Case No. 12-3023

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

ABASI S. BAKER,

Appellant.

Appeal from the United States District Court for the District of Kansas
Honorable Carlos Murguia, United States District Judge
Case No. 2:11-cr-20020-CM

REPLY BRIEF OF THE APPELLANT

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Table of Contents

Table of Authorities

Cases

Constitution of the United States

Federal Rules of Appellate Procedure

Federal Rules of Criminal Procedure

Reply as to Issue I

In the first issue in his opening brief, Appellant Abasi Baker explained how the district court plainly erred in admitting evidence obtained through the warrantless attachment and monitoring of a GPS tracking device on his car. He explained that, under *United States v. Jones*, 132 S.Ct. 945 (2012), handed only down five days after his sentencing, attachment of such a device constitutes a "search" under the Fourth Amendment requiring a warrant. He then explained how the exclusionary rule necessitated reversal of the district court's judgment.

In response, the Government largely sidesteps the substance of this issue. Instead, first, it argues Mr. Baker waived this claim by not moving to suppress the evidence obtained through the warrantless GPS search. It insists he cannot show good cause for being excused from this failure. Then, the Government argues that, under plain error review, admission of the evidence did not prejudice Mr. Baker, as it inevitably would have been discovered through lawful means. Finally, it argues the evidence was admissible anyway, as the agent executing the search was acting in "good faith" based on "binding judicial precedent" from *other* circuits.

The Government's arguments are without merit. First, under *Griffith v. Kentucky*, 479 U.S. 314 (1987), new rules announced by the Supreme Court, including *Jones*, always apply to cases such as this pending on direct review, regardless of whether the claim properly had been raised earlier. Not only does the

Griffith rule allow Mr. Baker to raise his *Jones* claim as plain error for the first time on appeal, but it makes the fact *Jones* was handed down *after* his sentencing sufficient "good cause" for his not having raised it earlier.

Second, "inevitable discovery" cannot be based on the Government's speculation or desires as to uncertain situations. Instead, that doctrine only applies when a definite chain of events inevitably leading lawfully to the evidence already had begun. Here, there was no such inevitable chain. The Government's insistence it inevitably would have discovered the evidence lawfully is merely its speculation as to uncertain events, as well as a misstatement of the record.

Finally, the "good faith" exception to the exclusionary rule could not apply. As other courts now have explained regarding *Jones*, reliance on anything less than truly binding circuit precedent – especially when the state of non-binding precedent is in flux – cannot support an *objective* reasonability. As, before *Jones*, this Court never had decided the issue of whether placing a GPS tracker on a car required a warrant, there was no such binding precedent. Indeed, at the time of the search, other circuits had disparate answers to this question. The warrantless search in this case could not have been in *objectively* reasonable good faith.

The admission of the evidence obtained from the warrantless GPS search of Mr. Baker's car was plain, prejudicial error. The Court should reverse the district court's judgment of conviction and sentence against him.

A. The Court should review for plain error the admission of evidence obtained from the Government's warrantless GPS tracking of Mr. Baker's vehicle.

In his opening brief, Mr. Baker admitted he had not timely raised or preserved the issue of whether, under *Jones*, 132 S.Ct. at 945, the district court erred in admitting evidence obtained from the Government's warrantless attachment of a GPS tracking device to his car (Appellant's Brief 42-43). He requested this Court review that issue for plain error (Aplt.Br. 42-43). He presented his argument in the context of plain error review.

In response, the Government argues that, under Fed. R. Crim. P. 12(e), Mr. Baker "is not entitled to review of this issue unless he can show good cause for failing to raise it before the district court" (Appellee's Brief 23). It argues Mr. Baker "waived [this] claim," barring *any* review of it, as he "cannot show 'good cause' for failing to raise [this] claim before the district court" (Aple.Br. 25).

The Government anticipates, however, that Mr. Baker "might argue" *Jones* "constitutes good cause because the [Supreme] Court decided it on January 23, 2012, after [Mr. Baker]'s trial had ended" and, indeed, after his sentencing, while this appeal was pending before this Court (Aple.Br. 25). It argues, though, that this cannot "constitute good cause because the basis for any *Jones*-type suppression claim existed before" the actual decision in *Jones* (Aple.Br. 26). For this, however, it offers no authority.

This is because no authority supports the Government's argument. Rather, as Mr. Baker briefly mentioned in his opening brief (Aplt.Br. 51), in *Griffith*, 479 U.S. at 314, and its progeny, the Supreme Court was plain that, once it *has* decided an issue (regardless of previous percolations over it in the lower courts), the decision applies to all cases then pending on direct review, regardless of otherwise-existing procedural devices generally barring it. This is because, if this were not so, the present law of the United States would not apply equally to all individuals, but instead would apply disparately based on mere temporal differences. The *Griffith* line of cases firmly rejects that situation – even when an issue otherwise might have been waived.

Under the *Griffith* rule, the fact *Jones* was decided while this appeal was pending must be held to constitute "good cause" for Mr. Baker's not having raised his *Jones* claim earlier. Indeed, the procedural waiver rule of Fed. R. Crim. P. 12(e) itself must be trumped by the *Griffith* rule mandating fundamental fairness in applying the Constitution equally to all litigants pending direct review at the time a new rule is announced.

The Government's ignoring of the *Griffith* rule is without merit. The Court should review Mr. Baker's first issue for plain error.

1. As the Supreme Court decided *United States v. Jones* only five days after Mr. Baker's sentencing, there is good cause for his failure to raise his *Jones* claim in a timely suppression motion.

Fed. R. Crim. P. 12(b)(3)(C) requires a motion to suppress evidence "must be raised before trial …." Under Fed. R. Crim. P. 12(e), "A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver." Thus, a "federal criminal defendant is barred, absent good cause, from raising a reason to suppress evidence for the first time on appeal." *United States v. Burke*, 633 F.3d 984, 988 (10th Cir. 2011) (quoting *United States v. Rose*, 538 F.3d 175, 185 (3d Cir. 2008)). The Rule 12 "good cause" showing applies "at the appellate level," too, and this Court may "grant relief" under it. *Id.*

Good cause exists in this case for Mr. Baker's failure to raise his *Jones* claim in a timely suppression motion. Mr. Baker could not have sought the district court to apply the now-binding precedent of *Jones* to this case within the time limit specified in Rule 12(e), because, at that time, *Jones* had not yet been decided.

In this case, the district court ordered any pretrial motions to be filed by May 25, 2011 (Appellant's Appendix 8). The trial took place over four days in September 2011 (Aplt.App. 9-10). The district court sentenced Mr. Baker on January 18, 2012 (Aplt.App. 11). Only then, five days later, on January 23, 2012 –

the same day Mr. Baker filed his notice of appeal (Aplt.App. 11) – did the Supreme Court unanimously decide 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.'" 132 S.Ct. at 949.

The "good cause" exception of Rule 12(e) is "a safety valve for counsel's inadvertent failure to raise an argument at a suppression hearing." *Burke*, 633 F.3d at 991. It is intended to "protec[t] against a miscarriage of justice." *Id.* If "sufficient information was" not "available to defense counsel that would have enabled him to frame his suppression motion to include" a specific claim, that can constitute sufficient "good cause" to meet Rule 12(e). *Id.* at 988 (quoting *United States v. Wilson*, 115 F.3d 1185, 1191 (4th Cir. 1997)). Similarly, an "impediment to [a defendant's] ability to raise [an] issue" can constitute sufficient "good cause." *Id.* (quoting *United States v. Dewitt*, 946 F.2d 1497, 1502 (10th Cir. 1991)).

The circumstances of this case as to Mr. Baker's *Jones* claim support opening Rule 12(e)'s "good cause" "safety valve" to address the justice of the Government's warrantless action that *Jones* firmly decides was a search, requiring a warrant. Sufficient information to make out a suppression claim under *Jones* was unavailable to Mr. Baker's counsel below because, regardless what other circuits had decided by May 2011, *Jones* had not yet been decided. While whether attachment and monitoring of a GPS tracking device to a car is a "search" was in

flux nationally, the law announced by the Supreme Court in *Jones* had *not yet been* announced in May 2011, when Mr. Baker's pretrial motions were due.

To avoid applying the Constitution merely because Mr. Baker's circumstances vis-à-vis *Jones* are an accident of time would be a miscarriage of justice. Good cause must exist for Mr. Baker's not raising *Jones* before *Jones* existed. The *Griffith* rule explains this more fully.

2. Under the rule of *Griffith v. Kentucky*, plain error application of *Jones* is proper for the first time on appeal, regardless of Fed. R. Crim. P. 12(e)'s ordinary waiver rule.

The fundamental principle of *Griffith*, 497 U.S. at 107 – that a new rule announced by the Supreme Court always applies to cases pending on direct review at the time of the Supreme Court's decision – even more strongly supports that the timing of *Jones* must constitute sufficient "good cause" under Rule 12(e). The *Griffith* rule simultaneously both mandates application of the "good cause" "safety valve" in Rule 12(e) to Mr. Baker's *Jones* claim and trumps Rule 12(e)'s ordinary waiver principles in applying *Jones* to this case.

In all instances, a litigant whose case is on direct review is entitled to the benefit of a change in the law through retroactive application of the intervening decision. *Harper v. Va. Dep't. of Taxation*, 509 U.S. 86, 97 (1993) (civil cases); *Griffith*, 479 U.S. at 328 (criminal cases).

When this occurs, traditional waiver rules do not bar this application:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given *full retroactive effect in all cases still open on direct review and as to all events*, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 509 U.S. at 97 (emphasis added). This is especially true in criminal cases: "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 328.

Retroactive application of an intervening decision is part of the "basic norms of constitutional adjudication …" *Id.* at 322. There are two overarching reasons for this. The first is to ensure federal courts fulfill their constitutional function of adjudication rather than legislation. *Id.* Because of the "case or controversy" requirement of U.S. Const. art. III, the "nature of judicial review" is such that a federal court necessarily adjudicates a single case and decides the issue before it; in so doing, it may announce a new rule. *Id.* Preservation of the "integrity of judicial review" requires the new rule be applied "to all similar cases pending on direct review." *Id.* at 322-23. This is because the "'nature of judicial review'" is different from "the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." *Harper*, 509 U.S. at 95 (quoting *Griffith*, 479 U.S. at 322).

The second reason for retroactively applying new rules to *all* cases pending direct review is that "selective application of new rules violates the principle of treating similarly situated [parties] the same." *Id.* (alteration in original) (quoting *Griffith*, 479 U.S. at 323). In the context of retroactivity, the Supreme Court has measured whether parties are "similarly situated" solely by reference to the finality of the direct appeal. *See, e.g.*:

- *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting) (contending an intervening decision ought to apply retroactively to case not yet final when intervening decision was handed down, because "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently");
- *Harper*, 509 U.S. at 97 (discussing "similarly situated" in terms of the finality of the case: "[W]e now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases"); and
- *United States v. Johnson*, 457 U.S. 537, 555-56 (1982) (discussing "similarly situated defendants" strictly in terms of the finality of conviction on direct appeal, and advocating an approach "that resolve[s] all nonfinal convictions under the same rule of law").

An case is considered "final" for retroactivity purposes when the availability of an appeal has been exhausted and the time for a certiorari petition has expired or

a certiorari petition has been denied. *Griffith*, 479 U.S. at 321 n. 6; *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (Harlan, J., concurring) ("Just as in the criminal field the crucial moment is ... the time when a conviction has become final, ... so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become res judicata.").

Implicit in the Government's argument that Mr. Baker waived his *Jones* claim before *Jones* even existed is that litigants are not "similarly situated" for retroactivity purposes if one litigant has failed to make an argument anticipating the intervening decision while another litigant has made such an argument. For *Griffith* retroactivity purposes, this must be a distinction without a difference.

Indeed, previous decisions retroactively applying new, intervening Supreme Court decisions to cases pending on direct review do not support adding an additional, procedural hurdle to that retroactive application, as the Government advances. Such a hurdle unnecessarily would narrow the class of litigants who will receive the benefit of an intervening Supreme Court decision.

Numerous federal appellate courts – including this Court – previously have cast aside traditional waiver principles in applying intervening Supreme Court decisions to cases pending on direct review. For example, when the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), holding the Sixth

Amendment right to a jury trial prohibited judges from increasing criminal sentences beyond statutory maximums when based on facts other than those decided by a jury, this Court and many others applied *Apprendi* to cases pending on direct review even where the *Apprendi* claim otherwise would have been waived. *See, e.g.*:

- *United States v. Clinton*, 256 F.3d 311, 313 (5th Cir. 2001) (on GVR order from the Supreme Court) (reviewing a defendant's sentences for plain error where "the [*Apprendi*] arguments presented herein were not presented to the district court or this Court on initial appeal");
- *United States v. Terry*, 240 F.3d 65, 72-73 (1st Cir. 2001) (reviewing a defendant's *Apprendi* claims for plain error where the defendant did not object "at sentencing" and failed to put the "arguments in the initial briefs on appeal");
- *United States v. White*, 238 F.3d 537, 541 (4th Cir. 2001) (reviewing an *Apprendi* claim for plain error where the defendant first raised it in a supplemental brief);
- *United States v. Delgado*, 256 F.3d 264, 280-81 (5th Cir. 2001) (same);
- *United States v. Mietus*, 237 F.3d 866, 875 (7th Cir. 2001) (reviewing a defendant's *Apprendi* claims for plain error after the defendant "waived" the claims below by failing to object at trial; the defendant raised *Apprendi*-type claims for the first time in supplemental briefs five days before oral argument);

- *United States v. Poulack*, 236 F.3d 932, 935-37 (8th Cir. 2001) (reviewing an Apprendi claim for plain error where the defendant first raised the claim in a "supplemental brief");
- *United States v. Cernobyl*, 255 F.3d 1215,, 1216-17 (10th Cir. 2001) (same);
- *see also United States v. Gonzales*, 436 F.3d 560, 575-76 (5th Cir. 2006) (reviewing for plain error admission of evidence under recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004), raised for first time on appeal).

In all of these cases, the litigants certainly *physically* could have raised a claim that the Sixth Amendment prohibited their sentence enhancements for the reasons *Apprendi* gave. Just as the Government advances here, "the legal bases of [the *Apprendi* claims] were well-known at least as of [the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)], when the" Supreme Court laid the basic framework it specifically confirmed in *Apprendi*, and even earlier, "when the Supreme Court had granted certiorari in" *Apprendi* (Aple.Br. 26). But this mattered not: *Apprendi* had to be applied retroactively and the defendants' *Apprendi* claims reviewed.

The Supreme Court itself specifically has confirmed the *Griffith* rule of retroactivity trumps ordinary waiver principles. *See Powell v. Nevada*, 511 U.S. 79 (1994). The defendant in *Powell* was arrested without a warrant and held for ten days before he was brought before a magistrate. *Id.* at 81-82. The law of Nevada

was that "an accused waives his right to a speedy arraignment when he voluntarily waives his right to remain silent and his right to counsel," which the defendant had done. *Id.* at 82.

While the case was on direct appeal, the Supreme Court decided *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991), promulgating a new rule that an arrestee must be brought before a judicial officer within 48 hours of a warrantless arrest. *Id.* at 83-84. The Nevada Supreme Court, however, refused to apply *McLaughlin* retroactively, holding the defendant "had waived his right under state law to a speedy arraignment." *Id.* at 82.

The U.S. Supreme Court reversed: regardless of Nevada's procedural waiver laws, it could not "decline to apply a recently rendered … decision of [the Supreme Court] to a case pending on direct appeal." *Id.* at 83. The *Griffith* rule controlled: "a new rule for the conduct of criminal prosecutions is to be applied retroactively to *all cases*, state or federal, pending on direct review or not yet final." *Id.* at 84 (quoting *Griffith*, 479 U.S. at 328) (emphasis added). Thus, "the Nevada Supreme Court erred in failing to recognize that *Griffith v. Kentucky* calls for retroactive application of *McLaughlin*'s 48-hour rule." *Id.* at 85.

The Supreme Court's "retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a potential ground for relief." *Davis v. United States*, 131 S.Ct. 2419, 2430 (2011).

"Retroactive application under *Griffith* lifts what would otherwise be a categorical bar to obtaining redress for the government's violation of a newly announced constitutional rule." *Id.* at 2430-31.

Thus, the *Griffith* rule operates to open otherwise-closed doors and require application of the new decision. "It may 'make more sense to speak in terms of the 'redressability' of violations of new rules, rather than the 'retroactivity' of such new rules." Retroactive application does not determine what "appropriate remedy" (if any) the defendant should obtain." *Id.* at 2431 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008)). "Remedy is a separate, analytically distinct issue." *Id.*

"As a result, the retroactive application of a new rule of substantive Fourth Amendment law," such as *Jones* in this case, "raises the question whether a suppression remedy applies; it does not answer that question." *Id.* "When [the Supreme Court] announced its decision in [*Jones*], [Mr. Baker's] conviction had not yet become final on direct review. [*Jones*] therefore applies retroactively to this case. [Mr. Baker] may invoke its newly announced rule of substantive Fourth Amendment law as a basis for seeking relief." *Id.*

As the *Griffith* rule makes plain, as this Court and the other circuits recognized in applying *Apprendi* and other new decisions to pending cases, and as the Supreme Court specifically confirmed in *Powell*, a litigant's previous failure to have raised a claim based on a new, intervening Supreme Court decision cannot

waive that claim. Were it otherwise, the reasons the Supreme Court advanced in *Griffith* for that rule – preserving the integrity of judicial review and treating similarly situated parties the same – would be vitiated.

The Court should review Mr. Baker's *Jones* claim for plain error.

B. The district court plainly erred in admitting evidence obtained from the Government's warrantless GPS tracking of Mr. Baker's vehicle.

As the Government states, "Under the plain error doctrine, this Court will reverse the district court's judgment … if the defendant shows (1) an error; (2) that is plain, which means clear or obvious; (3) that affects substantial rights; and (4) that "seriously affects the fairness, integrity, or public reputation of the judicial proceedings" (Aple.Br. 24) (quoting *United States v. Morris*, 562 F.3d 1131, 1133 (10th Cir. 2009)).

In his opening brief, Mr. Baker explained the admission of the evidence obtained through warrantless attachment and monitoring of a GPS tracking device on his car met this standard (Aplt.Br. 42-57). This is because the Supreme Court's unanimous decision in *Jones* confirms the clear and obvious current law that this was a "search" under the Fourth Amendment requiring a warrant, meeting the second prong (Aplt.Br. 46-49). He then showed the search in this case violated the Fourth Amendment and no exception to the exclusionary rule applied, meeting the first and third prong (Aplt.Br. 49-55). Finally, he showed the admission of the evidence prejudiced him, meeting the fourth prong (Aplt.Br. 55-57).

The Government argues the admission of this evidence was not plain error (Aple.Br. 27-32). But it limits this argument to the third and fourth prongs of plain error review (Aple.Br. 27-32).[1] It insists Mr. Baker "cannot show that any error in admitting this evidence affected his substantial rights … or seriously affected the fairness, integrity, or public reputation of judicial proceedings" (Aple.Br. 27). It argues this is because the evidence would "have been discovered *but-for* [*sic*] the illegal search," invoking the "inevitable discovery" doctrine (Aple.Br. 29-30). It suggests the evidence would have been "inevitably discovered" due "to GPS information supplied by the GPS tracker in [Mr. Baker's] phone and visual surveillance by" one of its agents (Aple.Br. 31) (emphasis removed).

The Government's reliance on the "inevitable discovery" exception is misplaced. There was no chain of events already in place that unquestionably would have led to the evidence discovered through the warrantless GPS search, as the "inevitable discovery" exception requires. Instead, the Government's argument is based on its mere speculation that other methods of search *might* have uncovered

[1] In its brief, the Government conceded "that the Court's decision in *Jones* rendered the district court's admission of [this] evidence … both erroneous and plain under the first and second plain-error prongs" (Aple.Br. of Aug. 17, 2012, at 27-28 n.5). Several days later, it retracted this express concession in an errata notice. Its new pages 27 and 28 omit this language. Even after the errata notice, however, the Government makes no argument as to the first and second prongs. Its strategic concession now is implied, rather than express.

the evidence. In relying on its cell phone GPS tracking and visual surveillance, however, the Government misstates the record.

1. The error in admitting the evidence affected Mr. Baker's substantial Fourth Amendment rights.

In *Jones*, the Supreme Court held "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'" within the meaning of the Fourth Amendment. 132 S.Ct. at 949. Nonetheless, the Government contends the warrantless GPS tracking of Mr. Baker's car did not implicate Mr. Baker's Fourth Amendment rights because it was not "the but-for cause" of Mr. Baker's ultimate arrest and capture of the car containing all the evidence described in his brief (Aple.Br. 30-31). Invoking the "inevitable discovery" exception to the exclusionary rule, the Government suggests it instead would have obtained this evidence based on "GPS information supplied by the GPS tracker in [his] phone and visual surveillance by Agent McCrary," leading agents to "have inevitably located and arrested [Mr. Baker] while he was in the Nissan Sentra" (Aple.Br. 30-31).

"The inevitable discovery doctrine provides an exception to the exclusionary rule and permits evidence [discovered unlawfully] to be admitted if an independent, lawful police investigation inevitably would have discovered it." *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005). Still, what makes a discovery 'inevitable' is not probable cause alone … but probable cause

plus a chain of events that would have led to a warrant (or another justification) independent of the search." *United States v. Souza*, 223 F.3d 1197, 1204 (10th Cir. 2000) (quoting *United States v. Brown*, 64 F.3d 1083, 1085 (7th Cir. 1995)). "The key issue in these cases, one of probability, is how likely it is that a [lawful search would have occurred] and that the evidence would have been found pursuant to the [lawful search]." *Id.*

As such, "the inevitable discovery exception does not apply in situations where the government's only argument is that it had probable cause for the search." *Id.* This is because "the inevitable discovery exception" does not apply "so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant …. [T]o excuse the failure to obtain a warrant merely because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement." *Id.*at n.8 (quoting *United States v. Mejia*, 69 F.3d 309, 319-20 (9th Cir. 1995)).

Given this, the common thread in inevitable discovery cases is that a specific, definite chain of events *already* was set in place that *inevitably* would have led to the evidence obtained otherwise unlawfully. For example, where a defendant's vehicle was unlawfully searched at the time of arrest, yielding evidence, the exclusionary rule would not apply to that evidence when his vehicle inevitably would have been searched – and the evidence found – in a standard

inventory search after his arrest. *See United States v. Albert*, 579 F.3d 1188, 1197 (10th Cir. 2009); *United States v. Martinez*, 512 F.3d 1268, 1273-74 (10th Cir. 2008); *United States v. Tueller*, 349 F.3d 1239, 1243-45 (10th Cir. 2003). Thus, application of the inevitable discovery doctrine usually has "involved application of the doctrine in conjunction with another exception to the warrant requirement, such as an inventory search or a search incident to arrest." *Cunningham*, 413 F.3d at 1199.

Conversely, the inevitable discovery doctrine cannot be invoked based on a "speculative assumption of 'inevitability' …." *United States v. Owens*, 782 F.2d 146, 153 (10th Cir. 1986). Thus, when police officers unlawfully searched a defendant's hotel room without a warrant, uncovering evidence, the Government could not argue the evidence inevitably would have been discovered anyway by someone else speculatively entering the defendant's hotel room. *Id.* at 152-53.

The Government's reliance here on "inevitable discovery" is similarly speculative. It suggests its GPS tracking of Mr. Baker's cell phone, as opposed to his vehicle, as well as an agent's visual sighting of Mr. Baker's vehicle, inevitably would have resulted in his immediate arrest and discovery of the evidence at the same time and in the same manner as that resulting from the GPS tracking of his vehicle (Aple.Br. 30-31).

The record does not support this. First, the GPS tracker on Mr. Baker's phone did not have the same immediate mapping capability as the one unlawfully placed on his vehicle. The phone tracker merely sent the phone's location to an e-mail address every 15 minutes (Aplt.App. 788). Unlike the GPS tracking of the vehicle, the location of the phone was limited solely to that report (Aplt.App. 788, 791). Conversely, the unlawful *vehicle* GPS sent an e-mail to investigators containing the vehicle's location whenever the vehicle physically started and stopped and also could be pulled up in live-time on a map on a computer screen (Aplt.App. 791).

As Agent Hauger, himself, who personally had "slapped" the GPS on the vehicle, testified, there had been no ability to make a "definitive" placement of the vehicle before the warrantless tracker, *even with* the every-15-minute cell phone GPS (Aplt.App. 790, 1158). He stated that, before the tracker on the vehicle, because "there wasn't a tracker on the vehicle," the phone tracker's location "wasn't as definitive" (Aplt.App. 1158).

Indeed, it was the *car*'s GPS tracker that first alerted him to the car's presence in the area of 75th Street and Metcalf Avenue on March 3, 2011, where he then determined there recently had been a robbery (Aplt.App. 823-24, 1088-89). He immediately began monitoring the car's live-time GPS tracking on his computer, following it as it traveled east on I-70 from Kansas toward and

eventually through Downtown Kansas City, Missouri (Aplt.App. 826-28). As Agent Hauger admitted, this would not have been possible with the every-15-minute-message cell phone GPS tracker alone (Aplt.App. 1158). The Government's suggestion that the cell phone GPS tracker alone "inevitably" would have led to the stop that day is without merit.

So, too, is the Government's reliance on Agent McCrary's "visual surveillance" (Aple.Br. 31). As it states, "Agent McCrary began attempting to locate [Mr. Baker's] vehicle very shortly after the Radio Shack robbery after receiving information that the subject vehicle was moving north into Kansas City, Kansas," upon which he "visually sighted the vehicle at 55th Street and Metropolitan, and followed it until it was stopped" (Aple.Br. 31). But that "information that the subject vehicle was moving north into Kansas City, Kansas" was *from the vehicle GPS tracker*, which Agent Hauger personally was following on a live-time map on his computer (Aplt.App. 826-28).

Thus, the Government's only bases for invoking "inevitable discovery" *both* stem *directly* from the GPS tracker unlawfully placed on Mr. Baker's vehicle. The far "less definitive" GPS tracking of the cell phone was not what led either to Mr. Baker's vehicle being "visually sighted" or to its ultimate stop. Rather, the agents followed where the vehicle's own GPS tracking told them it was going, found and followed it on the road, and then set up a preemptive roadblock to pull it over.

Unlike in all the cases, cited above, in which the evidence inevitably would have been discovered, absent the unlawful tracking there was no definitive chain of events set in place that inevitably would have led to the evidence. Instead, the chain the Government seeks to invoke itself was set in place *by* the unlawful GPS tracking. It offers no other suggestion of how the evidence inevitably would have been discovered. Its speculation is simply not enough. *Owens*, 782 F.2d at 153.

The Government's invoking the inevitable discovery doctrine is without merit. As in *Jones*, the unlawful attachment of a GPS tracking device to Mr. Baker's car violated Mr. Baker's Fourth Amendment rights, satisfying the third prong of plain error review.

2. The error seriously affected the fairness and integrity of judicial proceedings, as there is a reasonable possibility the evidence obtained from the warrantless search contributed to the jury's decision.

The Government lumps together the third and fourth prongs of plain error review (Aple.Br. 27-32). In his opening brief, however, Mr. Baker explained the thrust of these prongs really amounts to "prejudice" (Aplt.Br. 55) (citing *United States v. Marcus*, 130 S.Ct. 2159, 2164 (2010)). That is, plain error seriously affects the fairness of judicial proceedings and the defendant's substantial rights when it is "prejudicial" – that there is "a reasonable probability that the error affected the outcome of the trial." *Marcus*, 130 S.Ct. at 2164.

Thus, in his opening brief, Mr. Baker explained in detail how the admission of plethora of evidence recovered only due to the unlawful GPS tracking of his car prejudiced him (Aplt.Br. 55-57). Besides invoking "inevitable discovery," however, the Government offers no response to this. And for good reason: it cannot seriously be argued the evidence taken from his car (detailed in Aplt.Br. 54-55) did not affect the outcome of his trial. Prejudice is established when "there is a reasonable possibility that the evidence complained of *might* have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

This is obviously so for the evidence obtained from the illegal, warrantless GPS tracking in this case. The Government offers no argument otherwise.

C. The good faith exception to the exclusionary rule does not apply.

Finally, the Government argues "the good-faith exception" to the exclusionary rule "applies" because Agent Hauger attached the GPS device to Mr. Baker's car "with an objectively reasonable good-faith belief that [his] conduct was lawful" (Aple.Br. 33). Mr. Baker previously addressed this in his opening brief, explaining that, as the state of the question in *Jones* was in nationwide flux at the time Agent Hauger attached the GPS device, with guidance from no bidning authority – neither this Court nor the Supreme Court – reliance on *some* judicial authority was not enough (Aplt.Br. 51-54).

In response, however, the Government invokes *Davis*, 131 S.Ct. at 2419, to argue Agent Hauger was "acting in reasonable reliance both on the absence of precedent from this Circuit [*sic*] alerting [him] that [his] conduct was unlawful, and on binding judicial precedent from the majority of the circuit courts of appeal [*sic*] holding such conduct lawful" (Aple.Br. 33-35). This argument is without merit.

First, the Government misunderstands what "binding precedent" is. In the Tenth Circuit, only previous decisions of *this Court* and the Supreme Court are "binding." *United States v. Collins*, 461 Fed.Appx. 807, 813 n.1 (10th Cir. 2012). As it admits, at the time Agent Hauger attached the GPS device to Mr. Baker's car – and before *Jones* – there was an "absence of precedent from this" Court on the *Jones* issue, and the other circuits were split (Aple.Br. 33).

Under *Davis*, reliance on *non*-binding precedent does not amount to objective good faith. Rather, the Supreme Court's plain delineation in *Davis* is that reliance on *truly* binding circuit precedent is in objectively good faith, as Mr. Baker admitted in his opening brief (Aplt.Br. 51-52) (discussing *United States v. McCane*, 573 F.3d 1037, 1041-44 (10th Cir. 2009)). For,

> when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "'ac[t] as a reasonable officer would and should act'" under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from "'do[ing] his duty.'"

Davis, 131 S.Ct. at 2429 (citations omitted).

As Justice Sotomayor observed in her concurring opinion in *Davis*, however, the decision did "not present the *markedly different question[s]* whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled" or "whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled." *Id.* at 2435, 2436 (Sotomayor, J., concurring in the judgment) (emphasis added).

Indeed, in the eight months since *Jones*, district courts have been called upon to answer this question specifically in circuits, such as this, that had not previously decided before *Jones* whether attachment and monitoring of a GPS device to a vehicle was a "search" under the Fourth Amendment. Four have held the search was not justified by the good faith exception. *See United States v. Ortiz*, ___ F.Supp.2d ___, 2012 WL 2951391 at *1 (E.D.Pa. 2012); *United States v. Lujan*, 2012 WL 2861546 at *3 (N.D.Miss. 2012); *United States v. Lee*, ___ F.Supp.2d ___, 2012 WL 1880621 at *6-10 (E.D.Ky. 2012); *United States v. Katzin*, 2012 WL 1646894 at *10 (E.D.Pa. 2012). Three have held the search was justified by the good-faith exception. *See United States v. Oldasou*, ___ F.Supp.2d ___, 2012 WL 3642851 at *5-10 (D.R.I. 2012); *United States v. Baez*, ___ F.Supp.2d ___, 2012 WL 2914318 at *1 (D.Mass. 2012); *United States v. Leon*, ___ F.Supp.2d ___, 2012 WL 1081962 at *4-5 (D.Haw. 2012).

As the District of Rhode Island pointed out in *Oldasou*, however, "these district court results are not necessarily at odds with one another when plotted on [a] timeline." 2012 WL 3642851 at *9. Rather,

> What emerges from all of these decisions is a common theme – assessment of police culpability, based on the legal landscape at the time of the GPS attachment. … The better approach … is to conduct an analysis of whether law enforcement relied in good faith on judicial precedent, which in turn requires a case-by-case assessment of the legal landscape at the time of the Fourth Amendment [*Jones*] violation at issue.

Id.

The district court in *Oldasou* explained (and then plotted on a detailed timeline) that the four decisions holding the good faith exception did not apply *all* involved attachment of a GPS device, just as in this case, *after* the District of Columbia Circuit first declared such attachments to be "searches" in *United States v. Maynard*, 615 F.3d 544, 564-66 (D.C. Cir. 2010), *aff'd*, *Jones*, 132 S.Ct. at 949. *Id.* at *9-10. Conversely, the three courts reaching the opposite result *all* involved attachments *before Maynard*. *Id.*

For, at the time Agent Hauger attached the device to Mr. Baker's car,

> after *Maynard* and [*United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting from denial of rhg. en banc)], the law was unsettled and law enforcement officials in circuits where no binding precedent was present were arguably on notice that use of a GPS device may require a warrant. In this situation, it might not have been objectively reasonable for law enforcement to rely on the decisions of the Seventh, Eighth, and Ninth Circuits. It could be that proceeding to use a warrantless GPS in the face of emerging

> uncertainty would be a "reckless[] or grossly negligent disregard for Fourth Amendment rights." *See Davis*, 131 S.Ct. at 2427 (internal quotations omitted). The requisite "culpability" could be there. *See id*. at 2428.

Id. at *9.

In this Court, this is now an issue of first impression. But all the post-*Jones* district court decisions on pre-*Jones* violations have followed this bright line. Given the flux at the time Agent Hauger warrantlessly put the tracker on Mr. Baker's car, under *Davis* it cannot be said his action was *objectively* reasonable. *Davis* is limited to truly binding decisions and, arguably, statements of law without any existing judicial disparity. That simply is not the case here.

The district court plainly erred in admitting evidence obtained from the Government's warrantless GPS search of Mr. Baker's car. The Court should reverse the district court's judgment of conviction and sentence.

Reply as to Issue II

In the second issue in his opening brief, Mr. Baker explained how the Government's evidence on counts 2, 3, 5, 6, 8, 9, 11, and 12 of the indictment was insufficient to connect him to the specifically-charged Glock pistol before February 14, 2011 (Aplt.Br. 58-63). He explained this was because the Government only presented evidence connecting him to that firearm after February 14, 2011, whereas four of the robberies had occurred before that date.

The Government responds the evidence was sufficient because Ms. Collier, the owner of the gun, "testified that [Mr. Baker] visited her at her residence during January 2011," "she saw him 'quite a lot,'" and Mr. Baker "had unfettered access to all areas of her house," and that "sometimes she left her vehicle unlocked" with the gun in her garage (Aple.Br. 39) (citing Aplt.App. 752-54, 756-57, 759-60).

This misstates the record. Ms. Collier explained Mr. Baker's unfettered access to her home only began *after* he started living there on February 14, 2011, when she gave him a key (Aplt.App. 734, 738, 756). She testified that, before then, in January 2011, Mr. Baker would *not* have had access to her gun (Aplt.App. 745, 748). She said he would have had no way to know she owned the gun; she never told him she owned it or where she kept it (Aplt.App. 750, 761).

For the most part, however, the Government relies on a single "ping" of Mr. Baker's cell phone "in the cell sector serving [Ms.] Collier's residence" on January

6, 2011, at 3:26 p.m. (Aple.Br. 39-40). From this – and this alone – it speculates Mr. Baker visited Ms. Collier that day, somehow knew about her gun and knew where it was, took the gun, and used it to commit four robberies in the next month (Aple.Br. 39-40).

This was insufficient. It amounts merely to "speculation, conjecture, or surmise," which is not evidence (Aplt.Br. 62) (quoting *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999)). A single use of a cell phone in relation to a tower sector on one day does not lead beyond a reasonable doubt – "beyond a mere likelihood or probability" (Aplt.Br. 62) (quoting *United States v. Beckner*, 134 F.3d 714, 719 (5th Cir. 1998)) – to the four other steps on which the Government insists (Aple.Br. 39-40).

The Government's supposed evidence connecting Mr. Baker to Ms. Collier's gun *before* he began living with her on February 14 was insufficient to prove beyond a reasonable doubt that he possessed that specific gun and used it in robberies before that date. Half of it is a misstatement of the record. The other half is speculation.

The Court should reverse the district court's judgment of conviction and sentence against Mr. Baker on counts 2, 3, 5, 6, 8, 9, 11, and 12 of the indictment.

Conclusion

The Court should reverse the district court's judgment of conviction and sentence against Mr. Baker. Alternatively, it should reverse the judgment of conviction and sentence against him on counts 2, 3, 5, 6, 8, 9, 11, and 12 of the indictment.

Respectfully submitted,

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I hereby certify that on September 4, 2012, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the following:

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