335, 337 (2014).
[166] Dr. Dana Raigrodski, *PROPERTY, PRIVACY AND POWER: RETHINKING THE FOURTH AMENDMENT IN THE WAKE OF U.S. V. JONES,* 22 B.U. Pub. Int. L.J. 67, 127 (2013).
[167] Dr. Dana Raigrodski, *PROPERTY, PRIVACY AND POWER: RETHINKING THE FOURTH AMENDMENT IN THE WAKE OF U.S. V. JONES,* 22 B.U. Pub. Int. L.J. 67, 127 (2013).

David Twombly examined how in a post-*Jones* world the *Davis* good-faith exception applied to certain federal cases and circuits with clear binding precedent.[168] Additionally, some lower courts appear to have extended the *Davis* good-faith exception in circuits without clear binding precedent, relying on nearby circuits' then-binding precedent. Twombly concluded lower courts appeared to have disagreed on the application of *Davis* to police conduct prior to *Jones* related to G.P.S. devices, where some courts use the good-faith exception more narrowly based on a close reliance to the facts and holding of then-binding precedent; meanwhile, other courts apply the exception more broadly to cover all relevant police conduct prior to *Jones*.[169]

Nancy Forster claimed that the *Jones* decision is a significant change in Fourth Amendment law.[170] Moreover, Forster's main argument is that society has lost its objective reasonable expectation of privacy. This is mainly due to the fact that so many individuals give away so much information through their cell-phones and various social media websites. This information is often viewed as voluntarily given, and thus, third parties through cell-phones and other social media platforms gain access to this information.[171] Furthermore, advanced technology could reach a point where society no longer has an expectation of privacy. Forster concluded with an example of law enforcement using x-ray glasses and being freely able to examine the contents of a purse out in public. Forster posited the question of privacy will

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[168] David J. Twombly, *The Good-Faith Exception and Unsettled Law: A Study of GPS Tracking Cases After United States v. Jones,* 74 Ohio St. L.J. 807, 810 (2013).*Davis* good-faith exception refers to the Court decision in *Davis v. United States* which held that the exclusionary rule does not apply if law enforcement were acting on governing appellate precedent. (citing *Davis v. U.S.,* 131 S.Ct. 2419, 2423-24 (2011)).

[169] David J. Twombly, *The Good-Faith Exception and Unsettled Law: A Study of GPS Tracking Cases After United States v. Jones,* 74 Ohio St. L.J. 807, 839 (2013).

[170] Nancy Forster, *Privacy Rights & Proactive Investigations: 2013 Symposium on Emerging Constitutional Issues in Law Enforcement: Article: Back to the Future: United States v. Jones Resuscitates Property Law Concepts in fourth Amendment Jurisprudence,* 42 U. Balt. L. Rev. 445, 446 (2013).

[171] Nancy Forster, *Privacy Rights & Proactive Investigations: 2013 Symposium on Emerging Constitutional Issues in Law Enforcement: Article: Back to the Future: United States v. Jones Resuscitates Property Law Concepts in fourth Amendment Jurisprudence,* 42 U. Balt. L. Rev. 445, 482 (2013).

ultimately depend on the type of technology available to law enforcement which will cause the Courts to drastically shift society's perceptions of Fourth Amendment law.[172]

The final article which appeared in the citator list based on the specific criteria did not actually have "Jones" in the title. The citator appears to have inadvertently and incorrectly included the article in the list of articles with "Jones" in the title.[173] As can be seen from the literature, academics are split on whether the *Jones* decision was beneficial in further developing Fourth Amendment search jurisprudence or not. Those in favor of *Jones* being a significant and productive change explain that the resurgence of the trespass doctrine is an important milestone as society moves into a digital age. More specifically, the *Jones* decision has vastly changed the scope of what constitutes a police search. Additionally, the trespass doctrine has the ability to work alongside *Katz* reasonable-expectation-of-privacy test. Those against the *Jones* decision generally describe it as a "missed" opportunity. These academics describe that returning to the trespass doctrine solves nothing, namely because the law moved away from the trespass doctrine to the *Katz* test in the wake of modern technology developed in the 1960s (i.e., wire taps). This has left many to wonder why the current United States Supreme Court felt it was reasonable to return to the trespass doctrine. Some academics believe that *Katz* or the Mosaic theory is enough to ensure the protection provided by the Fourth Amendment, with some deliberation on specific instances. Others mentioned *Jones* is too specific or narrow to be widely applied. The United

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[172] Nancy Forster, *Privacy Rights & Proactive Investigations: 2013 Symposium on Emerging Constitutional Issues in Law Enforcement: Article: Back to the Future: United States v. Jones Resuscitates Property Law Concepts in fourth Amendment Jurisprudence,* 42 U. Balt. L. Rev. 445, 483 (2013).

[173] Zachary Gray, *Herding Katz: GPS Tracking and Society's Expectations of Privacy in the 21st Century,* 40 Hastings Const. L.Q. 145 (2012). Zachary Gray argued that the *Katz* test was initially created because the advanced technologies of that time had made it increasingly more difficult to judge a search solely on the basis of a physical trespass.[173] As a result, the United States Supreme Court in *Jones* has gone full circle by returning to a trespass ideology. However, Gray commented that the Supreme Court will soon be faced with answering the question of how privacy plays a role with advanced technology, such as GPS tracking. Gray concluded by stating the *Katz* test is more than enough to determine if the government has conducted a search in this context.

States Supreme Court has come under much criticism as some argue that it dodged crucial questions with regards to modern technology and Fourth Amendment search inquiries.

This study will help to fill the gap in literature by carefully examining and interpreting federal appellate cases to see how these courts are applying the Fourth Amendment search inquiry as it was developed by the United State Supreme Court in *Jones*. The primary purpose of this study is to examine, in the aftermath of *Jones*, which test - the *Katz* privacy test and/ or the *Jones* property/ trespass test - the courts are using and whether they found a search occurred (i.e., if a search was found, then it would invoke the Fourth Amendment protections afforded to all under the Constitution). The secondary purpose is to compare the period prior to *Jones* and following *Jones* in terms of the rate of "search" findings by the federal appellate courts. This has led to two overall hypotheses. The first hypothesis is that, in the wake of *Jones*, the majority of the federal appellate courts would be relying on the trespass doctrine to determine Fourth Amendment search inquiries (i.e., since *Jones* itself recently resurrected this doctrine). The second hypothesis is that the majority of the federal appellate courts after *Jones* would find that no police search occurred (i.e., if no search was found then the citizen would not receive the protections of the Fourth Amendment). The first hypothesis is theorized as such because *Jones* is one of the most recent cases to address Fourth Amendment search law, and, as such, it is expected that more courts will want to weigh in and utilize this new precedent. The second hypothesis is theorized as such because of the post-9/11 crime control era that the American criminal justice system is currently experiencing. Historically, during these crime-control leaning times, courts tend to side with law enforcement officers over protecting or expanding individual freedoms.

Chapter 3 - Methodology

The purpose of this research is to get a better understanding of how certain courts are interpreting the United States Supreme Court decision in *United States v. Jones.* Therefore, a qualitative approach was employed for this research project to analyze large amounts of case information. The type of analysis chosen for this study was a directed content analysis. This type of analysis was employed because of its efficiency in analyzing large amounts of text data. More specifically, this technique was used to help analyze and interpret the numerous amount of federal appellate cases chosen for this study. A directed content analysis is defined as an analysis whereby the researchers use existing theory or prior research to develop a coding scheme prior to the start of the project.[174] This type of analysis is most often thought of as an inductive research technique, which makes educated predictions among the relationships between the variables. As the research becomes more developed, the coding scheme becomes more refined.[175]

For this study, it was decided to create a coding scheme of specific groupings based on the type of test the federal appellate courts used to decide a particular case. This coding scheme originally was broken up into three sections: "Jones," "Katz," or a combination of the two tests referred to as "Both." This study examined the relevant facts, holding and rationale of the court cases in order to determine which test was used. For example, if the court mentioned the trespass concept from *Jones* and relied substantially on the United States Supreme Court's rationale in *Jones* to decide if a search had occurred under the facts of the case, then this case was categorized under the "Jones" grouping. Conversely, if the court mentioned the reasonable expectation of privacy concept from *Katz* and relied substantially on the United States Supreme

[174] Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, Qualitative Health Research. 15 (9), 1277-1288 (2005)
[175] Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, Qualitative Health Research. 15 (9), 1277-1288 (2005)

Court's reasoning in *Katz* to determine whether a search had occurred under the facts of the case, then this case was categorized under the "Katz" grouping. Finally, if the court mentioned both the *Jones* and *Katz* concepts, or tests, and examined the search question using the reasoning from both of these cases, then this case was categorized under the "Both" group.

Additionally, the analysis included whether the particular federal appellate court found a search had occurred under the applicable legal test (*Jones*, *Katz* or Both) and facts of the case. This part of the analysis consisted of a simple dichotomy of the court cases into "search" or "no search" categories, or groupings. For example, if a court relied on the *Jones* common-law trespass test to hold that a search had occurred under the facts of the case, then that case would be categorized under the "search" grouping.

The cases used for this project were obtained through the use of legal citators provided by Westlaw and/or LexisNexis. The purpose of a citator is to catalog cases, secondary sources, and any other forms of authority by analyzing what they say about the sources they cite.[176] Citators are maintained and constantly updated by editors at LexisNexis or Westlaw who are trained in the law. In sum, citators are an essential tool for legal scholars and practitioners to determine if certain authority is still "good law," which generally means that the law has not been changed or overturned.

Westlaw provides a citator called KeyCite.[177] KeyCiting refers to a process or technique to identify cases or other sources which have been cataloged based on the sources they cite. In Westlaw, a KeyCite entry for a case has three sections: full history, direct history, and citing

[176] Amy E. Sloan, Basic Legal Research 143 (5th ed. 2012).
[177] *Id.* at 155.

references.[178] The full history option in the KeyCite provides information on (1) the direct history of the case; (2) any negative indirect history; (3) and any procedural phrases.[179] The direct history option provides an illustration of the procedural history of the case. This chart is also known as "Graphical KeyCite" under Westlaw.[180] Lastly, the citing references option shows the complete indirect history of the original case and various types of citing sources attached to the case.[181] This option allows the user to change the parameters of the criteria for finding cases which cite the original case depending on the goals of the researcher (i.e., cases associated with a certain jurisdiction, level of court, treatment depth, etc.).[182] For example, if the researcher was interested in accessing all or certain cases which cited *Jones*, then using the citing references option would obtain these cases.

Accessing the citator is relatively straightforward. Once you arrive at the Westlaw home page, there is an option at the top of the page called "KEYCITE.[183]" Accessing that option brings the user to another page which reads "KeyCite this citation" above a search bar on the left. This is where the user may type in the legal citation to have access to the case and the various sections in Keycite for that case.[184] The *Jones* legal citation for purposes of Keycite is "132 S.Ct. 945" and once entered, it brings up the *Jones* decision under the "Full History" view option. Since the current research project is interested in how federal appellate cases are deciding Fourth Amendment search law, accessing those cases which reference *Jones* is accomplished by using

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[178] *Id*. at 157.
[179] *Id.* at 157-158. Procedural phrases are legal notations to quickly identify the "effects of the history cases on the validity of the original case." This can include phrases such as overruled, distinguished, affirmed, and reversed. Additionally, the original case citation will be highlighted within the text to easily identify.
[180] *Id.* at 158.
[181] *Id*.
[182] *Id.* at 160.
[183] *Id.* at 156.
[184] *Id.*

the "Citing References" option on the left of the page[185]. This will bring the user to a page which shows all materials that reference *Jones*, a total of approximately 3083 various documents.

Since the focus of the research is to interpret federal appellate court cases, the search can be narrowed using the "Limit KeyCite Display" option at the bottom of the screen.[186] After accessing this option, another webpage appears with additional options for narrowing the search criteria. The Limit KeyCite Display may limit the search depending on the (1) document type; (2) headnotes used in the case; (3) location; (4) jurisdiction; (5) date; and (6) depth of treatment.[187] For this project, the search parameters were first narrowed by document type (i.e., federal appellate cases). This document type was chosen since the federal appellate courts would offer insight on how the higher, precedential courts are interpreting searches following the *Jones* decision. Accordingly, "highest court" and "other courts" options were selected for this specific search criteria. This would allow the citator to narrow the search to only include federal appellate courts and the United States Supreme Court.[188]

Second, under the Limit KeyCite Display option, the depth of treatment was used to narrow further the list of citing cases for the *Jones* decision.[189] This was done to focus on the cases which gave "significant treatment" to *Jones*, meaning that *Jones* was examined or discussed in the citing case.[190] This limit was applied to eliminate cases which merely cited or briefly mentioned *Jones* rather than discuss the impact of the case. Westlaw's KeyCite uses a

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[185] *Id.* at 158.
[186] *Id*. at 160.
[187] *Id.* at 160.
[188] *Id.* at 161. "Highest Court" and "Other Court" were needed to be checked off under document type when using the KeyCite Limits in order to produce the cases which cited Jones under the U.S. Supreme Court and the Federal Appellate Courts. If "Other Court" was not checked then (all other parameters the same) it would only produce 2 cases instead of 58.
[189] *Id.*
[190] *Id.* at 160.

system of star categories which range from one star to four stars, where one star is the lowest amount of treatment a citing case can provide and four stars are the highest amount of treatment.[191] Accordingly, the search was narrowed to only include citing cases identified with three or four stars.

Finally, under the Limit KeyCite Display option, jurisdiction was used to narrow the search.[192] This option allows the user to include or exclude citing cases associated with *Jones* from certain jurisdictions. For this research project, the jurisdiction was narrowed to United States Supreme Court, the eleven numbered federal circuit courts, the United States Circuit Court for the District of Columbia, and the Federal Circuit Court.

After applying all of these search criteria within the Limit KeyCite Display option of the citator by selecting the "apply" button on the left side of the screen, the list of citing cases was narrowed to 58 cases that fit the specific criteria. The total number of cases which cited *Jones* was reduced to 53 after eliminating cases that were overturned or did not sufficiently answer the Fourth Amendment search question.[193] The search results for the citing cases include cases from the date of the *Jones* decision (January 23, 2012) through May 31 of 2015.

As the research became more refined, the original groupings had to be expanded to include two initially unforeseen groups. The first newly established category included cases wherein the factual events of the case occurred prior to the *Jones* decision; however, the case was actually heard at the federal circuit level after *Jones.* Since the facts occurred prior to *Jones,*

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[191] *Id.*

[192] *Id.* at 161.

[193] These cases were eliminated due to their decisions being overturned by a future case or did not sufficiently address the Fourth Amendment search question. The four withdrawn/ vacated or reversed/ overturned cases are: (1) *United States v. Wahchumwah*, 704 F.3d 606 (9th Cir. 2013); (2) *United States v. Katzin*, 732 F.3d 187 (2014); (3) *United States v. Davis* 754 F.3d 1205 (11th Cir. 2014); (4) *Patel v. City of Los Angeles*, 686 F.3d 1085 (2012). The one case that did not address the Fourth Amendment search question is *American Civil Liberties Union v. Clapper*, 785 F.3d 787 (2nd Cir. 2015).

federal circuit courts were turning to their previous, pre-*Jones* circuit decisions (i.e., precedent) to help analyze the Fourth Amendment search question (e.g., whether a search had occurred through police use of a GPS device). The category created for these court cases was titled "then-binding precedent."[194] Though their existence is mentioned in the findings section, these cases, which reflect a reliance by circuit courts on relevant pre-*Jones* binding precedent, were ultimately excluded from the study's reported findings since they failed to answer the intended, applicable research question (i.e., how federal appellate courts are interpreting *Jones* following its decisional date and application).[195] For example, in these cases, federal appellate courts are relying on pre-*Jones* search laws and rationales underlying the application of those laws. This approach by these courts is somewhat expected due to how recent the *Jones* decision is.

The second, new category was titled "procedural error." The cases categorized under this grouping included federal appellate court cases which contained some form of procedural error which prevented the courts from deciding on the merits whether a search under the Fourth Amendment had occurred. An example of these types of cases included the defendant's failure to raise a timely motion in court objecting to the admission of evidence obtained through the police search.[196] Thus, the lack of the court's analysis on the search question in these cases warranted a new category. This category was kept for classification purposes, but the category did not offer any answers to the study's substantive research questions and therefore the cases in this category

[194] This title, or label, was chosen as a majority of circuits were turning to their previously binding precedent as courts could not hold law enforcement or attorneys guiding them accountable under Jones for conduct occurring prior to Jones (i.e., since Jones was not explicitly stated as being retroactive).

[195] Five (5) cases were exempt from exclusion and instead categorized as Jones since the courts made an in depth Fourth Amendment search analysis which led to the courts concluding a search had occurred under Jones; however, these courts ultimately turned to binding appellate precedent and applied *Davis* good faith exception to the exclusionary rule. These cases include *U.S. v. Sellers,* 512 Fed.Appx. 319 (4th Cir. 2013); *U.S. v. Fisher,* 745 F.3d 200 (6th Cir. 2014); *U.S. v. Pineda-Moreno,* 688 F.3d 1087 (9th Cir. 2012); *U.S. v. Smith,* 741 F.3d 1211 (11th Cir. 2013); *U.S. v. Stephens,* 764 F.3d 327 (4th Cir. 2014)

[196] See the Appendix A section to review all the Binding Precedent "BP" or Procedural Error "PE" cases.

were omitted from the reported findings. Overall, the omission of the cases falling into these two categories reduced the original sample of fifty three (53) citing cases for *Jones* to thirty three (33) cases.

To ensure a more complete analysis of Fourth Amendment search law following *Jones* , the citator was also used to search for any cases which cited *Katz* during this period (i.e., from the date of *Jones* through May 31, 2015). This approach was undertaken because *Jones* retained the *Katz* test as a possible, single lens through which lower courts may examine the search question. This would also produce the most accurate view of how courts are determining Fourth Amendment search questions by capturing all cases which either cited *Jones* or *Katz* in the citator.

To use the citator for *Katz*, the same steps were followed as with *Jones* (above) with one more additional step. First, the "KEYCITE" option was accessed at the top of the Westlaw page. The legal citation for *Katz* was entered into the search bar --- "389 U.S. 347" --- and the citator results appeared. Clicking on the citing references at this point brought up a webpage with over 32,000 citing documents.

Next, the search parameters were reduced by using the "Limit KeyCite Display" option at the bottom of the screen. Following the same search parameters used for *Jones*, under document type, both the "Highest court" and "Other courts" were the only options selected. Jurisdiction was limited to United States Supreme Court, the eleven numbered federal circuit courts of appeal, the Federal Circuit Court of Appeals, and the United States Court of Appeals for the District of Columbia. Depth of treatment was maintained at three stars and four stars so as to only include cases which examined and discussed *Katz*. Finally, the date limitation was used to further narrow the search. This option was used to only include cases which cited *Katz* after

Jones was decided. After applying these search limitations, the citator produced twenty three (23) cases which referenced *Katz* after the decisional date of *Jones*. Cross referencing the list produced from the citator of *Jones* with the citator of *Katz*, there was an overlap of eighteen (18) cases. This left five (5) cases which needed to be evaluated and incorporated into the findings. These five (5) cases from the *Katz* citator were added to the thirty three (33) cases from the *Jones* citator, which totaled thirty eight (38) cases for the post-*Jones* findings.

To compare and contrast how Fourth Amendment search law has changed since *Jones*, the citator was used to examine Fourth Amendment search determinations under *Katz* during the ten (10) years **prior** to the *Jones* decision. To accomplish this, the "Limit KeyCite Display" option was again applied in the citator (for *Katz*). The date option was selected and January 22, 2002 was inserted into the "AFTER" box. Next, the date January 22, 2012 was inputted into the "BEFORE" box. A ten (10) year timeframe was selected so as to acquire a sufficient number of federal appellate cases providing significant treatment to *Katz* to substantially equal, or match, the number of *Jones* cases previously obtained (i.e., thirty nine cases). The treatment limitations selected were the same as those selected for the *Jones* cases, (i.e., "discussed" and "examined"). Additionally, the jurisdiction parameter was set to the same search criteria as in the *Jones* analysis --- United States Supreme Court, the eleven numbered federal circuit courts of appeal, and the United State Circuit Court of Appeals for the District of Columbia. Lastly, "higher court" and "other court" options were chosen for the document type parameter. This search using the citator obtained thirty nine (39) citing cases for *Katz*.

These thirty nine (39) citing cases from the federal appellate courts were used to examine whether they found a search had occurred under the *Katz* reasonable expectation of privacy test. This determination left two groupings of cases in which one group concluded a search had

occurred and another group found a search had not occurred. However, the original thirty nine (39) citing cases were reduced due to the case later being overturned or overruled.[197] The final working sample of *Katz* cases decided prior to *Jones* consisted of thirty four (34) cases. Five (5) cases were eliminated for various reasons. First, a lower court case within the *Jones* litigation was eliminated because it had been overturned (i.e., by the United States Supreme Court in *Jones* itself).[198] Second, *United States v. Maynard* was eliminated because both its holding and reasoning focused upon the reasonableness of a police search as opposed to whether a search had initially occurred. In addition, this case was related to the *Jones* litigation since defendants Maynard and Jones were co-defendants (i.e., in *United States v. Maynard*).[199] Third, cases were eliminated because they were overruled or overturned by another case which appeared in the citator or on other grounds unrelated to a Fourth Amendment search question.[200] Fourth, cases were eliminated because they did not reference *Katz* in the majority opinion, but instead discussed or examined *Katz* in their dissenting or concurring opinions.[201] Because these latter opinions do not constitute the law, these cases were removed from the study's findings. Finally, a case was eliminated because it was more focused on a procedural question, and not on the determination of whether a search had occurred under the *Katz* privacy test.[202]

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[197] Cases which were eliminated, included *Quon v. Arch Wireless Operating Co., Inc*., 529 F.3d 892 (9th Cir. 2008); *U.S. v. Maynard,* 615 F.3d 544, (D.C. Cir. 2010); *U.S. v. Jones,* 625 F.3d 766 (D.C. Circ. 2010); *U.S. v. Crawford*, 372 F.3d 1048 (9th Cir. 2004); *Bentz v. City of Kendallville,* 577 F.3d 776 (7th Cir. 2009).

[198] The case denied the government's petition to have Maynard decision reviewed again.

[199] Jones case by Supreme Court essentially agreed with Maynard court's finding that a search had occurred when police attached a GPS device to Jones' vehicle, but disagreed on the basis for this --- Maynard case said search occurred because Jones' privacy rights were violated while Jones case said a search occurred because Jones' property rights violated at the time of GPS attachment/ monitoring. In sum, Jones Supreme Court case essentially overrules Maynard court (i.e., at the very least its rationale).

[200] *Quon v. Arch Wireless Operating Co., Inc*., 529 F.3d 892 (9th Cir. 2008) was overruled by *City of Ontario, Cal. v. Quon,* 560 U.S. 746, (2010); *U.S. v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) overruled *U.S. v. Crawford*, 323 F.3d 700 (9th Cir. 2003) on grounds outside of Fourth Amendment search law.

[201] The citator found *Katz* referenced in the concurring and dissenting opinion. *U.S. v. Crawford*, 372 F.3d 1048, 1074 (9th Cir. 2004).

[202] *Bentz v. City of Kendallville,* 577 F.3d 776 (7th Cir. 2009).

The literature review was created by accessing law review articles through the database LexisNexis Academic.[203] LexisNexis Academic and its widely known and accepted legal citator, "Shepard's," allowed for a more specific focus on only those law reviews which cited *Jones* in their title (i.e., law review articles that provided substantial treatment of *Jones*).[204]

To access the LexisNexis Acadmic database of legal periodicals first, log onto the site and click on the dropdown box above the search bar. This box should be titled "Search By Content Type" and then click on law reviews. Next, enter the legal case citation for *Jones* into the search bar. The Shepard's produced 999 law reviews and other legal journals which cited *Jones*. In order to focus more on only those law review and legal journals which provided substantial treatment of *Jones*, the "Advanced Options" feature in Shepard's was applied. Using the Advanced Options, the search was narrowed to law reviews and journals whose titles included the word "*Jones*." To produce this restriction, one possibility is to type in the space provided for restrictions the following phrase ---"TITLE (JONES)." Another possibility is to select "TITLE" from the available dropdown box, and then type in "JONES" in the space provided. The search bar should read "132 S.Ct. 945 AND TITLE (JONES)." To finalize this restriction, the "apply" button is selected, and then the "search" button. This search produced fifty (50) law reviews and journals which both cited *Jones* and had the word "Jones" somewhere in their title. The literature review also included historical United States Supreme Court "search" cases decided prior to *Katz v. United States*, such as *On Lee v. United States* (1952) and

[203] Amy E. Sloan, Basic Legal Research 47 (5th ed. 2012). Law reviews are legal periodicals written by legal scholars, judges and practitioners, and students studying the law.
[204] *Id.* at 145.

Olmstead v United States (1928). These cases were included to provide historical context on the development of Fourth Amendment search law in the United States over time.[205]

[205] These cases were mentioned in the majority opinion of *Jones* by Justice Scalia. See *U.S. v. Jones,* 132 S.Ct. 945, 950-952 (2012).

Chapter 4 - Findings

Overall, the findings consists of two sections. The first section (part I) consists of the summary of the findings. This includes all relevant findings related to the post-*Jones* and pre-*Jones* data. At the end of this section there are tables which represent the findings. The second section (part II) consists of the detailed findings. This section begins with the detailed post-*Jones* findings which includes all cases that cited *Jones* or *Katz* after the *Jones* decision and then ends with the pre-*Jones* findings which cited *Katz* prior to the *Jones* decision.

I. Summary of the Findings

The post-*Jones* working sample totaled thirty eight (38) cases which gave significant treatment to *Jones* and *Katz* from the date *Jones* was decided until May 31, 2015.[206] The breakdown of the cases are as followed. First, eleven (11) cases strictly used the *Jones* trespass test to decide Fourth Amendment search question.[207] All eleven (11) of these cases found a search had occurred under the *Jones* trespass doctrine. Second, eleven (11) cases strictly used the *Katz* reasonable expectation of privacy test. Of these cases, three (3) found a search had occurred and eight (8) found no search had occurred. Finally, sixteen (16) cases fell under the "Both" category. This means that these cases used both the *Jones* trespass doctrine and the *Katz* reasonable expectation of privacy doctrine to answer the Fourth Amendment search inquiry. Of these cases, six (6) found a search had occurred, meanwhile ten (10) had found a search had not

[206] Cases were eliminated due to their decisions being overturned by a future case which appeared within citator. Refer to the Methodology section for a detailed explanation of the cases which were eliminated in this research study.

[207] There are five (5) cases which were categorized as Jones since the courts made an in depth Fourth Amendment search analysis which led to the courts concluding a search had occurred under Jones; however, these courts ultimately turned to binding appellate precedent and applied *Davis* good faith exception to the exclusionary rule. These cases include *U.S. v. Sellers,* 512 Fed.Appx. 319 (4th Cir. 2013); *U.S. v. Fisher,* 745 F.3d 200 (6th Cir. 2014); *U.S. v. Pineda-Moreno,* 688 F.3d 1087 (9th Cir. 2012); *U.S. v. Smith,* 741 F.3d 1211 (11th Cir. 2013); *U.S. v. Stephens,* 764 F.3d 327 (4th Cir. 2014).

occurred. Lastly, fourteen (14) cases were classified as "Binding Appellate Precedent" and six (6) fell under "Procedural Error."[208]

The second section of pre-*Jones* findings includes all cases which cited *Katz* during the ten (10) years **prior** to the *Jones* decision (January 22, 2002-January 22, 2012). The pre-*Jones* working sample totaled thirty four (34) cases.[209] Of the thirty four (34) cases, sixteen (16) found a search had occurred and eighteen (18) found a search had not occurred.

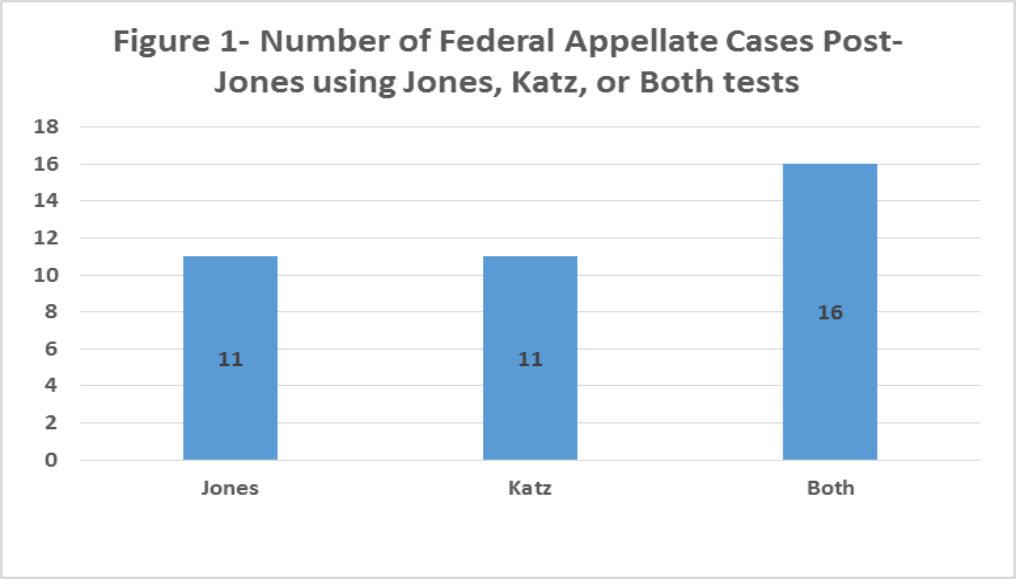

Figure 1 represents all cases which cited *Jones* or *Katz* after the *Jones* decision. This is all thirty eight (38) cases. First, eleven (29%) cases solely relied on the *Jones* trespass test to find if a search had occurred. Second, eleven (29%) cases exclusively used the *Katz* reasonable expectation of privacy test to find if a search had occurred. Finally, the last category includes the

[208] Refer to the Appendix A for a detailed summary of the cases which fell under "Binding Appellate Precedent" or "Procedural Error". These cases were not included in the analysis since they failed to answer the Fourth Amendment search questions.

[209] Cases were eliminated due to their decisions being overturned or overruled. Refer to the Methodology section for a detailed explanation of the cases which were eliminated. These cases included *Quon v. Arch Wireless Operating Co., Inc*., 529 F.3d 892 (9th Cir. 2008); *U.S. v. Maynard,* 615 F.3d 544, 549 (D.C. Cir. 2010); *U.S. v. Crawford,* 372 F.3d 1048 (9th Cir. 2004); *U.S. v. Jones*, 625 F.3d 766 (D.C. Circ. 2010); *Bentz v. City of Kendallville,* 577 F.3d 776 (7th Cir. 2009).

remaining sixteen cases (42%) which used both the *Jones* trespass test and *Katz* reasonable expectation of privacy test to find if a search had occurred.

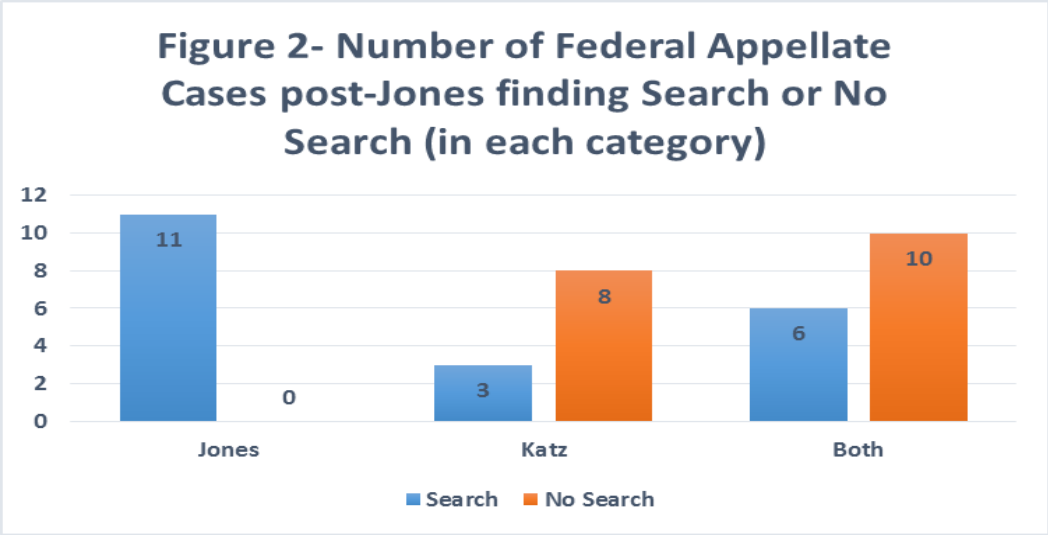

Figure 2 represents all post-*Jones* findings and whether the courts found a search or not a search. Of the eleven (11) cases which used *Jones*, 100% (11) found a search had occurred. Of the 11 cases using *Katz*, 27.2% (3) were found to have decided a police search transpired and 72.8% (8) found no search occurred. Finally, of the remaining 16 cases which used both tests, 37.5% (6) of the cases found searches and 62.5% (10) of the cases found no search.

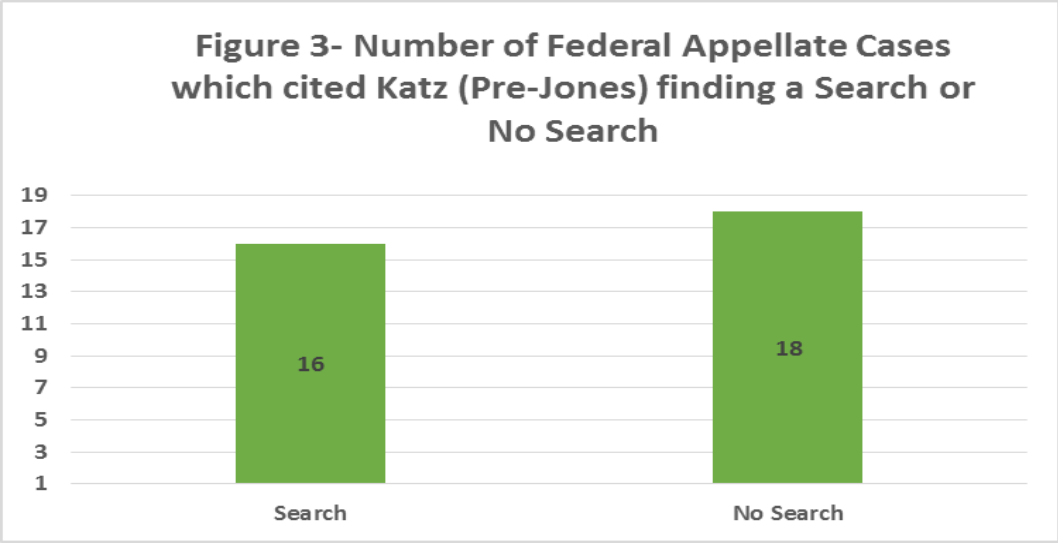

Figure 3 represents all cases spanning 10 years prior to the *Jones* decision. Of the 34 cases which cited *Katz,* 47% (16) cases found a search had occurred and 53% (18) cases found a search had not occurred.

II. Detailed Findings

Post-*Jones*

Key: K=Katz, J=Jones, B=Both (i.e., Jones and Katz tests); S=Search; NS=No search

1. *U.S. v. Mathias* (B-NS)

Officer Murray received an anonymous tip that Richard Mathias was growing marijuana plants in his back yard which was enclosed by a fence.[210] Officer Murray inspected the fence and on the north side was able to peek inside the area where he saw marijuana plants. During his inspection of the fence, Officer Murray did not manipulate or disturb the fence to make these observations. Based on what he had observed, Officer Murray obtained a warrant and arrested Mathias. In court, Mathias claimed that officer Murray physically intruded into his area when looking through the fence.[211]

The Court of Appeals for the Eighth Circuit explained that in order to establish "a *Jones* trespassory search …requires the challenged intrusion to be into a constitutionally protected area enumerated within the text of the Fourth Amendment."[212] The Court reasoned that Officer Murray's precise location was within an "open field" when he merely looked through Mathias' fence, without any manipulation. Thus, Officer Murray's actions did not constitute a search

[210] *U.S. v. Mathias,* 721 F.3d 952, 954 (8th Cir. 2013).
[211] *Id.*
[212] *Id.* at 956.

under the *Jones* trespass doctrine.[213] The Court then turned to the *Katz* reasonable expectation of privacy test. Taking into consideration that officer Murray had a right to be in a public vantage point and the fact that Mathias' fence had small gaps; the Court ruled that Mathias had no reasonable expectation of privacy and ultimately had no Fourth Amendment protection. Therefore, no law enforcement search occurred under *Jones* or *Katz*.

2. *In re U.S. for Historical Cell Site Data* (B-NS)

In October 2010, the United States filed three applications under § 2703(d) of the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701–2712.[214] The purpose of this order was to seek evidence relevant to three separate criminal investigations. The applications requested "the cell phone service provider to produce sixty days of historical cell site data and other subscriber information for that particular phone."[215] Furthermore, the Government requested the same cell site data in each application: specifically requesting "the antenna tower and sector to which the cell phone sends its signal."[216]

This information was requested during times when the phone was both actively sending a signal to a tower to obtain service and when the phone was turned off.[217] The ACLU argued that under certain conditions, individuals "have a reasonable expectation of privacy in their location information when they are tracked."[218] The ACLU depended on the concurrences of Justice Alito, who was joined by Justices Ginsburg, Breyer, and Kagan in *Jones*, "which concluded that

[213] *Id.* at 955-956.
[214] *In re U.S. for Historical Cell Site Data,* 724 F.3d 600, 602 (5th Cir. 2013).
[215] *Id*.
[216] *Id*.
[217] *Id.*
[218] *Id.* at 608.

lengthy GPS surveillance of a vehicle could constitute a search."[219] It was further argued by the ACLU that individuals are only in their vehicles for various amounts of time, but most people have a cell phone on or near their person at all times.

The Court of Appeals ruled that cell site data are similar to that of business records and this significantly alters the district court's decision by applying a different legal standard.[220] Since a third party was recording the data and not the government, there was no physical intrusion.[221] Furthermore, the *Katz* reasonable expectations of privacy test does not apply to what "a person knowingly exposes to the public, even in his own home or office" and therefore, "is not subject of Fourth Amendment protections."[222] The Court concluded that there are indeed changes in society's reasonable expectations of privacy with technological advances; however, the Congress is the best governmental body to address any privacy concerns.[223] As a result, the cell site data should be analyzed under a different legal standard. The Court concluded that "the SCA's authorization of § 2703(d) allowing orders for historical cell site information if an application meets the lesser 'specific and articulable facts' standard, rather than the Fourth Amendment probable cause standard, is not unconstitutional."[224] Thus, the court ultimately concluded that no search occurred under *Jones* or *Katz*.

3. *U.S. v. Castellanos* (B-NS)

[219] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 964 (2012)).
[220] *Id.* at 611-612.
[221] *Id.* at 610 (citing *U.S. v. Jones,* 132 S.Ct. 945, 964 (2012)).
[222] *Id.* at 612 (citing *Katz v. U.S.,* 389 U.S. 347, 351 88 S.Ct. 507 (1967)).
[223] *Id.* at 614.
[224] *Id.* at 615.

On September 2010, Reeves County Sheriff, Captain Roberts was conducting patrol at a truck stop.[225] Captain Roberts suspicion was raised when a commercial car carrier [Direct Auto Shippers (DAS)] transporting a vehicle bore a dealership placard on the Ford Explorer. Captain Roberts questioned the driver of the car carrier about the Explorer oddity, namely the vehicle not having a "normal" license plate. The driver provided Roberts with the shipping documents which identified the owner of the vehicle as Wilmer Castenada.[226]

The officer asked the driver of the DAS car carrier for permission to search the Explorer after being unable to contact Wilmer Castenada. The driver consented and Captain Roberts found fresh tool marks near the rear of the seats, a strong odor of Bondo, and when he pounded on the rear floorboard, he noticed inconsistent sounds above the gas tank.[227] Next, Roberts used a fiber optic scope to examine the inside of the gas tank and saw several blue bags floating in the tank which later turned out to be 23 kilogram-sized bricks of cocaine.[228] Captain Roberts falsely informed Castenada that the DAS driver had been arrested and his cargo seized. A few days later, Roberts learned that someone had arrived and was attempting to claim the Explorer, but was identified as Arturo Castellanos.[229] Police located and detained Castellanos.[230] He stated he knew of Castenada and was there to pick up the vehicle. Police also seized two duffle bags.[231]

Castellanos denied that they were his bags. Officers searched the bags and found a cell phone which matched the number provided by the DAS driver, earlier. Castellanos was later indicted on

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[225] *U.S. v. Castellano,* 716 F.3d 828, 830 (4th Cir. 2013).
[226] *Id*.
[227] *Id*.
[228] *Id.*
[229] *Id.*
[230] *Id.* at 831.
[231] *Id.*

one count of conspiracy to distribute 5 kilograms or more of cocaine.[232] Castellanos moved to suppress the items contained in the duffle bag and cocaine found in the gas tank as his Fourth Amendment rights were violated.

The Court of Appeals for the Fourth Circuit agreed with the district court's analysis. The Court used both the *Katz* reasonable expectation of privacy test and the *Jones* trespass test in their analysis.[233] The Court stated that parties may have a possessory interest in the vehicle; however, Castellanos had not established ownership of the vehicle or raised he was the "exclusive driver."[234] Thus, the Court reasoned based on the facts of this case, Castellanos had not properly established a "close connection to the vehicle" and therefore, Castellanos does not have any reasonable expectation of privacy during the police search.[235]

Also, Castellanos lacked a reasonable expectation of privacy for a package that was searched and addressed to someone else, even though later it turned out to be an alias or fictitious name.[236] Originally, Castellanos position at the suppression hearing demonstrated that the name "Wilmer Castenada" was another individual engaged in a sale transaction.[237] The Court stated, "Castellanos lacks standing because he failed to carry his burden to show that he had a constitutionally sufficient connection to the Explorer to demonstrate an objectively reasonable expectation of privacy."[238] In sum, the Court found that defendant was not entitled to the protections of the Fourth Amendment under *Jones* or *Katz*.

4. *U.S. v. Anderson-Bagshaw* (B-NS)

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[232] *Id*.
[233] *Id.* at 832-833.
[234] *Id.* (citing *Jones,* 132 S.Ct. at 949)
[235] *Id.* at 834.
[236] *Id*.
[237] *Id.*
[238] *Id.* at 835.

Karen Bagshaw worked at a mail carrier in 1998 in the city of Wickliffe, Ohio.[239] Approximately a year later, she was diagnosed with thoracic degenerative disc disorder and underwent a failed spinal fusion surgery. The Department of Labor Office of Workers Compensation awarded her disability payments from June, 2002 until July, 2011.[240] She was required to report any earnings from employment or other business involvement during that time. However, in 2008, a claim examiner had notified Special Agent Stephanie Morgano of the United States Postal Service Office the Inspector General of possible business activities with Bagshaw and an alpaca farm.[241]

Following the investigation of the alpaca farm, agents conducted extensive surveillance on Bagshaw. This included monitoring her on a Caribbean cruise which included recording her "sunbathing, moving … luggage, walking, and playing bingo."[242] To further complete the surveillance, the agents installed a pole camera in 2009. It had the ability to "pan as well as zoom" but did not have the capability to examine the interiors of the house.[243] Karen Bagshaw argued that the use of the pole camera violated the Fourth Amendment due to her backyard being within the curtilage of her home, and she therefore had a reasonable expectation of privacy in that area.[244] Furthermore, she argued that the sheer quantity of constant video surveillance footage for twenty-four days invaded her reasonable expectation of privacy.

The Court of Appeals for the Sixth Circuit concluded *Jones* does not apply to the events in this case because GPS tracking is considered a much greater trespass than a fixed camera,

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[239] *U.S. v. Anderson-Bagshaw,* 509 Fed.Appx 396, 398 (6th Cir. 2012).
[240] *Id.* at 399.
[241] *Id.* at 400.
[242] *Id.* at 401.
[243] *Id*.
[244] *Id.* at 403.

capable of surveillance from a fixed position.[245] This form of surveillance only revealed Bagshaw's activities outside in her yard, which was already open to public view. The Court stated, it did not "'generate [] a precise record of [her] public movements that reflect[ed] a wealth of detail about her familial, political, professional, religious, and sexual associations' like a GPS would have done."[246]

The Court also examined this case from a *Katz* reasonable expectation of privacy test. Due to the "backyard" being easily visible from various public locations, the government agents were constitutionally permitted to view inside the "curtilage" area. With reference to *Katz,* the Court mentioned, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[247] The Court held that any further Fourth Amendment violations in this case would be harmless and declined to resolve whether long-term video surveillance of curtilage would require a warrant.[248] The length of surveillance from the fixed camera lasted from June 16 until July 10, 2009.[249] Furthermore, the Court ruled that these clips of Bagshaw in the backyard were "utterly insignificant" and thus, harmless to use against Bagshaw during trial.[250] The Court affirmed the trial court's decision to deny her suppression motion. In sum, the court found no search occurred under either *Jones* or *Katz*.

5. *Grady v. North Carolina* (J-S)

[245] *Id.* at 406.
[246] *Id.* at 405 (citing *Jones,* 132 S.Ct. at 955).
[247] *Id.* at 405 (citing *Katz v. U.S.,* 389 U.S. 347 (1967)).
[248] *Anderson-Bagshaw,* 509 Fed.Appx at 405.
[249] *Id* at 401.
[250] *Id.* at 406.

The facts of this case start by describing that the petitioner, Torrey Grady was convicted of various sexual offenses in 1997 and 2006.[251] Grady was ordered to appear in superior court after having finished his sentence. The New Hanover County Superior Court would be responsible for determining whether Grady should be placed under satellite-based monitoring as a recidivist sex offender. Grady argued against the monitoring program because it violates his Fourth Amendment rights.[252] The trial court declined his argument and ordered him to be enrolled in the lifelong monitoring program. Grady appealed and relied heavily on the Court's decision in *United States v. Jones.* The North Carolina Court of Appeals rejected this argument, relying on *State v. Jones.*[253] The North Carolina Supreme Court agreed with the Court of Appeals and dismissed Grady's appeal.

The United States Supreme Court rejected the North Carolina Court of Appeals analysis.[254] The Court turned to its prior decision in *United States v. Jones* stating 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.'"[255] Moreover, the Court explained the importance of the Government "physically occupied private property for the purpose of obtaining information" being tantamount to a search.[256] Furthermore, the monitoring system set forth by North Carolina included: 1) continuous tracking with time stamps and 2) reported subject's violations and proscriptive locations.[257] Thus, the Court concluded such monitoring was intended to obtain specific information on the individual and because "it does so [by] physically intruding on a

[251] *Grady v. North Carolina,* 132 S.Ct. 1368, 1369 (2015). Specifically, Torrey Grady was charged and convicted of a second degree sexual offense (1997) and of taking indecent liberties with a child (2006) *Id.*
[252] *Id.*
[253] *Grady v. North Carolina,* 132 S.Ct. at 1370. In *State v. Jones,* the Court rejected GPS ankle bracelet monitoring as being a search.
[254] *Id.*
[255] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[256] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[257] *Id.* at 1371.

subject's body, it effects a Fourth Amendment search."[258] However, the Court declined to decide on the constitutionality of the program, as it was not previously examined by the lower courts. The Court vacated the Supreme Court of North Carolina's judgment. The Court found that the satellite-based monitoring system is tantamount to a search based on the *Jones* trespass test.

6. *U.S. v. Wahchumwah* (K-NS)

The defendant, Ricky Wahchumwah, appealed his jury conviction for offenses related to the illegal exchange of eagle parts. He contended that his Fourth Amendment rights were violated when an undercover agent used a concealed audio-video device to record an illegal transaction Wahchumwah conducted in his home.[259] The Court of Appeals for the Ninth Circuit rejected this argument because the Fourth Amendment's protection does not extend to information that a person "voluntarily exposes" to a government agent, including an undercover agent.[260] Furthermore, the Court held that an undercover agent's warrantless use of the hidden recording device inside the home, which he has been invited to enter, does not violate the Fourth Amendment. When examining from the *Katz* reasonable expectation of privacy, the Court determined that Wahchumwah "forfeited his expectation of privacy when he invited the undercover agent and knowingly exposed incriminating evidence."[261] As a result, Wahchumwah did not have a reasonable expectation of privacy in the encounter taking place between the undercover agent and himself. In sum, the Court determined that no search occurred under the *Katz* test.[262]

7. *U.S. v. Skinner* (B-NS).

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[258] *Id.*
[259] *U.S. v. Wahchumwah,* 710 F.3d 862, 865 (9th Cir. 2013)
[260] *Id.*
[261] *Id.* at 867 (citing *Katz,* 389 U.S. at 351).
[262] *Id.*

In May and June 2006, Drug Enforcement Administration (DEA) agents were tracking drug courier Melvin Skinner, AKA "Big Foot," through cell information data, "ping" data, and GPS real-time location from his phone.[263] These actions were certified by a federal magistrate judge. By continuously "pinging" the phone, agents tracked the whereabouts of Melvin Skinner from Arizona to Texas. More specifically, agents tracked Melvin Skinner to a truck stop in Texas where they located a motorhome.[264] An officer approached the motorhome and Skinner answered the door. Skinner denied the officer's request to search the vehicle. Then, a K-9 officer and his dog arrived at the scene and conducted a perimeter dog sniff around the motorhome.[265]

The trained K-9 alerted officers that there was a presence of narcotics. Subsequently, officers entered the motorhome and found marijuana and handguns.[266] Skinner and his son were placed under arrest.[267] Skinner appealed and argued that the use of the GPS information from his cell phone violated his Fourth Amendment.[268] The Court of Appeals for the Sixth Circuit stated for *Jones* to apply to a Fourth Amendment analysis, "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."[269] The Court concluded that no physical intrusion occurred in this case due to Skinner voluntarily using the cell phone for the intended purposes of communication. The agents who used the cell-phone GPS technology were merely a byproduct of the intended use.[270]

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[263] *U.S. v. Skinner,* 690 F.3d 772, 775 (6th Cir. 2012).
[264] *Id.* at 776.
[265] *Id.*.
[266] *Id.*
[267] *Id*.
[268] *Id.* at 777.
[269] *Id.* at 779 (citing *U.S. v. Jones,* 132 S.Ct. 945, 951 (2012)).
[270] *Id.*

Moreover, *Jones* does not apply to *Skinner* because, "the majority opinion's trespassory test" provides little guidance on "cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property."[271] Furthermore, this form of tracking does not implicate Justice Alito's concern he expressed in his concurrence opinion.[272] In *Jones,* Justice Alito explained, "constant monitoring of [Jones'] vehicle for four weeks…would have required a large team of agents, multiple vehicles, and perhaps aerial assistance."[273] However, this is a different set of circumstances in the current case of Skinner. The surveillance on Skinner was for three days and therefore does not give rise to the concern of Justice Alito. In fact, the Court mentioned that Justice Alito stated, "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable."[274]

Due to authorities tracking a known number that was voluntarily used while traveling on public thoroughfares, Skinner did not have a reasonable expectation of privacy in the GPS data and location of his cell phone. Accordingly, the Court found under either the *Jones* trespass doctrine or *Katz* reasonable expectation of privacy criteria, no search occurred. Therefore, suppression is not warranted and the district court correctly denied Skinner's motion to suppress.

8. *Free Speech Coalition, Inc. v. Attorney General of U.S.* (B-S)

This case involved a collection of individuals and entities who are a part of various aspects of the adult media industry who had brought an action challenging the constitutionality of 18

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[271] *Id.* at 780 (citing *U.S. v. Jones,* 132 S.Ct. 945, 955 (2012)).
[272] Justice Alito mentioned long-term GPS monitoring by police may implicate Fourth Amendment protections. *U.S. v. Jones,* 132 S.Ct. 945, 964 (2012).
[273] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 963)).
[274] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 964)).

U.S.C. §§ 2257 and 2257A.[275] These statutes are "criminal laws which imposed recordkeeping, labeling, and inspection requirements on producers of sexually explicit depictions."[276] The same Plaintiffs also challenge the constitutionality of certain regulations.[277] Plaintiffs claim that the statutes and regulations encroach upon various provisions of the First, Fourth, and Fifth Amendments to the Constitution. With regard to the Fourth Amendment claim, the statute states that producers make their records "available to the Attorney General for inspection at all reasonable times."[278] More specifically, these statutes "authorize investigators, at any reasonable time and without delay or advance notice, to enter any premises where a producer maintains its records to determine compliance with the recordkeeping requirements or other provisions of the Statutes."[279] Additionally, "[p]roducers must make these records available for inspection for at least twenty hours per week, and the records may be inspected only once during any four-month period unless there is reasonable suspicion to believe that a violation has occurred."[280]

When deciding whether a search had occurred the Court of Appeals for the Third Circuit found it was not clear due to the lack of specific information, such as "which specific members of the Free Speech Coalition, Inc. (FSC) were searched, when and where the search took place (i.e., offices or homes), and the conduct of the government during the alleged search."[281] The Court stated this type of information is required when attempting to analyze the government's actions. According to the Court, "[t]his factual context is necessary for determining whether the government's conduct was a 'search' under the Fourth Amendment pursuant to either the reasonable-expectation-of-privacy test set forth in *Katz* or the common-law-trespass test

[275] *Free Speech Coalition, Inc. v. Attorney General of U.S.,* 677 F.3d 519, 524-525 (3rd Cir. 2012).
[276] *Id.* at 524.
[277] *Id.* at 525.
[278] *Id.* at 541-542 (citing 18 U.S.C. §§ 2257(c) and 2257A(c).)
[279] *Id*. at 542 (citing 28 C.F.R. § 75.5(a) and (b)).
[280] *Id*. (citing 28 C.F.R. § 75.5(c)(1) and (d))
[281] *Id.* at 543-544.

described in *Jones.*"[282] Accordingly, the Court "vacate[ed] the District Court's order [dismissing] Plaintiffs claims under the Fourth Amendment, and remand[ed] for development of the record. In particular, remand will permit the District Court to consider the impact, if any, of the recent Supreme Court decision in *United States v. Jones.*"[283] On remand, the District Court found a search had occurred under both the *Katz* and *Jones* test upon reexamination, which was later upheld by the Court of Appeals for the Third Circuit.[284] In sum, this case found a search had occurred and that the District Court correctly used both tests.[285]

9. *U.S. v. Cowan* (B-NS)

Information from a confidential informant led officers to conduct surveillance on the apartment owned by Johnny Booth.[286] The tip included information on Johnny Booth receiving a shipment of crack cocaine to later be sold. During the surveillance of the apartment, officers observed two individuals in vehicles who they believed to be involved in a drug trafficking scheme. The officers obtained a warrant to search the apartment, the persons inside the apartment, and the parking areas for controlled substances, including keys.[287] A squad of seven officers broke down the exterior door of the building and administered the search.

Officers executing the warrant discovered eight adults, including Cowan, inside the apartment.[288] Detective Canas conducted a frisk of Cowan's clothing and found a set of keys in his front pocket. The Detective questioned Cowan about how he got there and suspected Cowan

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[282] *Id*. at 544.
[283] *Id*. at 542-43.
[284] See *Free Speech Coalition Inc. v. Holder*, 957 F. Supp. 2d 564, 602-04 (E.D. Pa. 2013)
[285] See *Free Speech Coalition, Inc. v. Attorney General of U.S,* 787 F.3d 142, 149 (3rd Cir. 2015)
[286] *U.S. v. Cowan,* 674 F.3d 947, 951 (8th Cir. 2012).
[287] *Id*.
[288] *Id.*

was lying.[289] After finding crack cocaine in several locations, Detective Canas removed the handcuffs from Cowan and explained "he could leave if the keys did not match any of the parked vehicles."[290] The Detective walked outside with Cowan and continued to press the key fob until it set off an alarm of a car in front of the apartment.[291] An accompanying officer re-handcuffed Cowan and brought a drug dog near the scene who alerted officers of the presence of drugs in Cowan's vehicle. The subsequent search of Cowan's car revealed crack cocaine inside the vehicle.[292]

The Court of Appeals for the Eighth Circuit applied both "search" tests to this case. Accordingly, the Court stated, "[a]n individual may challenge a search if it violated the individual's 'reasonable expectation of privacy,' or involves an unreasonable 'physical intrusion of a constitutionally protected area.'"[293] First, the Court determined that Cowan "did not have a reasonable expectation of privacy in the identity of his vehicle."[294] Even if Detective Canas' use of the key fob to locate the car did constitute a search, it would be reasonable under the Fourth Amendment's automobile exception. Second, applying *Jones* to this case, Detective Canas did not "trespass on the key fob itself because [Detective Canas] lawfully seized it" (i.e., under the warrant and as part of the pat-down).[295] Therefore, under both the *Katz* and *Jones* tests, the Court concluded that no search had occurred.

10. *Lavan v. City of Los Angeles* (J-S)

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[289] *Id*.
[290] *Id.*
[291] *Id*.
[292] *Id.*
[293] *Id.* at 955 (citing *U.S. v. Jones,* 132 S.Ct. 945, 950-53 (2012)).
[294] *Cowan,* 674 F.3d at 955 (2012).
[295] *Id.*

The facts involve the Appellees, who are homeless people living on the streets of Skid Row.[296] These individuals store their personal possessions, including personal identification and other important documents, in containers provided by social service organizations. In this case, the Appellees kept their possessions in distinctive carts provided by a soup kitchen, hosted by Los Angeles Catholic group.[297] On multiple occasions between February 6, 2011 and March 17, 2011, Appellees stepped away and left their personal property on the sidewalks. They had not "abandoned their property;" however, City of Los Angeles (City) employees seized and immediately destroyed their property. This was in accordance with "a policy and practice of seizing and destroying homeless persons' un-abandoned possessions."[298]

The City's only argument on appeal is that its seizure and destruction of Appellee's un-abandoned property implicates neither the Fourth nor the Fourteenth Amendment.[299] The City based its argument on the Appellees having no legitimate expectation of privacy in unattended property. The Court of Appeals for the Ninth Circuit stated due to the facts of this case, it is unnecessary to focus on the *Katz* reasonable expectation of privacy standard.[300] Instead, the Court focused on the *Jones* test for this analysis. Consequently, as stated in *Jones*, the *Katz* test "did not narrow the Fourth Amendment's scope, but added to not substituted for, the common-law trespassory test."[301]

The Court concluded in this case, from the immediate seizure and destruction of Appellee's un-abandoned property, that the "City meaningfully interfered with Appellee's possessory

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[296] *Lavan v. City of Los Angeles,* 693 F.3d 1022, 1024 (9th Cir. 2012).
[297] *Id.* at 1025.
[298] *Id*.
[299] *Id.* at 1027.
[300] *Id.* at 1029.
[301] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 952 (2012)).

interests in that property."[302] Furthermore, the Court reasoned that un-abandoned property by the homeless are still protected by the Fourth Amendment. Therefore, the Court concluded "once the City destroyed the property, it rendered the seizure unreasonable."[303] In sum, the Court found that a seizure did occur under *Jones*, and it violated the Appellee's Fourth Amendment rights.[304]

11. *Patel v. City of Los Angeles* (B-S)

Los Angeles Municipal Code § 41.49 "requires hotel and motel staff to keep records with specified information about their guests."[305] These records must contain the guest's name, address, the number of people in the party, vehicle, license plate number, etc. This case is focused on the constitutionality of the warrantless inspection requirement. This states that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection," provided that, "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the business."[306]

The City of Los Angeles argued that a police officer's non-consensual inspection of hotel guest records does constitute a Fourth Amendment search.[307] The Court of Appeals for the Ninth Circuit found that the business records are the hotel's private property, and the hotel therefore has both a possessory and an ownership interest in the records. The Supreme Court in *Jones* established that a search occurs when "the government physically intrudes upon one of these enumerated areas, or invades protected privacy interest, for the purpose of obtaining

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[302] *Id.* at 1030.
[303] *Id.*
[304] *Id*.
[305] *Patel v. City of Los Angeles,* 738 F.3d 1058, 1060 (9th Cir. 2013).
[306] *Id.* at 1061.
[307] *Id.*

information."[308] The Court in *Patel* held that a police officer's non-consensual inspection of hotel guest records plainly constitutes a "search" under both the property-based approach of *Jones* and the privacy-based approach of *Katz*.[309] These types of "inspections involve both a physical intrusion upon the hotel's private papers and an invasion of hotel's protected privacy interest in those papers for the purpose of obtaining information."[310] These types of inspections upon hotel records do in fact involve a physical trespass into the hotel's protected privacy interest.

The Court stated that these "papers" are classified as business records, which means that they are the hotel's private property and the hotel shares a possessory interest in the matter. The Court found that the § 41.49 requirement concerning hotel guest records being made available upon an officer's request is "facially invalid under the Fourth Amendment" because it authorizes inspections of records without affording an opportunity to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply."[311]

12. *Florida v. Jardines* (J-S)

In 2006, Detective Pedraja received an "unverified tip that marijuana was being grown in the home of Jardines."[312] After watching his home for approximately 15 minutes, Detective Pedraja and Officer Bartelt, a canine handler, approached Jardines' residence. After Officer Bartelt's trained canine conducted the dog sniff of the front door, it sat which signaled to Officer Bartelt that he discovered an odor of drugs.[313] The officers returned to the vehicle and Detective Pedraja

[308] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 949-51(2012); *Katz v. U.S.,* 389 U.S. 347, 360-61, 88 S.Ct. 507 (1967)).
[309] *Id.* at 1062.
[310] *Id*.
[311] *Id.* at 1065.
[312] *Florida v. Jardines,* 133 S.Ct. 1409, 1413 (2013).
[313] *Id.*

applied for and received a search warrant for the residence based on the dog sniff. The warrant was executed that day and Jardines was arrested for the trafficking of cannabis, which the officers had discovered during their search.[314]

The Supreme Court held "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"[315] Additionally, the *Jones* Court reasoned that property rights "are not the sole measure of Fourth Amendment violations," in reference to *Katz* still having a place in Fourth Amendment analyses.[316] The Court in *Jones* stated, a person's "Fourth Amendment rights dot not rise or fall with the *Katz* formulation."[317] The Court held that "the use of a trained police dog to investigate the home and its immediate surroundings does constitute a 'search' within the meaning of the Fourth Amendment" because the officers had initially trespassed on Jardines' property (i.e., when they approached the area immediately surrounding the property with the canine).[318] Moreover, the Supreme Court held it was unnecessary to decide whether the officers violated Jardines' expectation of privacy under the *Katz* test.[319] Accordingly, through the single lens of *Jones*, the Supreme Court found a search did occur.

13. *U.S. v. Jackson* (B-NS)

On May 26, 2011, Virginia police officers pulled two bags of trash from a trash can.[320] These trash cans were located directly behind the apartment of Sierra Cox. The officers had

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[314] *Id.*
[315] *Id.* at 1414 (citing *U.S. v. Jones,* 132 S.Ct. 945, 950-951 (2012).
[316] *Id.* (citing *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).
[317] *Id.* at 1417 (citing *U.S. v. Jones,* 132 S.Ct. 945, 951-952 (2012)).
[318] *Id.* at 1418.
[319] *Id.* at 1417.
[320] *U.S. v. Jackson,* 728 F.3d 367, 369 (4th Circ. 2013).

received a tip from a confidential informant that Dana Jackson was selling drugs from the apartment. Jackson was Sierra Cox's boyfriend. During the trash pull, officers recovered items from the bags that were consistent with drug trafficking.[321] Subsequently, the police officers obtained a warrant to search the apartment. The officers found evidence of drug trafficking. Jackson argued that the trash pull violated his Fourth Amendment right as the police "physically intruded upon a constitutionally protected area" to obtain evidence found inside the trash.[322] Additionally, Jackson argued his reasonable expectation of privacy was violated during the trash pull. The Court of Appeals for the Fourth Circuit stated, under *Jardines* (an extension of *Jones*) this would be considered a search within the meaning of the Fourth Amendment if it occurred within the curtilage of Cox's apartment.[323] A further analysis of what constitutes the curtilage of Cox's residence, under *Dunn*, revealed that the trash cans were located outside the apartment's curtilage. As a result, under the *Jones* trespass test, officers did not physically intrude upon a constitutionally protected area.[324] Next, the Court decided whether Jackson had a reasonable expectation of privacy under *Katz* in the trash can's contents as the "property rights are not the sole measure of Fourth Amendment violations" and "[t]he *Katz* reasonable-expectations test has been added to .. the traditional property-based understanding of the Fourth Amendment."[325] The Court held that the trash can was "readily accessible to animals, children, scavengers, snoops, and other members of the public" and as a result, the owner of the contents had a diminished expectation of privacy.[326] Therefore, the Court concluded that the trash pull was a lawful investigatory procedure due to the trash can sitting in the common area of the apartment complex

[321] *Id.*
[322] *Id.*
[323] *Id.* at 373.
[324] *Id.* at 374.
[325] *Id.* (citing *Florida v. Jardines,* 133 S.Ct. 1409, 1414 (2013)).
[326] *Id.* at 375.

courtyard. Additionally, the Court concluded that no search had occurred after applying both *Jones* and *Katz* tests to the circumstances of this case.

14. *U.S. v. Davis* (B-S)

On August 29, 2000, Davis arrived at Howard County General Hospital with a gunshot wound to his leg.[327] He claimed he was a victim of an unfortunate robbery which went terribly wrong. As part of Maryland law, the hospital staff called the police. Officer King found Davis in the emergency room. He was conscious, sitting up, and able to communicate with Officer King. As per procedure of the hospital, the clothing of Davis was removed, placed in plastic baggies, and then placed under the bed by the hospital staff.[328] After arriving on the scene, Officer King observed Davis' gunshot wound. He then secured Davis' clothes as evidence of the shooting/robbery and without the permission of Davis or a warrant. Police and forensic specialists were able to extract DNA from the blood stains on Davis' pants, without a warrant, and created a "DNA profile" from the results.[329] This "DNA profile" was later used to compare with samples found at the scene of an unrelated murder of Michael Neal; however, these profiles were not a match. Nevertheless, the "DNA profile" was kept in police databases and used against Davis in the robbery and the murder of Mr. Schwindler.[330] This was a "cold hit" which resulted in law enforcement being able to obtain a warrant and extract direct a DNA sample from Davis, which subsequently matched the samples from the Schwindler murder scene. This evidence was used against Davis at trial.[331]

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[327] *U.S. v. Davis,* 690 F.3d 226, 230 (4th Cir. 2012).
[328] *Id*.
[329] *Id.* at 231.
[330] *Id.* at 232.
[331] *Id*.

Davis argued to suppress the DNA evidence due to officers violating his Fourth Amendment rights.[332] Davis explained that the contents of the hospital bags (clothes) were not in plain view and thus, law enforcement seized and searched the bag illegally.[333] The Court of Appeals for the Fourth Circuit ruled that the plain view doctrine justified both the warrantless seizure and the subsequent search of the plastic bag which contained the clothes of Davis.[334] The Court's rationale behind their decision was due to the years of experience of Officer King, the normal procedures of the hospital placing patient's clothing under the bed, and the appearance of the "victim" when Officer King had spoken with him.[335] Furthermore, the Court explained that Davis did have an expectation of privacy in the bags and clothing; however, the evidence was in plain sight of the officer and thus, was legally obtained under the plain view doctrine. Next, the Court examined whether the creation and retention of the "DNA profile" was lawful.

The Fourth Amendment provides 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[336] Protections of an individual's Fourth Amendment rights are in effect when there is a "constitutionally protected reasonable expectation of privacy;" however, when there is a lack of reasonable expectation of privacy, then the Fourth Amendment protections do not occur. Furthermore, the Supreme Court recently found a search can occur when the "Government

[332] *Id*.
[333] *Id.*at 234.
[334] *Id.* at 238.
[335] *Id.* at 236.
[336] *Id.* at 241 (citing U.S. Const. amend. IV).

physically occupied private property for the purpose of obtaining information.[337] The Court concluded that though Davis may not have had a reasonable expectation of privacy in the clothing, the extraction of DNA and the retention of the "DNA profile" are subject to a reasonable expectation of privacy inquiry.[338] Furthermore, the Court held that Davis retained his privacy interests in the DNA on the material and therefore, the DNA sample extraction and the creation of the "DNA profile" constituted a search.[339] Additionally, once officers had lawfully obtained Davis' clothing, there was no intrusion upon his property.[340]

The Court held that the retention of Davis' "DNA profile" in police database was unreasonable under the Fourth Amendment under the fruit of the poisonous tree doctrine.[341] Nevertheless, the Court ruled that the good-faith exception applied to law enforcement extraction and tests of Davis' DNA. The officers "had no reason to question that Davis' blood was lawfully within HCPD custody and indeed, we have concluded that the clothing was properly in police custody.[342] Furthermore, the Court stated though Davis had a reasonable expectation of privacy in his DNA, that does not necessarily mean the police and lab technicians were not acting in good faith. The Court explained the actions of the police classified as "isolated negligence attenuated from the arrest" and not the actions motivated by reckless law enforcement.[343] The Court concluded for these reasons, the good faith exception to the exclusionary rule applied to

[337] *Davis,* 690 F.3d at 241 (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[338] *Id.* at 246.
[339] *Id*.
[340] *Id.* at 241.
[341] *Id.* at 250.
[342] *Id.* at 253.
[343] *Id.* at 256.

this case."[344] In sum, the Court found a search under the *Katz* test, but it did not find a search under the *Jones'* trespass test.

15. *U.S. v. Patel* (B-S)

Dr. Patel was a cardiologist in Louisiana.[345] A grand jury indicted Dr. Patel on 91 counts of health care fraud in violation of 18 U.S.C. § 1347. In February 2002, Neil Kinn, a nurse who worked alongside Dr. Patel, contacted the United States Department of Health and Human Services (HHS) with concerns of Dr. Patel's illegal behavior. Nurse Kinn provided documents from a mobile laboratory that Dr. Patel leased several days each week at his office. After meeting with HHS Agent Alleman, the nurse gathered additional records from the lab.[346] On Mach 26, 2002, the nurse mailed agent Alleman a letter with additional information. Toward the end of 2003, agent Alleman obtained a search warrant "for documents and electronic storage media" in Dr. Patel's permanent and mobile offices.[347]

Dr. Patel argued his Fourth Amendment rights were violated and the warrant was based on the fruits of an earlier warrantless search, which lacked probable cause to permit a lawful seizure.[348] The Court of Appeals for the Fifth Circuit stated when the Supreme Court had decided *Jones*, it gave new guidance as to what constitutes a search. In *Jones*, the Supreme Court explained that "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test."[349] The Court, however, found that they did not need to squarely address how *Jones* would affect the holding, and essentially left intact the finding of the

[344] *Id.* at 257.
[345] *U.S. v. Patel,* 485 Fed.Appx. 702, 705 (5th Cir. 2012).
[346] *Id*.
[347] *Id.*
[348] *Id.* at 710.
[349] *Id.* at 711 (citing *U.S. v. Jones,* 132 S.Ct. 945, 954-55 (2012)).

lower, district court that a search had occurred. The Court stated if Dr. Patel had sufficient privacy or possessory interest in the mobile lab to implicate the Fourth Amendment, as the district court had found, it would be irrelevant because evidence gathered by Nurse Kinn does not implicate the Fourth Amendment before March 15 as Nurse Kinn was acting as an independent source (i.e., private, non-state actor).[350] In this vein, the Court stated, "Even if Dr. Patel had a sufficient privacy or possessory interest in the mobile lab to implicate the Fourth Amendment and render Nurse Kinn's post-March 15 evidence gathering a violation, because there was an independent source for it [i.e., the warrant based on information handed over initially and voluntarily to the government by the Nurse], the evidence was properly admitted."[351] Furthermore, the Court concluded that the warrant was not defective as officers relied on statements from informants which were in good-faith.[352] The additional information supplied after the meeting with HSS Agent Alleman also does not matter as that information was not used as part of the warrant's probable cause. Thus, the Court a search had occurred under both the *Jones* or *Katz* criteria.

16. *U.S. v. Flores-Lopez* (B-S)

Law enforcement officers had reason to believe that the Flores-Lopez was a supplier of illegal drugs.[353] Officers received information about a drug deal between Flores-Lopez and another dealer, Alberto Santana-Cabrera, from a paid informant. Police listened to a phone conversation between Cabrera and Flores-Lopez, who stated a delivery of meth had been ordered to a garage. Police immediately arrested both Flores-Lopez and Santana-Cabrera.[354] Flores-

[350] *Id.*
[351] *Id*.
[352] *Id.* at 712.
[353] *U.S. v. Flores-Lopez,* 670 F.3d 803, 804 (7th Cir. 2012).
[354] *Id.*.

Lopez had driven a truck containing the drugs and officers found a cell phone on Flores-Lopez and two other cell phones. Flores-Lopez admitted that the cell phone found on his person belonged to him. Flores-Lopez argued that the search of his cell phone violated his rights as it was not conducted pursuant to a warrant.[355] Flores-Lopez argued that "[t]he [cell] phone number itself was not incriminating evidence, but it enabled the government to obtain such evidence from the phone company, and that evidence … was the fruit of an illegal search [of his phone] and was therefore inadmissible."[356] More specifically this evidence includes the call history, including the overheard phone conversation and calls made between him and his associates.

The Court of Appeals for the Seventh Circuit examined the Fourth Amendment search around the reasonableness of the search of the cell phone. The Court stated that a modern cell phone is similar in one aspect to a diary. Moreover, a warrantless search of a cell phone, is justified by police officers' reasonable concerns for their safety.[357] The Court elaborated that some types of "stun guns" have been made to look like cell phones and as a result, officers may reasonably believe there is a safety concern. However, once the officer has the cell phone, they are able to distinguish it from a weapon. As a result, there would be no reason to go further and manipulate it since safety is no longer an issue.[358] The Court stated that opening the diary found on the suspect whom the police have arrested, to verify his name and address and discover whether the diary contains information relevant to the crime for which he has been arrested, is permissible. The Court mentioned that *Jones* held that attaching a GPS device to a vehicle is a search because "the Government physically occupied private property for the purpose of

[355] *Id.* at 805.
[356] *Id.*
[357] *Id.* at 806.
[358] *Id*.

obtaining information."[359] The *Jones* Court thus breathed new life into the trespass doctrine. Also, the Court in *United States v. Concepcion,* found that testing the keys of a person that law enforcement had in custody was said to be a "search."[360] However, the Court held in *Concepcion* that a minimally invasive search may be lawful in the absence of a warrant, even if the usual reasons for excusing the failure to obtain a warrant are absent. Since the officers in the case-at-hand did not thoroughly search the contents of the phone, and only obtained the cell phone's phone number, this type of search was minimally invasive and thus did not require a warrant.[361] The search did technically occur under both the *Jones* and *Katz* criteria; however, the Court of Appeals found it was minimally invasive.

17. *U.S. v. Duenas* (B-NS)

On April 19, 2007, Guam Police Department (GPD) officers, DEA, and ATF agents executed a search warrant at the home of the Duenas family for narcotics trafficking.[362] Ray and Lou Duenas were asleep and when the officers entered the residence the scene was described as "chaotic." No single officer was clearly in charge of managing the scene even though approximately forty officers were at the scene. As a result, civilians and journalists were able to go on Duenas' property. Law enforcement instructed media to remain in the front yard and to not pass a certain shipping container.[363] The media was permitted to film and photograph the scene and Officer Wade was dedicated to escorting the media members around the scene. During the execution of the warrant, which lasted two days, police found drugs, drug paraphernalia, stolen property, and weapons. The Court of Appeals for the Ninth Circuit initially stated it was difficult

[359] *Id.* at 807.
[360] *Id.* (citing *U.S. v. Concepcion,* 942 F.2d 1170, 1172-73 (1991)).
[361] *Id.* at 809.
[362] *U.S. v. Duenas,* 691 F.3d 1070, 1075 (9th Cir. 2012).
[363] *Id.* at 1076.

to determine if the Duenas' Fourth Amendment rights were violated based on the factual record, namely due to the uncertainty of whether any members of the media actually entered the Duenas' residence or its surrounding curtilage.[364] In *Katz*, the Supreme Court held that "the Fourth Amendment protects people, not places" in which citizens are entitled to a reasonable expectation of privacy.[365] Conversely, the Supreme Court in *Jones* "reaffirmed that the home and its curtilage are sacrosanct, and that nothing in *Katz* requires courts to apply reasonable expectation of privacy standard in addition to finding that the subject of the search was 'persons, houses, papers, [or] effects.'"[366] The Court determined that the curtilage warrants the "same" Fourth Amendment protection as the home. Thus, the Court turned to *Dunn* to determine whether the area is considered curtilage.[367]

The Court found that only the first of the four *Dunn* factors suggested the front yard was considered curtilage. In this case, the federal circuit court agreed with the assessment made by the district court in which the front yard was not considered curtilage and therefore, does not receive Fourth Amendment protections.[368] This is important because the majority of journalists and other media members were confined to the front yard. However, some journalists were escorted throughout the property, beyond the front yard. The Court concluded these facts (including the inadequate management of the search scene by GPD), are in agreement with the district court's analysis, in that the media presence did not violate the Fourth Amendment.[369] In sum, the Court found a search had not occurred under *Jones* or *Katz* tests.

18. *U.S. v. Perea-Rey* (J-S)

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[364] *Id.* at 1079.
[365] *Id.* at 1080 (citing *Katz v. U.S.,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d (1967)).
[366] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 951 (2012)).
[367] *Duenas,* 691 F.3d at 1080 (citing *U.S. v. Dunn,* 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)).
[368] *Id.* at 1081.
[369] *Id.*.

On April 19, 2010, border patrol agents watched a man "hop" the Mexico-United States border fence.[370] Border patrol agent Trujillo followed the individual, later identified as Pedro Garcia, to Perea-Rey's home. Agent Trujillo witnessed Garcia enter the front yard through the gate, knock on the door, and speak to Perea-Rey briefly before being signaled to the carport of his residence.[371] Agent Trujillo was unable to see into the carport and therefore proceeded to follow both individuals. Agent Trujillo found them standing right inside the carport. The agent announced his presence and detained both of them. Perea-Rey refused to allow border patrol agents to enter his house. As a result, the agent Trujillo waited for back up and once back up arrived, they ordered everyone to exit the home.[372] The individuals who exited the home were later found to be undocumented illegal immigrants. Perea-Rey argued in court that the evidence of the "aliens" was "fruit" of a warrantless search and seizure and should be excluded from court.[373]

The Court of Appeals for the Ninth Circuit examined if the curtilage of the home was protected by Fourth Amendment search. In *Jones*, the Supreme Court held, "where the government physically occupie[s] private property for the purpose of obtaining information," that is a "'search' within the meaning of the Fourth Amendment."[374] Furthermore, the Court of Appeals turned to the decision *Payton v. New York* which held that "[s]earches and seizures inside a home without a warrant are presumptively unreasonable."[375] Additionally, the Court stated that searches and seizures in the curtilage of a home are presumptively unreasonable,

[370] *U.S. v. Perea-Rey,* 680 F.3d 1179, 1182 (9th Cir. 2012).
[371] *Id.* at 1183.
[372] *Id.*
[373] *Id.* at 1182.
[374] *Id.* at 1184 (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[375] *Id.* (citing *Payton v. New York,* 445 U.S. 573, 586,(1980)).

absent a warrant.[376] Based on the Dunn factors, the Court determined the agents searched the curtilage of Perea-Rey's home when they entered the carport.[377] Since the carport is classified as curtilage, then it is subject to Fourth Amendment protection. As a result, the Court stated that this warrantless trespass by government agents into the home or its curtilage does constitute a search. As the Supreme Court found in *Jones* "[w]here …the Government obtains information by physically intruding on a constitutionally protected area, … a search has undoubtedly occurred."[378] However, *Jones* did not remove the possibility of the application of the *Katz* reasonable expectation of privacy test to determine a search under the Fourth Amendment. Indeed, the Court in *Jones* stated "*Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.[379]

The Court concluded that the agents could observe the curtilage from the sidewalk and these observations, in turn, could serve as a basis for a warrant application; however, they were unable to commit a warrantless entry into the carport.[380] This occurred when the border patrol agents "physically occupied" the carport, which was part of the curtilage of Perea-Rey's home. The Court in *Perea-Rey* concluded that the "warrantless intrusion into the curtilage of Perea-Rey's home by border patrol agents resulted in an unreasonable search and seizure, which violated Perea-Rey's Fourth Amendment rights."[381]

19. *U.S. v. Wilfong* (B-NS)

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[376] *Id.*
[377] *Id.* (citing *U.S. v. Dunn,* 480 U.S. 294 (1987)).
[378] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[379] *Id.* at 1186 (citing *U.S. v. Jones,* 132 S.Ct. 945, 952 (2012)).
[380] *Id*.
[381] *Id.* at 1189.

On January, 15, 2011, Wilfong arrived at his mother's house and got into a dispute with his brother, Eric.[382] Wilfong pulled out a gun and fired a shot at Eric's feet, hitting the floor. Wilfong took the keys to the pickup belonging to his mother and drove away. Eric reported the events to the police. Wilfong had an outstanding arrest warrant for violating his supervised release. Local officers and United States Marshal Albright learned of the whereabouts of the pickup and set up surveillance, but Wilfong never returned.[383] Deputy Albright received permission from Eric to place a GPS device on the vehicle. The next morning, the GPS signaled the movements of the pickup and law enforcement were able to track the vehicle to another apartment complex. A car chase ensued.[384] Eventually, Wilfong decided to abandon his weapon by throwing it out of the vehicle. A postman found the gun and immediately called 911. Wilfong was later arrested. Wilfong stated that the placement of the GPS on the pickup was not authorized which would mean the gun was the fruit of an illegal search.[385] Recently, the Supreme Court had held in *Jones* that a GPS tracking device attached to a vehicle by law enforcement does constitute a search.[386] The Court of Appeals for the Tenth Circuit explained that Wilfong lacked standing to raise the claim to suppress the gun as he had no privacy interest in the stolen vehicle. Furthermore, the Court reasoned even if Wilfong had standing, the attempted suppression of the weapon would prove unsuccessful. In particular, the court focused on the fact that an exception to the warrant requirement exists in the form of "voluntary consent by a third party."[387] Furthermore, the Court reasoned that the "totality-of-the-circumstances" would cause a "reasonable officer" such as Deputy Albright to believe Eric had the authority to consent to

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[382] *U.S. v. Wilfong,* 528 Fed.Appx. 814, 815 (10th Cir. 2013).
[383] *Id*.
[384] *Id.* at 816.
[385] *Id*.
[386] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 948 (2012)).
[387] *Id.* at 817.

placing the GPS on the stolen vehicle.[388] If the search was a Fourth Amendment violation under *Jones*, the exclusionary rule would not apply due to the application of one of the three exceptions: independent source, attenuated basis, or inevitable discovery. Finally, the Court mentioned how *Jones* may not be applicable here because the presence of exigent circumstances of a fleeing, armed felon.[389] The Court elaborated by stating that Wilfong had a pre-existing arrest warrant and thus the placement of the GPS device was purely to locate Wilfong, not to obtain incriminating information. Thus, the Court stated, it could be argued that *Jones* may not necessarily be applicable in this case. Nonetheless, the Court of Appeals found no search had occurred after it applied both tests.

20. *U.S. v. Gibson* (K-NS)

Drug Enforcement Administration agent Greg Millard suspected James Gibson and his associates of drug trafficking.[390] As a result, DEA placed a tracking device on the vehicle of James Gibson. The device was installed on the vehicle without a warrant on January 27, 2009. On February 18, 2009, Agent Millard received information which suggested that James Gibson would be traveling. Between February 18 and February 20, DEA used the tracking device to locate the whereabouts of James Gibson and his accomplices.[391] Agent Millard notified Deputy Sheriff Haskell of Gibson's estimated location. Agent Millard instructed Haskell to search the vehicle if the deputy was able to establish probable cause for the search. Deputy Haskell stopped the vehicle, smelled burnt marijuana emanating from the vehicle, was given consent to search the

[388] *Id.*
[389] *Id.* at 819.
[390] *U.S. v. Gibson,* 708 F.3d 1256, 1261 (11th Cir. 2013).
[391] *Id.* at 1262.

vehicle, and found 2 kilograms of cocaine inside the vehicle.[392] The driver was an individual named Burton and Gibson was not in the vehicle.

James Gibson argued that all evidence obtained from the tracking device placed on the vehicle should be suppressed because the installation and use of a GPS device constitutes a search under the Fourth Amendment.[393] Conversely, the government also argued that the evidence obtained from the tracking device was admissible under the good faith exception to the exclusionary rule because agents attached the GPS device on the vehicle in reliance on then-binding circuit precedent.[394] The Court of Appeals for the Eleventh Circuit relied heavily on the notion of "standing" in the vehicle to determine the Fourth Amendment search question. This was a two part question; first, does Gibson have privacy interest on the day it was searched; second, does Gibson have privacy interest on the other times (February 18-19) the vehicle wasn't searched.

First, the Court reasoned that Gibson had no reasonable expectation of privacy because he was neither the driver nor the passenger of the vehicle when the vehicle was searched.[395] Additionally, due to Gibson not being present, he had neither control nor custody of the vehicle during the search. Second, the Court stated that Gibson does have privacy interests in the vehicle on the other days of February 18-19 while the vehicle was in his possession. However, he could not challenge the tracking device because it was used while he was traveling public roads.[396] Furthermore, the Court stated that even if Gibson had standing to challenge the search of the

[392] *Id.* at 1263.
[393] *Id.* at 1276.
[394] *Id.*
[395] *Id.* at 1278.
[396] *Id.* at 1277.

vehicle when it was in his possession and control, the admission of any GPS-related evidence from this time-frame into court was harmless.[397]

21. *U.S. v. Davis* (J-S)

Police were alerted of a robbery that had occurred at a Radio Shack on March 3, 2011.[398] Soon after, Federal Bureau of Investigation (FBI) agents stopped a vehicle which matched the description of the Radio Shack robbers' vehicle, a gray Nissan Sentra. The vehicle was driven by Asabi Baker and Mark Davis was the passenger. The vehicle was registered to neither Baker nor Davis, but to Baker's girlfriend. Inside the vehicle police found evidence of clothes, tools, and weapons which matched the robbers' description. Baker and Davis were charged and convicted of armed robbery.[399] Prior to the events on March 3, police were investigating a string of robberies occurring in the Kansas City area. As a result, officers began to suspect that Baker's girlfriend's vehicle was used at multiple scenes. Accordingly, on March 2, 2011, a warrantless global positioning device (GPS) was placed on the vehicle.[400] Prior to March 2, officers had obtained a warrant to place a GPS device on Mr. Baker's phone. During the events of the robbery, police coordinated and tracked the whereabouts of the vehicle using a combination of vehicle GPS tracking, cell phone GPS tracking, and visual tracking.[401]

Davis moved to suppress the evidence of the robbery in district court because he claimed attaching a warrantless GPS device under *Jones* violated his Fourth Amendment rights.[402] The district court failed to grant Davis' motion. On appeal, the Court of Appeals for the Tenth Circuit

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[397] *Id.* at 1279.
[398] *U.S. v. Davis,* 750 F.3d 1186, 1188 (10th Cir. 2014).
[399] *Davis,* 750 F.3d at 1188.
[400] *Id.*
[401] *Id.*
[402] *Id.*

focused on whether defendant Davis had "standing" to challenge police use of the GPS device on the vehicle, although it did address the search issue as part of the standing analysis.[403] For example, as part of its standing analysis, the Court essentially noted the basic holding of *Jones*, and then proceeded to refer to the warrantless attachment and monitoring of the GPS device by police in the case as a "search" and a "Fourth Amendment violation."[404] However, because the Court found that defendant lacked standing to challenge police use of the GPS device on another individual's vehicle, it ultimately held the evidence discovered by police in the vehicle admissible against Davis.[405]

The Court reasoned that Davis' lacked standing was due to the fact that Davis did not have "possessory interest or reasonable expectation of privacy" in the vehicle which belonged to Baker's girlfriend; hence, the "poisonous tree was planted in someone else's orchard."[406] Therefore, Davis lacked standing to challenge any tainted fruits. The Court stated that the officers obtained the information on which they tracked the vehicle through a variety of means, where only one appeared to be unconstitutional. Although, it may appear that it violated someone's rights, those rights were not those of Davis. The Court affirmed the district court decision. In sum, the Court stated that police "trespassed" onto Davis' property by attaching a warrantless GPS device to his vehicle; however, Davis lacked a possessory interest in said vehicle and therefore, lacked standing to gain Fourth Amendment protections. In other words, a search did occur.

22. *U.S. v. Gutierrez* (K-NS)

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[403] *Davis*, 750 F.3d at 1189.
[404] *Id.*
[405] *Id.* at 1190.
[406] *Id.*

In November 2012, Indianapolis police received a tip that Oscar Gutierrez may be involved in drug trafficking.[407] A joint task force consisting of local law enforcement officers, detectives, and a Drug Enforcement Agency (DEA) agent and a drug dog (Fletch) went to the home of Oscar Gutierrez to investigate the tip. Officers approached the residence, knocked on the door, but no one answered; however, they did notice movement inside the residence. Detective Sergeant Cline obtained Fletch and had him examine the front door, whereupon Fletch positively alerted the handler of the presence of narcotics.[408] Again, the officers knocked on the door and received no response. After consulting with the Marion County Prosecutor, officers forcibly entered the home and conducted a sweep. Meanwhile, Detective Sergeant Cline left the scene to obtain a warrant based on the informant tip, attempt to enter the residence, and Fletch's positive alert.[409] Detective Sergeant Cline was given the warrant. In the meantime, officers at the scene found Gutierrez and another tenant, Cota, and immediately arrested them. Officers did not conduct an official search until Detective Sergeant Cline arrived with the warrant. Once the search began, DEA Agent Schmidt found a duffel bag containing 11.3 pounds of methamphetamines.[410]

The Court of Appeals of the Seventh Circuit held that the methamphetamines discovered during the search under warrant based on the drug dog's positive alert did not need to be suppressed, even though it was later determined that the actions of the drug dog constituted a search.[411] The Court of Appeals reasoned that normally a case such as this would be governed by the precedent of *United States v. Jardines*, which held that the use of the drug dog to sniff the

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[407] *U.S. v. Gutierrez,* 760 F.3d 750, 752 (7th Cir. 2014).
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] *Gutierrez,* 760 F.3d at 750.

premises constitutes a search and therefore implicates all protections under the Fourth Amendment.[412] However, *Jardines* was decided after the facts of this case; as a result, the Court had to decide between *United States v. Jones* (with defendant Gutierrez claiming that the basic rule from *Jardines* was already in effect at the time of *Jones*), or its binding circuit precedent of *U.S. v. Brock.*[413] The Court concluded that *Brock* remained good law after *Jones* and had not been overruled until the United States Supreme Court decided *Jardines.*[414] Thus, before *Jardines* and according to the *Brock* precedent, police were allowed to conduct dog sniffs at residences without a warrant. Finally, the Court stated because officers' actions falls under the binding appellate precedent of *Brock*, the officers are afforded the *Davis'* good-faith exception to the exclusionary rule.[415] The Court concluded that no search had occurred under *Brock* because police did not violate defendant's reasonable expectation of privacy by conducting the residential dog sniff. In sum, this case used the specific language of privacy when analyzing the Fourth Amendment search question involving facts occurring after the decisional date of *Jones*. As a result, this was categorized as a case which used the reasonable expectation of privacy test.

23. *U.S. v. Wheelock* (K-NS)

Minneapolis Police Officer Dale Hanson discovered child pornography was being downloaded from a certain Internet Protocol (IP) address.[416] This information resulted in Officer Hanson obtaining an administrative subpoena which ordered the Internet Service Provider (ISP),

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[412] *Gutierrez,* 760 F.3d at 755 (citing *U.S. v. Jardines,* 133 S.Ct. 1409, 1414 (2013)).
[413] *U.S. v. Brock* held that "the dog sniff inside Brock's residence was not a Fourth Amendment search because it detected only the presence of contraband and did not provide any information about lawful activity over which Brock had a legitimate expectation of privacy." 417 F.3d at 696.
[414] *Gutierrez,* 760 F.3d at 756. *Jones* did not call into question the underlying search question of *Brock* regarding an individual's lack of legitimate expectation of privacy in contraband, which concluded that a drug dog sniff is not a Fourth Amendment search.
[415] *Gutierrez,* 760 F.3d at 758.
[416] *U.S. v. Wheelock,* 772 F.3d 825, 827 (8th Cir. 2014).

Comcast Communications, to produce specific subscriber information linked to the IP address.[417] Comcast provided Wheelock's name and address which were associated with the IP address. A criminal history check on Wheelock revealed he had previously been charged and convicted for the possession of child pornography. Officer Hanson used this information to obtain a search warrant of Wheelock's house, specifically searching for hard drives, DVDs, and CDs which contained child pornography. Wheelock was later charged and pled guilty to possessing, receiving, and attempting to distribute child pornography.[418] Wheelock argued that Officer Hanson's use of the administrative subpoena violated his privacy rights.[419] More specifically, Wheelock contended that such rights were violated due to Justice Sotomayor's concurring opinion in *United States v. Jones.*[420]

The Court of Appeals for the Eighth Circuit stated for Fourth Amendment protections to be bestowed to defendant Wheelock, it must be proven that "he had a reasonable expectation of privacy" and that "society is prepared to accept this privacy expectation as objectively reasonable."[421] The Court in *Wheelock* found that defendant had no Fourth Amendment protections because of the third party doctrine. The Court stated that normally, the Fourth Amendment does not forbid the Government from obtaining information from third parties.[422] Additionally, the Court responded to Wheelock's reliance upon Justice Sotomayor's concurrence by describing that "she did not advocate the abandonment of the third-party disclosure doctrine," and until such time as the Supreme Court revises the third-party doctrine, courts across the

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[417] Officer Hanson stated such information was "relevant to an ongoing, legitimate law enforcement investigation of Distribution of Child Pornography."
[418] *Wheelock,* 772 F.3d at 828.
[419] *Id.*
[420] *Id.* at 829 (citing *U.S. v. Jones,* 132 S.Ct. 945, 957 (2012)) Justice Sotomayor stated, "It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." *Id.*
[421] *Wheelock,* 772 F.3d at 828.
[422] *Id.* at 829.

country are bound by existing precedent.[423] The Court held that the officers were not required to have a warrant as Wheelock had no reasonable expectation of privacy in the information obtained from Comcast.[424] This case distinguished itself from *Jones* and instead relied upon the *Katz* test, which the Court finding no search had occurred because Wheelock lacked a reasonable expectation of privacy under the third-party doctrine by disclosing information to the ISP (i.e., his name, address, etc.).

24. *U.S. v. Stephens* (J-S)

The defendant, Henry Stephens, was suspected of being connected to possible drug and firearms crimes in Baltimore after federal and state law enforcement received information from a confidential informant.[425] As part of a joint task force consisting of federal and local law enforcement commanded by Officer Paul Geare, Geare himself attached a battery-powered GPS device to the underside of Stephens' vehicle without a warrant on May 13, 2011.[426] The vehicle happened to be parked in a public parking lot in Maryland at the time of the installation. Officer Geare discovered that Stephens worked at a nightclub called "Club Unite" and that he was scheduled to work there on May 16. He also found out that Stephens typically carried his firearm with him at work, even though he is a convicted felon.[427] Three days later, the GPS device was used to locate Stephens' vehicle at a school. Officer Geare and Sergeant Johnson then physically followed Stephens to his residence where they saw him reach around to the back of his waistband. The officers interpreted this motion as a check for a weapon and notified fellow

[423] *Id.*
[424] *Id.*
[425] *U.S. v. Stephens,* 764 F.3d 327, 329 (4th Cir. 2014).
[426] *Id.*
[427] *Id.* at 330.

officers they had reasonable suspicion to believe he was armed.[428] Next, Officer Geare followed Stephens, using a combination of visual observations and GPS monitoring. When Stephens arrived at "Club Unite," officers approached Stephens, conducted a pat down, and found an empty holster located in the middle of his back. Soon after, a k-9 unit arrived on the scene and alerted officers of the presence of drugs from the exterior of the vehicle. At this point, officers searched the vehicle and found a loaded pistol.[429] Shortly after discovering the pistol, the officers arrested Stephens for illegal possession of a firearm by a convicted felon.

The Court of Appeals for the Fourth Circuit declared that the GPS device used without a warrant to locate and monitor Stephens in May 2011 constituted an unreasonable search according to Fourth Amendment guidelines. In so holding, the Court essentially endorsed the district court's earlier finding that a search had occurred under *Jones*.[430] However, as of May 2011, neither the United States Supreme Court nor the Fourth Circuit had given a clear decision on the use of warrantless GPS devices. As a result, the Court of Appeals turned to the earlier Supreme Court case of *Knotts,* which had found that the use of beepers to track vehicle on public roadways does not constitute a search under the Fourth Amendment.[431] The Court of Appeals ruled that under *Davis,* the exclusionary rule was not applicable as the officers were acting in good-faith by relying upon binding precedent which allowed officers to attach a GPS device without a warrant.[432]

25. *U.S. v. Davis* (B-NS)

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[428] *Id*.
[429] *Id*.
[430] *Id.* at 334.
[431] *Id.* at 337.
[432] *Id.* at 338.

The government obtained an order from the district court to obtain "cell site location information" on defendant Davis. This information also included a call list made by Davis. Although it was possible to obtain more generalized location information, it was not possible to pinpoint an individual's precise location from the information.[433] The Court of Appeals for the Eleventh Circuit held that cell site location data does not fall within one's reasonable expectation of privacy and therefore, the government did not violate Davis' Fourth Amendment rights.[434] The Court of Appeals for the Eleventh Circuit examined this Fourth Amendment issue using a combination of the trespass and privacy test. More specifically, the Court acknowledged that since there was no trespass because police neither placed or used a GPS device or conducted a physical trespass, then *Jones* did not apply to provide Fourth Amendment protections.[435]

The Court instead viewed the cell site location data as being held by a private telephone company and obtained by the government through a court order.[436] In addition, the United States Supreme Court in *Jones* concluded that "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to [the] *Katz* [privacy] analysis."[437] Accordingly, the court in *Davis* turned to the *Katz* reasonable expectation of privacy test to analyze the Fourth Amendment "search" issue. The Court relied on former precedent cases of *Miller* and *Smith* and found Davis was not entitled to Fourth Amendment protections as he has not subjective or objective reasonable expectations of privacy in MetroPCS's business records.[438] Finally, the Court turned to the third-party doctrine and reasoned that individuals who use cell

[433] *U.S. v. Davis,* 785 F.3d 498, 501-502 (11th Cir. 2015).
[434] *Id.* at 513.
[435] *Id.*
[436] *Id.* at 514.
[437] *U.S. v. Jones,* 132 S.Ct. 945, 953 (2012).
[438] *Id.* at 511.

phones "voluntarily convey" the cell information to their respective telephone companies.[439] These users are aware of voluntarily exposing information to a third-party service provider. As such, the Court concluded that the government's order did not constitute a search when it acquired the historical cell tower data from MetroPCS. In sum, the Court found a search had not occurred.

26. *U.S. v. Ganias* (B-S)

During the 1980s, Ganias started his own business after working for the Internal Revenue Service (IRS) for fourteen years.[440] In 1998, Ganias had contracted services to James McCarthy and his businesses, American Boiler and Industrial Property Management (IMP). IMP had been later contracted by the Army to maintain and keep secure a vacant facility in Stratford, Connecticut. On August 2003, a confidential source came forward and tipped off the Criminal Investigative Command of the Army that some individuals within IMP were engaging in stealing copper wire and other valuable items, while simultaneously billing the Army for work.[441] This information led to the start of an investigation. Over the course of the investigation, the Army investigators obtained numerous search warrants, including one for Ganias' accounting offices. This particular warrant was issued on November 17, 2003, and executed two days later. The investigators were accompanied by computer specialists who made identical copies of the contents of all hard drives at the offices.

As evidence was being reviewed, the Army investigators discovered that payments were being made by IMP to an unregistered business.[442] As a result, Internal Revenue Service (IRS)

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[439] *Id.* at 512.
[440] *U.S. v. Ganias,* 755 F.3d 125, 128 (2nd Cir. 2014).
[441] *Id.*
[442] *Id.* at 129.

joined the investigation. By December 2004, the Army and IRS investigators uncovered data relevant to their investigation and were careful to review only data pertinent to the November 2003 warrant. However, investigators failed to purge any unrelated data. Accounting irregularities were discovered in the data entries. The IRS case agent wanted to review the data obtained on the hard drive, but was aware that the data was beyond the scope of the initial warrant.[443] In February 2006, Ganias was asked permission if the United States government could access the files that were beyond the scope of the initial warrant. Ganias did not answer; thus, the government obtained another warrant to search the copies of the hard drives that was in its possession for two and a half years.[444]

Ganias argued that the government's seizure and long-term retention of his business records violated his Fourth Amendment rights.[445] The Court of Appeals for the Second Circuit relied on both *Katz* and *Jones* tests to analyze this case. The Court explained that Fourth Amendment protections apply if there is a search by government officials and is accompanied by either a physical intrusion by those officials or a violation by them of defendant's reasonable expectations of privacy.[446] Furthermore, the Court explained that Fourth Amendment protections do apply to the government's examination of a suspect's computer files. The Court of Appeals for the Second Circuit in *Ganias* concluded that the government failed to demonstrate any legal basis for the prolonged retention of the copied electronic data; therefore, it violated Ganias' Fourth Amendment rights.[447] The Court's analysis encompasses the limited question of whether

[443] *Id.*
[444] *Id.* at 130.
[445] *Id.* at 131.
[446] *Ganias*, 755 F.3d at 133-34 & n. 8.
[447] *Id.* at 139.

the Fourth Amendment permits the indefinite retention of every computer file obtained subsequent to the execution of a warrant.[448] The Ganias Court concluded in the negative.

27. *U.S. v. Gomez* (K-NS)

In 2009, the United States Drug Enforcement Agency (DEA) suspected defendant Axel Gomez of distributing drugs and organized an operation to have a government informant purchase 20 grams of heroin from Gomez.[449] The informant also provided the DEA with Gomez's cell phone. The DEA obtained a court order and monitored Gomez's calls through a "pen register" and "trap and trace" device from July 9, 2009 until August 18, 2009. The DEA was able to access phone numbers who called and were called by Gomez, have time stamps for when individuals called, and recorded multiple drug purchases.[450] This call data, along with other evidence uncovered by undercover officers, was used to obtain a wiretap for Gomez's cell phone on August 24, 2009. At one point, Gomez swapped phones and the DEA was able to get access to the new phone through a confidential informant.

The DEA obtained a search warrant for Gomez's apartment based on the conglomeration of evidence obtained.[451] The search of the apartment uncovered $6,000 in cash, a firearm, a digital scale, and materials for packing drugs. Gomez was immediately indicted and found guilty on drug distribution, conspiracy, and possession of a firearm with drug trafficking. Gomez argued the DEA's initial "pen register" and "trap and trace" violated his Fourth Amendment privacy rights. Additionally, Gomez argued that the concurring opinions in *Jones* joined by five United

[448] *Id.* at 137.
[449] *U.S. v. Gomez,* 575 Fed.Appx. 84, 85 (3rd Cir. 2014).
[450] *Id.* at 86.
[451] *Id.*

States Supreme Court justices effectively restrict the application of the third party doctrine as enunciated in *Smith v. Maryland.*[452]

The Court of Appeals for the Third Circuit in *Gomez* held that defendant Gomez's rights were not violated because, "Gomez provided a third party-in this case, Sprint-with all the data and the DEA obtained [it] through the use of the pen register and trap and trace device."[453] The Court further explained once this occurred, Gomez had relinquished any privacy interest in the data. Additionally, the Court rejected the argument that the concurring opinions in *Jones* had effectively revised *Smith.* According to the Court, no search had occurred because Gomez did not have a reasonable expectation of privacy in information disclosed to a third-party, in this case Sprint. With the mention of reasonable expectation of privacy, this case falls more in line with the inquiry used in *Katz* for Fourth Amendment searches.

28. *U.S. v. Sellers* (J-S)

Drug Enforcement Administration agents and Orangeburg County officers conducted surveillance of various persons of interest, including: Sellers, Matthews, and James from January 19, 2008 until July, 2008.[454] Accordingly, DEA agents attached a warrantless GPS device to the vehicle owned by James, and monitored the whereabouts of the vehicle. In February, the device malfunctioned and stopped transmitting information. In March, the officers removed the device and subsequently began wiretapping James phone.[455] A total of seven wiretaps were issued from January until July of 2008. On August 14, 2008, Sellers was stopped for improper lane change and subsequently arrested after police found drugs, a pistol, and approximately $3,000. The

[452] *Smith v. Maryland,* 442 U.S. 735 (1979). The Smith court held that "an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." Id. at 745.
[453] *Gomez,* 575 Fed.Appx. at 87.
[454] *U.S. v. Sellers,* 512 Fed.Appx. 319, 322 (4th Cir. 2013).
[455] *Id.* at 323.

plethora of evidence obtained from various surveillance methods were used against James, Sellers, and Matthews for drug conspiracy charges, including the wiretaps and GPS data.[456]

The appellants argued under *Jones* that the district court erred by admitting evidence obtained from the installation of the GPS device.[457] James further contended the GPS tracking data and the resulted wiretaps should be suppressed as they are fruits of the poisonous tree. In *Jones,* the Supreme Court noted, "[t]respass alone does not qualify [as a search], but there must be conjoined with that what was present here: an attempt to find something or to obtain information."[458]

The Court of Appeals for the Fourth Circuit relied on *Jones* to ultimately find that the police use of a warrantless GPS device on James' vehicle did constitute a search.[459] Therefore, the Court concluded that the search in this case violated their Fourth Amendment rights. The Court did mention the good faith exception, but decided against it as the Court explained this evidence was never introduced in trial. In sum, the Court found that a search occurred under the *Jones* test.

29. *U.S. v. Fisher* (J-S)

In May 2010, Drug Enforcement Administration (DEA) agents and law enforcement officials received confidential information that Brian Fisher was involved in selling drugs in various locations within Michigan and Illinois.[460] In May 28, 2010, law enforcement officers attached a GPS device to Fisher's vehicle. In June, 2010, the informant told officers about a possible drug

[456] *Id*.
[457] *Id.* at 327.
[458] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 951 n. 5 (2012)).
[459] *Id.* at 328.
[460] *U.S. v. Fisher,* 745 F.3d 200, 201 (6th Cir. 2014).

run to Chicago, Illinois.[461] The police followed Fisher's movements using 10-12 vehicles and the GPS information. Police stopped Fisher once he entered Michigan, used a narcotics dog who alerted the officers that drugs were near the vehicle, and subsequently found three ounces of cocaine.[462] Fisher was arrested and convicted of possession and trafficking drugs.[463]

Fisher argued that the warrantless installation of the GPS device and subsequent tracking by law enforcement violated his Fourth Amendment rights.[464] During the course of the litigation, Jones was decided, and both the lower (district court) and the Court of Appeals for the Sixth Circuit stated under *Jones* police searched defendant Fisher's vehicle when they installed the GPS device and used it to monitor the vehicle's movements.[465] These types of actions require a warrant. However, under the good faith exception to the exclusionary rule, the Court of Appeals ultimately deemed the actions undertaken by the officers were to be justifiable under Sixth Circuit binding precedent. Accordingly, defendant's motion to suppress the GPS evidence was denied.[466]

30. *U.S. v. Martin* (J-S)

Matthew Martin was suspected of taking part in multiple robberies in Burlington, Iowa in 2009.[467] Police officers received a tip regarding Martin's involvement in the robberies and subsequently attached a warrantless global positioning system on Martin's vehicle.[468] Through

[461] *Id.* at 201-202.
[462] *Id.* at 202.
[463] *Id.*
[464] *Id.*
[465] *Id.* at 202-203.
[466] *Id.* at 203.
[467] *U.S. v.Martin,* 664 F.3d 684, 686 (7th Cir. 2011).
[468] *U.S. v. Martin,* 712 F.3d 1080, 1081 (7th Cir. 2013).

several tips, detectives were able to contact the accomplice, Jackson.[469] After interviewing Jackson, detectives contacted law enforcement in Indiana with information about Martin. Indiana law enforcement got a tip from a Super 8 motel clerk that Martin had checked in. Law enforcement attached a GPS tracking device to his vehicle on the 19th of November. A few days later, the GPS device malfunctioned for a short amount of time and then resumed proper functions.[470]

Detectives followed Martin and eventually contacted Illinois law enforcement for support. Law enforcement officers had stopped the vehicle and conducted a search of the vehicle. The officers discovered marijuana, cocaine, and a revolver. Martin was subsequently arrested.[471] Martin pleaded guilty to possessing a firearm, which is against the law as he was a convicted felon.[472] On appeal, Martin cited *Jones* and argued that the evidence should be suppressed as his Fourth Amendment rights were violated due to the warrantless GPS device. The trial court concluded that the evidence should not be suppressed because of *Davis v. United States.*[473]

In this case, the good-faith exception applied due to heavy reliance on then-existing precedent, which allowed law enforcement to attach a warrantless GPS device to the undercarriage of a suspect's vehicle. However, the Seventh Circuit Court of Appeals rejected this argument because there was no binding precedent.[474] Conversely, the court concluded that the evidence Martin sought to suppress had little to do with the fact that a GPS device had been used. This information was "significantly 'attenuated' from the inappropriate installation of the

[469] *U.S. v. Martin,* 664 F.3d 684, 686 (7th Cir. 2011).
[470] *U.S. v. Martin,* 664 F.3d 684, 686 (2011).
[471] *U.S. v. Martin,* 664 F.3d 684, 687 (2011).
[472] *U.S. v. Martin,* 712 F.3d 1080, 1081 (2013).
[473] *Martin,* 712 F.3d at 1082.
[474] *Id.*

GPS device" (i.e., without a warrant under *Jones*). [475] The Court affirmed the district court's initial ruling, "there was probable cause for Martin's arrest [and] it was reasonable for the officers to believe Martin's vehicle contained evidence of the bank robbery."[476]

The GPS data only aided law enforcement in tracking down Martin. In *Jones*, a search occurs when "[t]he Government physically occupie[s] private property for the purpose of obtaining information."[477] This is an essential component as in the current case of Martin the GPS data was used primarily to locate him. The court further explained that if Martin had further developed the argument at district court they would be able to touch on the subject more in depth; however, that was not the case.[478] This case resulted in a finding that a police search did occur under *Jones*, but it did not violate the defendant's rights due to attenuation.

31. *U.S. v. Pineda-Moreno* (J-S)

In 2007, Drug Enforcement Administration agents suspected Juan Pineda-Moreno of growing marijuana in southern Oregon.[479] The DEA began investigating the men and monitored the movements of Pineda-Moreno. The agents attached a mobile tracking device to Pineda-Moreno's jeep without a warrant. DEA used the device to pin-point the Jeep's location and agents learned that it traveled to two suspected marijuana grow sites on July 6, August 14, August 16, and September 12.[480] The Jeep traveled public thoroughfares for the majority of the recorded monitoring. Based on their surveillance, DEA and law enforcement officers stopped

[475] *Id.*
[476] *Id.*
[477] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[478] *U.S. v. Martin,* 712 F.3d 1080, 1083 (7th Cir. 2013).
[479] *U.S. v. Pineda-Moreno,* 688 F.3d 1087, 1088 (9th Cir. 2012).
[480] *Id*.

Pineda-Moreno's Jeep on September 12. A subsequent search incident to arrest uncovered marijuana within the Jeep.[481]

The Court of Appeals for the Ninth Circuit held that a search had occurred based on the facts. The Court relied on the recent Supreme Court decision of *Jones.*[482] The Court of Appeals found that in accordance with *Jones* the GPS surveillance of Pineda-Moreno's vehicle and subsequent monitoring constituted a search within the meaning of the Fourth Amendment. Furthermore, since these officers did not have a warrant, based on *Jones,* it would be unreasonable.[483] However, related to the admissibility of the evidence issue, the Court of Appeals ruled that since the events occurred prior to *Jones,* they needed to turn to binding appellate precedent from within the circuit for this purpose. The Court ultimately found that agents were acting in compliance with binding appellate precedent and therefore, under *Davis,* exclusion was not warranted.[484]

32. *U.S. v. Smith* (J-S)

Law enforcement officers and Bureau of Alcohol, Tobacco, Firearms and Explosives suspected Smith had been transporting cocaine from Alabama to Florida.[485] Special Agent Davis obtained driver records from Florida Driver and Vehicle Information Database regarding the vehicles Smith had obtained. Special Agent Davis installed GPS trackers on two of Smith's vehicles.[486] They did not obtain a warrant. Officers monitored the movements of the vehicle from January 6, 2011. However, on February 5th, 2011, Smith had discovered one of the trackers. On

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[481] *Id*.
[482] *Id.* at 1090.
[483] *Id.*
[484] *Id.* at 1090 (citing *Davis v. U.S.,* 131 S.Ct. 2419, 2423-24, 180 L.Ed.2d 285 (2011)).
[485] *U.S. v. Smith,* 741 F.3d 1211, 1214 (11th Cir. 2013).
[486] *Id.* at 1215.

April 12, 2011, the officers obtained a search warrant for Smith's residence. Once the search warrant was executed, they discovered nearly ten thousand dollars in cash, a firearm, drugs, a disposable cell phone, and digital media seized from Smith's computer and camera.[487]

Smith was indicted on drug and firearms charges and found guilty in the trial court on these charges. Smith appealed and argued that the officers violated the Fourth Amendment when they searched his residence, which relied on some of the information which was obtained during the GPS surveillance.[488] The Court of Appeals for the Eleventh Circuit found that *Jones* applied to the actions of the law enforcement during their GPS monitoring.[489] In *Jones,* the Supreme Court held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor a vehicle's movements, constitutes a 'search' within the meaning of the Fourth Amendment."[490] However, the Court concluded that even though the police violated Smith's Fourth Amendment rights with the warrantless GPS search, the evidence seized should still be admissible under the *Davis* good-faith exception. More specifically, the Court stated, "[e]ven if *Jones* would have rendered the warrantless searches in this case unreasonable [under the Fourth Amendment], the officers' good-faith reliance upon [binding appellate precedent permitting these searches at the time they were conducted] renders exclusion inappropriate here."[491] The Court concluded to allow the evidence to be admissible since officers were acting in good-faith when they conducted the GPS search of Smith.[492] In sum, a search did occur.

33. *U.S. v. Pope* (K-S)

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[487] *Id*.
[488] *Id.* at 1218.
[489] *Id.* at 1221.
[490] *Id.* at 1220 (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[491] *U.S. v. Smith,* 741 F.3d 1211, 1225 (2013).
[492] *Id.*

On August 16, 2009, Forest Law Enforcement Officer Ken Marcus responded to an incident of loud music in El Dorado National Forest.[493] When the officer reached the scene, he discovered the music had gathered a large crowd. Officer Marcus was arresting an individual when he was approached by Travis Pope. During their conversation, Officer Marcus became suspicious of Pope being under the influence of marijuana. Officer Marcus asked Pope if he had been smoking marijuana and Pope stated he did.[494] Pope was then asked if he had any marijuana on him. Pope denied having marijuana in his possession. Officer Marcus then asked him to empty his pockets; however, Pope did not comply with this request. Pope was asked by Officer Marcus if he had any marijuana on him a second time, and this time Pope said that he did.[495] Pope took the marijuana out of his pockets and placed it on Officer Marcus' vehicle. Officer Marcus cited Pope for possession and told him he could leave. Pope was charged with one count of misdemeanor possession of marijuana.[496]

Pope argued that Officer Marcus' initial command constituted a Fourth Amendment search, which was illegal unless accompanied by a warrant or an exception to the warrant requirement.[497] Furthermore, he argued that the trial court erred in determining that the law enforcement officer had probable cause to conduct the search. Finally, Pope argued against the facts surrounding the incident falling under the search-incident-to-lawful-arrest exception as no arrest occurred during the search.

The Court of Appeals for the Ninth Circuit stated a Fourth Amendment "search" occurs when "the government infringes on a subjective expectation of privacy that society is prepared to

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[493] *U.S. v. Pope,* 686 F.3d 1078, 1079 (9th Circ. 2012).
[494] *Id.* at 1080.
[495] *Id.*
[496] *Id.*
[497] *U.S. v. Pope,* 686 F.3d 1078, 1080 (9th Cir. 2012).

recognize as reasonable."[498] Furthermore, the Supreme Court recently announced a "property-based" approach in addition to the *Katz* "reasonable expectation of privacy" when analyzing Fourth Amendment search questions.[499] The Court stated there was no question that Pope had a reasonable expectation of privacy inside his pockets, but whether the officer's command was sufficient to intrude upon that expectation required further consideration. Although the Court reasoned Pope had a reasonable expectation of privacy inside his pockets, the Court concluded the command was not sufficient to intrude upon Pope's privacy expectation.[500] The Court's rationale focused around Pope's initial denial.[501] Because Pope refused to comply with Officer Marcus' initial command, he did not produce any materials that were not already exposed to the public. Thus, the Court concluded the initial command does not constitute a search. Additionally, based on the Court's initial analysis, it found no reason to address whether the search lacked proper justification in the form of probable cause since it did not qualify as a search.[502]

Next, the Court examined the second command by Officer Marcus.[503] The Court held that the second command by Officer Marcus to place marijuana on the vehicle did constitute a search because Pope had a reasonable expectation of privacy in the items located inside his pockets.[504] However, the warrantless search of Pope could be considered justified if it fell under an exception to the rule requiring searches under warrant, such as "probable cause already existed to arrest Pope, a high risk of destruction of evidence, or the search was commensurate with

[498] *Id.* at 1081(citing *Katz v. U.S.,* 389 U.S. 347, 360-61, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).
[499] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 949-50, 181 L.Ed.2d 911 (2012)).
[500] *Id.*
[501] *Id.*
[502] *Id.* at 1082.
[503] *Id.* at 1083.
[504] *Id*.

circumstances necessitating the invasion."[505] The Court concluded Officer Marcus had probable cause to arrest Pope for possession of a controlled substance after Pope admitted he had marijuana in his possession. Furthermore, had Pope left with the marijuana in his possession there would be a high probability of destruction or concealment. Finally, the Court determined the search was "minimally intrusive" as Officer Marcus commanded Pope to place the marijuana on the hood of his vehicle. The Court concluded Officer Marcus' warrantless search was justified.[506] In sum, the Court found a search had occurred and it was justified as a warrantless search because Officer Marcus had established probable cause that Pope was engaged in a crime, had evidence which could be destroyed, and the search was "minimally intrusive."[507]

34. *U.S. v. Scott* (K-S)

During August 2009, detectives arranged for a confidential informant to purchase drugs from Reynolds in Indiana.[508] The detectives attached a listening device to the confidential informant and placed a second one inside his vehicle. When the confidential informant arrived at the motel, Reynolds arranged a meeting with the supplier.[509] Together, the confidential informant and Reynolds left and drove to the gas station. The confidential informant exited his vehicle and Reynolds drove it to Scott's residence (i.e., the supplier), alone. Scott met Reynolds outside of his garage and they began talking for about five minutes. During the course of the conversation, the police were still able to record their conversation as they were close enough to the vehicle.[510] Police had also followed the vehicle back to Scott's home. Scott and Reynolds talked about the

[505] *Id.* at 1084. In this case, the Court refers to "intrusion" as the invasion of Pope's reasonable expectation of privacy with the items located inside his pockets.
[506] *Id.* at 1084.
[507] *Id.*
[508] *U.S. v. Scott,* 731 F.3d 659, 661 (7th Circ. 2013).
[509] *Id.* at 662.
[510] *Id.*

price of heroin, "yay," which police believed was code word for cocaine, "ball," which detectives believed was an eighth of an ounce of cocaine, and "quarter," which police believed to be a quarter of an ounce of cocaine. After their conversation ended, Scott returned to his home and Reynolds drove back to the gas station, still under police surveillance.

Five days later, the same events occurred between the confidential informant, Reynolds, and Scott. They met in the motel, Reynolds then drove to the gas station and dropped off the confidential informant, and then Reynolds went to Scott's house.[511] This time, Reynolds entered Scott's house for about five minutes and then left to pick up the confidential informant from the gas station. Two days later, detectives submitted an affidavit for a search warrant of Scott's house. The affidavit explained that the confidential informant had been proven credible from corroborated information by police.[512] The officers were awarded a search warrant and Scott's house was searched. Police found a loaded handgun, cocaine, marijuana, and heroin. On appeal, Scott argued that the recorded conversation between himself and Reynolds violated his Fourth Amendment reasonable expectation of privacy.[513] Furthermore, Scott argued that without the conversation, the police would not have probable cause to apply for a search warrant.

The Court of Appeals for the Seventh Circuit examined if Scott had a reasonable expectation of privacy in the conversation located on his driveway and if this evidence was illegally obtained then the police would no longer have enough probable cause to apply for the search warrant.[514] The Court of Appeals turned to the *Katz* reasonable expectation of privacy when deciding the first question. The Supreme Court stated that in *Katz,* "the Fourth Amendment

[511] *Id*.
[512] *Id*.
[513] *Scott,* 731 F.3d at 663.
[514] *Id.*

protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection .. [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[515] However, the Court held that it was not required to answer whether the conversation recorded by police was reasonable because, even if had been unreasonable, the search warrant was "sufficiently supported by facts separate and apart from the recording."[516] Although the Court explicitly avoided answering the reasonableness question, the Court moved forward under the assumption that the recorded conversation was a search and illegally obtained. The Court concluded that even if the recording was illegally obtained, the affidavit itself had been filled with a plethora of other facts to support probable cause and therefore, the application and issuance of the search warrant was legal.[517] In sum, although the Court analyzed the facts using the *Katz* test to determine if Scott had both a subjective and objective reasonable expectation of privacy in the conversation in his driveway, the Court did not explicitly answer the question; however, the Court moved further with their analysis under the assumption the recording of the conversation did constitute a search.

35. *American Civil Liberties Union of Illinois v. Alvarez* (K-NS)

The American Civil Liberties Union of Illinois (ACLU) filed a suit against Alvarez seeking to barr her from enforcing the eavesdropping statute.[518] The Illinois eavesdropping statue "makes it a felony to audio record 'all or any part of any conversation' unless all parties to the conversation gave their consent."[519] The eavesdropping statute exempts recordings made by

[515] *Id.* at 664 (citing *Katz v. U.S.,* 389 U.S. 347, 351, 88 S.Ct. 507 19 L.Ed.2d 576 (1967)).
[516] *Id.*
[517] *Id.* at 666.
[518] *American Civil Liberties Union of Illinois v. Alvarez,* 679 F.3d 583, 588 (7th Circ. 2012).
[519] *Id.* at 586.

police for law-enforcement purposes from public disclosure. This is to ensure police have discretion over any "enforcement stop," such as traffic violations, assistance given to civilians, pedestrian stops, requests for identifications, and any investigative purposes. Therefore, the ACLU argued that this statute is a violation of the First Amendment's speech, press, and petition clauses.

The Government argued that privacy of communication is an important interest which served First Amendment interests because "fear of public disclosure of private conversations might well have a chilling effect on private speech."[520] The Court stated that when analyzing privacy interests the Fourth Amendment is more directly implicated. Moreover, the Court held that these interests are not an issue in this particular case. The ACLU wants to openly audio record police officers performing their duties. This would entail officers speaking loud enough for witnesses to hear, and "communications of this sort lack any reasonable expectation of privacy."[521] Furthermore, under *Katz*, "[w]hat a person knowingly exposes to the public is not a subject of Fourth Amendment protections. Conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."[522] In sum, the Court found that based on the circumstances posited by the ACLU, there would be no privacy interests implicated as the officers would have to speak loud enough for bystanders to hear, which means no Fourth Amendment protections would be given, and thus, a search would not occur.[523]

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[520] *Id.* at 605.
[521] *Id.* at 606.
[522] *Id.* (citing *Katz v. U.S.,* 389 U.S. 347, 361, 88 S.Ct. 507 (1967)).
[523] *Id.* at 605-606.

But this does not prevent the Illinois General Assembly from strengthening the First Amendment protections for conversational privacy. The Court concluded that the ACLU's argument would be successful when focusing on the First Amendment.[524] The eavesdropping statute "restricts" information and ideas and does not serve the government interest of protecting conversational privacy, and thus, is viewed as unconstitutional according to the First Amendment.[525]

36. *U.S. v. Wells* (K-NS)

FBI agents were informed by witnesses that Officer J.J. Gray had engaged in illegal acts while on duty.[526] This included stealing money and drugs from suspects detained by Officer Gray. FBI Special Agent Joe McDoulett went undercover as a Mexican drug dealer known as Jason Lujan who adopted the moniker "Joker." FBI attached recording equipment to a room rented at the Super 8 Motel. Agent McDoulett received $13,620 in cash from the government and placed part of it in a Crown Royal bag in a bedside table drawer. The remaining funds were under his pillow.[527] Once the room was ready, FBI cooperating witness, Debra Clayton, informed Officer Gray that a drug dealer was in the room. Gray immediately contacted Officer Wells and together they surveyed the Super 8 Motel for some time. They re-contacted Debra Clayton and instructed her to go to "Joker's" room. She reported back that she had successfully purchased the drugs.[528]

"Joker" left the hotel room and entered the hotel lobby where he was detained and handcuffed by Officer Eric Hill. Wells approached "Joker" and obtained consent to search his

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[524] *Id.* at 608.
[525] *Id.*
[526] *U.S. v. Wells,* 739 F.3d 511, 514 (10th Circ. 2014).
[527] *Id.* at 515.
[528] *Id.*

room. Through the use of the recording equipment in the room, it was learned that approximately $2,000 was stolen by Gray and Wells and an additional amount of money was allowed to be stolen by the other officers in the room. "Joker" explained the details of his "operation" in that he brought five pounds of methamphetamines and sold it all. [529] Wells and Gray agreed to not arrest him if he could help set up additional drug dealers.

After the initial sting operation, the officers kept in contact with "Joker" by encouraging future trips; meanwhile, Gray introduced a new customer, Ryan Logsdon.[530] As part of a second sting operation, another FBI agent was introduced as one of "Joker's" customers. Wells and Joker met at a nearby restaurant. The meeting focused on the impending sale of a pound of methamphetamines to a customer Wells could arrest if he wanted to.[531] The customer, who was a new undercover agent, arrived at "Joker's" motel room and they engaged in a drug transaction. However, the customer did not have enough money to buy the pound and "Joker" notified Wells after the customer left. Eventually, Wells and other Tulsa Police Department officers were indicted on multiple counts of official corruption.

The Court of Appeals for the Tenth Circuit started their analysis by first explaining that "Wells' voluminous assertions on appeal" could be simply re-stated as the district court should have reviewed "Wells' personal privacy expectation in the content of the conversation."[532] In other words, Wells claimed that a search had occurred when the government recorded his conversation and thus, required a search warrant. Moreover, the Supreme Court in *Katz* stated,

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[529] *Id.* at 516.
[530] Gray knew Ryan Logsdon as a former informant of ATF Agent McFadden who helped facilitate illegal acts. Gray and Wells were not aware that Logsdon was working with FBI; however, Logsdon did not know "Joker" was really an FBI undercover agent, either. *Id.*
[531] *Id.* at 517.
[532] *Id.* at 522.

"the Fourth Amendment protects people, not places."[533] The Court concluded that Wells did not have a reasonable expectation of privacy in his dealings with "Joker," including in the motel room rented by "Joker," with or without "Joker" physically being present.[534] The Court reasoned that Wells had no "socially meaningful connection" to the motel room. At times, Wells was just merely legally present in the room for a short amount of time. Thus, the Court found Wells lacked an objectively reasonable expectation of privacy in the presence of "Joker" and in the conversations which took place between them in Joker's motel room. In sum, the Court found no search had occurred.

37. *Gennusa v. Canova* (K-S)

In 2009, Detective Marmo investigated a possible misdemeanor violation of a domestic violence injunction by Mr. Studivant.[535] Detective Marmo arranged a non-custodial interview of Mr. Studivant at the Sheriff's Office. Mr. Studivant had his attorney, Ms. Gennusa, present at the interview. Unknown to either of them, Detective Marmo had a concealed camera in the room. During the course of the interview, Mr. Studivant agreed to prepare a written statement.[536] Detective Marmo left the room and closed the door. Ms. Gennusa and her client proceeded to discuss their matters in private and once their discussion was completed, Ms. Gennusa left the interview room and met with Detective Marmo.[537]

When she returned to the interview room, she closed the door and informed Mr. Studivant he was going to be arrested by Detective Marmo.[538] Mr. Studivant no longer wished to give a

[533] *Id.* (citing *Katz v. U.S.,* 389 U.S. 347, 351 (1967)).
[534] *Id.* at 525.
[535] *Gennusa v. Canova,* 748 F.3d 1103, 1108 (11th Circ. 2014).
[536] *Id*.
[537] *Id.*
[538] *Id.*

written statement.[539] The Detective demanded the written statement when he returned to the interview room. Both Mr. Studivant and Ms. Gennusa refused after a heated discussion. The detective left the room to speak with his superior, Sgt. Canova. During their conversation, Detective Marmo and Sgt. Canova actively monitored Mr. Studivant and Ms. Gennusa. Sgt. Canova instructed Detective Marmo to retrieve the statement.[540] Detective Marmo forcibly grabbed the statement from Ms. Gennusa's hands and then subsequently arrested Mr. Studivant.

Mr. Studivant and Ms. Gennusa filed suits against Sgt. Canova, claiming their Fourth Amendment rights had been violated because of the warrantless recording of their privileged conversations and the ultimate seizure of the written statement.[541] Furthermore, the district court found that Detective Marmo and Sgt. Canova did not qualify for immunity. Thus, these officers challenged the district court's findings based on that neither Studivant nor Gennusa had a reasonable expectation that their conversation would be kept private.[542] Additionally, they argued that it was not "obvious to a reasonable officer" that such monitoring violated the Fourth Amendment. The Court of Appeals for the Eleventh Circuit held that Mr. Studivant and Ms. Gennusa did in fact have a reasonable expectation of privacy inside the interview room and that the officers violated their Fourth Amendment rights when they recorded their attorney-client conversations.[543] Furthermore, the Court held there was no exigency to justify the warrantless "search" and "seizure" of the written statement. Therefore, the officers do not qualify for immunity from their reckless behavior which resulted in an unlawful "search."[544] In sum, an

[539] *Id.* at 1108.
[540] *Id.*
[541] *Id.* at 1109.
[542] *Id.*
[543] *Gennusa v. Canova,* 748 F.3d 1103, 1112 (11th Cir. 2014).
[544] *Id* at 1114.

unlawful search and seizure did occur through the recording of Mr. Studivant's and Ms. Gennusa's private conversation by law enforcement.

38. U.S. v. Pirosko (K-NS)

In March 2012, Nebraska Department of Justice Officer Edward Sexton detected a specific IP address sharing several files of child pornography.[545] On this IP address, Officer Sexton was able to discern three Globally Unique Identifiers (GUIDs).[546] Officer Sexton gave special attention to the third GUID and attempted to both connect and obtain any files of interest being shared over the network. Over the course of a few months, Officer Sexton was able to download several files and track the IP addresses from hotels across the nation. Officer Sexton acquired the guest list of the hotels and was able to determine that Joseph Pirosko owned the GUID. On June 4, 2012, Officer Sexton applied for a search warrant, which he was granted, and officers seized Pirosko's computer and USB drive. The contents of Pirosko's computer revealed child pornography and an online account with a share folder.[547] Pirosko argued his Fourth Amendment rights were violated because the Nebraska officers obtained the search warrant "using unreliable and unsupported information."[548] However, the district court rejected this argument.

The Court of Appeals for the Sixth Circuit held that the District Court properly denied Pirosko's motions to suppress.[549] In the first part of the analysis, the Court of Appeals for the Sixth Circuit found that the argument was meritless because Officer Sexton's affidavit contained his experience, qualifications, the software used, and the files obtained from Pirosko's computer. This came out to be more than 10 pages of work. Additionally, the Court of Appeals for the Sixth

[545] *U.S. v. Pirosko,* 787 F.3d 358, 362 (6th Circ. 2015).
[546] *Id.* at 363.
[547] *Id.*
[548] *Id.*
[549] *Id.* at 370.

Circuit reviewed the issue of unconstitutional warrantless tracking. Originally, Pirosko's motion to suppress did not argue this point, nor did it refer to *United States v. Jones.*[550] Furthermore, Pirosko voluntarily agreed to plea, and therefore, waived the majority of his rights to appeal, except for review of the Court's denial of his suppression motion. With that in mind, the Sixth Circuit Court of Appeals reviewed this portion of the case for plain error.[551]

The Court concluded that Pirosko's reliance on *United States v. Jones* is misplaced, as his main argument is for the adoption of the theory put forth by the concurrence in that case.[552] The Court explained adopting this theory would simultaneously disregard the Supreme Court precedent and "give a free pass to on-the-road downloaders of child pornography."[553] Therefore, the Court of Appeals for the Sixth Circuit rejected the adoption of *Jones,* and instead relied on other precedent which acknowledged an individual's reasonable expectation of privacy on non-shareable data on his or her computer, but that does not extend to files which are accessible through a shared-online folder.[554] The Court ruled that Pirosko lacked objectively reasonable expectation of privacy in the data; therefore, no search had occurred prior to the warrant allowing the extraction of the data.

Pre-*Jones*

1. *U.S. v. Titemore* (K-NS)

[550] *Id.* at 371.
[551] *Id.*
[552] The concurrence's theory stated that "relatively short-term monitoring of a person's movements on public streets is okay, but … longer term GPS monitoring in investigations of most offenses is no good." *U.S. v. Pirosko,* 787 F.3d 358, 372 (2015)(citing *U.S. v. Jones,* 132 S.Ct. 945, 954 (2015)).
[553] More specifically, this Court explained, "under this theory, your rights are not violated if you download from a single location (e.g., your home), but they are violated if you travel across the country, using a hotel's wireless network to download and upload files." *Id.*
[554] *U.S. v. Pirosko,* 787 F.3d 358, 372 (6th Cir. 2015) (citing *Guest v. Leis,* 255 F.3d 325, 333 (6th Circ. 2001)).

On April 27, 2003, Vermont State Police were called to resolve a dispute between David Titemore and Kevin Lothian.[555] Additionally, Titemore had assaulted one of Lothian's employees. When police arrived, they had issued a citation to Titemore. The next evening, Lothian returned to a vandalized home. He called the police and reported the incident.[556] Amongst the destruction, a .22 Marlin rifle had been stolen. While waiting for police to get there, Lothian and a friend, Larry Tatro, witnessed Titemore come on to Lothian's property and smash some lights, "play" with a propane tank, and try to enter the home. Lothian called police again and the dispatcher immediately connected Lothian's distress call to Trooper Thad Baxter.[557] The trooper and Lothian agreed to meet up on Main Street. After explaining the situation to Trooper Baxter, they decided (Trooper Baxter, Lothian, and Tatro) to meet back up at Tatro's house. From there, the three men began walking towards Lothian's residence, when Trooper Baxter decided to talk to Titemore before inspecting the damages of Lothian's dwelling. At about 10:20 p.m., they arrived at the edge of Titemore's property, where Trooper Baxter ordered the other two men to stay near the house.[558] Before the men left, they informed the trooper that Titemore might be drunk and may have the missing rifle. Furthermore, they advised Trooper Baxter to approach the door from the western side to activate the motion-sensing light so as to not be mistaken for Lothian or Tatro to Titemore.[559]

When Trooper Baxter approached the residence, he saw a television on through a sliding-glass door on the eastern side of the porch.[560] "As the district court found, he chose this route for two principal reasons: (1) because the television was on in the room adjacent to the porch, he

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[555] *U.S. v. Titemore,* 437 F.3d 251, 252 (2nd Cir. 2006).
[556] *Id*.
[557] *Id.* at 253.
[558] *Id.*.
[559] *Id.*
[560] *Id.* at 254.

thought that he was more likely to find Titemore if he knocked on the sliding-glass door next to that room; and (2) Baxter was concerned about approaching from the western side of the house because the motion-sensing light would permit Titemore to see him approach, but he would not be able to see Titemore."[561] Once at the door, Baxter noticed that the sliding door had been left open; however, the screen door was shut. Trooper Baxter peered through the screen and saw Titemore facing him watching television. The rifle was also lying within Titemore's reach. Trooper Baxter immediately identified himself. Trooper Baxter had noted Titemore had been acting strangely, as if during their conversation Titemore was seeing "through" him.[562] Trooper Baxter asked if he was David Titemore and Titemore acknowledged. Trooper Baxter asked Titemore if he could either come in or Titemore come outside and talk. Titemore decided to come outside and during the course of their conversation, Trooper Baxter had detected numerous indicators that Titemore may be intoxicated, such as the odor of alcohol on Titemore's breath, slurred speech, and sluggish thought processes.[563]

Trooper Baxter asked Titemore if he was a convicted felon, to which Titemore responded, "I may have been once."[564] Additionally, Trooper Baxter asked if he was supposed to have a gun. Titemore replied in the negative. Trooper Baxter asked the make and model of the gun and if it was loaded. Titemore replied the rifle was a loaded Marlin. Trooper Baxter asked if he could have permission to retrieve the rifle. Titemore replied in the affirmative. Trooper Baxter then opened the screen door, grabbed the rifle, and stepped back outside of Titemore's residence.[565] Trooper Baxter was unfamiliar with this weapon and asked Titemore how to unload it. Titemore

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[561] *Id*.
[562] *Id.*
[563] *Id*.
[564] *Id*.
[565] *Id.* at 255

explained and then Trooper Baxter successfully unloaded the weapon and removed the bullet from the chamber. Next, Trooper Baxter asked about Lothian's home being vandalized. Titemore claimed he was in his house all day. Moreover, Titemore claimed Lothian had assaulted him during their previous altercation.[566] Trooper Baxter issued a citation for unlawful mischief and trespass to Titemore. Titemore argued that Trooper Baxter violated his Fourth Amendment rights by effecting a "warrantless entry on his protected property" because the lawn and deck of his home were associated with the home itself and therefore, should be considered protected curtilage of the home.[567]

Titemore argued that Trooper Baxter violated his Fourth Amendment rights by conducting a "warrantless entry onto [his] protected property."[568] Furthermore, Titemore argued that the lawn and deck of his residence should be considered falling under the protection of curtilage of his dwelling. When examining a Fourth Amendment search question, the Court of Appeals for the Second Circuit turned to *Katz*, which adopted the concept of "the Fourth Amendment protects people, not places."[569] However, *Katz* did not eliminate all Fourth Amendment inquiries related to a particular place. This case corresponded more closely with *Hester v. United States*, which dealt with the concepts of the curtilage of a home and open fields.[570] *Hester* was historically important because it was the Court's first acceptance of a distinction between open fields and the curtilage of a home. To complete the analysis, the current court in *Titemore* turned to *United States v. Dunn.*[571] The Court in *Dunn* recognized a reasonable expectation of privacy existed

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[566] *Id*.
[567] *Id.* at 256.
[568] *Id.* at 255-256.
[569] *Id.* at 256 (citing *Katz v. U.S.,* 389 U.S. 347, 351, 88 S.Ct. 507 (1967)).
[570] *Titemore,* 437 F.3d at 257 (citing *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924)).
[571] *Titemore,* 437 F.3d at 258 (citing *U.S. v. Dunn,* 480 U.S. 294, 107 S.Ct. 1134 (1987)).

within the curtilage of a home. Furthermore, the Court provided indications as to how future courts should determine curtilage and its boundaries.

However, the court in *Titemore* ultimately concluded Titemore had no reasonable expectation of privacy.[572] Their rationale focused around the sliding-glass door.[573] The Court held that although normally it would be considered part of the curtilage, the sliding-glass door had a diminished expectation of privacy as it was the principal entranceway. Next, the lawn and porch area were not enclosed or fenced off in an attempt to "separate" or delineate public from and private space. Lastly, there were no steps taken to "shield" the contents behind the sliding-glass door or the porch. It is for these reasons that the court concluded Titemore had no expectation of privacy.[574] "Thus, there was no offense to the Fourth Amendment when Trooper Baxter approached the sliding-glass door to talk to Titemore about the vandalism that took place on the Lothian property."[575] As a result, the rifle seized and the statements made by Titemore were lawfully obtained and therefore, admissible in trial. A search had not occurred under *Katz* due to the absence of a reasonable expectation of privacy.

2. *Taylor v. Michigan Dept. of Natural Resources* (K-NS)

On February 20, 2003, Paul Rose, a conservation officer, approached Alan Taylor's 240-acre fenced property.[576] The officer was called to investigate a complaint regarding a fencing problem. Under Michigan law, it is viewed as a misdemeanor to "unlawfully erect a barrier denying ingress or egress to an area where the lawful taking of animals may occur."[577] There was no violation; however, Officer Rose did notice tire tracks and footprints continuing onto the

[572] *Id*.
[573] *Id.* at 259.
[574] *Id.* at 258.
[575] *Id.* at 260.
[576] *Taylor v. Michigan Dept. of Natural Resources,* 502 F.3d 452, 454 (6th Cir. 2007).
[577] *Id*.

property towards a house. These tracks went right through two "NO Trespassing" signs. Officer Rose shouted and asked if anyone was home and then proceeded toward the house. He peered inside the windows of the home and garage, but he could not see anyone. After about five minutes, Officer Rose left his business card in the door.[578] Officer Rose claimed he did these "checks" in case a trespasser might be on the property. Another suspicious observation made by Rose was the curtains being left open. Based on his years of experience, most residents would close their curtains upon leaving.[579]

Alan Taylor found the card when he returned home and called the officer as was requested by Officer Rose.[580] Officer Rose explained the fence complaint and offered assistance in the event of future trespassing problems, but he did not mention the property check he had conducted. Alan Taylor reviewed his home security tape and immediately contacted the Michigan Department of Natural Resources ("DNR") to report the illegal check conducted by Officer Rose.[581] The director stated that the conduct of Officer Rose fell within departmental policy. Alan Taylor filed a complaint in federal district court. He argued that Officer Rose's conduct did constitute a search, and that his conduct was not protected by qualified immunity.[582]

The Court of Appeals for the Sixth Circuit started its analysis with an examination of whether the conduct of Officer Rose constituted a search.[583] A search is defined in terms of whether a person had a "constitutionally protected reasonable expectation of privacy."[584] The Court agreed with the analysis of the district court in that "Officer Rose's conduct does not

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[578] *Id*.
[579] *Id.*
[580] *Id.*
[581] *Id*.
[582] *Id.* at 455.
[583] *Id.*
[584] *Id.*(citing *Katz v. U.S.,* 389 U.S. 347, 360, 88 S.Ct. 507 (1967)).

constitute a search within the meaning of the Fourth Amendment."[585] The rationale behind its decision focused on the second prong of *Katz.*[586] The Court agreed with the district court's decision in that the methods and purposes for the observations made by Officer Rose constituted a low level of intrusion. Furthermore, due to Officer Rose's twenty-plus years of experience, he had reason to believe that the situation could lend itself to a wintertime break-in and thus, warranted a protective check.[587]

The Court stated that "without physically intruding upon the home or employing any technology to substitute for a physical intrusion, Officer Rose observed the home in an effort to ensure the integrity of the property for the homeowner."[588] Thus, the Court found Officer Rose's protective check did not constitute a search. Furthermore, the Court need not answer if Officer Rose was entitled to qualified immunity because he did not violate the constitutional rights of Alan Taylor.[589]

3. *Warshak v. U.S.* (K-S)

In March 2005, Steven Warshak and his company, Berkeley Premium Nutraceuticals, Inc., were being investigated on allegations of various types of fraud and money laundering.[590] The government obtained an order from a magistrate judge which requested Warshak's internet service provider (ISP), NuVox Communications, to supply information regarding Warshak's e-mail. The order was based on "specific and articulable facts" and prohibited NuVox from

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[585] *Taylor,* 502 F.3d at 455.
[586] The second prong of the *Katz* test generally addresses two considerations. The first focuses on "what a person had an expectation of privacy *in,* for example, a home, office, phone booth or airplane." … The second consideration examines "what the person wanted to protect his privacy *from,* for example, nonfamily members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes…" Other relevant factors in applying *Katz's* second prong include "the intention of the Framers of the Fourth Amendment" …
[587] *Id.* at 457.
[588] *Id*.
[589] *Id.* at 458.
[590] *Warshak v. U.S.,* 490 F.3d 455, 460 (6th Cir. 2007).

"disclosing" the order to the customer, Warshak. The judge ordered that the notification by the government of the search request to Warshak may be delayed for ninety days. On September 12, 2005, the government obtained a similar order directed at Yahoo; however, it added another individual, Ron Fricke, to the order. On May 31, 2006, over a year later after investigators obtained the initial order, Warshak was notified of both orders.[591] Warshak filed suit on June 12, 2006, and sought declaratory and injunctive relief against the government. Warshak claimed his Fourth Amendment right was violated when the government compelled the disclosure of e-mails without a warrant.[592]

The Court of Appeals for the Sixth Circuit held that the contents of the e-mail are meant to be private and thus, it is reasonable to have an expectation of privacy.[593] The Court reasoned that, "like telephone conversations, simply because the phone company or the ISP could access the content of e-mails and phone calls, the privacy expectation in the content of either is not diminished, because there is a societal expectation that the ISP or the phone company will not do so as a matter of course."[594] According to the Court, a government search did occur, and it violated Warshak's reasonable expectation of privacy in the contents of his email.[595]

4. *Rehberg v. Paulk* (K-NS)

Anonymous harassing faxes were sent by Charles Rehberg to the management of Phoebe Putney Memorial Hospital.[596] Then District Attorney Hodges and Chief Investigator Paulk had investigated Rehberg's actions. From October 2003 to February 2004, Hodges and Paulk subpoenaed BellSouth, Alltel, and Sprint for Rehberg's telephone records. Additionally, Chief

[591] *Id.* at 461.
[592] *Id.*
[593] *Id.* at 482.
[594] *Id.* at 471.
[595] *Id.* at 481.
[596] *Rehberg v. Paulk,* 611 F.3d 828, 835 (11th Cir. 2010).

Investigator Paulk subpoenaed Rehberg's email accounts from his internet service provider. Rehberg's case was presented to a grand jury on December 14, 2005.[597] During the course of the investigation, media coverage revealed a furtive relationship between Hodges and the hospital. As a result, Hodges recused himself from the prosecution; however, he still gave "support" to the prosecution team and was in contact with Paulk.[598]

Throughout the history of this case, the prosecution attempted to indict Rehberg for various charges. The first indictment was for charges of aggravated assault, burglary, and "harassing phone calls" to Dr. James Hotz.[599] A closer investigation revealed that Reherg had never been at Dr. Hotz's residence nor had Dr. Hotz reported an assault or burglary to police. The second indictment charged Rehberg for simple assault charges and harassment (via telephone) to Dr. Hotz on August 22, 2004. However, it was later dismissed due to a lack of evidence. Finally, the third indictment on March 1, 2006 charged Rehberg for simple assault and telephone harassment. On May 1, 2006, the trial court dismissed the charges.[600]

The Court of Appeals for the Eleventh Circuit examined the subpoenas during the investigation through a Fourth Amendment lens. The Court held that Rehberg "lacked a legitimate expectation of privacy in the phone and fax numbers he dialed."[601] Moreover, the Court reasoned once Rehberg made a phone call through a third party, the dialing-related information he provided to Bellsouth, Alltel, and Spring could be turned over to law enforcement officers as Rehberg lacked a reasonable expectation of privacy in that information. When the Court analyzed Paulk's subpoena of the e-mail contents, the Court found there was a lack of

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[597] *Id*.
[598] *Id*.
[599] *Id.* at 835-836.
[600] *Id.* at 836.
[601] *Id.* at 843.

jurisprudence in this area of law regarding defendants' privacy rights in e-mail and the contents voluntarily transmitted over the Internet.[602] Thus, the Court found "Paulk could not have known the scope of the privacy rights, if any, that Rehberg had in email content stored at his third party ISP."[603] The Court concluded that due to federal law not being clearly established, Paulk qualified for immunity. Therefore, a search did not occur.

5. *Georgia v. Randolph* (K-S)

In May 2001, Scott Randolph and his wife, Janet, separated due to marital difficulties.[604] After their separation, Janet left their home in Americus, Georgia, and took their son to live with her parents in Canada. Janet and her son returned to Americus, Georgia a few months later. On July 6th, Janet called police and explained after a heated dispute between her and her former husband, Scott had taken her son. When police arrived at the house, they were informed by Janet that her husband was a habitual cocaine user.[605] Janet further explained to police their previous marital problems and that she had recently returned from being with her parents in Canada. Soon after, Scott Randolph returned home and explained he had left their son at a neighbor's house because he was fearful of his wife taking him out of the country. When police questioned Scott about his cocaine usage, he declined ever using the drug and stated that his wife was an alcoholic and drug user.[606]

Sergeant Murray had taken lead role at the scene and took Janet Randolph to find the missing child from the neighbor's residence.[607] When the child was found and Janet returned to the scene, she repeated her initial complaints about Scott's drug problems and also explained that

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[602] *Id.* at 847.
[603] *Id*.
[604] *Georgia v. Randolph,* 547 U.S. 103, 106 (2006).
[605] *Id*. at 107.
[606] *Id*.
[607] *Id*.

there were "items of drug evidence" inside their residence. Sergeant Murray asked Scott for consent to search the house, but he declined. Next, Sergeant Murray turned to Janet and asked for consent, which she eagerly granted. Janet led Sergeant Murray upstairs to Scott's bedroom and Sergeant Murray observed straws with a powdery substance, which he suspected was cocaine.[608] After finding this evidence, Sergeant Murray exited the house to retrieve an evidence bag and simultaneously called the district attorney ("DA") to check on the validity of the search. The DA immediately instructed him to stop the search and obtain a warrant. Subsequently, Janet withdrew her consent when Sergeant Murray returned. The police seized the straws found previously, and then took both Scott and Janet to the police station. Afterwards, officers obtained a valid search warrant and returned to the Randolph's house to seize more drug evidence.[609]

In court, Scott argued the evidence should be suppressed as it was obtained from a warrantless search of his house in the absence of his expressed consent.[610] The trial court denied the motion, ruling that Janet had common authority to consent to the search. The Court of Appeals of Georgia reversed the decision and the State Supreme Court affirmed on the principle that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search."[611] The United States Supreme Court granted certiorari and was in agreement with the Court of Appeals and State Supreme Court decisions. After establishing no exceptions were present to permit entry into the dwelling at the time (i.e., exigent circumstances or the possibility of evidence being destroyed) the United States Supreme Court applied the Fourth Amendment reasonableness standard. The United States Supreme Court stated, "Since the

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[608] *Id.*
[609] *Id.*
[610] *Id.* at 108.
[611] *Id.*(citing *State v. Randolph,* 278 Ga. 614, 604 S.E.2d 835, 836 (2004)).

co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all."[612] In short, the United States Supreme Court held an unreasonable search had occurred.

6. *Groh v. Ramirez* (K-S)

Special Agent Jeff Groh of the Bureau of Alcohol and Tobacco and Firearms (ATF) had been notified by a "concerned citizen" that they had seen a small armory of weaponry on the ranch owned by Joseph Ramirez and his family.[613] The citizen had explained to Special Agent Groh he had previously visited the Ramirez ranch and observed the family owning automatic rifles, grenades, a grenade launcher, and a rocket launcher.[614] Special Agent Groh applied for a search warrant to obtain "any automatic firearms or parts to automatic weapons, destructive device to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers."[615] Although the warrant elucidated the expected illegal items to be found as well as the physical location to be searched, it failed to enumerate the items to be seized. In the section detailing the "person or property" to be seized, it described the Ramirez house, but not the supply of firearms. Nevertheless, the Magistrate issued the warrant and the following day, Special Agent Groh executed the warrant with a team of officers. Joseph Ramirez was absent during the execution of the warrant; however, other members of his family were present (i.e., his wife and

[612] *Randolph,* 547 U.S. at 114.
[613] *Groh v. Ramirez,* 540 U.S. 551, 554 (2004).
[614] *Id.*
[615] *Id*.

children).[616] Special Agent Groh explained the items of the search to Mrs. Ramirez, and to Mr. Ramirez over the phone. The search uncovered no illegal weapons or explosives. Special Agent Groh left a copy of the search warrant, but not a copy of the application. The following day, Special Agent Groh faxed a copy of the application in response to a request from Ramirez's attorney.[617]

Joseph Ramirez sued Special Agent Groh and other officers with claims related to violations of the Fourth Amendment. The district court found no Fourth Amendment violations and the Court of Appeals affirmed the judgment, with one exception against Special Agent Groh.[618] The Court of Appeals held that the warrant was invalid since it did not specify the places to be searched and the items to be seized. The United States Supreme Court granted certiorari and held both that a search did occur, and that it was "unreasonable."[619] Moreover, the Court reasoned even though the Magistrate issued the warrant, it did not mean that he agreed to the scope of the search. Therefore, according to the Court, "even though the petitioner acted with restraint in conducting the search, the inescapable fact is that his restraint was imposed by the agents themselves, not by a judicial officer."[620] Consequently, the Court concluded a search did occur and that it violated the constitutional rights of Ramirez.

7. *U.S. v. Amanuel* (K-S)

On March 19, 2002, police obtained an eavesdropping warrant which authorized the interception of digital papers which belonged to Joseph Amanuel.[621] Contrary to the specifications of the warrant, police did not record the interception of digital communications.

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[616] *Id.* at 555.
[617] *Id.*
[618] *Id.* at 556.
[619] *Id.* at 558.
[620] *Id.* at 560 (citing *Katz v. U.S.,* 389 U.S. 347, 356 (1967)).
[621] *U.S. v. Amanuel,* 615 F.3d 117, 120 (2nd Cir. 2010).

Instead, a written log was kept. On May 30, 2002, police obtained a wiretap based on the information acquired previously, and later renewed it on June 7, 2002. The wiretaps were used to support the application for a search warrant which, in turn, led to the discovery of incriminating physical evidence against the defendant.[622] The Court of Appeals for the Second Circuit held that the initial interception was a violation of Amanuel's statutory rights. "The holding in *Katz* lead to the well-established conclusion that law enforcement authorities seeking to engage in electronic surveillance must comply with the requirements of the Fourth Amendment."[623] However, this case required the evaluation of police compliance with a statute, which is not necessarily the same as a constitutional violation. As a result, the Court concluded that the failure to record the interception and seal does not meet the level of a constitutional violation and thus, found that suppression of the evidence would be unsuitable.[624] In effect, the Court found that though a search did occur under the Fourth Amendment, there was no violation of defendant's Fourth Amendment rights but rather a violation of his statutory rights.

8. *Cassidy v. Chertoff* (K-S)

On July 1, 2004, Lake Champlain Transportation Company (LCT) ferry workers searched passengers as part of protocol.[625] This involved asking passengers to open carry-on items and to present other items for inspections. Car passengers had a visual inspection conducted on their vehicle which included the opening of their vehicle's trunk or tailgate. Michael Cassidy, who commuted daily with ferry, had been asked to open the trunk of his vehicle, which he did. Another passenger, Cabin, had been asked to open his bike pack. These two individuals

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[622] *Id.* at 121

[623] *Id.* at 126 (citing *Katz. v. U.S.,* 389 U.S. 347 (1967)).

[624] *Amanuel,* 615 F.3d at 127. Under statute 18 U.S.C. § 2518, sealing refers to the procedures in place to safeguard the "recording" from any type of edits or alterations. This procedure is in place to protect the integrity of evidence. *Id.*

[625] *Cassidy v. Chertoff,* 471 F.3d 67, 73 (2nd Cir. 2006).

explained in court that use of the ferry is necessary or the alternative route would take at least twice as long.[626] The plaintiffs alleged that the ferry's searches were unconstitutional and violated their Fourth Amendment rights.[627]

The Court of Appeals for the Second Circuit held that the LCT ferry passengers did not suffer a diminished privacy interests in their carry-on luggage.[628] The Court reasoned that even though airline pre-boarding searches were reasonable, airline commuting differs from traveling by ferry.[629] The Court explained for air travel, society had accepted the increased security measures and intrusion on their privacy since the 9/11 attack. However, the Court found that the pre-emptive checks of the carry-on luggage and vehicle trunks of ferry passengers were minimally intrusive.[630] Finally, the Court agreed with the government's argument in that the prevention of terrorist attacks (via searches on only the nation's largest ferries) supported their searches under the special needs doctrine. The Court explained, "Indeed, given that both the intrusions on plaintiffs' privacy interests are minimal and the measures adopted by LCT are reasonably efficacious in serving the government's undisputedly important special need to protect ferry passengers and crew from terrorist acts, we find no constitutional violation."[631] In sum, the court concluded that the searches by LCT are reasonable under the special needs doctrine to protect ferry passengers and the crew from terrorist acts.[632]

9. *Caldarola v. County of Westchester* (K-S)

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[626] *Id*.
[627] *Id.* at 74.
[628] *Id.* at 77.
[629] *Id.* at 76-77.
[630] *Id.* at 81.
[631] *Cassidy,* 471 F.3d at 87.
[632] *Id.* The special needs doctrine is an exception to the warrant requirement governing searches. "Factors in applying special needs doctrine, under which suspicionless searches may be permitted under Fourth Amendment due to special needs other than crime detection or ordinary evidence gathering, are (1) nature of privacy interest involved; (2) character and degree of governmental intrusion; and (3) nature and immediacy of government's needs, and efficacy of its policy in addressing those needs." U.S.C.A. Const.Amend. 4.

An investigation of correctional officers suspected of receiving disability benefits on fraudulent job injury claims led to the arrest of Freeman and several other correctional staff.[633] Evidence was obtained through Department of Corrections (DOC) surveillance. On July 12, 1999, correctional officers were summoned to DOC headquarters, placed in separate rooms, and eventually arrested. The same day correctional staff members were arrested, the County of Westchester held a press conference with the intent to publicize the investigation. During the associated arraignment, the media filmed Freeman and other correctional officers, which included when they were in the police vehicles until they walked into the courthouse.[634] The media had shown the accused being led by police to the courthouse handcuffed, and this particular story continued to be featured in various newspapers and news stations for several decades to illustrate that police/correctional corruption is not tolerated.[635]

Freeman argued that his Fourth Amendment right to be free of an unreasonable search and seizure was violated when the County's act of coordinating the arrests and videotaping the "perp walk" was made public. The district court, however, rejected his claim.[636] Freeman appealed and contended that the district court erred in its analysis. The Court of Appeals held that under the circumstances, the broadcasting of the videotape implicated Freeman's privacy interests.[637] Moreover, while on DOC property, Freeman and other correctional officers had a reasonable expectation of privacy; however, this interest was diminished.[638] Ultimately, the court concluded that the privacy interest of Freeman and the other arrestees was "outweighed by the County's

[633] *Caldarola v. County of Westchester,* 343 F.3d 570, 572 (2nd Cir. 2003).
[634] *Id*.
[635] *Id.*
[636] *Id.* at 573.
[637] *Id.* at 574.
[638] *Id.* at 575.

legitimate government purposes. Therefore, Freeman sustained no actionable Fourth Amendment injury."[639] A search occurred, but it was found to not have violated Freeman's rights.

10. *Cressman v. Ellis* (K-S)

The plaintiffs alleged the state technical college officials violated their Fourth Amendment privacy rights.[640] More specifically, the plaintiffs claimed that state technical college officials began surveillance in squad rooms of the college police department for forty-five (45) days without obtaining a warrant. The Court of Appeals for the Fifth Circuit reviewed *de novo* the dismissal ruling by the district court. First, the Court began its analysis with a two-pronged test to determine if there had been a violation of privacy: (1) first, was there a subjective expectation of privacy and if so, (2) was it objectively reasonable.[641] When reviewing *de novo*, the Court examined the original petition and concluded that "the plaintiffs could prove a set of facts in support of their claims which would entitle them to relief."[642] The Court claimed it was premature for the district court to deny their action as it is possible to provide both a subjective and objective expectation of privacy. The Court again rejected the district court's final analysis in that, if law enforcement's conduct was illegal that their actions would be protected under qualified immunity.[643] Thus, a search occurred and it violated the plaintiffs' Fourth Amendment rights.

11. *Zaffuto v. City of Hammond* (K-S)

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[639] *Id.* at 577.
[640] *Cressman v. Ellis,* 77 Fed.Appx. 744, 744 (5th Cir. 2003).
[641] *Id.*at 745.
[642] *Id.*
[643] *Id.* at 746.

In 1997, Sergeant Terry Zaffuto placed a call from his private office to his wife.[644] The two talked about the police department's impending re-structuring, which was to affect his superiors. His wife, Susan, stated that "those SOBs will finally get what they deserve."[645] Unbeknownst to them, the conversation was being recorded by Assistant Police Chief Kenneth Corkern and in 1999 officer Zaffuto learned that Corkern had played the tape to two other police officers. Officer Zaffuto filed a complaint against Corkern, the police chief, Roddy Devall, and the City of Hammond. The Supreme Court held in *Katz* that recording private conversations without a valid warrant is a violation of the speaker's reasonable expectation of privacy.[646] Furthermore, the Supreme Court stated in *Katz* 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."[647] Based on the evidence and jurisprudence of *Katz*, the court concluded that the recording policy of the police department was well understood by the officers, in that all incoming communications were being recorded.[648] This did not include outgoing calls from private offices. As a result, the court concluded that Officer Zaffuto had reasonably believed that his outgoing call to his wife was private. A search and seizure did occur in violation of Zaffuto's constitutional rights.

12. *U.S. v. Hardin* (K-S)

On August 29, 2005, Officer Kingsbury received a tip from a confidential informant on the whereabouts of Hardin.[649] Officer Kingsbury and Officer Jason Tarwater went to the building described in the tip and saw the vehicle described by the confidential informant. The officers

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[644] *Zaffuto v. City of Hammond,* 308 F.3d 485, 487 (5th Cir. 2002).
[645] *Id.*
[646] *Id.* at 488(citing *Katz v. U.S.,* 389 U.S. 347, 351-52, 88 S.Ct. 507 (1967)).
[647] *Zaffuto,* 308 F.3d at 488(citing *Katz v. U.S.,* 389 U.S. 347, 353, 88 S.Ct. 507 (1967)).
[648] *Zaffuto,* 308 F.3d at 489.
[649] *U.S. v. Hardin,* 539 F.3d 404, 407 (6th Cir. 2008).

talked to the manager of the building, which was an apartment complex, and found out Hardin had not leased an apartment or been seen on the property. After explaining that Hardin had been convicted of a shooting at a school and an armed robbery, the manager agreed to assist the police in their investigations. Accordingly, one of the officers explained that the manager could enter the apartment of a Germaine Reynolds, who they suspected had a relationship with Hardin, and investigate if Hardin was there, under the ruse of "maintenance."[650] The officers watched on CCTV and the manager entered the apartment with the use of his key and shouted out "Maintenance."[651] Hardin answered the door and asked the manager about the purpose of the visit. The manager explained there had been a leak and wondered if he could check the bathroom.[652] Hardin relayed the information to Reynolds through his cell phone. Afterwards, the apartment manager confirmed to Kingsbury that Hardin was in the apartment. The officers called for backup and broke into the apartment and arrested Hardin. The officers also found three firearms, crack cocaine, marijuana, and $2,000 in cash.[653] The court concluded in this case that the apartment manager acted as an agent of the government and that the officers' remaining information based on the confidential informant did not establish either probable cause or reasonable suspicion.[654] The court held that the search of the apartment violated Hardin's Fourth Amendment rights and all evidence were "tainted" fruits.

13. *U.S. v. Gooch* (K-NS)

In Nashville, Tennessee, there was a nightclub, Club Prizm, which frequently had visits from police in response to fights, loud music, shootings, and a murder.[655] As a result of the rise in

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[650] *Id*.
[651] *Id.*
[652] *Id.* at 408.
[653] *Id*.
[654] *Id.* at 426.
[655] *U.S. v. Gooch,* 499 F.3d 596, 597 (6th Cir. 2007).

crime emanating from the club, police frequently conducted sweeps in the parking lot. The owner of the nightclub, Fidanza, did not own the parking lot, but rather it was shared by all the surrounding businesses. Fidanza had arranged a valet service for his nightclub. On May 20, 2004, police arrived to do a "sweep" and Officer Mark Anderson approached a Lincoln Town Car and shined his flashlight inside it.[656] He saw a velvet Crown Royal whiskey bag underneath the driver side of the vehicle. He also observed what was to his knowledge a firearm handle sticking outside of the bag. Anderson pulled his car alongside the vehicle and ran the license plates to determine the vehicle's owner. It was determined to be owned by defendant Gooch, who did not have either a valid gun permit or a valid driver's license.[657] Gooch also had an extensive criminal history. Later, Gooch left the nightclub with his wife, Seniqua King, and entered the Lincoln. Officer Anderson approached the car with his firearm drawn and demanded Gooch to place the vehicle in park, and exit the vehicle. Gooch complied with Officer Anderson's commands, and Officer Anderson then placed Gooch under arrest.[658] The officers conducted a search of the vehicle and found a firearm. In 2005, Gooch pled guilty, but "preserved the suppression issue for appellate review."[659]

The Court of Appeals in this case had to determine whether Gooch did in fact have a reasonable expectation of privacy in the "VIP" area of the parking lot. "In order to be afforded protection under the Fourth Amendment, a person must exhibit a subjective expectation of privacy and society must be willing to recognize this expectation as reasonable."[660] The Court held that Gooch had no reasonable expectation of privacy. The Court reasoned that "members of

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[656] *Id.* at 598.
[657] *Id*.
[658] *Id.* at 599.
[659] *Id.* at 600.
[660] *Id.* at 601(citing *Katz v. U.S.,* 389 U.S. 347, 351, 88 S.Ct. 507 (1967)).

the public and police officers had access to, and were able to walk through, the VIP area."[661] Thus, the court found that no search had occurred.

14. *U.S. v. Ellison* (K-NS)

Officer Mark Keeley observed a male inside a white van parked in a "Fire Lane" and "No Parking" area.[662] Instead of issuing a citation or requesting the male to move the vehicle, Officer Keeley parked in a spot and ran a check on the license plates. The database stated the vehicle belonged to Curtis Ellison, who also had an outstanding felony warrant. Officer Keeley called for back-up. After a few minutes, another male entered the vehicle and then the van drove off. Officer Keeley followed the van for a few moments, until his back-up was close. He then stopped the van.[663] Officer Keeley approached the driver and asked for registration and proof of insurance. The driver was identified as Edward Coleman, and Curtis Ellison was the passenger. Officer Keeley moved to the passenger side of the vehicle and notified him he had an outstanding warrant, and arrested him. During the routine pat-down, two firearms were discovered. Coleman was released with a warning for parking in a fire lane.[664]

The district court found that the "van was not parked illegally, and thus, the officer did not have probable cause to run the Law Enforcement Information Network (LEIN) check of Ellison' license plate."[665] The government appealed. The government argued Ellison had no reasonable expectation of privacy in the information contained on his plates. The Court of Appeals stated that the Fourth Amendment protects only what society intends to keep private. Moreover, the Court in *Katz* stated "What a person knowingly exposes to the public … is not a subject of

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[661] *Gooch,* 499 F.3d at 603.
[662] *U.S. v. Ellison,* 462 F.3d 557, 559 (6th Cir. 2006).
[663] *Id*.
[664] *Id*.
[665] *Id.*

Fourth Amendment protections."[666] Thus, the court held in Ellison that "It is apparent that when a vehicle is parked on the street or in a lot or at some other location it is readily subject to observation by members of the public, it is no search for the police to look at the exterior of the vehicle."[667] The Court concluded that a privacy interest does not exist for motorists such as Ellison because they do not have a reasonable expectation of privacy in the information on the license plate.[668] Moreover, the court reasoned as long as Officer Keeley was in a "position to observe" the plates, then he did not violate the Fourth Amendment.[669] No search had occurred.

15. *Widgren v. Maple Grove Tp.* (K-NS)

Kenneth Widgren, Sr., owned a twenty acre tract of land, which was largely undeveloped.[670] His land was covered by trees, hills, and overgrowth. Over the course of about a year, from May of 2002 until the spring of 2003, Widgren had built a house on the property. There was no fence, but at the "mouth" of the driveway there were multiple signs posted, including "No Trespassing" signs. Widgren did not purchase a building permit. Three times, zoning administrators and Township tax assessors, Louis Lenz and H. Wayne Beldo, attempted to confront Widgren about zoning violations, and conduct some minor observations of the exterior of the house.[671] Unable to get a hold of Widgren, they would post the civil infractions on the door of the house. When Widgren learned of the infractions, he and his son filed a claim in federal district court asserting various violations. The district court held that no Fourth Amendment violation had occurred due to the "open fields" doctrine.[672]

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[666] *Id.* at 561(citing *Katz v. U.S.,* 389 U.S. 347, 351, 88 S.Ct. 507 (1967)).
[667] *Id.* at 563(citing *Katz,* 389 U.S. 347 (1967))
[668] *Ellison,* 462 F.3d at 562.
[669] *Id.*at 563.
[670] *Widgren v. Maple Grove Tp.,* 429 F.3d 575, 577(6th Cir. 2005).
[671] *Id*.
[672] *Id*.

The Court of Appeals agreed with the district court's decision and held that all three separate visits did not constitute a search. The Court reasoned that regarding the first inspection, the "open field doctrine" applied and therefore, while it may be considered a trespass, it was not a search.[673] The objective of the second inspection was to issue a citation and did not seek incriminating evidence against the Widgrens. Therefore, the Court held that the "intrusion" was minimal in nature and therefore did not constitute a Fourth Amendment search.[674] Finally, the last visit by a property assessor also did not constitute a Fourth Amendment search. The Court reasoned the official did enter the curtilage, but for the sole purpose of "naked-eye" observations of the exterior of the house.[675] Furthermore, it did not violate the Widgrens' Fourth Amendment rights because the house was plainly visible. Concerning this final inspection, the Court concluded that the Widgrens' "expectation of privacy in 'the plainly visible attributes and dimensions of the exterior of their home' is at the Fourth Amendment's periphery, not its core, when compared to the hidden features of the house's interior."[676] No search had occurred.

16. *Christensen v. County of Boone* (K-NS)

In 1998, Boone County police officer Robert Alty arrested a friend, Edward Krieger, for driving under the influence.[677] Edward Krieger was also a Deputy Sheriff of Boone County. This led toward an animosity in their relationship, which later manifested into face-to-face altercations in 2001. Deputy Krieger would harass and intimidate Officer Alty and his girlfriend, Anita Christensen This included a series of events consisting of Deputy Krieger following the pair in Boone County, parking his squad car in front of the business in which Anita worked, and

[673] *Id.* at 580.
[674] *Id.* at 581.
[675] *Id.* at 585.
[676] *Id.* at 583.
[677] *Christensen v. County of Boone, IL,* 483 F.3d 454, 457 (7th Cir. 2007).

other intimidation tactics.[678] Numerous complaints were filed against Krieger to his superior, but no departmental actions were taken. Officer Alty and Anita Christensen claimed Deputy Krieger deprived them of their rights of privacy and further claimed this harassment was tantamount to an unreasonable search and seizure. The district court dismissed the claims.[679]

The Court of Appeals stated "a search takes place when the state intrudes upon an individual's legitimate interest in privacy."[680] In the present case, the Court concluded that the actions of Deputy Krieger did not constitute a Fourth Amendment search or seizure.[681] The Court reasoned that while driving on public streets, individuals do not ordinarily have a legitimate expectation of privacy. The Court concluded that the district court appropriately dismissed the plaintiff's Fourth Amendment claims.[682]

17. *U.S. v. Lucas* (K-NS)

In 2003, defendant Lucas escaped the custody of the Nebraska Department of Correctional Services.[683] On October 22, Director of Correctional Services Harold Clarke issued an arrest warrant for Lucas. On January 4, 2004, a tip was given to Sergeant Timothy Carmody of Lucas' location. Carmody passed the tip to Deputy Gerald Kellogg. Later that day Kellogg directed officers to travel to the residence of Theresa Scaife, which was the location described in the tip. When officers knocked on the door, they could hear a man and a woman inside. When Scaife opened the door, she was asked if Lucas was inside.[684] She responded that he was not inside the residence. The officers explained to her that they had an arrest warrant for Lucas and based on

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[678] *Id.* at 458.
[679] *Id*.
[680] *Id.* at 459 (citing *Katz v. U.S.,* 389 U.S. 347 (1967)).
[681] *Christensen,* 483 F.3d at 460.
[682] *Id.* at 461.
[683] *U.S. v. Lucas,* 499 F.3d 769, 773 (8th Cir. 2007).
[684] *Id*.

the warrant, they intended to enter and search for him. Shortly thereafter, Scaife admitted Lucas was inside and officers placed her in the squad car. Officers asked Lucas to come outside the residence; however, he did not respond to their request. At that point, officers entered the apartment and found Lucas in the basement dressed in boxer shorts. Due to department policy, those placed under arrest must be dressed appropriately during winter weather. Deputy Kellogg saw a pair of pants in a bedroom and asked Lucas if the pants belonged to him. Lucas acknowledged ownership of the pants, but requested to wear a different pair. After Deputy Kellogg picked up the pants and he discovered crack cocaine, marijuana, and $2,900 in cash inside the pants.[685] After officers took Lucas away, Scaife was allowed to enter her apartment. She was asked by Sergeant Carmody for permission for the officers to search the apartment for contraband or weapons which may have belonged to Lucas. Scaife verbally agreed and signed a consent form. Officers found a firearm and another bag of marijuana.[686]

The Court of Appeals stated that because Lucas had escaped lawful custody, he possessed a diminished expectation of privacy.[687] The Court held that Director Clarke had met the standard required to draft an arrest warrant for a prison escapee; therefore, the officers' entry into Scaife's apartment was reasonable.[688] Furthermore, the Court stated the dissent erred by failing to consider the status of Lucas. Because Lucas' reasonable expectation of privacy was limited by his escapee status and in light of the fact officers had both a valid administrative warrant and

[685] *Id*.
[686] *Id.* at 774.
[687] *Id.* at 778.
[688] *Id*.

reasonable cause to believe Lucas was in the apartment, the Court concluded Lucas' Fourth Amendment rights were not violated.[689] Thus, a valid search had occurred.

18. *Nelson v. National Aeronautics and Space Admin.* (K-NS)

This case dealt with the employees who worked on the jet propulsion laboratory for NASA. NASA had conducted routine National Agency Check with Inquiries (NACI) investigations of all employees since its inception, excluding contract employees.[690] NASA had determined this exclusion posed a security risk and thus began requiring investigations into contract employees in 2005. However, these changes did not affect those who worked for California Institute of Technology (Caltech) until January 29, 2007. This team, in conjunction with NASA, were in charge of working on the jet propulsion laboratory. At this point, NASA had modified its contract with Caltech to require of all its (Caltech's) contractual employees to undergo a thorough NACI investigation.[691] Caltech initially opposed the new security measures, including the investigations, but ultimately conceded due to the nature of the contract they had previously signed. These investigations would be conducted through Form 42 inquiries and a SF 85 questionnaire.[692] Thus, on August 30, 2007, the appellants filed suits against NASA, Caltech, and the Department of Commerce.[693] One of the primary suits alleged NASA's forced investigations on contract employees constituted an unreasonable search.[694] The district court

[689] *Id.* at 779. Additionally, the Court explained the search incident to arrest and the search of the apartment owned and consented to by Scaife did not violate Lucas' Fourth Amendment rights because he lacked standing to argue vicariously for Scaife.
[690] *Nelson v. National Aeronautics and Space Admin.,* 530 F.3d 865, 871 (9th Cir. 2008).
[691] *Id.* at 872.
[692] The Form 42 inquiries are sent to applicant's acquaintances (i.e., landlords, references, friends, and families) asking about the applicant's trustworthiness and other highly personal information. The SF 85 questionnaire asks the applicant personal information. *Nelson,* 530 F.3d at 870-871.
[693] *Id.*
[694] *Id.* at 872.

rejected the argument and held the investigations required by NASA were not a "search" under the Fourth Amendment.[695]

The Court of Appeals stated for appellants' Fourth Amendment claim to be successful, there must be evidence that the investigation conducted by NASA using Form 42 or the SF 85 questionnaire violated appellants' "reasonable expectation of privacy."[696] The Court held Form 42 written inquiries did not constitute a search under the Fourth Amendment according to *Miller's* bright-line rule.[697] This bright-line rule states that there is no reasonable expectation of privacy to any information voluntarily given to the government. Furthermore, the Court concluded that the investigations conducted using the SF 85 questionnaire did not constitute a search. The Court reasoned direct questioning was not a Fourth Amendment issue, but rather a Fifth Amendment concern.[698] Thus, the Court concluded that neither Form 42 written inquiries nor the SF 85 questionnaire were considered "searches" under the Fourth Amendment.[699] In sum, no search had occurred.

19. *U.S. v. Ziegler* (K-NS)

FBI Special Agent James Kennedy had received a tip that a Frontline Processing employee had accessed child pornography from a work computer.[700] In response, Kennedy contacted the IT administrator of Frontline. The administrator, John Softich, explained to Kennedy that a firewall was placed on all work computers and internet activities were strictly monitored. During their

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[695] *Id.*
[696] *Id.* at 875(citing *Katz v. U.S.,* 389 U.S. 347, 361, 88 S.Ct. 507 (1967)).
[697] *Id.* "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id*. (quoting *U.S. v. Miller,* 425 U.S. 435 (1976)).
[698] *Nelson,* 530 F.3d at 877.
[699] *Id*.
[700] *U.S. v. Ziegler,* 456 F.3d 1138, 1139 (9th Cir. 2006).

conversation, Softich confirmed the tip and explained he had personally viewed the sites. Based on the log, Softich said Jeffrey Ziegler's office computer had accessed the site.[701] Next, Agent Kennedy interviewed William Schneider, an employee for the IT department. Schneider confirmed Softich's findings and reported he had "spot checked" the cache files on Ziegler's computer and it revealed images of child pornography. Subsequent events, however, were disputed by the parties. Softich and Schneider claimed that Agent Kennedy instructed them to make a copy of Ziegler's hard drive. Conversely, Agent Kennedy claimed he was told by Softich that the IT department had made a backup file and therefore, Agent Kennedy instructed them to ensure its protection.[702] On January 20, 2001, Softich and Schneider obtained a key to Ziegler's office, entered the office, and made two copies of the hard drive. Frontline's counsel, Michael Freeman, contacted Agent Kennedy and stated they would cooperate with the FBI during their investigation and that a search warrant would be unnecessary. Agent Kennedy received Ziegler's computer and one of the copies of the hard drive on February 5, 2001.[703]

Ziegler argued that the evidence obtained from his workplace computer violated his Fourth Amendment freedom for unreasonable search and seizures.[704] The Court of Appeals stated for Fourth Amendment protections to be applicable, "an expectation of privacy must be one that society is prepared to recognize as 'reasonable.'"[705] The Court concluded Ziegler had no objectively reasonable expectation of privacy on his computer in the workplace; as a result, no search implicating the Fourth Amendment had occurred.[706] The Court reasoned, "The workplace

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[701] *Id.* at 1140.
[702] *Id*.
[703] *Id.* at 1141.
[704] *Id.* at 1142.
[705] *Id.* at 1145(citing *Katz v. U.S.,* 389 U.S. 347, 361 (1967)).
[706] *Id.* at 1146.

computer was company-owned; Frontline's computer policy included routine monitoring, a right of access by the employer, and a prohibition against private use by its employees."[707]

20. *U.S. v. Scott* (K-S)

Raymond Scott was arrested for drug possession and then released.[708] As part of his release, Scott was required to comply with random drug testing and allow his home to be randomly searched by a peace officer without a warrant. Sometime later, an informant tipped officers that Scott might have been using drugs. As a result, State officers went to Scott's house and administered a urine test. The test concluded Scott was on methamphetamines. The officers arrested him and searched his house, which revealed an unregistered shotgun.[709]

Scott moved to suppress the shotgun and any statements made at the scene.[710] The district court granted Scott's motion because officers needed probable cause to justify the warrantless search. The Court of Appeals for the Ninth Circuit examined if the searches were valid based on the consent given during his release. When considering Fourth Amendment search and seizures, the Court of Appeals turned to the *Katz* reasonable expectation of privacy concept and further decided the searches are on valid if they were conducted reasonably.[711] To determine reasonableness, the Court turned to whether the searches were supported by probable cause, special needs doctrine, or "totality of the circumstances" approach. Ultimately, the Court answered these various components in the negative. Thus, the Court agreed with the district court's decision in that there is no evidence to support the search, which means the statements

[707] *Id.*
[708] *U.S. v. Scott,* 450 F.3d 863, 865 (9th Cir. 2006).
[709] *Scott,* 450 F.3d at 865.
[710] *Id.*
[711] *Scott,* 450 F.3d at 867-868.

made by Scott and the shotgun was correctly suppressed.[712] In sum, the Court found an unlawful search had occurred.

21. *Johnson v. Hawe* (K-NS)

On January 28, 2000, Johnson videotaped his friends at Sequim's skateboard park and an interaction they had with Chief Nelson.[713] Chief Nelson arrived on the scene in his patrol car and was looking for a missing juvenile. Johnson approached the vehicle from the passenger side. Nelson rolled down the passenger window and asked what Johnson was doing. Johnson did not say anything, but continued to face the camera at Nelson. Unbeknownst to Nelson, Johnson had powered his camera down. Nelson told Johnson to stop because Johnson "did not have [ ] permission to record [him] and … it was a violation of the law to record conversations without consent."[714] Nelson then gave a second warning and then left the vehicle in order to retrieve the camera. There was a physical struggle, but with the help of Nelson's back-up officer, they placed Johnson under arrest. Johnson had spent three days in jail before being charged of violating the Washington Privacy Act of recording communication without permission and resisting arrest.[715]

Johnson appealed and argued that the actions against him violated his First and Fourth Amendment rights.[716] The Court of Appeals held that the conversation Chief Nelson was having with dispatch did not qualify for Fourth Amendment protection.[717] The Court provided three reasons for this finding. First, the Washington's Privacy Act does not prohibit or criminalize the public from recording police while they are on duty.[718] Second, the Court reasoned that Chief

[712] *Scott,* 450 F.3d at 874-875.
[713] *Johnson v. Hawe,* 388 F.3d 676, 670 (9th Cir. 2004).
[714] *Id.* at 680.
[715] *Id.*
[716] *Id*.
[717] *Id.* at 683.
[718] *Id.*

Nelson had no reasonable expectation of privacy because he was in a public area, with his vehicle window rolled down, and knew that Johnson had a camera when he approached the vehicle.[719] Third, the Court stated Chief Nelson lacked a reasonable expectation of privacy in his communications with dispatch.[720] The Court stated, "Because the communications over Chief Nelson's police radio could be commonly monitored, overhead, and recorded by other officers and private citizens owning scanning devices, there was no reasonable expectation of privacy in those communications."[721] Furthermore, the Court concluded Nelson's arrest lacked probable cause which ultimately violated Johnson's Fourth Amendment right.[722] In sum, no search had occurred.

22. *Callahan v. Millard County* (K-S)

Police raided the residence of defendant Callahan on March 19, 2002.[723] Police had received a tip from a confidential informant ("CI") that Callahan was selling and distributing methamphetamines. The "CI" had been invited to Mr. Callahan's home to try a "test" sample. The officers learned that the "CI" had been drinking before heading over to the residence and was intoxicated. Despite his inebriated state, police attached a wire to the informant and gave him a marked $100 bill. When the "CI" was inside the house, he completed the transaction, and then gave the signal.[724] The signal alerted officers to enter the house, and they ordered the residents to drop to the ground, including the informant. Mr. Callahan dropped a small plastic bag, which was later revealed to contain methamphetamines. A search of the house revealed evidence of drug sales, drug syringes, and methamphetamines. The police did not have a

[719] *Id.* at 683-684.
[720] *Id.* at 684.
[721] *Id.* at 685.
[722] *Id.* at 684.
[723] *Callahan v. Millard County,* 494 F.3d 891, 893 (10th Circ., 2007).
[724] *Id*.

warrant.[725] The Court of Appeals held that Mr. Callahan's rights were in fact violated.[726] Furthermore, the Court reasoned Mr. Callahan had not consented to the officers' entry, and the consent given to the informant could not be interpreted to extend to the officers. As a result of a lack of a search warrant or exigent circumstances, the Court concluded the search and seizure was illegal.

23. *U.S. v. Hatfield* (K-NS)

On October 10, 2000, police received an anonymous tip that Hatfield had been growing marijuana.[727] In response, Lieutenant Tim McCullum and Deputy Linda Sinclaire were sent to Hatfield's residence. Once at the scene, they decided to split up. Deputy Sinclaire went to the front door on the north side of the house and McCullum walked to the parking pad located on the southern side of the house, near a pickup truck.[728] McCullum waited in this area so that he could see individuals in case they exited the house through the backyard.[729] When he heard Hatfield had answered the door, McCullum left his position and returned to the squad car.

Sinclaire informed Hatfield of the tip they had received and asked permission to search the premises.[730] Hatfield refused. McCullum and Sinclaire radioed in to their superior and explained the events which had transpired. In the meantime, Deputy Dale Harrold had overheard the conversation on the radio and met with the other two officers at the scene. Deputy Harrold reached Hatfield's residence, and walked about fifty to sixty feet alongside the fenced property to get a vantage point.[731] At this point, Deputy Harrold could look into Hatfield's backyard and was able to make out marijuana being grown from inside a chicken coop and behind a tin shed.

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[725] *Id.* at 894.
[726] *Id.* at 898.
[727] *U.S. v. Hatfield,* 333 F.3d 1189, 1190 (10th Cir. 2003).
[728] *Id.*
[729] *Id.* at 1191.
[730] *Id.*
[731] *Id.*

To get a better view, Officer Harrold walked south along the fence, back toward Hatfield's house, and from a particular vantage point he confirmed that marijuana was, in fact, being grown on Hatfield's property.[732] Hatfield also walked on the inside of the fence and noticed Deputy Harrold and began yelling at the officer for trespassing. Deputy Harrold placed Hatfield under arrest for growing marijuana. While police secured the premises, Deputy Harrold left and obtained a search warrant.[733]

Hatfield claimed that Officer Harrold's observation of Hatfield's backyard was a search under the Fourth Amendment.[734] The Court of Appeals held that Officer Harrold's observation into the backyard and discovery of the marijuana did not constitute a search.[735] The Court reasoned Fourth Amendment protections do not extend to the home and its curtilage from "ordinary visual surveillance."[736] Therefore, the Court concluded Hatfield had no reasonable expectation of privacy in the observations made by Officer Harrold from the vantage point where he detected the marijuana in Hatfield's backyard.[737]

24. *McClish v. Nugent* (K-S)

Deputies Shawn Terry and Clifford Groves responded to a complaint between neighbors Holmberg and Padzur.[738] Furthermore, the complaint did not mention McClish, who was not at home when the deputies arrived at the scene. The argument started over a property dispute. McClish had reason to believe that the neighbors had encroached on his property line. When McClish arrived home, he was angry that deputies were on his property. After McClish shouted

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[732] *Id.*
[733] *Id.* at 1192.
[734] *Id.* at 1195.
[735] *Id.* at 1199.
[736] *Id.* at 1196.
[737] *Id.* (citing *Katz v. U.S.,* 389 U.S. 347 (1967)).
[738] *McClish v. Nugent,* 483 F.3d 1231, 1233 (11th Cir. 2007).

profanities at the deputies, they stepped over to Padzur's property.[739] The Padzurs explained to the deputies that Holmberg and McClish had issued threats to harm their family, fire guns into the air, and shout profanities at them. McClish denied the accusations. During the deputies' interview with the Padzurs, McClish got back into his car and drove past the property, and yelled some profane language out the window.[740]

Deputy Terry reviewed the phone records at the Sheriff's Office and in conjunction with the statements he had received from the neighbors and personal observations, Terry concluded he had probable cause to arrest McClish.[741] Later than night, Deputies Terry, Calderone, and K-9 handlers Martinez and Magnum, returned to arrest McClish. Vehicle access to McClish's property was extremely limited because of an electronic gate. However, McClish did give an electronic "clicker" to a neighbor, Lanny Baum, with the instruction to never give the "clicker" to anyone. That night, Baum either left the gate open for the officers or lent them the "clicker" to gain access to the residence. According to Deputy Terry, he and Calderone went up to the residence, knocked on the door, and told McClish it was the Sherriff's Office. McClish then stepped out, and Terry arrested him.[742] Conversely, McClish stated in district court that Terry was standing directly in the front door and forcibly grabbed and pulled him out onto the porch. In any event, Holmberg was also arrested for resisting an officer without violence. McClish argued that Deputy Terry violated his Fourth Amendment rights during the arrest.

The Court of Appeals held that the arrest was unlawful and violated McClish's Fourth Amendment right to be secure from unreasonable searches and seizures.[743] The Court reasoned

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[739] *Id.* at 1234.
[740] *Id.*
[741] *Id.*
[742] *Id.* at 1235.
[743] *Id.* at 1248.

"McClish did not completely surrender or forfeit every reasonable expectation of privacy when he opened the door, including, most notably, the right to be secure within his home from a warrantless arrest."[744] A Fourth Amendment search and seizure occurred.

25. *U.S. v. Young* (K-NS)

Raymond Young had applied and received a particular certificate known as a "637 certificate" to buy and sell "off-road" fuel, which included fuel for marine use in the spring of 1987.[745] He had stated to an IRS agent that he owned a nautical vessel; however, Young sold his boat four months prior to obtaining his certificate. Young had begun the elaborate plan to purchase tax-free fuel and sell it to cash-only retailers and trucking companies. IRS Agent Sutherland interviewed Young on April 30, 1991. According to Sutherland, Young had hinted at bribing him. As a result, the IRS Inspection Service arranged for Agent Sutherland to wear a wire during the next interview with Young.[746] During the second meeting, Sutherland found Young's invoices to be very suspicious. At the third interview, Agent Sutherland revoked Young's 637 certificate.

Meanwhile, IRS Agent Ruka continued investigations against Young through a different approach.[747] Agent Ruka had contacted Federal Express and asked the operational manager for assistance in permitting IRS and United States Customs to view packages sent for and by Young and Ahmed, the co-defendant in this case. They agreed and without a warrant, IRS x-rayed several packages. The x-rays revealed the packages contained large amounts of currency. This evidence was used to apply for a search warrant for a residence owned by Young.

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[744] *Id.* at 1247.
[745] *U.S. v. Young,* 350 F.3d 1302, 1304 (11th Cir. 2003).
[746] *Id*.
[747] *Id*.

Young argued that the search and seizure of the packages violated his Fourth Amendment rights. The Court of Appeals held that the IRS' actions and Federal Express' handing over the packages for x-ray did not violate Young's Fourth Amendment rights.[748] The Court reasoned that "No reasonable person would expect to retain his or her privacy interest in a packaged shipment after signing an airbill containing an explicit, written warning that the carrier is authorized to act in direct contravention to that interest."[749] Furthermore, the Court explained Federal Express' package policy, which states to not ship cash and the contents of packages may be inspected at any time. The Court reasoned based on their policy, this further "eliminated any expectation of privacy" from within the package.[750] Accordingly, no search occurred by government officials in the first place.

26. *U.S. v. Lee* (K-NS)

Robert Lee was the president and co-founder of the International Boxing Federation (IBF) which is a credited organization responsible for publishing the ratings of various boxers and announcing the champion.[751] These ratings are important because they determine who gets to fight for the championship. The FBI began an investigation into the Lee's company for scamming and rigging the ratings. In May 1997, C. Douglas Beavers was questioned by the FBI and then agreed to cooperate. Beavers explained he had solicited and accepted various bribes while working for IBF. The FBI created a sting operation where they used Beavers to arrange a meeting with Lee at a hotel room that had both audio and visual recording equipment.[752] The FBI relied heavily on Beavers' consent and did not obtain a warrant for the operation. The FBI only

[748] *Id.* at 1308.
[749] *Id*.
[750] *Id.*
[751] *U.S. v. Lee,* 359 F.3d 194, 198 (3rd Cir. 2004).
[752] *Id.* at 199.

recorded when Beavers was present in the room and accordingly, shut off the equipment when Beavers left.[753] Lee was later indicted, charged, and convicted of receiving bribes.

The Court of Appeals for the Third Circuit concluded that the FBI's use of restraint by only recording and surveying when Beavers was in the room aligned with Lee's expectation of privacy and therefore, no Fourth Amendment violation occurred.[754] The Court reasoned since Beavers was invited into the hotel by Lee, Lee lacked a reasonable expectation of privacy when Beavers was present in the room.[755] Furthermore, the Court explained that the FBI solely used the recording equipment to monitor their conversation when Beavers was present.[756] In sum, the Court found that the FBI did not violate Lee's Fourth Amendment rights, therefore, no search occurred.

27. *U.S. v. Warshak* (K-S)

Steven Warshak owned various small businesses in 2001 classified as a "nutraceuticals" company.[757] Later, the businesses were combined to create Berkeley Premium Nutraceuticals, Inc. This company was in charge of the product known as Enzyte, which was the male enhancement supplement. The product was advertised through various media outlets, including television commercials, radio, and eventually printed ads.[758] The ads claimed a 96% satisfaction rating; however, this was later revealed by James Teegarden, the Chief Operating Officer, to be false.[759] Teegarden stated he was asked to find 500 names in the database and then mark 475 of them as satisfied to create the fabricated statistic. Finally, the ads also purported that the product

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[753] *Id.*
[754] *Id.* at 203.
[755] *Id*.
[756] *Id.*
[757] *U.S. v. Warshak,* 631 F.3d 266, 276 (6th Cir. 2010).
[758] *Id.* at 277.
[759] James Teegarden was hired by Warshak to be the Chief Operating Officer of Berkeley Premium Nutraceuticals, INC. *Id.*

was endorsed by a Dr. Fredrick Thomkins from Stanford and Dr. Michael Moore from Harvard.[760] Later, investigations revealed these doctors' names were also fabricated.[761]

Berkeley also had its customers under an automatic shipping program, which continued to charge the customer and ship the products until the customer notified the company to stop.[762] The Better Business Bureau (BBB) contacted Berkeley due to the high volume of complaints about customers' inability to cancel the automatic shipping program.[763] As a response, Berkeley began recording and monitoring the interactions with the call center representatives and customers. However, this response proved to be ineffective because representatives failed to provide proper disclosure and customers continued ordering the product over the internet, which failed to notify them of the automatic shipping program.[764]

In 2004, the President of the BBB mailed Warshak about the complaints. [765] Meanwhile, the Berkeley Company experienced an enormous amount of "chargebacks," which caused the loss of Warshak's merchant account.[766] "Chargebacks" occur when customers dispute a charge. Berkeley was able to get other merchant accounts; however, this was successfully done after Warshak and his wife applied to numerous banks, and falsely stated they had never had a merchant account terminated.[767] Because of the problem of chargebacks, Warshak devised a ruse to inflate the number of transactions through a process of diluting the transactions which would, in turn, reduce the "chargeback" ratio. One approach included splitting up a single charge into

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[760] *Id.*
[761] *Id.*
[762] *Id.* at 278.
[763] *Id.*
[764] *Id.* at 279.
[765] *Id.*
[766] *Id.* at 279-280.
[767] *Id.* at 280.

two charges, also known as "double-dinging."[768] Another strategy involved employees making small credit transactions using Warshak's personal credit card. As part of the investigation, the government requested Warshak's ISP provider (NuVox) to maintain copies of his emails.[769] Additionally, this requested prevented NuVox from informing Warshak of the government's actions. This request was submitted in October 2004, and in January 2005, NuVox received a subpoena to hand over the emails.[770] An additional mandate from the court ordered NuVox to submit any supplementary emails. Warshak did not receive any notice until May 2006.[771]

In court, Warshak argued that warrantless seizure of his private emails violated his Fourth Amendment rights against unreasonable searches and seizures.[772] The Court held that Warshak did have a reasonable expectation of privacy in his emails.[773] The Court reasoned email was analogous to a letter or phone call, and therefore the government cannot compel an Internet Service Provider (ISP) to turn over the emails without a warrant.[774] Consequently, a search under the Fourth Amendment had occurred. However, the Court held that although the government violated Warshak's Fourth Amendment right through the warrantless seizure of his emails, the emails themselves were not subject to exclusion because the government acted in good-faith of the Stored Communications Act (SCA).[775]

28. *U.S. v. Cuevas-Perez* (K-NS)

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[768] *Id.*
[769] *Id.* at 283. This request was endorsed by 18 U.S.C. § 2703(f).
[770] *Id.*
[771] *Id.*
[772] *Id.* at 281.
[773] *Id.* at 288.
[774] *Id.*(citing *Katz v. U.S.,* 389 U.S. 347, 353 (1967)).
[775] *Warshak,* 631 F.3d at 292. The SCA authorizes government officials to obtain electronic communications from service providers under specific circumstances. 18 U.S.C.A. § 2701 et seq.

Juan Cuevas-Perez was being investigated by Immigration and Customs Enforcement ("ICE") of operating a drug distribution ring in 2008.[776] ICE agents installed a pole camera outside the residence of Cuevas-Perez to easily monitor his movements. This footage revealed he owned a jeep. On February 6, 2009, Detective Shay attached a warrantless GPS tracking device onto the Jeep while it was in a public area.[777] Cuevas-Perez traveled to New Mexico, Texas, Oklahoma, Missouri, and Illinois. During his time in Missouri, the GPS device began to run low on power.[778] Shay contacted a regional ICE agent and asked them to continue visual surveillance. Once Cuevas-Perez entered Illinois, Illinois State Police ("ISP") took over visual surveillance. ICE agents instructed ISP to find a reason to pull over Cuevas-Perez and after 40 miles of tracking him, ISP pulled him over for a minor traffic violation.[779] A trained K-9 was sent to the scene and the dog motioned to the handler that there were drugs present. A search of the Jeep revealed heroin packed in secret compartments in the vehicle.[780]

The Court of Appeals for the Seventh Circuit relied on *Knotts* precedent and held that the placement of the GPS device on Cuevas-Perez's vehicle did not constitute a search and therefore, did not violate his Fourth Amendment rights.[781] The Court explained the surveillance was not lengthy (60 hours total) and therefore did not expose various aspects of Cuevas-Perez's life.[782] Additionally, this was all done during one continuous journey along public thoroughfares, which was found to not be a search in *Knotts.* Furthermore, the purpose of the GPS device was strictly

[776] *U.S. v. Cuevas-Perez,* 640 F.3d 272, 272 (7th Cir. 2011).
[777] *Id.*
[778] *Id.* at 273.
[779] *Id.*
[780] *Id.*
[781] *Id.* at 276.
[782] *Id.* at 274-275.

to track the defendant's, Cuevas-Perez, movements as he travelled across the country.[783] In sum, the actions of ICE agent did not constitute a search.

29. *U.S. v. Ward* (K-NS)

Ward had contacted his mother after escaping custody.[784] Federal marshals learned of his whereabouts and notified two deputies of where his mother lived. When they arrived, they discovered that Ward's car had departed. The Federal marshals and local law enforcement searched nearby motel parking lots for a maroon Buick. They found a vehicle that matched the description at a Days Inn parking lot. The clerk explained that Ward was not a registered guest.[785] The marshals conducted a stake-out of the car and waited for Ward to reappear. When Ward returned to the scene, the marshals moved in, but he managed to enter his vehicle and take off. Marshals did not chase him because they feared he would cause an accident. They found his vehicle at another motel and the manager confirmed that Ward was staying there. They obtained a key to the room and knocked and announced their presence and entered the room. The marshals found a bag with a firearm, ammo, an address book, and a pharmacy card.[786] Ward was eventually arrested in the nearby town of Midland. Ward pled guilty in district court, but retained his right to appeal. Ward argued the evidence found in his motel room should be suppressed.[787]

The Court of Appeals for the Fifth Circuit held that the marshals' warrantless search of his motel room and the bag did not violate Ward's rights.[788] The Court first stated the implications for the different, possible statuses of Ward. If Ward was considered to share the status of a probationer or parolee, then he would harbor a diminished expectation of privacy that "could be

[783] *Id.* at 275.
[784] *U.S. v. Ward,* 561 F.3d 414, 415 (5th Cir. 2009).
[785] *Id*.
[786] *Id.* at 416.
[787] *Id.*
[788] *Id.* at 420.

outweighed by government interests."[789] Conversely, if the status of Ward is more aligned with that of a prisoner, then under *Katz*, "a prisoner cannot invoke the Fourth Amendment because society is not prepared to recognize a prisoner's expectation of privacy in his prison cell."[790] Finally, the court explained that since Ward's status was that of an escaped prisoner, there was enough probable cause for police to arrest him, search his dwelling (i.e., the motel room), and the bag without a warrant.[791] A search did not occur under the particular facts of this case.

30. *U.S. v. Ramirez* (K-NS)

Immigration and Customs Enforcement ("ICE") Special Agent Hugas received a tip from a paid informant, Martin Delgado, that a white Chevy Cavalier would deliver a large quantity of marijuana.[792] Delgado was an occupant of the Cavalier and he gave Agent Hugas the specific timeframe and course of travel. The ICE agents found the Cavalier and followed it to 420 Esperanza. To get a better vantage, the agents drove past the property. Special Agent Hugas was able to see over the gate from the new position and he saw two men, Jose and Nelson Ramirez, allow access to the Cavalier onto their property.[793] Delgado exited the vehicle, and began unloading the contents of the vehicle (i.e., marijuana bundles). After they had completed their task, Delgado and his cousin reentered their vehicle and exited the property. Next, a Southern Union Gas truck was seen entering the premises, driven by Jesus Ramirez. After thirty to forty minutes of surveillance, the agents approached the property.[794] When they encountered Jose and Nelson, the ICE agents explained they had reason to believe there were narcotics on the premises. ICE agents presented a consent to search form to Jose. Jose signed the consent form

[789] *Id.* at 419.
[790] *Id.*
[791] *Id.* at 420.
[792] *U.S. v. Ramirez,* 145 Fed.Appx. 915, 917 (5th Cir. 2005).
[793] *Id*.
[794] *Id.* at 918.

and the subsequent search revealed no marijuana on the ground floor of the house or the carport.[795] The ICE agents then asked for consent to search the apartments located above the carport. The apartments were owned by Vanessa and Jose Garcia, who granted permission to the agents to search. Agents found large rolls of shrink wrap which they believed to be used for drug paraphernalia. The agents then decided to examine the canal near the residence.[796]

At the canal, agents discovered loose bundles of marijuana wrapped in cellophane and black plastic bags.[797] When questioned about the marijuana, Jose denied ever knowing about it and accused the Garcias' of handling it. Agent Hugas explained in court that because no one had seen either Jose or Nelson handle the marijuana the agents lacked probable cause to arrest, so they left the residence.[798] Agent Martinez returned the next morning and seized an additional 182 pounds of marijuana from the canal. In July 2002, Agents Hugas interviewed Juan Cardenas and explained he (Juan) was seen helping unload the white Cavalier of marijuana. Before Cardenas agreed to aid the investigation against the Ramirez family, he was unfortunately deported. He did not return to the United States until October 2003.[799] Cardenas was later arrested and his testimonial statements were used to indict Jose, Nelson, and Jesus of drug possession with intent to distribute. Jose and Nelson pled not guilty, while their brother, Jesus, pled guilty.[800] They were convicted and Jose and Nelson appealed.

The Court of Appeals for the Fifth Circuit held that the Ramirez brothers had no reasonable expectation of privacy in the balcony of the carport.[801] The Court reasoned this area was

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[795] *Id.*
[796] *Id.*
[797] *Id.*
[798] *Ramirez,* 145 Fed.Appx. at 919.
[799] *Id.*
[800] *Id.*
[801] *Id.* at 923.

accessible to anyone since it was the only way to enter the upstairs and there were no measures taken to restrict access. Also, the Court agreed with the district court's analysis concluding that the canal was part of the "open fields" outside the curtilage of the home.[802] Since Agent Hugas was standing on a lawful vantage point, the Ramirez family lacked a reasonable expectation of privacy when Agent Hugas saw into the canal.[803] Thus, the Court found that the Ramirez brothers also lacked a reasonable expectation of privacy in the canal area; accordingly, a search under the Fourth Amendment did not occur.

31. *City of Ontario, Cal. v. Quon* (K-S)

Jeff Quon was part of a Special Weapons and Tactics unit for the Ontario Police Department.[804] In 2001, the City awarded the police department new pagers capable of sending and receiving text messages. As a result, the City put a limit on the number of characters sent or received per month. Before distributing the pagers, the City announced a new computer policy. Although the language of the policy did not appear to cover text messages, the City explicitly stated it would treat text messages the same as emails.[805] During Quon's first couple of billing cycles, Quon had exceeded his monthly text message allotment. Lieutenant Duke reminded Quon that the city treated the messages as emails and he could be audited. Quon wrote a check to reimburse the City for the fees. The next few months, Quon exceeded his limits again and each time he reimbursed the city. Duke notified Chief Scharf of what was going on and that he was "tired of being a bill collector."[806] To investigate if the monthly allotment was too low, he requested to the see the text message transcripts of officers who exceeded the limit. Arch

[802] *Id.* at 921.
[803] *Id.* at 923.
[804] *City of Ontario, Cal. v. Quon,* 560 U.S. 746, 750,(2010).
[805] *Id.* at 751.
[806] *Id.* at 752.

Wireless provided the transcripts. Duke reviewed the transcripts and discovered that Quon's messages were not work related, and some were sexually explicit. Duke presented his findings to Chief Scharf, who referred the matter to internal affairs.[807]

The United States Supreme Court held that regardless of the expectation of privacy that Quon may have had related to the text messages, the "search" did not violate his Fourth Amendment rights.[808] The Court reasoned that the search was justified because there were "reasonable grounds for suspecting that the search [was] necessary for [a] noninvestigatory work-related purpose."[809] Furthermore, the Court reasoned the scope of the search was also reasonable due to its efficiency and the purpose. It was also viewed as not "excessively intrusive."[810] A search occurred, but it was deemed reasonable and did not violate Quon's Fourth Amendment rights.

32. *U.S. v. Crawford* (K-S)

Federal Bureau of Investigation Special Agent David Bowdich was in charge of investigating a series of bank robberies in San Diego between 1997 and 1998.[811] Approximately two years after receiving his assignment, Bowdich received a tip from an unnamed source that one of the participants in the most recent robber of the Bank of America on Ulrich Street went by the name of Ralphie Rabbit. Special Agent Bowdich later believed Ralphie Rabbit was an alias for Raphyal Crawford. Upon further investigations, Bowdich learned Crawford was on state parole with the special condition where Crawford had signed away his Fourth Amendment rights through a "Fourth Waiver."[812]

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[807] *Id*. at 753.
[808] *Id.* at 761.
[809] *Id.*
[810] *Id.*
[811] *U.S. v. Crawford,* 323 F.3d 700, 702 (9th Cir. 2003).
[812] *Id.* "In referring to the parole condition as a "Fourth Waiver," we adopt the government's preferred nomenclature. For purposes of all but Section II.A.3 *infra,* we treat the "Fourth Waiver" precisely as the dissent

Special Agent Bowdich explained the "Fourth Waiver" was a tool used against suspects to help them "talk" about crimes. As a result, Bowdich contacted Crawford's parole agent, Carl Berner, explained the situations, and obtained his permission to conduct a parole search of Crawford's residence.[813] Bowdich conducted the parole search on July 27, 2000 with the assistance of four other law enforcement officers. Crawford's sister, Abdullah, answered the door when the officers knocked on the door. They explained their intentions to Abdullah and she pointed them to the room where Crawford was asleep with his eighteen month old daughter.[814] Officers entered the room with weapons drawn, told Crawford they were conducting a parole search, removed him from the bedroom and escorted him to the couch, and the officers administered the search. The search lasted approximately 50 minutes long. As planned, no physical evidence was obtained from the search; however, this gave Bowdich the opportunity to converse with Crawford. Toward the end of their conversation, Bowdich suggested they move their chat to the FBI office so as to eliminate any distractions or the possibility of a creative defense attorney claiming coercive atmosphere with five officers.[815] Crawford agreed. At the FBI office, Crawford was placed in an interview room, where he was free to leave at any time, but the door was closed so as to keep the setting private. Bowdich began to read the *Miranda* rights and Crawford interrupted. Bowdich assured Crawford he was not in custody and could leave at

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urges that it be treated-as a mandatory condition of parole. For purposes of Section II.A.3, however, we treat the condition as a purported waiver in order to address the government's arguments in that respect." Additionally, the "Fourth Waiver" document contained the following conditions: "You and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer. You agree to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant, and with or without cause."

[813] *Crawford,* 323 F.3d at 703.

[814] *Id.*

[815] *Id.* at 704.

any time, but Bowdich never completed stating the *Miranda* rights.[816] Ultimately, Crawford admitted to being part of the robbery with a weapon.

The Court held that "after examining the totality of the circumstances-including Crawford's parole status, the parole condition, the location of the search, Crawford's expectation of privacy in his own home, the state's interest in rehabilitating parolees, and the interest of both the state and federal government in preventing and punishing recidivist crimes-we hold that a search of a parolee's home pursuant to a parole condition is reasonable only if it supported by reasonable suspicion."[817] However, based on the information stated previously, the Court ruled that law enforcement officials did not have reasonable suspicion. The Court agreed with the district court's analysis that there was an overall lack of reasonable suspicion to believe evidence of a criminal activity would have been present during the search, which consequently, made law enforcement not have the desired burden of proof to conduct the parole search, thus making the parole search illegal.[818]

33. *U.S. v. Scott* (K-S)

Scott was released on his own recognizance after being arrested for drug possession crimes.[819] A condition of his release involved him consenting to the random drug tests, regardless of the time of day or night and by any peace officer with or without a warrant. Additionally, said peace officer may conduct a search of his home for drugs at any time of day or night, with or without a warrant.[820] Officers received an anonymous tip that Scott may have had

[816] *Id.*
[817] *Id.* at 715.
[818] *Id.* at 716.
[819] *U.S. v. Scott,* 424 F.3d 888, 889 (9th Cir. 2005).
[820] *Id.*

some drugs. Officers went to his house and administered a drug test. Scott tested positive for methamphetamines, which the officers then searched his house and they found a shotgun.[821]

The Court held that Scott's drug test violated his Fourth Amendment rights.[822] The Court explained that Scott's consent to a search, as part of his release, is only lawful depending on the reasonableness of the search.[823] The government needed probable cause to administer the drug test and therefore the search of the house and the seizure of the shotgun, which relied on the drug test being positive to establish probable cause, were illegal. The Court concluded searches did occur; however, they were invalid as they lacked probable cause.[824]

34. *Riverdale Mills Corp. v. Pimpare* (K-NS)

James Knott is the President of Riverdale Mills Corporation in charge of making steel wired related products.[825] As part of the manufacturing process, alkaline and other toxic chemicals are created. Riverdale Mills Corporation has an agreement to dump the wastewater into the public sewer system as long as the company took the necessary steps to properly neutralize the harmful chemicals.[826] These steps include using a testing area (Manhole 1) which is two feet deep and eventually flows into the public area (Manhole 2) which is 300 feet away. All parties consider Manhole 1 as the testing area for Riverdale Mills Corporation as it is located on street they claim to be on their property.[827] Manhole 2 is not claimed and thus deemed as being the public. On July, 1997, the Environmental Protection Agency (EPA) received an anonymous tip that the plant may be dumping untreated wastewater due to a malfunction in the plant's treatment

[821] *Id.* at 890.
[822] *Scott,* 424 F.3d at 898.
[823] *Id.* at 893.
[824] *Id.* at 898.
[825] *Riverdale Mills Corp. v. Pimpare,* 392 F.3d 55, 56 (1st Circ. 2004).
[826] *Id.* at 57.
[827] *Id.*

facility.[828] The EPA sent Inspectors Pimpare and Granz to investigate the allegation on October, 21, 1997. When they arrived at the factory, they did not have a warrant. Inspector Pimpare asked President Knott if they could investigate the wastewater treatment facility to which he replied yes, as long as they are with him or someone designated by him.[829] Knott took the inspectors to the treatment plant where they conducted some testing. After the first round of testing was completed, Knott took the inspectors on a small tour of the facility.

After finishing the tour, both parties dispute the events which occurred next. According to Pimpare and Granz, they asked to return to the treatment area to conduct more tests, and Knott allowed it.[830] On the other hand, Knott claimed he did not give them consent to return to the treatment area. The second round of testing was later used to obtain a search warrant of the facility and eventually a criminal warrant.[831] Knott moved to suppress the evidence obtained during the rounds of testing. The district court suppressed the evidence obtained in the second round of testing, claiming the inspectors went beyond the scope of consent given by Knott.[832] In response, Knott brought a civil action law suit against the EPA for violating his Fourth Amendment rights. The district court denied Granz's and Pimpare's qualified immunity claim.[833] The defendants appealed.

The Court of Appeals for the First Circuit held that Riverdale Mills Corporation lacked a reasonable expectation of privacy when the wastewater was in the Manhole 1.[834] The Court reasoned that the wastewater will "inevitably" and "irretrievably" flow into the public area (i.e.

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[828] *Id.*
[829] *Id* at 58.
[830] *Id.*
[831] *Id.* at 58-59.
[832] *Id.* at 59.
[833] *Id.*
[834] *Id.* at 64.

Manhole 2). The Court explained this is very similar to trash being left on the curb, where they have held in the past no one is entitled to a reasonable expectation of privacy.[835] Based on this, the Court reasoned "Riverdale had abandoned any reasonable expectation of privacy in the wastewater by allowing it to flow irretrievably into a place where it will be 'exposed' … to the public."[836] Thus, the Court found that no Fourth Amendment violation had occurred and the actions by the inspectors were not a search.

[835] *Id.*
[836] *Id.*

Chapter 5 – Discussion and Conclusion

The Court in *Jones* in 2012 significantly renewed the old definition of a search under the Fourth Amendment by reintroducing the common law trespass test to the largely accepted and well-established reasonable expectation of privacy test laid out by the 1960s-era *Katz* decision. In *Jones*, the United States Supreme Court's holding depended on the interpretation of the Fourth Amendment search law. Justice Scalia wrote the opinion of the Court and stated, "It is important to be clear 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."[837] Justice Scalia went on to further describe a strong association between the written text of the Fourth Amendment and persons and property (i.e., houses, papers, and effects).[838] This focused reading of the Fourth Amendment bolstered the majority's opinion in returning to the trespass doctrine as a lens through which to evaluate Fourth Amendment searches. Thus, in *Jones*, the Court narrowly held that the warrantless installation of a GPS device to monitor a suspect is a search and, more broadly, revived the idea of the government physically intruding on private property as being considered a search.[839]

In doing so, the Court added another level of protection associated with Fourth Amendment searches, which both the police and the courts must now consider. This addition has had the effect of strengthening individual rights as well as alerting law enforcement to newer constraints they must consider in respect to possible Fourth Amendment intrusion. The property-based approach in *Jones* to considering Fourth Amendment searches is in addition to the

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[837] *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012).
[838] U.S.C.A. Const.Amend. 4.
[839] *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012).

aforementioned reasonable expectation of privacy lens from *Katz* through which police and courts must still continue to evaluate searches under the Fourth Amendment (i.e., *Jones* retained *Katz* the privacy notion as a criterion for determining if a Fourth Amendment search has occurred).[840]

In particular, prior to the *Jones* decision, the *Katz* test was used as the benchmark precedent to determine if a police search for Fourth Amendment purposes had occurred. It would only be found to be a search if the citizen's reasonable expectation of privacy had been intruded upon.[841] Considering the status of search inquiries prior to the Jones decision helps lay a foundation for studying the changes and trends in Fourth Amendment search law. Spanning 10 years before the *Jones* case was decided, 34 cases were decided to be relevant to this study. Of these 34, the courts found no search had occurred in more cases than they found a search had occurred. In fact, only 47% of the cases studied (16) found that a search had occurred (and therefore the citizen's rights were protected under the Fourth Amendment), and 53% of the cases studied (18) found that no search had occurred (thereby offering no protection for the citizens under the Fourth Amendment).

The *Jones* case itself brought to light specifically police use of GPS technology without a warrant, and how this new technology may impact citizens' rights through the collection of private information for possible future use in court. In terms of the balance between citizens' privacy rights and increased availability of technological tools for police to detect and prevent crime, the United States Supreme Court, in *Jones*, appeared to "tilt" this balance towards citizens' privacy and individual rights by determining that police placement of a GPS device on

[840] *U.S. v. Jones,* 132 S.Ct. 945, 952 (2012).
[841] *Katz v. United States*, 389 U.S. 347, 360-361 (1967)(Harlan, J., concurring).

the undercarriage of an individual's vehicle constitutes a physical trespass and, hence, a search of that individual under the Fourth Amendment.[842]

However, this finding by the Court in *Jones* does not represent a revolutionary new idea. In fact, originally, Fourth Amendment search questions under the Court's jurisprudence had been governed by a trespass test until the late 1960s when the *Katz* test emerged, and with it, the apparent, official elimination of the trespass test.[843] This elimination was partially due to the fact that the United States Supreme Court, at the time of the *Katz* decision, believed that the trespass test no longer had a place in Fourth Amendment search analyses with the growth and increased use by police of advanced technologies, including wiretaps. In particular, the United States Supreme Court in *Katz* decided that the trespass doctrine had no place in an era of intangible items, and, thus, created the notion that the Fourth Amendment protects people, not places.[844] This maneuver effectively killed at the time the trespass doctrine as an analytical approach to determining Fourth Amendment searches.

In today's world, however, one possible benefit for reintroducing the trespass test to the *Katz* test, and using it as another lens through which to evaluate Fourth Amendment searches, would be so that the law could attempt to keep up with further advancements and changes in technology. In the modern era, society as a whole has become increasingly interconnected to the point that individuals within that society arguably have a diminished expectation of privacy. Thus, one possible benefit resulting from the modification of the *Katz* test could be increased protection of individuals' Fourth Amendment interests; that is, even in those instances where

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[842] *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012).
[843] See *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928); *On Lee v. United States,* 747, 72 S.Ct. 967 (1952); *Katz v. U.S.,* 389 U.S. 347, 88 S.Ct. 507 (1967).
[844] *Katz v. U.S.,* 389 U.S. 347, 353 (1967).

individuals lack a reasonable expectation of privacy, they may still retain Fourth Amendment protections as a result of intrusions by police onto their physical property.

This fundamental change in Fourth Amendment search law as a result of *Jones* has been accompanied by not only certain, distinct advantages, but also several disadvantages or problems for courts, especially during the transition phase. For example, in terms of the advantages, lower courts (i.e., courts below the United States Supreme Court) now have a means of analyzing Fourth Amendment searches in situations where the *Katz* test could not reasonably apply.[845] This is a unique opportunity for lower courts to have more flexibility of adapting and tailoring the *Jones* "trespass" test to apply to variety of unique factual situations. For example, in *Lavan v. City of Los Angeles,* the homeless Appellees had no reasonable expectation in the property they left on the curb; however, the Court ruled that the city's actions were tantamount to search and seizure after the city's employees "meaningfully interfered with the Appellees's possessory interest in that property."[846] As another example, in *Grady v. North Carolina,* the United States Supreme Court explained the monitoring system set up to track sex offenders was tantamount to a search because the purpose was to obtain information "by physically intruding on a subject's body."[847] This flexibility allows the *Jones* decision to be more widely applicable, as well as assist in offering more protection against the use of technology encroaching upon individual citizens' rights.

Conversely, the *Jones* decision has also created a certain level of ambiguity among lower courts, as well. The United States Supreme Court's holding in *Jones* provided little clarity on

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[845] See *U.S. v. Martin,* 712 F.3d 1080 (7th Circ. 2013); *Lavan v. City of Los Angeles,* 693 F.3d 1022 (9th Circ. 2012); *Florida v. Jardines,* 133 S.Ct. 1409 (2013); *U.S. v. Davis,* 750 F.3d 1186 (10th Circ. 2014); *Grady v. North Carolina,* 132 S.Ct. 1368 (2015).

[846] *Lavan v. City of Los Angeles,* 693 F.3d 1022, 1030 (9th Cir. 2012).

[847] *Grady v. North Carolina,* 132 S.Ct. at 1371 (2015).

whether there were any circumstances to allow a warrantless GPS device or whether the decision would be applicable retroactively. Furthermore, *Jones* did not elaborate on what lower courts should do in the situation where one test, such as *Jones* test, would find a search, but the other test, such as the *Katz* test, would not.[848] Additionally, the previous use by police of now-largely obsolete technology, such as beeper technology, had previously been found by the Court to not constitute a search.[849] If law enforcement were to strategically return to using these more outdated technological devices, in particular, without first obtaining a warrant, it is unclear whether this conduct would be allowed under *Jones*, as the *Jones* decision was specific to GPS devices and attaching those physically to a vehicle. These unanswered questions and gaps in the law have left the lower courts with little guidance until future cases are decided by the United States Supreme Court resolving these issues.

Concerning specific problems arising from the *Jones* decision, the paradigm shift in Fourth Amendment search law reflected in *Jones* has led circuit courts to encounter certain cases during the transition phase. For example, certain circuit court cases included in this study consisted of facts which occurred **before** the *Jones* decision, but the case had not yet been heard or decided until **after** the *Jones* decision. Prior to *Jones*, the majority of circuit courts had ruled that the warrantless placement and use by police of a GPS device on the undercarriage of a vehicle did not constitute a search.[850]

In particular, due to this retroactivity issue, many federal appellate court cases (14, 24%) in this study decided after *Jones* fell under the umbrella of "binding-appellate precedent," which

[848] See *U.S. v. Davis,* 690 F.3d 226 (4th Cir. 2012). This was the only case which found a search under 1 test (i.e., *Katz*), but not the other test (i.e., *Jones*).
[849] See *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081 (1983) and *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, (1984). These cases held that law enforcement use of beeper technology to track a suspect traveling on public thoroughfares does not constitute a search.
[850] See cases labeled as "BP" or "Binding Precedent" in Appendix A.

reduced somewhat the overall amount of data for the study. After removing the "binding-appellate precedent" cases, 38 cases from the federal appellate courts were left that cited either *Jones*, *Katz*, or both. Of the 38 cases reviewed, 11 used *Jones* and physical trespass as the requirements for a search, 11 used *Katz* and the reasonable expectation of privacy doctrine as the requirements for a search, and 16 used both. Of the 11 cases using *Jones*, all were found to have determined a police search occurred. Of the 11 cases using *Katz*, 27.2% (3) were found to have decided a police search transpired and 72.8% (8) found no search occurred. Of the remaining 16 cases, which used both tests, 37.5% (6) of the cases found searches and 62.5% (10) of the cases found no search.

This research revealed that the category created by the study with the largest number of cases following Jones is "Both" (i.e., 16 cases). Courts were using a combination of both tests to solve various Fourth Amendment search inquiries instead of either solely *Katz* or *Jones* (i.e., 16 Both "versus" 11 Jones "versus" 11 Katz). However, majority of the courts in the study in the aftermath of Jones are using a single test or "lens" to evaluate whether a Fourth Amendment search had occurred (i.e., 22 courts "versus" 16 courts). There is a possible explanation for why courts may be preferring a single "lens" versus the dual "lens": Simplicity. Generally speaking, when the case involved a GPS device being used to monitor a suspect's whereabouts or property rights, the *Jones* test was used.[851] However, in other specific instances, such as involving a search of a defendant's home, both tests were typically used.[852] This proves to be promising, as these courts are not completely forgoing the former *Katz* reasonable expectation of privacy test,

[851] See, e.g., *U.S. v. Martin,* 712 F.3d 1080 (9th Circ. 2013); *U.S. v. Stephens,* 764 F.3d 327 (4th Circ. 2014); *U.S. v. Sellers,* 512 Fed.Appx. 319 (4th Circ. 2013); *U.S. v. Fisher,* 745 F.3d 200 (6th Circ. 2014); *U.S. v. Pineda-Moreno,* 688 F.3d 1087 (9th Circ. 2012); *U.S. v. Smith,* 741 F.3d 1211 (11th Circ. 2013).
[852] See, e.g.,*U.S. v. Mathias,* 721 F.3d 952 (8th Circ. 2013); *U.S. v. Anderson-Bagshaw,* 509 Fed.Appx. 396 (6th Circ. 2012); *U.S. v. Jackson,* 728 F.3d 367 (4th Circ. 2013).

but instead are doing as the United States Supreme Court in *Jones* appears to have wished in using both tests, either solely or in tandem, to solve Fourth Amendment search inquiries.

Of the cases which used both types of tests, a majority (10 cases or 62.5%) found no search had occurred. This would suggest that the courts who considered both *Jones* and *Katz* together are leaning more to a pro-law enforcement, crime control model in the wake of *Jones*. When looking at the aggregate of decisions made post-*Jones*, though, another picture becomes clear. Overall, 20 (52.6%) of the cases post-*Jones* found that searches had occurred, thus suggesting a slight favoring of a due-process, rights-focused approach following *Jones*. This information is interesting as, previously mentioned, there was a majority of cases where no search had occurred when using solely *Katz* or a combination of both tests (i.e., 9 courts finding a search "versus" 18 courts finding no search). Additionally, when comparing the pre-*Jones* data, 18 (53%) of the cases examined found that no search had occurred. This latter finding suggests that there was a significant change in the number of search determinations by federal appellate courts in the period examined prior to and following *Jones*.

Herbert Packer explained that the viewpoint of the criminal justice systems swings, like a pendulum, between two different models: crime control and individual's rights/due process. The crime control model generally forfeits the rights of the individual in the interest of catching and punishing as many offenders as possible. The due process model is focused around the protection of the rights of the accused, even if it means justice in the form of successful apprehensions and convictions is not being served in individual cases.[853] In other words, during time periods associated more with the crime control model, one should expect that the courts are generally

[853] Herbert L. Packer, *Two Models of the Criminal Process,* University of Pennsylvania Law Review, 1-68 (1964).

more inclined to find no police search has occurred, and hence the accused does not gain Fourth Amendment protections and in fact may lose them. Conversely, in times more associated with the due process model, courts generally err on the side of individual protections and rights, and are more likely to find that a search has occurred, and that the individual's rights are protected under the Fourth Amendment.

This "pendulum" may explain pre-*Jones* findings (i.e. 18 (53%) cases found no search). After 9/11, the American criminal justice system moved swiftly into a phase where individual rights were more willingly given up in favor of safety and protection provided by the government, thereby encroaching further upon traditional citizen's rights. At this time, courts moved to supporting police and crime control much more stringently than individual freedoms in an effort to protect the many (even if it meant intruding further on the rights of the few). The pendulum, as explained by Packer, was strongly on the crime control side. The cases considered in this study tracked the decisions of the courts from after 9/11 until the decision of *Jones* (2002-2012) as well as cases decided from *Jones* until May 31, 2015. Based on the post-*Jones* findings (i.e. 20 (52.6%) cases found a search), it appears the pendulum has swung away from the crime control model and toward the due process model (i.e. favoring rights of the individual over trying to control crime). This would also suggest that courts are following the intent behind the *Jones* decision and add another level of protections to safeguard the Fourth Amendment rights.

It is important to note that this pendulum model only suggests possible trends. Based on the data, this concept is not definitive of our courts grossly favoring crime control or due process. Moreover, the search rate has remained almost the same pre- and post- *Jones* (i.e., the percentage of determinations of searches being found to have occurred, remained similar in the period examined prior to *Jones* and the period examined after *Jones*). This finding could suggest that

the law may be less important to how judges determine case outcomes (i.e., privacy "versus" trespass test) than other forces. These forces could include philosophical beliefs, decisions favoring societal norms or policy trends, and the continued "balance" between due process and crime control. Nevertheless, this concept suggests that in the aftermath of *Jones* courts are leaning more toward a due process model.

On a related note, the *Katz* privacy test is not as concretely defined as the *Jones* property test, and indeed privacy is much more of a nebulous idea or concept overall than property. The lack of concreteness with the *Katz* privacy test gives the courts flexibility to change the meaning of a search depending on the model which the criminal justice system is more influenced by at the time. In contrast, the *Jones* decision was so specific (e.g., trespass on property or absence thereof), that any cases that fell under the same factual parameters must be evaluated in the same or at least fairly similar manner, as there are fairly clear delineations of what is and is not a search under *Jones*. Even in a time when crime control is the more favored view, that trend may be less likely to impact the application of the *Jones* decision. This may explain why all (100%) of cases using the *Jones* trespass test in the study found a police search occurred. That is the trespass test is more rigid than privacy test. For example, if there is a physical intrusion by police onto defendant's property, there is less interpretive room for courts to find no search. Also, this finding could provide some evidence of a trend consisting of a "backlash" to the erosion of privacy rights following 9-11. In particular, this may go beyond the law in that it is a societal response rooted in concerns regarding an all-powerful, unrestrained, intrusive government in the wake of 9-11.

In addition, in the wake of *Jones*, many of the federal appellate courts are still relying upon the *Katz* test, whether in combination with *Jones* or alone (71%). This may be because

there is more modern precedent available for these courts to rely upon for guidance that either uses or applies the *Katz* test (i.e., as opposed to the Jones trespass test), including relevant precedent from the Supreme Court itself.[854] Indeed, *Katz* had been the sole lens to evaluate Fourth Amendment searches over the last forty years (i.e., from 1967 to 2012, the year *Jones* was decided). As a result, courts have had more recent exposure and familiarity with *Katz* and are, therefore, more likely to select its reasonable expectation of privacy test to apply to various factual scenarios involving police searches under the Fourth Amendment. In turn, given its long-term existence as the sole criterion for evaluating Fourth Amendment search questions, police are also more familiar with applying the *Katz* test when they decide whether and how to conduct searches. If law enforcement is able to effectively understand and apply the law, then it is better able to work within the guidelines of those laws, including constitutional laws designed to protect citizens' rights. To a degree, the federal appellate courts may be aware of these basic effects of their decisions on police behavior, and accordingly choose *Katz* as the criterion because they know police will be better able to apply it.

In addition, the reliance on *Katz* may be explained by a concern among the federal circuit courts of avoiding possible findings of reversible error in light of the judicial uncertainties remaining under *Jones*. Thus, this may have caused these courts to be somewhat more hesitant or reserved in their application of *Jones*, including taking further steps to broaden *Jones*' application.[855] For example, in *U.S. v. Skinner*, the Court explained *Jones* does not apply to the facts of *Skinner* because, "the majority opinion's trespassory test [in *Jones*]" provides little guidance on "cases of electronic or other novel modes of surveillance that do not depend upon a

[854] See, e.g., *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081 (1983) and *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, (1984).
[855] See *U.S. v. Skinner,* 690 F.3d 772 (6th Circ. 2012).

physical invasion on property.[856]" As future Supreme Court cases further interpret and apply *Jones*, more cases may emerge from the federal appellate courts using *Jones* as the sole criterion with which to decide Fourth Amendment search questions. Thus, any change in Fourth Amendment search law as a result of *Jones* appears likely to be slow and gradual, and notably not as revolutionary as one may have expected.

Nonetheless, the effects of the change in Fourth Amendment search law following *Jones* are beginning to reveal themselves. For example, the United States Supreme Court in *Jones* originally applied the trespass doctrine to police use of GPS devices to track the whereabouts of a suspect's vehicle. Since *Jones*, federal appellate court cases and United States Supreme Court cases have applied the *Jones* trespass test to cases involving dog sniffs, electronic mail, computer searches, and other forms of obtaining electronic data, such as cellular data.[857] For example, in *Florida v. Jardines*, the United States Supreme Court found that police using a dog sniff technique at the front door of a residence constituted a search. The majority opinion agreed that this action constituted a search because the officer had trespassed onto Jardines' property.[858] In *U.S. v. Skinner*, DEA agents tracked Skinner through his cell phone as it was "pinging" off cell sites and through GPS technology installed on his cell phone. The Court concluded that no physical intrusion occurred in this case due to Skinner voluntarily using the cell phone for the intended purposes of communication. The agents who used the cell-phone GPS technology were merely taking advantage of technology the defendant chose to use.[859]

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[856] *U.S. v. Skinner,* 690 F.3d 772, 780 (2012)(citing *U.S. v. Jones,* 132 S.Ct. 945, 955)).
[857] See *Florida v. Jardines,* 133 S.ct. 1409 (2013); *Lavan v. City of Los Angeles,* 693 F.3d 1022 (9th Circ. 2012); *In re U.S. for Historical Cell Sit e Data,* 724 F.3d 600 (5th Circ. 2013); *U.S. v. Skinner,* 690 F.3d 772 (6th Circ. 2012).
[858] *Florida v. Jardines,* 133 S.Ct. 1409, 1418 (2013).
[859] *U.S. v. Skinner,* 690 F.3d 772, 779 (2012).

On another note, scholars had some major concerns about the addition of the *Jones* test to evaluate Fourth Amendment search inquiries. First, scholars worried that the *Katz* test would become obsolete with the "new" search test.[860] Second, scholars posited that the resurgence of the property test in *Jones* may reflect the slow realization by society as a whole that reasonable expectations of privacy are diminishing as a result of increasing technological interconnectedness.[861] Though where society may be heading with regard to its views on privacy is beyond the scope of this study, this study's findings clearly show that *Katz* has not been eliminated from Fourth Amendment search jurisprudence; to the contrary, in the wake of *Jones*, *Katz* was applied by many of the courts evaluated in this study either alone or in tandem with *Jones* (71%). Additionally, it is important to recognize that 71% of the examined cases used *Jones* trespass test in some manner either standalone or in combination with the *Katz* privacy test.

This study was centered on two hypotheses to be explored through the effects of the *Jones* decision. First, it was hypothesized that in the wake of *Jones*, a majority of the federal appellate courts would be relying on the trespass doctrine to determine Fourth Amendment search inquiries. This hypothesis is only partially accurate, as it did not take into consideration the use, by federal appellate courts, of both the *Jones* and *Katz* tests to determine a search. As such, this hypothesis, as it was stated, is rejected. Secondly, it was hypothesized that a majority of the federal appellate courts after *Jones* was decided would find that no police search occurred.

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[860] Jason D. Medinger, *Privacy Rights & Proactive Investigations: 2013 Symposium on Emerging Constitutional Issues in Law Enforcement: Article: Post-Jones: How District Courts are Answering the Myriad Questions Raised by the Supreme Court's Decision in United States v. Jones,* 42 U. Balt. L. Rev. 395, 395 (2013); Lauren Elena Smith, *PRIVACY LAW: Jonesing for a Test: Fourth Amendment Privacy in the Wake of United States v. Jones,* 28 Berkeley Tech. L.J. 1003, 1003 (2013).

[861] Nancy Forster, *Privacy Rights & Proactive Investigations: 2013 Symposium On Emerging Constitutional Issues In Law Enforcement: Article: Back to the Future: United States v. Jones Resuscitates Property Law Concepts In Fourth Amendment Jurisprudence,* 42 U. Balt. L. Rev. 445, 446 (2013); Lauren Elena Smith, *PRIVACY LAW: Jonesing for a Test: Fourth Amendment Privacy in the Wake of United States v. Jones,* 28 Berkeley Tech. L.J. 1003, 1003 (2013).

This study found that 52.6% (20) of the reviewed cases decided after *Jones* determined a police search had occurred; therefore, this hypothesis is also rejected.

There are many areas which are ripe for future research in dealing with Fourth Amendment search law, and specifically the impact which the *Jones* decision has had. One such area would be to further explore the "pendulum" idea set forth by Herbert Packer. Researching cases farther back than the ten years this study covered could help to identify a pattern in the shifting view between a crime control model and a due process model, and the relationship between the *Katz* test and the search determination. Expanding upon the cases reviewed in the wake of Jones by including lower court decisions would also add another layer of insight into Fourth Amendment search law. Not only including the variance among different jurisdictions in the study, but also considering the political atmosphere of each jurisdiction in accordance with their decisions would be yet another angle for future exploration (e.g., is a more conservative state or region responsible for a disproportionately large percentage of cases in which a search is not found, and/ or are states which are more liberal consistently siding with the due process model of thought and finding a search occurs?). Lastly, as more time passes, there will be a clearer picture of *Jones* and its impact on Fourth Amendment search law, as this study's largest limitation was the lack of available cases to review in light of the *Jones* case decision being so recent. As time moves forward, fewer cases will fall under the "binding-appellate precedent" category, and there will be more cases to substantiate this study's findings.

Appendix A

1. *U.S. v. Baez* (BP)

In August 2009, Bureau of Alcohol, Tobacco, Firearms and Explosives agents attached a warrantless global positioning system (GPS) device to Jose Baez 1989 Chevrolet Caprice.[862] ATF suspected Baez after a result of two fires that occurred earlier that year. At the scenes, Baez's vehicle was captured on camera, which ATF used to identify Baez as the owner. ATF agents tracked Baez from August 2009 and continued to monitor and track his movements for 347 days.[863] Baez drove his vehicle infrequently during the year of surveillance. However, during the week leading up to his arrest, Baez drove his vehicle six times. During this week, the Caprice had left the perimeter during the start of a fire.[864] Following the reported fire, local police located Baez inside his vehicle and arrested him. A search of his residence revealed evidence which linked him to the two previous fires.[865]

Baez argued to suppress all evidence obtained as a result of the GPS monitoring as it violated his Fourth Amendment Rights.[866] The Court of Appeals for the First Circuit stated that *Jones* explained that majority of circuit courts had been misinterpreting *Knotts* and other prior cases dealing with electronic surveillance.[867] In *Jones*, the United States Supreme Court concluded that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to

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[862] *U.S. v. Baez,* 744 F.3d 30, 31 (1st Cir. 2014). This case is an example of what is known as "then-binding precedent". This occurs when searches are being conducted by law enforcement in "objectively reasonable reliance on binding appellate precedent" and thus the exclusionary rule is deemed not to apply. In essence, law enforcement are protected by a good-faith-type exception to the exclusionary rule, namely because the officers are acting in a reasonable manner in accordance with prevailing precedent at the time of the events (i.e., in this instance, prior to the date *Jones* was decided).
[863] *Id.*
[864] *Id.* at 32.
[865] *Id*.
[866] *Id.*
[867] *Id.* at 35.

monitor the vehicle's movements, constitutes a 'search'"[868] In reference to *Knotts*, as stated by Justice Sotomayor in her concurrence, "[that case] 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."[869] However, ATF agents involved in Baez's case did not have the "benefit" of *Jones.* As a result, the Court turned to *Sparks*, which relied heavily on *Knotts* and *Davis.*

Thus, the Court reasoned that according to *Sparks*, the applicable language is that officers are responsible for complying with "precedent that is clear and well-settled"[870] The court in *Sparks* held that the warrantless installation of a global positioning system (GPS) device and subsequent data retrieved from the eleven days of monitoring did not warrant exclusion because that monitoring had occurred prior to *Jones.*[871] ATF agents acted reasonably within the rules laid out at the time by both their circuit and *Knotts*; in particular, *Knotts* had found that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[872]

This case represents pre-*Jones* warrantless GPS tracking by police, but of a significantly longer duration. Nonetheless, the Court concluded under *Davis* that suppression would not serve the purpose of the exclusionary rule because of good-faith reliance by the officers on then-applicable or binding precedent.[873]

2. *U.S. v. Sparks* (BP)

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[868] *Id.* at 32 (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[869] *Id.* at 31 (citing *U.S. v. Jones,* 132 S.Ct. 945, 956 (2012)).
[870] *Id.* at 33 (citing *U.S. v. Sparks,* 711 F.3d 58, 64 (1st Cir. 2013)).
[871] *Id.* at 31.
[872] *Id.* at 35 (citing *U.S. v. Knotts,* 460 U.S. 276, 281 (1983)).
[873] *U.S. v. Baez,* 744 F.3d 30, 35 (2014)(citing *Davis v. U.S.,* 131 S.Ct. 2419, 2423-24 (2011)).

Federal Bureau of Investigation (FBI) agents had reason to believe Craig Sparks was responsible for three bank robberies in 2009.[874] As a result, FBI agents placed a GPS tracker on a car owned by Sparks' mother without a warrant in December of 2009. On January 4, 2010, the FBI agents used the GPS to locate the car at the scene of a bank robbery and followed the car on the highway until it wrecked in a ditch; the two occupants fled the vehicle and a brief foot chase ensued.[875] A search of the car revealed evidence of BB gun weapons, clothing, and tools used in the bank robbery. Sparks moved to suppress the evidence obtained from the GPS tracker as it violated his Fourth Amendment rights.[876]

The Supreme Court held in *Jones* that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' for Fourth Amendment purposes."[877] Furthermore, the Court held that a search occurred because "[t]he Government physically occupied private property for the purpose of obtaining information.[878]" However, the events in *Sparks* were conducted prior to *Jones.* As a result, the court relied on *Davis*' good-faith exception, "where new developments in the law have upended the settled rules on which the police relied."[879] The good-faith exception to the exclusionary rule applied under *Davis* because even though the warrantless GPS surveillance did violate the Fourth Amendment rights, officers relied on "binding precedent" in the form of *Knotts* and *Moore*.[880]

[874] *U.S. v. Sparks,* 711 F.3d 58, 60 (1st Cir. 2013).
[875] *Id.*
[876] *Id.* at 61.
[877] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[878] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945, 949 (2012)).
[879] *Id.* at 68.
[880] *Id.* at 67.

Therefore, suppression would not have the intended effect of deterring improper law enforcement tactics.[881]

3. *U.S. v. Hohn* (BP)

Sheriff's deputies installed a warrantless "slap-on," battery-powered Global Positioning System (GPS) device to Mr. Hohn's truck on July 24, 2011.[882] The sheriff's deputy explained a hard-wired GPS device required a warrant, but the battery-powered "slap-on" GPS device did not require a warrant for installation and monitoring. Throughout the investigation, law enforcement officers replaced the batteries in the device to continue tracking. Law enforcement officers tracked the vehicle for 62 days, until November 9, 2011.[883] Based on the information they had collected during the course of the investigation, including the GPS device, officers obtained a warrant to install hard-wired GPS devices to Mr. Hohn's truck and another vehicle. Officers were unable to install the hard-wired GPS device to the truck, so they continued to use the "slap-on" GPS device.[884] Finally, the officers obtained a warrant to search the truck on December 23, 2011. Hohn moved to suppress the information obtained through the use of the GPS device; however, the district court denied the motion.[885] Mr. Hohn further argued that police should not be afforded good-faith exception as there was no clear precedent in their circuit.[886] The district court reasoned that the device placement qualified as a warrantless search, based on *Jones,* but the officers had acted in good faith which did not require exclusion.

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[881] *Id.*
[882] *U.S. v. Hohn,* 606 Fed.Appx. 902, 904-905 (10th Circ. 2015).
[883] *Id.* at 905.
[884] *Id.*
[885] *Id.*
[886] *Id.* at 906.

The Court of Appeals for the Tenth Circuit stated that the use of the "slap-on" GPS device was an unreasonable search.[887] However, the Tenth Circuit Court disagreed with Mr. Hohn's analysis in that officers were following Supreme Court decisions.[888] First, in *United States v. Knotts*, the Supreme Court held that warrantless monitoring through the use of beeper technology to track the defendant on public highways and streets did not constitutes a search under the Fourth Amendment.[889] Second, in *United States v. Karo*, the Supreme Court held that the placement of a beeper device and its subsequent transfer to the vehicle of the defendant was not considered a search.[890] Therefore, the Court reasoned that the officers' actions were following the binding precedent set forth in *Knotts* and *Karo.*[891] Also, the Court mentioned that the *Jones* decision did not abrogate *Knotts* and *Karo.*[892] As a result, the Court agreed with the district court's analysis and found that law enforcement officers were acting in good-faith based on Supreme Court binding precedent.

4. *Elkins v. Elenz* (BP)

David Elkins appealed aerial monitoring of his vehicle, which took place along a public causeway.[893] This surveillance was conducted by Drug Enforcement Administration agent Robbins. David Elkins also challenged the legality of his probation officer requiring him to submit a mental health examination. Elkins alleged that failure to comply with this request would

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[887] *Id.*
[888] "It is self-evident that Supreme Court decisions are binding precedent in every circuit." *U.S. v. Hohn,* 606 Fed.Appx. 902, 906 (2015)(citing *United States v. Katzin,* 769 F.3d 163, 173 (3d Circ. 2014)).
[889] *Id.* (citing *United States v. Knotts,* 460 U.S. 276, 277, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)).
[890] *Id.* (citing *United States. Karo,* 468 U.S. 705, 708, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984)).
[891] *Id.* at 907.
[892] The Court of Appeals for the Tenth Circuit stated, in contrast to the GPS device used in *Jones,* the beepers involved in *Knotts* and *Karo* "were not installed pursuit to a physical trespass, were not used for long-duration tracking, and provided only limited information." *U.S. v. Hohn,* 606 Fed.Appx. 902, 907 (2015).
[893] *Elkins v. Elenz,* 516 Fed.Appx. 825, 826 (11th Cir. 2013).

have resulted in punishment by probation revocation.[894] The district court held law enforcement were entitled to qualified immunity and accordingly, dismissed the allegations of constitutional violations.[895]

Elkins argued that the district court erred in dismissing his constitutional claims.[896] The Court of Appeals for the Eleventh Circuit stated that though "aerial surveillance" has been found to be constitutional in other courts, the use of a warrantless GPS device does constitute a search.[897] However, the events in this case, particularly the surveillance, occurred before Jones was decided. As a result, because *Jones* was decided after the violations, it did not clearly establish the relevant law; therefore, the Court concluded that the district court correctly held that Elkins suffered no violation of constitutional rights.[898]

5. *U.S. v. Aguiar* (BP)

In 2008, local police were looking into a drug distribution ring.[899] Over the course of the investigation, police suspected Stephen Aguiar of transporting drugs and William Murray as the distributor. Soon after, DEA agents joined the investigation agents and installed a warrantless GPS device on Aguiar's vehicle to monitor his movements.[900] The taskforce continuously monitored Aguiar until he was arrested on July 30, 2009. DEA agents used the GPS data to identify numerous associates of Aguiar.[901]

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[894] *Id.*
[895] *Id.*
[896] *Id.* at 827.
[897] *Elkins v. Elenz,* 516 Fed.Appx. 825, 828 (2013)(citing *U.S. v. Jones,* 132 S.Ct. 945 (2012)).
[898] *Id.* at 828-829.
[899] *U.S. v. Aguiar,* 737 F.3d 251, 255 (2nd Cir. 2013).
[900] *Id.*
[901] *Id*.

On appeal, Aguiar argued the GPS data and evidence obtained as a result is a violation of his Fourth Amendment according to the recent decision of *U.S. v. Jones.*[902] The Court of Appeals for the Second Circuit started their analysis by describing the differences of pre-*Jones* and post-*Jones* law. Additionally, the Court established their specific circuit "lacked" binding circuit precedent on GPS devices.[903] Although the second circuit had no established circuit precedent, the Court explained the Supreme Court decisions of *Karo* and *Knotts* could acts as binding precedents for all circuit courts.[904] As a result, since the event occurred before *Jones* was decided, the Court in *Aguiar* applied pre-*Jones* law (i.e., *Karo* and *Knotts*). Accordingly, the Court held that the officers in the current case of Aguiar had reason to believe they could attach a GPS device without a warrant based on the "then-binding precedent" of *Karo* and *Knotts.*[905] Based on this information, the Court felt it was necessary to apply *Davis* good-faith exception and allow the evidence to be admitted.[906]

6. *U.S. v. Katzin* (BP)

Harry Katzin and his brothers were prime suspects of a chain of burglarized pharmacies from Delaware, Maryland, and New Jersey from 2009 until 2010.[907] The Katzin brothers had a criminal history of burglarizing which made them suspects of the Federal Bureau of Investigation. FBI agents placed a warrantless GPS tracker on Harry Katzin's van to track the movements of his vehicle during December, 2010. Two days after the installation, the GPS device revealed the Katzin brothers had driven to the area of a Rite Aid at 10:45 a.m. and the van

[902] *Id.* at 256.
[903] *Id.* at 261.
[904] *Id.*
[905] *Id.* at 262.
[906] *Id*.
[907] *U.S. v. Katzin,* 769 F.3d 163, 167 (3rd. Cir. 2014).

remained inactive for over two hours.[908] The FBI contacted local law enforcement to investigate. When the van started moving, state troopers continued visual surveillance. Local law enforcement relayed that the Rite Aid had been burglarized and the troopers immediately pulled over the van.[909] Inside the van, law enforcement found Harry, his brothers, and the merchandise and equipment from the burglarized Rite Aid, including pill bottles and Rite Aid storage bins.[910]

The appellees argued that the warrantless installation of the GPS device and the subsequent monitoring violated their Fourth Amendment rights.[911] The Court of Appeals for the Third Circuit stated that the events of this case occurred prior to *Jones,* and thus, must apply pre-*Jones* law. First, the Court established that the third circuit court had no existing precedent which governed the use of warrantless GPS tracking devices. However, in instances such as these, the Court of Appeals explained the U.S. Supreme Court's precedent are binding to all circuits. Thus, the Court of Appeals turned to *Knotts* and *Karo,* which found that the use of beeper technology to track a suspect through public thoroughfares was not a search. The Court of Appeals concluded the agents installed the GPS device onto Katzin's van, they exhibited an "objectively 'reasonable good-faith belief' that their conduct [was] lawful." [912]

7. *U.S. v. Brown* (BP)

In 2006, a warrantless GPS device was attached to a Jeep owned by Kevin Arms who notified police that an associate, Troy Lewis, was transporting drugs inside the Jeep.[913] Police followed the vehicle and subsequently stopped and arrested Lewis and his associates, including

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[908] *Id.*
[909] *Id.* at 168.
[910] *Id.*
[911] *Id*.
[912] *Id.* at 184 (citing *Davis v. U.S.,* 131 S.Ct. 2419, 2427 (2011)).
[913] *U.S. v. Brown,* 744 F.3d 474, 478 (7th Cir. 2014).

Brown. Brown argued that the GPS device violated his Fourth Amendment rights and evidence should be suppressed.[914]

The Court of Appeals for the Seventh Circuit decided since the facts of this case occurred *prior to Jones* and therefore the relevant police conduct is not subject to the Supreme Court's decision. In particular, the Court turned to "binding appellate precedent" in the form of *United States v. Garcia.*[915] However, *Garcia* was not established until February 2007, which also was after the events of the present case. Thus, Brown contended there was no "binding appellate precedent" in 2006 to guide the use of warrantless installation of GPS device to monitor a person of interest.[916] The Court turned to *Knotts* and *Karo* decisions to help them decide on the warrantless electronic surveillance issue. The Court explained through *Knotts* and *Karo* that tracking a vehicle's location by GPS does not constitute a search.[917] The Court concluded that *Knotts* and *Karo* provided law enforcement (and the lawyers guiding them) enough jurisprudence for objective reasonable reliance. Thus, the Court afforded law enforcement the Davis good faith exception to the exclusionary rule based on officers' reasonable reliance on *Knotts* and *Karo* to shape their conduct in this case.[918]

8. *U.S. v. Thomas* (BP)

On February 28, 2010, Jonathan Thomas drove to United States Border Patrol checkpoint.[919] He drove a pick-up truck with a large toolbox attached to the bed. Border Patrol Agent (BPA) LeBlanc had his drug-detection dog, Beny-A. As Thomas' truck passed the first inspection zone,

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[914] *Id.* at 476.
[915] *Id.* at 477.
[916] *Id*.
[917] *Id.*
[918] *Id.* at 478.
[919] *U.S. v. Thomas,* 726 F.3d 1086, 1087 (9th Cir. 2013).

the drug dog changed to "alert behavior."[920] As a result, BPA LeBlanc instructed Thomas to the second inspection zone. BPA LeBlanc instructed Thomas and his children to exit the vehicle. BPA LeBlanc and his drug dog walked around the truck. The drug dog, Beny-A, jumped up and placed his paws and nose on the vehicle's toolbox.[921]

After obtaining Thomas' keys, BPA LeBlanc found bundles of marijuana inside the toolbox.[922] Thomas argued that the drug dog, Beny-A, invaded a constitutionally protected area when his paws and nose were placed on the toolbox located inside the bed of the truck.[923] The Court of Appeals for the Ninth Circuit explained that the events of this case preceded *Jones* and *Jardines,* and therefore, must apply pre-*Jones* law.[924] The Court turned to *Illinois v. Caballes*, which concluded the use of a dog sniff on a vehicle did "not rise to the level of constitutionality cognizable infringement."[925] Therefore, the Court of Appeals for the Ninth Circuit concluded that LeBlanc acted in objective reliance on binding precedent, the evidence (i.e., the marijuana seized) was admitted correctly and should not be excluded.[926]

9. *U.S. v. Ransfer* (BP)

A series of robberies took place between April 2011 and June 2011.[927] An informant tipped law enforcement officers to believe a group of six individuals were responsible for the robberies. Police attached a GPS tracking device to a vehicle without a warrant in connection with the series of robberies. Through the use of the GPS tracking device, several individuals were arrested

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[920] *Id.*
[921] *Id.*
[922] *Id.* at 1088.
[923] *Id.*
[924] *Id.* at 1093.
[925] *Id.* at 1094 (citing *Illinois v. Caballes,* 543 U.S. 405, 409, 125 S.Ct. 834 (2005)).
[926] *Thomas,* 726 F.3d at 1095.
[927] *U.S. v. Ransfer,* 749 F.3d 914, 919 (11th Cir. 2014).

and soon after, physical evidence was recovered in connection with the robberies.[928] In *Jones*, the Supreme Court held that attaching a GPS to a vehicle constituted a "search" under the Fourth Amendment.[929] However, in *Davis*, the Supreme Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[930]

In the pre-*Jones* era during which the facts of this case occurred, the Court of Appeals for the Eleventh Circuit held that the warrantless use of an electronic tracking device to monitor the vehicle's movements on public thoroughfares does not constitute a search.[931] The Court turned to the then-binding precedent of *Michael*, which held warrantless electronic surveillance of a vehicle required police to only have reasonable suspicion of criminal wrongdoing.[932] Therefore, as a result of this precedent, the Court found that the *Davis* good-faith exception to the exclusionary rule applies, and that officers had the necessary burden of proof (i.e., reasonable suspicion) in this case. Therefore, the Court concluded that, the installation of an electronic tracking device on the outside of the vehicle without a warrant did not violate the defendant's Fourth Amendment rights.[933]

10. *U.S. v. Oladosu* (BP)

Officer Robert DiFilippo of the Rhode Island State Police High Intensity Drug Trafficking Area (HIDTA) task force suspected Abdulfatah Oladosu being part of a drug smuggling ring.[934] As a result, Office DiFilippo attached a warrantless GPS device to the undercarriage of

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[928] *Id*.
[929] *Id.* at 921.
[930] *Id.* at 922 (citing *Davis v. U.S.,* 131 S.Ct. 2419, 2423-24, 180 L.Ed.2d 285 (2011)).
[931] *Ransfer,* 749 F.3d at 922.
[932] *Id.*at 922-923 (citing *United States v. Michael,* 645 F.3d 252, 258 (8th Cir. 1981)).
[933] *Id.* at 938.
[934] *U.S. v. Oladosu,* 744 F.3d 36, 37 (1st Cir. 2014).

Oladosu's vehicle. Subsequently, the GPS device was used to track Oladosu for forty-seven days. The surveillance helped the task force to arrange a delivery of heroin where Oladosu and accomplices were arrested.[935] The Court decided that *Jones* does not apply in this case as the events occurred before *Jones* was decided. Thus, the Court had to consider if the *Davis* good-faith exception would apply.[936]

The Court did not consider or mention the *Katz* reasonable expectation of privacy. Instead, the court turned to the pre-*Jones* precedent case of *Sparks,* which allowed warrantless GPS monitoring for eleven days.[937] As a result, the court concluded the good-faith exception to the exclusionary rule applied. Thus, the Court concluded that law enforcement were acting on objectively reasonable reliance on then-binding precedent, based on *Baez* and *Sparks*.[938] Therefore, the *Davis* good-faith exception to the exclusionary rule applied to this pre-*Jones* warrantless GPS case.

11. *U.S. v. Barraza-Maldonado* (BP).

Drug Enforcement Administration (DEA) agents were notified by an informant of a possible drug trafficking plot.[939] The informant described the vehicle as a maroon 2006 Nissan Maxima and DEA agents found the car in a public parking lot. To monitor it, DEA agents installed a warrantless GPS device on a vehicle and tracked its whereabouts. Four weeks later, Barraza-Maldonado drove the vehicle to travel from Arizona to Minnesota. Once it entered Minnesota, DEA agents notified Minnesota State Police.[940] Trooper Schneider stopped the vehicle and found that neither of the occupants had a valid driver's license. Additionally, when the Trooper brought

[935] *Id*.
[936] *Id*.
[937] *Id.* (citing *U.S. v. Sparks,* 711 F.3d 58, (2013)).
[938] *Id.* at 39.
[939] *U.S. v. Barraza-Maldonado,* 732 F.3d 865, 866 (8th Cir. 2013).
[940] *Id.* at 867.

out the drug detection dog, the vehicle "tested" positive for narcotics. As a result, police discovered large amounts of drugs inside the vehicle after towing it to a nearby garage.[941]

Barraza-Maldonado argued the warrantless installation of the GPS device and subsequent monitoring violated his Fourth Amendment rights.[942] The events in this case occurred before *Jones* was decided. The Ninth Circuit had frequently held that the installation of GPS devices on a car did not constitute a search under the Fourth Amendment, especially if there was no reasonable expectation of privacy in the vehicle's location.[943] In this case, the warrantless GPS device was installed in a public lot in the Arizona area and eventually tracked through various public highways (i.e., the installation and tracking of the device occurred in non-private, public locations). Therefore, the Court held that "the agents acted in objectively reasonable reliance on binding Ninth Circuit precedent in installing the device, and binding Supreme Court precedent in using the device to monitor the car's movements on public highways."[944] As a result, the Court concluded the officer's actions qualified under the good faith exception to the exclusionary rule.[945]

12. *U.S. v. Holt* (BP)

Co-defendant Lewis filed a motion which claimed that federal law enforcement's use of a GPS device to monitor and track her whereabouts from September 21, 2011 until September 29, 2011 violated her Fourth Amendment rights.[946] The co-defendant argued that according to *U.S. v. Jones*, the attachment of GPS devices by police to vehicles without a warrant, constitute

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[941] *Id.*
[942] *Id.*
[943] *Id.* at 868.
[944] *Id.* at 867-868 (citing *United States v. McIver,* 186 F.3d 1119 (9th Cir. 1999); *United States v. Knotts,* 460 U.S. 276, 281, 103 S.Ct. 1081 (1983)).
[945] *Barraza-Maldonado,* 732 F.3d at 869.
[946] *U.S. v. Holt,* 777 F.3d 1234, 1246 (11th Cir. 2014).

unreasonable searches. However, the events in this case transpired before *Jones* was decided. As a result, the Eleventh Circuit Court of Appeals in *Holt* held that officers were acting in reasonable reliance upon then-binding appellate precedent.[947] The Court concluded that the district court correctly applied the good-faith exception to the actions of the officers.[948]

13. *United States v. Taylor* (BP)

Indianapolis Metro Police received a tip that Dwan Taylor had in his possession both drugs and illegal firearms in 2011.[949] The investigation was led by Detective Sergeant Garth Schwomeyer, who discovered Taylor had a history of drug related offenses. Further investigation of Taylor's phone records showed his most frequent contact had also been convicted of distributing drugs. Detective Schwomeyer presented these facts to a Marion County Superior Court judge who allowed Detective Schwomeyer's petition for permission to attach a GPS device to Taylor's vehicle for sixty (60) days on Taylor's vehicle.[950] The vehicle was tracked to a storage facility two weeks later. At the storage site, Detective Schwomeyer learned that Taylor had rented a locker. A drug-detection dog was summoned to the scene, and the dog alerted positive for drugs in Taylor's locker.[951] Finally, based on the evidence, Detective Schwomeyer applied and obtained a warrant to search the locker.[952] Inside the locker, police found drugs, firearms, and other drug paraphernalia. Taylor was charged with drug possession.

Taylor argued that a warrantless attachment of a GPS device and the subsequent tracking of his vehicle violated his Fourth Amendment rights.[953] The Court of Appeals for the Seventh

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[947] *Holt,* 777 F.3d at 1258.
[948] *Holt,* 777 F.3d at 1259.
[949] *U.S. v. Taylor,* 776 F.3d 513, 514 (7th Cir. 2015).
[950] *Taylor,* 776 F.3d at 515.
[951] *Id.*
[952] *Id.*
[953] *Id.*

Circuit held that the police officers attached the GPS under existing binding appellate precedent and therefore, under this precedent, a search had not occurred. As a result, no warrant was required to attach the GPS device. [954] Additionally, since this case fell under the then-binding precedent doctrine, *Davis'* good-faith exception to the exclusionary rule applied here to prevent the suppression of the drug evidence.[955]

14. *U.S. v. Robinson* (BP)

Fred Robinson was acting chair for a non-profit charter school, Paideia, in St. Louis in 2006.[956] Robinson also worked at the Parking Division of the St. Louis Treasurer's office. Since 1990, Robinson consistently recorded 40 hours of work at the Parking Division, including on holidays. This pattern continued to occur after the parking services were outsourced to another company in June 2009. This garnered the attention of the Federal Bureau of Investigation (FBI).[957] Special agents interviewed former employees who worked in the same division as Robison and the employees did not recognize or know of him. This prompted FBI special agents to conduct surveillance on Robinson between December 2009 and January 2010.[958] On January 22, 2010, "agents installed, without a warrant, a GPS device on his car while parked on a public street."[959] The FBI agents tracked and recorded data until March 17. The investigation led FBI to conclude Robinson no long inspected parking meters and was later charged with wire fraud, program theft, and various other charges.[960] On appeal, Robinson argued that the admission of GPS evidence violated his Fourth Amendment rights.

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[954] *Taylor,* 776 F.3d at 517.
[955] Id. (citing *U.S. v. Brown,* 744 F.3d 474 (7th Cir. 2014)).
[956] *U.S. v. Robinson,* 781 F.3d 453, 457 (8th Cir. 2015).
[957] *Id.*
[958] *Id.*
[959] *Id* at 458.
[960] *Id.*

The Court of Appeals for the Eighth Circuit examined if the GPS evidence warranted suppression. Robinson's argument relied on the Supreme Court's decision in *Jones,* which required a warrant to be used when installing of a GPS device to track the movements of a suspect. However, the Court instead chose to use *United States v. Knotts* and *United States v. Karo,* as the facts of this case occurred prior to the *Jones* decision.[961] In *Knotts*, the Court allowed the use of beeper technology to track and monitor a car traveling on public roads.[962] Additionally, in *Karo,* the Court allowed the government to track a target by using a beeper inside a can transferred to the target vehicle.[963] The Court of Appeals held that the FBI "agents could reasonably rely on the precedent set forth by *Knotts* and *Karo* as binding appellate precedent."[964] Therefore, the Court of Appeals found that the district court properly admitted the GPS evidence during trial.[965] Thus, the Court applied *Davis'* good-faith exception. Additionally, the Court elaborated that Robinson's vehicle was in public view and on "public thoroughfares" and therefore Robinson had no reasonable expectation of privacy, either.

15. *U.S. v. Rayford* (PE)

Rayford pleaded guilty in district court to various charges related to bank robbery.[966] Rayford pushed for a certificate of appealability (COA) in order to appeal district court decisions. Rayford claimed "his counsel was ineffective because they failed to seek suppression of evidence obtained through a warrantless satellite tracking device."[967] To support his claim, Rayford relied heavily on the decision of *U.S. v. Jones.*[968] The Court of Appeals for the Tenth

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[961] *Id* at 459.
[962] *Id* (citing *United States v. Knotts,* 460 U.S. 276, 281, 285, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)).
[963] *Id* (citing *United States v. Karo,* 468 U.S. 705, 712-713, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984)).
[964] *Id.*
[965] *Id* at 460.
[966] *U.S. v. Rayford,* 556 Fed.Appx. 678, 679 (10th Cir. 2014).
[967] *Id.*
[968] *Id.*

Circuit held that Rayford could not prove his defense counsel was ineffective.[969] Accordingly, the Court denied Rayford's Certificate of Appealablity (COA).[970]

16. *U.S. v. Baker* (PE)

Between January and March 2011, a sequence of retail stores being robbed in Kansas City led law enforcement to suspect Baker.[971] During the commission of one of the robberies, a retail camera caught images of the vehicle owned by Baker's girlfriend. Officers monitored the vehicle by installing a GPS device. Shortly after installation, the GPS device was used to link the vehicle to a recent robbery, where Baker was stopped and arrested. Arresting officers found cash and a loaded .40 caliber Glock handgun.[972] Baker argued in his appeal that the GPS device installed without a warrant violated his Fourth Amendment rights.[973] In *Jones,* the Supreme Court held that the attachment of a GPS device and its subsequent monitoring constitutes a search under the Fourth Amendment.[974] However, Baker failed to place a motion to suppress the evidence in the district court and as a result, waived his right to do so. Therefore, the Court found that Baker waived his Fourth Amendment right to object to the use of the GPS device by police without a warrant. Accordingly, his argument in the appellate court "cannot provide a basis for disturbing his conviction."[975]

17. *U.S. v. Curbelo* (PE)

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[969] *Id.* at 680
[970] *Id.* at 681. Because the court in Rayford did not attempt to examine if a search occurred, but instead focused on a procedural issue (i.e., a motion for reconsideration based on ineffective assistance of counsel), this case is classified as procedural (error).
[971] *U.S. v. Baker,* 713 F.3d 558, 559 (10th Cir. 2013).
[972] *Id.*
[973] *Id.* at 560.
[974] *Id.* (citing *U.S. v. Jones,* 132 S.Ct. 945 (2012)).
[975] *Id.* at 562.

In 2007, Ivan Curbelo worked as a carpenter for Jose Diaz.[976] Diaz offered Curbelo an opportunity to be a part of an indoor marijuana growing operation. Drug Enforcement Administration (DEA) agents began investigating Diaz and placed a global-positioning-system (GPS) device on vehicles used by Diaz and his accomplices.[977] The GPS device was placed on the vehicle without a warrant. The DEA also conducted GPS tracking of cellular phones.[978] However, DEA agents did obtained court approval to seize information through cellular phone communications. Soon after, Curbelo and other members of the Diaz's organization were indicted in violation of Controlled Substances Act.[979] The Court of Appeals for the Eleventh Circuit examined the GPS tracking of the vehicles and cell phones. However, Curbelo did not file a motion to suppress the GPS tracking evidence in the district court.[980] The Court held Curbelo failed to adequately challenge the tracking and waived his rights to challenge the Fourth Amendment issue.[981]

18. *Jones v. Warden, FCC Coleman-Medium* (PE)

Albert Jones was charged and convicted of drug crimes with intent to distribute (i.e., cocaine, crack cocaine, and marijuana) in 2001.[982] Law enforcement obtained text message information from one of the co-conspirators to use as evidence against Jones. Jones challenged the evidence obtained on appeal, where the Eleventh Circuit Court of Appeals affirmed the district court's holding.[983] As a result, Jones filed multiple motions, including § 2255 and § 2241 Petition.[984] The district court had denied § 2255 because they had been previously been brought up in direct

[976] *U.S. v. Curbelo,* 726 F.3d 1260, 1264 (11th Cir. 2013).
[977] *Id.* at 1264-1265.
[978] *Id.* at 1265.
[979] *Id.*
[980] *Id.* at 1266.
[981] *Id.* at 1267.
[982] *Jones v. Warden, FCC Coleman-Medium,* 520 Fed.Appx. 942, 943 (11th Cir. 2013).
[983] *Id.*
[984] *Id.* at 943-944.

appeal. The district court dismissed § 2241. The Court of Appeals for the Eleventh Circuit reviewed this case based on habeas relief under § 2241.[985] The Court concluded that defendant's argument was without merit for several reasons. First, the Court explained the differences between factual and legal innocence in this case.[986] This is important because Jones argued he was "actually innocent," when in fact, Jones claimed he was wrongfully charged and convicted based on unlawfully obtained text messages, which is the basis for "legal" innocence.[987] Second, Jones raised the text message issues in both his direct appeal and his first § 2255 motion.[988] Thus, defendant argued his conviction was based on the unlawfully obtained text messages which violated his due process rights. In addition, by admitting these text messages into trial, defendant argued his Fourth Amendment rights were also violated. Third, the Court explained "*Jones* deals the admissibility of the evidence and does not establish that Jones was convicted of a non-existent crime or is factually innocent of the charged drug conspiracy."[989] Fourth, *Jones* was not made retroactive to cases such as the defendant's whose facts occurred prior to *Jones*. This citing case falls within the category of procedural error because the court did not specifically use the *Jones* search criteria, and listed the four previously mentioned reasons why *Jones* cannot apply to defendant's case.

19. *U.S. v. Glay* (PE)

William Glay scammed financial institutions and retail establishments with counterfeit checks between the years of 1999 and 2007.[990] On March 2, 2007, police obtained a search warrant for the apartment owned by Emily Jallah, the suspected mother of Glay's child. Officers

[985] *Id.* at 943.
[986] *Id.* at 945.
[987] *Id.*
[988] *Id.*
[989] *Id.*.
[990] *U.S. v. Glay,* 550 Fed.Appx. 11, 11 (D.C. Cir. 2014).

had used information in obtaining this warrant from a previous warrantless tracking device on Glay's vehicle.[991] On March 6, 2007, law enforcement executed the search warrant and obtained evidence from the apartment to be used against Glay. Glay was later arrested and pleaded guilty. Glay argued based on *Jones* that his conviction must be re-visited. However, Glay waived his challenge to the warrantless use of the tracking device by pleading guilty.[992] The Court referenced *United States v. Delgado-Garcia* in commenting that "[u]nconditional guilty pleas that are knowing and intelligent ... waive the pleading defendants' claims of error on appeal, even constitutional claims."[993] Accordingly, the Court held that Glay waived his right to challenge. In sum, this case falls under the procedural error category.

20. *U.S. v. Johnson* (PE)

The government used a global positioning system device without a warrant during its investigation of Johnson's crimes.[994] Johnson filed a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure.[995] The Court of Appeals for the Ninth Circuit concluded Johnson failed to properly establish a suppression motion and waived his argument.[996] However, the Court quickly ran through the analysis if he had properly filed the motion. In *Jones*, the Supreme Court found that a search occurred when officers attached a GPS device to the vehicle of defendant Jones under a stale, expired warrant.[997] Although the court in *Johnson* admitted that *Jones* may have had the effect of strengthening Johnson's argument for a new trial, the Court ruled no error occurred in the district court when they denied Johnson's motion.[998] The Court

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[991] *Id.* at, 12.
[992] *Id.*
[993] *Glay,* 550 Fed.Appx at 12 (D.C. Cir. 2014)(citing *U.S. v. Delgado-Garcia,* 374 F.3d 1337, 1341 (D.C. Cir. 2004)).
[994] *U.S. v. Johnson,* 537 Fed.Appx. 717, 718 (9th Cir. 2013).
[995] *Id.* at 717.
[996] *Id.* at 718.
[997] *Id.*
[998] *Id.*

explained that pre-*Jones* law held "circuit precedent indicated that attaching an electronic tracking device to a vehicle was neither a search nor a seizure under the Fourth Amendment" hence, it did not require police to obtain a warrant.[999] Thus, the police acted in objectively reasonable reliance on binding appellate precedent and the evidence obtained is not subject to the exclusionary rule in accordance with *Davis.*[1000] Therefore, the Court concluded that the "government could present the same evidence at any re-trial which would ultimately lead to Johnson's original conviction" and based on the reasons already mentioned, the Court found Johnson suffered no prejudice.[1001]

[999] *Id.*
[1000] *Id.*
[1001] *Id.* at 718-719.