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

Christopher Totten and James Purdon***

The United States Supreme Court in 2012 in United States v. Jones *changed the legal test for what constitutes a police search under the Fourth Amendment. After* Jones*, a search occurs when: (1) an individual's privacy rights are violated (*"Katz" *test); and/or (2) an individual's property is trespassed upon (*"Jones" *test). From 1967 until* Jones*, only the* Katz *test was used. In light of this significant change, this study explores two questions using a content analysis approach: (1) the choice of legal test used by federal appellate courts to decide the "search" question (i.e., the* Jones *test,* Katz *test, or both tests), and (2) these courts' holding regarding whether a "search" occurred. Most of these courts are relying upon* Jones *in some fashion; however,* Jones *has not prevented these courts from frequently applying* Katz*. Though reliance on* Jones *alone has led to uniform determinations by courts of a "search" and hence enhanced Fourth Amendment*

*Christopher Totten is an Associate Professor of Criminal Justice (Law) in the Department of Sociology and Criminal Justice at Kennesaw State University. A graduate of Princeton University (A.B. 1997) and Georgetown University Law Center (J.D. 2000; LL.M. 2002), his research interests span criminal procedure and law (focus on police searches/seizures and interrogations), international crime (focus on adjudication), and criminal law and society (focus on courts/jurisprudence and police attitudes using social science research techniques). He is also the criminal law commentator of the *Criminal Law Bulletin* (volumes 46 through 51).

**James Purdon is a recent graduate (2015) of the Master of Science in Criminal Justice (MSCJ) program in the Department of Sociology and Criminal Justice at Kennesaw State University. The research for this paper was conducted, in part, during a graduate research assistantship he completed under the supervision of Dr. Totten. This research also formed the basis, in part, for his successfully completed thesis. This thesis was completed in partial fulfillment of the MSCJ degree requirements.

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*protections, overall post-*Jones *there are nearly an equal number of courts finding a "search" and "no search." When courts apply* Katz *alone to evaluate a search, they have held no search occurred. In sum,* Jones' *impact on Fourth Amendment search law has been incremental and gradual.*

Keywords: *criminal procedure, constitutional law, Fourth Amendment, search and seizure,* Jones*,* Katz

INTRODUCTION

In 2012, in *United States v. Jones*, the United States Supreme Court significantly changed the test for determining if a police search has occurred under the Fourth Amendment. After *Jones*, a search occurs when: (1) an individual's privacy rights are violated ("privacy test"); and/or (2) an individual's property is trespassed upon ("property/trespass test").[1] *Jones* resurrected the property test that had not been used since the Supreme Court decided *Katz v. United States* in 1967. *Katz* itself had established the privacy test as the sole test to determine whether a police search has occurred (i.e., until *Jones* was decided almost forty-five years later). *Jones*, though it did reestablish the property test as a lens through which to evaluate the search question under the Fourth Amendment, also retained the privacy test from *Katz*.[2] Thus, lower courts after *Jones* now have a choice of which test to use to evaluate the search question (i.e., privacy test or property/trespass test or both tests), and this choice has the potential to impact the court's finding on whether a police search occurred. Only if courts find that a search occurred, do Fourth Amendment protections for citizens generally apply (e.g., warrant and probable cause requirements). In light of this recent, major change in *Jones* to Fourth Amendment search law after over four decades exclusively under the *Katz* privacy regime, this study explores and addresses two main questions regarding this law: (1) the choice of legal rule, or "test," the federal appellate courts are using following *Jones* to decide the "search" question (i.e., the *Jones*

1. *See generally* U.S. v. Jones, 132 S.Ct. 945 (2012). *Jones* is described in detail in Part I.B of this Article (Background). Part I also explores the evolution of the Fourth Amendment "search" test within U.S. Supreme Court jurisprudence. *Jones* technically brought back, or "resurrected," the trespass test that the Court used to decide the Fourth Amendment search question prior to *Katz*. See infra note 14 and accompanying text.

2. *See generally id*. *See also* Katz v. United States, 389 U.S. 347 (1967). *Katz* is described in detail in Part I.A of this Article (Background).

property/trespass test, *Katz* privacy test, or both tests), and (2) these courts' ultimate finding, or holding, regarding whether or not a "search" occurred for Fourth Amendment purposes.

As a result of the methodological approach used in this study, consisting of a detailed content analysis of cases identified through a legal citator ("Keycite"), fifty (50) federal appellate court cases providing significant treatment to *Jones* during an almost two-year period were initially identified for inclusion in the study. After eliminating several cases for their failure to decide the merits of the Fourth Amendment search questions, thirty (30) cases fitting the specific parameters of the study emerged.[3]

Overall, based on the results of this research study, it does appear that the *Jones* decision and the accompanying return of the property-oriented, trespass doctrine to decide Fourth Amendment search questions has had an impact, albeit a gradual and incremental one, on Fourth Amendment law in general and Fourth Amendment search law specifically. First, *Jones* has not stopped the federal appellate courts from frequently selecting and applying the Katz privacy criterion to decide Fourth Amendment search questions.[4] Indeed, the federal appellate courts examined in this study most often rely on the *Jones* property test *in conjunction with* the *Katz* privacy test to evaluate the Fourth Amendment search question.[5] When it is relied upon in tandem with the *Katz* privacy concept, the *Jones* property test has been applied broadly to police conduct occurring in a variety of factual contexts.[6] Lastly, when these courts employed both tests, they almost uniformly reached the same outcome under each test regarding whether a search had occurred.[7]

In addition, though the reliance on the *Jones* property test by itself has uniformly led to more determinations by the federal appellate courts of a "search" and hence enhanced Fourth Amendment protections for defendants in this particular context (a rather curious result given *Jones* was authored by Justice Scalia, a conservative, crime control–oriented justice),

3. *See infra* note 49. The parameters used to identify cases for this study are explained in detail in Part III (Methodology).

4. *See infra* notes 52 & 54, Appendix A, Figure 1.

5. *See infra* note 52, Appendix A, & Figure 1.

6. *See infra* notes 346–55.

7. *See infra* note 345 and accompanying text. Most courts relying on both tests found that no search has occurred. *See infra* note 52 and accompanying text. *See also* Appendix B & Figure 1.

overall in the aftermath of *Jones*, nearly an equal number of federal appellate court cases find a Fourth Amendment "search," on the one hand, and "no search," on the other.[8] Significantly, most federal appellate court cases in the aftermath of *Jones* are relying on *Jones* in some fashion to decide Fourth Amendment search questions.[9] However, when the federal appellate courts examined in this study apply the *Katz* privacy test by itself to evaluate a Fourth Amendment search question, they uniformly have held that no search occurred.[10]

Part I of this Article describes in detail the U.S. Supreme Court cases of *United States v. Jones* and *Katz v. United States*. This Part also notes the evolution of Fourth Amendment "search" law from one based on property notions prior to *Katz*, to one based on privacy under *Katz*, to one based on both property and privacy concepts under *Jones*. Part II addresses the study's research questions and hypotheses.[11] Part III explains the study's methodological approaches, including the choice of and reliance on a content analysis approach. This Part also explains how the study arrived at its list of legal citing cases for *Jones* (i.e., the "sample") through the use of the legal citator (Keycite), including its selection of certain jurisdictional and treatment parameters. Finally, this Part describes why the study eliminated certain cases from the sample as a result of various procedural or substantive reasons. Part IV includes a summary and detailed description of the study's findings consisting of thirty-one (31) citing cases from the federal appellate courts providing significant treatment to *Jones* through 2014, and addressing the research questions covered by this study. Part V consists of a detailed analysis regarding the study's conclusions, including policy and other implications arising from the study's numerous findings. Limitations of the study are also addressed.

8. *See infra* notes 52–54. *See also* Appendix B & Figure 1. For an article explaining Justice Scalia's constitutional interpretive philosophy, see Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Content, Clarity and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 181 (2015).

9. *See infra* notes 52, 53. *See also* Appendix A & Figure 1.

10. *See infra* note 54. *See also* Appendix B & Figure 1.

11. *See generally* U.S. v. Jones, 132 S.Ct. 945 (2012). *See also* Katz v. United States, 389 U.S. 347 (1967). Both *Jones* and *Katz* are described in detail in Part I of this Article (Background). The research questions are: (1) the choice of legal rule, or "test," under the Fourth Amendment that the federal appellate courts are using in the aftermath of *Jones* to decide the "search" question (i.e., *Jones*, *Katz*, or both), and (2) these courts' ultimate finding, or holding, regarding whether or not a "search" occurred for Fourth Amendment purposes.

PART I. BACKGROUND

This Part begins with a discussion of the 1967 U.S. Supreme Court case of *Katz v. United States*. In *Katz*, the Court adopted a privacy-oriented inquiry to evaluate whether police conducted a "search" for Fourth Amendment purposes (i.e., whether defendant's reasonable expectation of privacy has been violated).[12] Next, the Part explains the 2012 U.S. Supreme Court decision of *United States v. Jones*. In *Jones*, the Court returned to a property-oriented, trespass test to decide the Fourth Amendment search question (i.e., whether defendant's property has been physically intruded upon, or occupied, by police for the purpose of obtaining information or discovering something). At the same time, however, the Court in *Jones* retained the *Katz* privacy test to decide Fourth Amendment search questions.[13]

Significantly, prior to *Katz*, the U.S. Supreme Court had essentially relied upon the property-oriented, trespass test to decide whether a search occurred under the Fourth Amendment.[14] Hence, the Court in *Jones* returned, in part, to evaluating the search question under the property test it had used prior to *Katz*.

A. *Katz v. United States*

The relevant facts and procedural history of *Katz* are as follows:

> [Defendant] was convicted in the [district court] under an eight-count indictment charging him with transmitting wagering information by

12. *See generally* Katz v. United States, 389 U.S. 347 (1967). See also *Katz*, 389 U.S. at 361, 362 (Harlan, J., concurring). *See also infra* note 18.

13. *See generally* U.S. v. Jones, 132 S.Ct. 945 (2012). For the return in *Jones* to property notions to decide the Fourth Amendment search question, *see infra* notes 27–30 and accompanying text. For the retention of the Katz privacy test in Jones to decide Fourth Amendment search questions, *see infra* note 32 and accompanying text. *See also Jones*, 132 S. Ct. at 953 ("Situations involving merely the transmission of electronic signals without trespass would remain subject to the Katz analysis.").

14. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928) (no Fourth Amendment protection because wiretap was installed by police outside defendant's property lines, hence no trespass); Silverman v. United States, 365 U.S. 505 (1961) (illegal search because police pushed a "spike mike" through a common wall hitting a heating duct in defendant's residence, thus accomplishing a trespass). *See also* On Lee v. United States, 343 U.S. 747 (1952) (no Fourth Amendment search when undercover police agent mechanically recorded a conversation he had with defendant, since defendant consented to agent's entry onto his property and started conversing with agent).

> telephone from Los Angeles to Miami and Boston in violation of a federal statute. At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversation, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because "(t)here was no physical entrance into the area occupied by [defendant]."[15]

The U.S. Supreme Court's first attempt in *Katz* at defining the nature of the interests protected by the Fourth Amendment (i.e., those related to privacy), was as follows:

> But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment 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. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[16]

The Court decided that defendant was entitled to Fourth Amendment protections while placing a call inside the telephone booth because of specific actions he took:

> But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen [i.e., a booth constructed partially of glass]. [A] person in a telephone booth may rely upon the protection of the Fourth Amendment. *One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.* To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.[17]

Finally, the Court found that the property-oriented, trespass test to decide Fourth Amendment search questions was no longer viable. In turning to

15. *Katz*, 389 U.S. at 348, 349 (internal citation omitted)
16. *Id.* at 351 (internal citations omitted)
17. *Id.* at 352 (emphasis added)

a privacy-based inquiry to decide Fourth Amendment search questions, the Court in *Katz* essentially held that the police had violated defendant's reasonable expectations of privacy and hence had "searched" defendant by attaching a recording device to the outside of the telephone booth from which defendant had placed a call:

> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.[18]

Apart from its finding of a search under the Fourth Amendment, the Court, in reversing defendant's gambling conviction, also found that police violated defendant's Fourth Amendment rights because they did not first obtain a warrant prior to recording defendant's conversation in the phone booth.[19]

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18. *Id.* at 353. Note that the formulation "reasonable expectation of privacy" is directly attributable to the concurring opinion in *Katz* by Justice Harlan. Harlan posited a two-part rule to determine whether defendants possessed a privacy interest. *See Katz*, 389 U.S. at 361, 362 (Harlan, J., concurring) ("I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where . . . a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant. As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'") (internal citations omitted).

19. *See id.* at 354–59 ("The government agents here ignored 'the procedure of antecedent justification that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.") (internal citation omitted).

B. *United States v. Jones*[20]

The Federal Bureau of Investigation (FBI) and Washington, D.C., police began an investigation of defendant Antoine Jones, a nightclub owner, because they suspected him of trafficking in narcotics. This investigation consisted of the following methods—visual surveillance of the night club, installation of a video camera at the club, and a pen register and wiretap on defendant's cell phone.[21] Using information obtained from these methods, the police applied for a warrant to install an electronic monitoring device on a vehicle registered to defendant's wife. A warrant was issued allowing police to install the device within ten days within the territory of the District of Columbia. Instead, police installed a Global Positioning Satellite (GPS) device on the vehicle on the eleventh day in a public parking lot outside the District in the State of Maryland.[22] Within the course of the following twenty-eight days, the police relied upon the device to track defendant's movements. Using signals from various satellites, the device pinpointed the location of defendant's vehicle within fifty to one hundred feet, and then relayed that location by cell phone to a law enforcement computer. The device captured and relayed more than two thousand pages of data over a four-week period.[23]

Defendant Jones and his alleged accomplices were charged with a conspiracy to distribute large quantities of drugs (cocaine). Jones filed a motion in the District Court for the District of Columbia to exclude the evidence obtained as a result of the law enforcement use of a GPS device. This evidence, consisting of locational information, "connected [defendant] to the alleged conspirators' stash house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base."[24] The court admitted the majority of this evidence except for the information obtained from the GPS while defendant's vehicle was parked in a garage next to his home. Defendant's trial resulted in a hung jury on the conspiracy count;

20. Except for minor corrections for clarity, this sub-section of the Article (Part I.B.) includes an excerpt and is quoted in its entirety from "More than Just the "GPS" Case—The Resurgence of Property Rights in Fourth Amendment Search Analysis in *United States v. Jones,*" which originally appeared in *Criminal Law Bulletin*, Vol. 48, Issue 6, with permission. © 2012 Thomson Reuters.

21. U.S. v. Jones, 132 S.Ct. 945, 948 (2012).

22. *Id.* at 948.

23. *Id.*

24. *Id.* at 948–49.

accordingly, the government charged and tried defendant and his alleged accomplices in a second trial.[25] At this trial, the government introduced all of the evidence admitted at defendant's first trial obtained through the use of the GPS device. Defendant was convicted; however, the U.S. Court of Appeals for the District of Columbia reversed defendant's conviction, holding that the data obtained by police without a warrant using the GPS device was improperly admitted at defendant's trial, in violation of his Fourth Amendment rights. The U.S. Supreme Court granted certiorari.[26]

The Supreme Court in *Jones* held that "the Government's installation of a GPS device on a target's [e.g., defendant's] vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" under the Fourth Amendment.[27] To reach its finding that a Fourth Amendment search occurred, the Court relied upon the notion that defendant's property rights had been intruded upon when law enforcement surreptitiously placed the GPS device on his vehicle:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.[28]

Furthermore, the Court noted that the text of the Fourth Amendment and previous jurisprudential interpretation of that Amendment supports the idea that it is tied to governmental invasion of property rights.[29] The Court in *Jones* found that the prevailing, modern-day test for a Fourth Amendment search—whether an individual's reasonable expectations of

25. *Id.* at 948.

26. *Id.* at 948–49.

27. *Id.* at 949. The Court previously framed the issue as "whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment." *Jones*, 132 S.Ct. at 948.

28. *Id.* at 948.

29. "The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous. Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." *Id.* at 948.

privacy have been violated—did not constitute the relevant inquiry because of the physical trespass on defendant's vehicle, "a constitutionally protected area." Since the government physically intruded upon defendant's vehicle, and obtained information as a result of the intrusion, a Fourth Amendment "search" occurred.[30]

Moreover, the Court distinguished two electronic monitoring cases it had previously decided regarding the use of beepers. First, in the *Knotts* case, the beeper had been placed in a container of chloroform prior to defendant receiving the container.[31] Once defendant received the container, police monitored its location using the beeper. The Court in *Jones* found that since its holding in *Knotts* was based on the reasonable expectations of privacy of defendant (and not his property interests), the case was inapplicable in the context of *Jones*:

> We said [in *Knotts*] that there had been no infringement of Knotts' reasonable expectation of privacy since the information obtained—the location of the automobile carrying the container on public roads, and the location of the off-loaded container in open fields near Knotts' cabin—had been voluntarily conveyed to the public. But as we have discussed, the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test. The holding in *Knotts* addressed only the former, since the latter was not at issue.[32]

30. *Id*. at 950–51 & n.3. The Court explains in a footnote that a technical trespass by police is not alone sufficient to constitute a Fourth Amendment search. Rather, a trespass must be accompanied by police obtaining information (or discovering something). *See id*. at 951 n.5 ("Likewise with [the definition of] a search. Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information. A trespass on "houses" or "effects," or a Katz invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy."). Note that to qualify as a trespass for Fourth Amendment purposes, the search must be of an item that is directly mentioned within that Amendment—a paper, effect, house, or person. *See id*. at 953 n.8.

31. The owner of the container at the time the police installed the beeper consented to its installment. The defendant in *Knotts* did not challenge this installation. U.S. v. Knotts, 460 U.S. 276 (1983). *See also Jones*, 132 S.Ct. at 952.

32. *Id*. at 951–52 (italics in original). The Court pointed out that in *Knotts*, it had "noted the 'limited use which the government made of the signals from this particular beeper, and reserved the question whether 'different constitutional principles may be applicable' to 'dragnet-type law enforcement practices' of the type that GPS tracking made possible here." *Id*. at 952 n.6 (citing *Knotts*, 460 U.S. at 284).

The Court in *Jones* also distinguished its second beeper case, *Karo*, which had held that the installation by police of a beeper in a container prior to the time defendant possessed the container (and with the consent of the container's prior owner) did not constitute a Fourth Amendment search of defendant, who had no knowledge of the beeper.[33] In contrast, in *Jones*, defendant possessed the vehicle at the time law enforcement intruded, or trespassed, upon it by installing the GPS device:

> The Government [in *Karo*] . . . came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location. Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.[34]

PART II. RESEARCH QUESTIONS AND HYPOTHESES

The purpose of this study is to analyze, in the aftermath of *Jones*, (1) which test(s) the federal appellate courts are using to decide whether a Fourth Amendment search has occurred (i.e., the *Katz* privacy test and/or the *Jones* property/trespass test), and (2) whether these courts found a search occurred under the chosen test. Based on this study's purpose, two hypotheses were formulated. First, it was hypothesized that in the wake of *Jones*, more federal appellate courts would be relying upon the trespass test alone to determine Fourth Amendment search questions (as compared to the *Katz* privacy test or both tests). Second, it was hypothesized that in light of the current crime control perspective within the American justice system, more courts overall would find that no police search occurred, regardless of the test chosen. If courts find no search has occurred for Fourth Amendment purposes, then defendants are not entitled to various protections under that Amendment (e.g., the protection afforded by a search warrant).[35]

33. *Id.* at 952 (citing and quoting *United States v. Karo*, 468 U.S. 705, 707-08, 712-13 (1984)).

34. *Id.*

35. The findings contradicted these hypotheses. *See* Part IV of this Article (Findings). *See also* Appendices A & B, & Figure 1.

For this study, to evaluate the research questions, a coding scheme was created consisting of specific groupings based on the type of Fourth Amendment "search" test the federal appellate court used to decide a particular case (i.e., the *Katz* reasonable expectation of privacy test and/or the *Jones* property/trespass test). The coding scheme originally consisted of three groupings, or categories: "Jones," "Katz," and a combination of the two tests referred to as "Both." This study examined the relevant facts, holding, and rationale of a particular federal appellate court case to determine which test was used. For example, if the court applied the property/trespass concept from *Jones* and/or relied on the rationale from *Jones* to decide if a search had occurred under the facts of the case, then this case was categorized under the "*Jones*" group. Conversely, if the court applied the reasonable expectation of privacy concept from *Katz* and/or relied on the reasoning in *Katz* to determine whether a search had occurred under the facts of the case, then this case was categorized under the "*Katz*" group. Finally, if the court used both the *Jones* and *Katz* concepts or tests to decide the search question, and/or examined the search question using the reasoning from both of these cases, then this case was categorized under the "Both" group.[36]

Additionally, the analysis included whether the particular federal appellate court found a search had occurred under its chosen legal test (i.e., *Jones* or *Katz* or Both) and the facts of the case. This part of the analysis consisted of a simple division of the court cases into "search" or "no search" categories, or groups. 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" group.[37]

36. Note that since the "search" and "standing" questions are both "threshold" questions related to whether a defendant is entitled to Fourth Amendment protections, if the federal appellate court used *Jones* and/or *Katz* to decide the related standing question, the case was included in this study. Similarly, if the court used *Jones* and/or *Katz* to determine whether a seizure occurred (i.e., as opposed to a search), this case was maintained in the study since the seizure issue is closely related conceptually to the search issue. Because there were very few cases that decided standing or seizure questions in this study's data set, and for reasons related to readability and ease/convenience of presentation, these cases were classified as "search" or "no search" under their respective category (i.e., Jones, Katz, or both). Technically, of course, the finding in a standing question case would be "standing" or "no standing" depending on the court's conclusion in this regard, and "seizure" or "no seizure" in a case examining whether a seizure occurred.

37. *See also supra* note 36 and accompanying text for further explanation of the "search" or "no search" dichotomy.

The final coding categorization for this case would read as follows: "Jones – Search."

As the research became more refined, the original groups 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 appellate level after *Jones*. Since the facts occurred prior to *Jones*, federal circuit courts were at times turning to their previous, pre-*Jones* circuit decisions (i.e., precedent) to 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 "Binding Precedent." Though their basic holdings are mentioned in a footnote in the findings section,[38] these cases, which reflect a reliance by circuit courts on relevant pre-*Jones* binding precedent, were ultimately excluded from the study's lengthier, descriptive case findings because they failed to answer the overall research question (i.e., how federal appellate courts are interpreting the criteria established in *Jones* to decide the Fourth Amendment "search" question). For example, in these cases, federal appellate courts are relying on pre-*Jones* rulings and rationales underlying the application of those rulings to determine the "search" question. (In particular, they often rely on this precedent to decide whether the court should decline to suppress evidence based on good faith reliance by officers on this precedent.[39]) This overall approach by these courts is to be somewhat expected given how recent the *Jones* decision is.

The second, new category created was titled "Procedural Error." The cases categorized under this grouping included federal appellate court cases that contained some form of procedural error by the defendant that prevented the courts from deciding on the merits whether a Fourth Amendment search had occurred. An example from this type of case included the defendant's failure to raise a timely motion in the lower court objecting to the admission of evidence obtained through the police search.[40] Thus, the lack of appellate court analysis on the Fourth Amendment search question in these cases warranted the new category. This category was kept for classification purposes, and the cases within it are mentioned briefly in

38. *See infra* note 341.
39. *See infra* note 341.
40. *See infra* note 342.

a footnote in the study's finding section.[41] However, since these cases did not offer any insight into the study's substantive research questions (i.e., whether a search occurred and under which search criterion or criteria), they were omitted from the full, descriptive case findings.

PART III. METHODOLOGY

Since the overall purpose of this research study consists of gaining a better, more detailed understanding of how numerous courts are interpreting the U.S. Supreme Court decision in *United States v. Jones*, a qualitative, content analysis approach was employed to analyze the large number of cases. The cases used for this project were obtained through the use of a legal citator, KeyCite in Westlaw.[42]

Since the focus of the research project is to identify certain federal appellate court cases interpreting *Jones*, the search was narrowed using the Limit KeyCite Display option.[43] In particular, the search parameters were first narrowed by document type (i.e., cases). Accordingly, "highest court" and "other courts" options were selected for this specific search criterion. Second, the depth of treatment was used to narrow further the list of citing cases for the *Jones* decision. This was done to focus on the cases that gave "significant treatment" to *Jones*, meaning that *Jones* was "examined" or "discussed" in the citing case.[44] This limit was applied to eliminate cases that merely cited or briefly mentioned *Jones* rather than discuss the impact of the case. In addition, KeyCite uses a system of star categories that range from one star to four stars, where one star is the lowest amount of treatment a citing case can provide and four stars is the highest amount

41. *See infra* note 342.

42. AMY E. SLOAN, BASIC LEGAL RESEARCH 143, 155 (5th ed. 2012). The authors hypothesized that in the wake of *Jones*, more federal appellate courts would be relying upon the trespass test alone to determine Fourth Amendment search questions (i.e., as compared to the *Katz* privacy test). The authors also hypothesized that in light of the current crime control environment within the overall American justice system, more courts overall would find that no police search occurred, regardless of test chosen. If courts find no search has occurred for Fourth Amendment purposes, then the defendant is not entitled to Fourth Amendment protection. The findings contradicted these hypotheses. *See* Part IV of this Article (Findings). *See also* Appendices A & B, & Figure 1.

43. *Id.* at 160.

44. *Id.* at 160.

of treatment.[45] Accordingly, the search was narrowed to include only citing cases identified with three or four stars ("examined" and "discussed," respectively).[46]

Finally, "jurisdiction" was used to narrow the search. For this research project, the U.S. Supreme Court, the eleven numbered federal circuit courts of appeal, the U.S. Circuit Court of Appeals for the District of Columbia, and special federal options were selected. These jurisdictions were chosen since the federal appellate courts would offer insight on how the higher, precedential federal courts are interpreting searches following the *Jones* decision.

After applying the search criteria or parameters within the Limit KeyCite Display option of the citator, the list of citing cases was narrowed to fifty (50) cases that fit the specific criteria. Four cases, however, were eliminated because they were overturned or withdrawn.[47] The total number of cases that cited *Jones* was therefore reduced to forty-six (46).[48] The search results for the citing cases include cases from the date of *Jones* (January 23, 2012) through December 31, 2014. In addition, the omission of the cases falling into the "Binding Precedent" and "Procedural Error" categories reduced the original sample of forty-six (46) significant *Jones* "citing" cases from the federal appellate courts to thirty (30) cases total.[49]

Overall, the type of analysis chosen for this study was a directed content analysis because of its efficiency in analyzing large amounts of text data.

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45. *Id.*

46. *Id.*

47. The four withdrawn/vacated or reversed/overturned cases are: (1) *U.S. v. Wahchumwah*, 704 F.3d 606 (9th Cir. 2013); (2) *U.S. v. Katzin*, 732 F.3d 187 (2014); (3) *U.S. v. Davis* 754 F.3d 1205 (11th Cir. 2014); (4) *Patel v. City of Los Angeles*, 686 F.3d 1085 (2012).

48. The findings section actually contains forty-seven (47) cases officially included within the study, since one case was added, *U.S. v. Davis*, 785 F.3d 498 (11th Cir. 2015), even though it was decided after December 31, 2014 (the date limit used for this study). This case was included because it constituted an appeal overturning a previous decision that was included in the results from the citator, *U.S. v. Davis*, 754 F.3d 1205 (11th Cir. 2014). The appeal dealt with the issue examined in this study (i.e., whether a Fourth Amendment search occurred under *Jones* and *Katz*). In addition, the litigation related to this case did commence within the date range.

49. In particular, six (6) cases were eliminated from the original sample for reasons related to "procedural error," and ten (10) cases were eliminated from the sample because of their reliance on pre-*Jones* "binding precedent." The full, descriptive findings section actually includes thirty-one (31) cases since one case was added, *U.S. v. Davis*, 785 F.3d 498 (11th Cir. 2015). For the reason why this case was added, see *supra* note 48.

More specifically, this technique was used to help analyze and interpret the numerous amount of federal appellate cases chosen for this study (i.e., through the use of the citator). 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.[50] This type of analysis is most often thought of as an inductive research technique, which makes educated predictions among relationships between existing variables. As the research becomes more developed, the coding scheme becomes more refined.[51] The specific coding scheme, or "categories," used in this study for the cases identified by the citator is explained in more detail in the Part II (above).

PART IV. FINDINGS

A. Summary of Findings

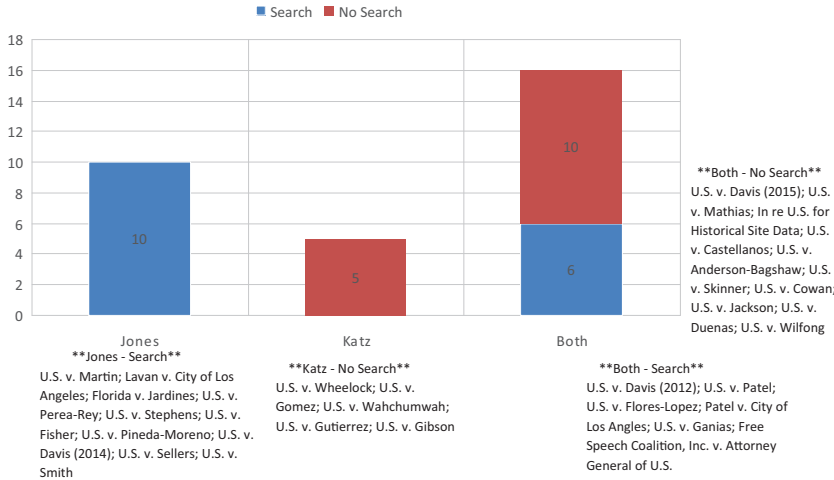
Overall, the principal findings consist of thirty-one (31) federal appellate court citing cases providing significant treatment to *Jones* through December 31, 2014, and addressing the study's research questions. Sixteen (16) of these cases used *both* the *Jones* property-oriented, trespass test and the *Katz* privacy test to evaluate whether a Fourth Amendment search occurred. Of these cases, six found a police search occurred for Fourth Amendment purposes and ten found no search occurred.[52] Ten (10) cases used the *Jones* test exclusively to decide the Fourth Amendment search question. All of

50. Hsiu-Fang Hsieh & Sarah E. Shannon, Three Approaches to Qualitative Content Analysis, 15(9) QUALITATIVE HEALTH RES. 1277–88 (2005).

51. *Id.*

52. The ten citing cases using both the Jones and Katz tests, and finding no search under the Fourth Amendment, are: *U.S. v. Davis*, 785 F.3d 498 (11th Cir. 2015); *U.S. v. Mathias*, 721 F.3d 952 (8th Cir. 2013); *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013); *U.S. v. Castellano*, 716 F.3d 828 (4th Cir. 2013); *U.S. v. Anderson-Bagshaw*, 509 Fed.Appx 396 (6th Cir. 2012); *U.S. v. Skinner*, 690 F.3d 772 (6th Cir. 2012); *U.S. v. Cowan*, 674 F.3d 947 (8th Cir. 2012); *U.S. v. Jackson*, 728 F.3d 367 (4th Cir. 2013); *U.S. v. Duenas*, 691 F.3d 1070 (9th Cir. 2012); *U.S. v. Wilfong*, 528 Fed.Appx. 814 (10th Cir. 2013). The six citing cases using both the *Jones* and *Katz* tests, and finding a search under the Fourth Amendment are: *U.S. v. Ganias*, 755 F.3d 125 (2d Cir. 2014); *Free Speech Coalition, Inc. v. Attorney General of U.S.*, 677 F.3d 519 (3d Cir. 2012); *U.S. v. Davis*, 690 F.3d 226 (4th Cir. 2012); *U.S. v. Patel*, 485 Fed. Appx. 702 (5th Cir. 2012); *U.S. v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012); *Patel v. City of Los Angeles*, 738 F.3d 1058 (9th Cir. 2013).

Figure 1. Number of federal appellate cases using *Jones*, *Katz*, or both, and finding Search or No Search (in each category). *Key*: J = *Jones*; K = *Katz*; B = Both (*Jones* and *Katz*); S = Search; NS = No Search



these court cases determined that a search had occurred for Fourth Amendment purposes.[53] Five (5) cases used the *Katz* test exclusively to evaluate the Fourth Amendment search question. All of these cases found no search occurred under the Fourth Amendment.[54]

Sixteen (16) cases were omitted from the principal findings and are described more briefly in the footnotes because they failed to address the merits of the Fourth Amendment search questions pertinent to this study.

53. The ten citing cases using *Jones* by itself to evaluate the Fourth Amendment search question are: *U.S. v. Martin*, 664 F.3d 684 (7th Cir. 2011); *Lavan v. City of Los Angeles*, 693 F. 3d 1022 (9th Cir. 2012); *Florida v. Jardines*, 133 S.Ct. 1409 (2013); *U.S. v. Perea-Rey*, 680 F.3d 1179 (9th Cir. 2012); *U.S. v. Stephens*, 764 F.3d 327, 329 (4th Cir. 2014); *U.S. v. Sellers*, 512 Fed. Appx. 319 (4th Cir. 2013); *U.S. v. Fisher*, 745 F.3d 200, 201 (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. Davis*, 750 F.3d 1186 (10th Cir. 2014). All of these cases found a search occurred under the Fourth Amendment.

54. The five citing cases using Katz by itself to evaluate the Fourth Amendment search question are: *U.S. v. Wheelock*, 772 F.3d 825 (8th Cir. 2014); *U.S. v. Gomez*, 575 Fed. Appx. 84 (3d Cir. 2014); *U.S. v. Wahchumwah*, 710 F.3d 862 (9th Cir. 2013); *U.S. v. Gibson*, 708 F. 3d 1256 (11th Cir. 2013); *U.S. v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014). All of these cases found no search occurred for Fourth Amendment purposes.

Of those sixteen, ten cases were categorized as "then-binding precedent" (BP) because they applied pre-*Jones* law to decide the Fourth Amendment search question.[55] The remaining six cases fell under the "procedural error" (PE) category because they failed to address the merits of the Fourth Amendment search question as a result of a certain procedural error by the defendant (e.g., failure to file a timely suppression motion).[56]

B. Detailed Findings

This sub-section consists of descriptions of the significant federal appellate court citing cases for *Jones* by category, including cases from the study's original "sample" of forty-six (46) cases.[57] In particular, thirty (30) of these cases are discussed in detail below because they address the merits of the Fourth Amendment search claim since *Jones*. (One additional case arising from this study and responsive to the research questions is also addressed in more detail in this sub-section, for a total of thirty-one cases).[58] The other sixteen (16) cases from the original sample are described more briefly in footnotes 340 and 341; these are the cases that fell into the categories "then-binding precedent," and "procedural error."[59]

a. Post-*Jones* cases using *Jones* property/trespass test and finding "Search"

1. *United States v. Martin.* Matthew Martin was suspected of taking part in multiple robberies in Burlington, Iowa, in 2009.[60] Police officers received

55. For a full list of these cases, see *infra* note 341.

56. For a full list of these cases, see *infra* note 342.

57. The findings section actually contains forty-seven (47) cases officially included within the study, since one case was added, *U.S. v. Davis*, 785 F.3d 498 (11th Cir. 2015), even though it was decided after December 31, 2014 (the date limit used for this study). For the explanation of why this case was added, see *supra* note 48.

58. As mentioned in previous notes, the full, descriptive findings section actually includes thirty-one (31) cases since one case was added, *U.S. v. Davis*, 785 F.3d 498 (11th Cir. 2015), even though it was decided after December 31, 2014 (the date limit used for this study). For the explanation of why this one case was added, see *supra* note 48.

59. For a full description of these two categories, "Binding Precedent" and "Procedural Error," see *supra* notes 38–41 and accompanying text.

60. U.S. v. Martin, 664 F.3d 684, 686 (7th Cir. 2011) (Martin I). This case pertains to the same litigation matter as *U.S. v. Martin*, 712 F.3d 1080, 1081 (7th Cir. 2013), which is the appellate court opinion that addressed the Fourth Amendment search question.

a tip regarding Martin's involvement in the robberies.[61] Through several tips, Burlington detectives were able to contact the accomplice, Daryl Jackson.[62] After interviewing Jackson, detectives contacted law enforcement in Indiana with information about Martin. Burlington law enforcement received a tip from a Super 8 clerk that Martin had checked in. Law enforcement placed a GPS tracking device on his vehicle without a warrant. A few days later, the GPS device stopped working for a brief amount of time and then resumed operating.[63]

Detectives from Burlington 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 found marijuana, cocaine, and a revolver. Martin was subsequently arrested.[64] Martin pleaded guilty to possessing a firearm as a convicted felon.[65] Martin cited *Jones* and argued that the evidence should be suppressed as his Fourth Amendment rights were violated by the warrantless GPS device. The trial court concluded that the evidence should not be suppressed under *Davis v. United States*.[66]

In particular, the trial court had found that the good-faith exception applied because the officers relied on existing precedent permitting the use of a GPS device without a warrant.[67] However, the Seventh Circuit Court of Appeals rejected this argument because there was no clear, binding precedent.[68] Conversely, the court concluded that the evidence Martin sought to suppress (i.e., drugs and a firearm) "had little to do with the fact that a GPS device had been used. . . . "[69] Rather, this evidence was "significantly 'attenuated' from the improper installation of the GPS device" (i.e., without a warrant under *Jones*).[70] The court affirmed the district court's initial ruling, which found that "'there was probable cause for Martin's arrest

61. *Martin*, 712 F.3d 1080, 1081 (7th Cir. 2013).
62. *Martin*, 664 F.3d 684, 686 (7th Cir. 2011).
63. *Id.* at 686.
64. *Id.* at 687.
65. *Martin*, 712 F.3d 1080, 1081 (7th Cir. 2013).
66. *Id.* at 1081, 1082 (citing and quoting Davis v. United States, 564 U.S. 229, 248–49 (2011).
67. *Id.* at 1082
68. *Id.*
69. *Id.*
70. *Id.*

[and] it was reasonable for the officers to believe Martin's vehicle contained evidence of the bank robbery' independent of any data gleaned from its electronic surveillance of the vehicle."[71]

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."[72] 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 of why *Jones* merits exclusion of the evidence in this case, it would be able to touch on the subject more in depth; however, that was not the case.[73] This case resulted in a finding that an illegal police search did occur under *Jones*, but it did not merit exclusion of the evidence because of the attenuation doctrine.

2. *Lavan v. City of Los Angeles.* The Appellees are homeless people living on the streets of Skid Row in Los Angeles.[74] 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 specific carts provided by a soup kitchen.[75] On multiple occasions between February 6 and March 17, 2011, Appellees "stepped away from their personal property, leaving it on the sidewalks. . . . "[76] They "had not abandoned their property"; however, City of Los Angeles ("City") employees seized and immediately destroyed their property under "a policy and practice of seizing and destroying homeless persons' unabandoned possessions."[77]

The City claims that "its seizure and destruction of Appellee's unabandoned property implicates neither the Fourth nor the Fourteenth Amendment."[78] The City based its argument on the Appellees having no legitimate expectation of privacy in unattended property.[79] The Court

71. *Id.*
72. *Id.* at 1082 (citing *Jones*, 132 S.Ct. 945, at 949).
73. *Martin*, 712 F.3d at 1083.
74. Lavan v. City of Los Angeles, 693 F.3d 1022, 1024 (9th Cir. 2012).
75. *Id.* at 1025.
76. *Id.*
77. *Id.*
78. *Id.* at 1027.
79. *Id.*

of Appeals for the Ninth Circuit stated that the facts of this case make it unnecessary to focus on the *Katz* reasonable expectation of privacy standard.[80] Instead, relying upon *Jones*' emphasis on property notions, the court focused on whether the City's actions constituted a seizure of the homeless individuals' personal property.[81] In particular, the court noted the observation by the Supreme Court in *Jones* that the *Katz* test "was *added to*, not *substituted for*, the common-law trespassory test."[82] The court ultimately identified the proper legal test as being "whether there was 'some meaningful interference' with Plaintiffs' possessory interest in the property."[83]

Because of the immediate seizure and destruction of Appellees' un-abandoned property by the City, the Court of Appeals found that the "City meaningfully interfered with Appellees' possessory interests in that property."[84] Furthermore, the court concluded that "the Fourth Amendment's protections extend to the Appellees' un-abandoned property."[85] In sum, the court found that a seizure did occur under property trespass notions put forth in *Jones*.

3. *Florida v. Jardines.* In 2006, Detective Pedraja learned through "an unverified tip that marijuana was being grown in the home of [defendant Jardines]."[86] After watching his home for approximately 15 minutes, Detective Pedraja and Officer Bartelt, a trained canine handler, approached Jardines' home. After the dog handled by Bartelt sniffed the front door,

80. *Id.* at 1027, 1029.

81. The Court said: "The reasonableness of Appellees' expectation of privacy is irrelevant as to the question before us: whether the Fourth Amendment protects Appellees' un-abandoned property from unreasonable seizures." *Id.* at 1027. It further commented, "We need not make any conclusion as to expectations of privacy because that is not the standard applicable to a 'seizure' analysis." *Id.* at 1029. Rather, according to the Court, the "constitutional standard" for seizures "is whether there was 'some meaningful interference' with Plaintiff's possessory interest in the property." *Id.* at 1028.

82. *Id.* at 1029 (citing *Jones*, 132 S.Ct. 945, 952 (2012) (italics in original)).

83. *Lavan*, 693 F.3d at 1028 (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

84. *Lavan*, 693 F.3d at 1030.

85. *Id.* The Court also concluded that once the City destroyed the property, it rendered the seizure unreasonable: "The district court was correct in concluding that even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable." *Id.*

86. Florida v. Jardines, 133 S.Ct. 1409, 1413 (2013).

the dog sat. This signaled to Officer Bartelt that the dog had detected the odor of drugs.[87] The officers returned to the vehicle, and Detective Pedraja applied and received a search warrant for the residence based on the dog's positive alert to the contraband. The warrant was executed that day, and police discovered marijuana. Jardines was charged with marijuana trafficking.[88] The Supreme Court, relying on *Jones*, noted that "[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.'"[89]

Furthermore, the Court reasoned that property rights "'are not the sole measure of Fourth Amendment violations,'" which was in reference to *Katz* and its privacy criterion still having a place in Fourth Amendment search analyses.[90] Additionally, the Court noted in *Jones* it had found that a person's "'Fourth Amendment rights do not rise or fall with the *Katz* formulation.'"[91] The Court held that "the government's use of a trained police dog to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment" because the officers had initially physically intruded, or trespassed, on Jardines' property (i.e., when they approached the area immediately surrounding the property, known as the curtilage, with the canine).[92] Moreover, the Supreme Court held it was unnecessary to decide whether the officers violated Jardines' expectation of privacy under the *Katz* test.[93] Accordingly, through the single lens of *Jones*, the Supreme Court found a search did occur.

4. *United States v. Perea-Rey.* On April 19, 2010, border patrol agents watched a man cross into the United States at the Mexico–U.S. border fence.[94] Border patrol agent Trujillo followed the individual, who was

87. *Id.*

88. *Id.*

89. *Id.* at 1414 (citing *Jones*, 132 S.Ct. 945, 950–51 (2012).

90. *Jardines*, 133 S.Ct. at 1414 (citing *Katz*, 389 U.S. 347 (1967)).

91. *Jardines*, at 1417 (citing and quoting *Jones*, at 951–52 (2012)).

92. *Jardines*, at 1415, 1417–18.

93. *Id.* at 1417 ("[W]e need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.")

94. U.S. v. Perea-Rey, 680 F.3d 1179, 1182 (9th Cir. 2012).

named Pedro Garcia, to another individual's home (i.e., Perea-Rey's home). Agent Trujillo witnessed Garcia enter the front yard of the home through the gate, knock on the door, and speak to Perea-Rey briefly before being signaled to the carport of theresidence.[95] 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, Trujillo knocked on a door in the carport, and he along with other agents ordered everyone inside the home to come outside. The agents aimed their guns toward the home.[96]

The individuals who exited the home were later found to be undocumented. Perea-Rey argued in court that the evidence of the individual persons was "fruit" of a warrantless search and seizure, and should be excluded from court.[97] Relying upon *Jones* physical trespass test, the Court of Appeals for the Ninth Circuit first analyzed whether the agents had entered the curtilage of Perea-Rey's home, a protected area under the Fourth Amendment for which agents generally need a warrant to search.[98]

Based on four factors referred to as the "Dunn" factors (i.e., the distance of the carport area to the home, the presence of an enclosure around the carport and home, the uses to which the carport was put, and the homeowner's efforts to protect the carport from view), the court determined the agents searched the curtilage of Perea-Rey's home when they entered, or "occupied," the carport.[99] Though the court recognized that the *Katz* reasonable expectation of privacy test was one criterion courts can use to determine whether a Fourth Amendment search has occurred, the court ultimately relied on *Jones* and its property-related trespass test to decide whether a search occurred in the case-at-hand:

> After determining that the carport was part of the curtilage to the home, the district court erroneously concluded that the agents did not violate Perea-Rey's Fourth Amendment rights when they occupied the carport without a warrant. The Supreme Court has explained that the role of reasonable

95. *Id.* at 1183.
96. *Id.*
97. *Id.* at 1182.
98. *Id.* at 1184.
99. *Id.* at 1184-85 (citing *U.S. v. Dunn*, 480 U.S. 294 (1987)).

> expectation analysis in evaluating the constitutionality of searches of the curtilage is only in determining the scope of the curtilage, and not the propriety of the intrusion. The district court circularly reasoned that because the agents were able to freely enter the carport, Perea-Rey had no reasonable expectation of privacy in the carport. Yet, because it was curtilage, it was a constitutionally protected area, and the warrantless entry, search and seizure by the agents violated Perea-Rey's Fourth Amendment rights. No further showing was required of Perea-Rey.[100]

The court did mention that the agents could view the curtilage from the sidewalk, and that these observations, in turn, could serve as a ground for obtaining a warrant; however, they were unable to commit a warrantless entry into the carport.[101] This occurred when the border patrol agents "physically occupied" the carport, which was part of the curtilage of Perea-Rey's home.[102] The court in *Perea-Rey* concluded that the "warrantless intrusion into the curtilage of Perea-Rey's home by border patrol agents and the resulting searches and seizures violated Perea-Rey's Fourth Amendment rights."[103]

5. *United States v. Stephens.* Defendant Henry Stephens was suspected of being connected to possible drug and firearms crimes in Baltimore when federal and state law enforcement received information from a confidential informant.[104] As part of a joint task force consisting of federal and local law enforcement commanded by Officer Paul Geare, Geare himself attached a GPS device to the bumper of Stephens' vehicle on May 13, 2011, without a warrant.[105] The vehicle happened to be parked in a public parking lot in Maryland at the time of the installation. 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 observed him reach toward the back of his waistband. The officers believed this motion to be an inspection for a weapon, and notified fellow officers

100. *Perea-Rey*, at 1186 (internal citations omitted).

101. *Id.* at 1186.

102. *Id.* at 1182.

103. *Id.* at 1189. There was no exigency or the presence of the "knock and talk" exception to excuse the warrant requirement. *Id.* at 1186–89.

104. U.S. v. Stephens, 764 F.3d 327, 329 (4th Cir. 2014).

105. *Id.* at 329.

they had reason to believe he was armed.[106] Next, Officer Geare and Sergeant Johnson followed Stephens, using a combination of visual observations and GPS monitoring. When Stephens arrived at a nightclub at which he worked, officers approached Stephens, conducted a frisk, and found an empty holster located in the middle of his back. Soon thereafter, a K-9 unit arrived on the scene and alerted officers to the presence of drugs from the exterior of the vehicle. At this point, officers entered the vehicle and discovered a loaded pistol. Shortly after discovering the pistol, the officers arrested Stephens.[107]

The Court of Appeals for the Fourth Circuit held that the GPS device used to locate and monitor Stephens in May 2011 constituted an unreasonable search according to Fourth Amendment guidelines.[108] The court essentially "accept[ed] the district court's ruling that Officer Geare's use of the GPS to locate and follow Stephens in May 2011 was an unreasonable search under the Fourth Amendment that led directly to the seizure of the evidence from Stephens' vehicle and his arrest."[109] In so holding, the Court of Appeals implicitly endorsed the district court's ruling that a search occurred under *Jones* when Officer Geare relied upon the GPS device to monitor defendant Stephens' vehicle:

> [T]he district court denied the motion [by defendant to suppress the firearm and other evidence]. The [district] court concluded that in light of *Jones*, Officer Geare's warrantless use of the GPS on Stephens' vehicle was an unconstitutional search that led to the seizure of the challenged evidence.[110]

However, the Court of Appeals also found that under *Davis*, the exclusionary rule was not applicable to the seized evidence, including the firearm, because the officers at the time of the search acted in good-faith reliance on binding precedent allowing them to attach a GPS device without a warrant.[111]

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106. *Id.* at 330.

107. *Id.*

108. *Id.* at 334.

109. *Id.*

110. *Id.* at 330.

111. *Id.* at 337–39. Since at the time of the officers' search neither the United States Supreme Court nor the Fourth Circuit had ruled on the use of warrantless GPS devices, the Court of Appeals turned to the earlier United States Supreme Court case of *Knotts*, which had found that police reliance on a beeper to track a vehicle on a public roadway did not constitute a search under the Fourth Amendment requiring a warrant. *Id.* at 337.

6. *United States v. Sellers.* Drug Enforcement Administration (DEA) agents and Orangeburg County officers conducted surveillance of defendants Sellers, Matthews, and James from January until July, 2008.[112] In addition, without a warrant, DEA agents attached a GPS device to the vehicle owned by James and tracked the vehicle's movements. Subsequently, the device ceased working and was eventually removed.[113] Based on the GPS data they gathered, however, officers successfully applied for wiretaps on James' phone. On August 14, 2008, Sellers was stopped for a motor vehicle infraction. A search of the vehicle yielded drugs and other contraband. Defendants were indicted on drug charges.[114] In particular, defendants James and Matthews sought to suppress the GPS evidence and the evidence obtained from the wiretaps (the latter being a "tainted" product of the GPS evidence, according to defendants).[115]

The Court of Appeals for the Fourth Circuit relied upon *Jones* to find that police placement and monitoring of a GPS device on James' vehicle constituted a search. The court commented that "[j]ust as in *Jones*, the DEA agents in this case attached a GPS device to a target's vehicle and used the device to gain information about the target's whereabouts, all absent a valid warrant. The search in this case, therefore, violated James's Fourth Amendment rights."[116]

7. *United States v. Fisher.* In May 2010, DEA agents and state law enforcement officials received confidential information that Brian Fisher was

112. U.S. v. Sellers, 512 Fed. Appx. 319, 322 (4th Cir. 2013).

113. *Id.* at 322–23.

114. *Id.* at 323.

115. *Id.* at 327.

116. *Id.* The Court did mention in a footnote that the officers in Jones had at least attempted to obtain a warrant for the GPS device, but that the warrant had gone stale and was improperly executed. In the case at hand, no warrant was sought for the placement of the GPS device. *Id.* at 327 n.2. Interestingly, the Court raised but never squarely decided whether the good faith exception to the exclusionary rule applied to the GPS evidence, because "there is no indication that any data gained from the GPS device was ever introduced at trial." *Id.* at 328. Finally, defendant James' additional argument that the wiretap evidence obtained by police based, in part, on the GPS evidence should also be suppressed, fails: "In this case, setting aside the allegedly impermissible GPS information contained in the wiretap application, the surviving information contained in the application remained sufficient to support a finding of probable cause and necessity required to issue the wiretap." *Id.* at 328. Regarding defendant Matthews, the Court subsumed his challenges to the GPS and wiretap evidence within its treatment of these same challenges by defendant James. *Id.* at 327 n.1.

involved in selling drugs in Michigan and Illinois.[117] On May 28, 2010, law enforcement officers installed a GPS device on Fisher's vehicle and monitored his vehicle during a suspected drug run. In June, 2010, the informant told officers about another possible drug run by Fisher to Chicago, Illinois.[118] The police followed Fisher's movements using ten to twelve vehicles and the GPS information. Police stopped Fisher upon his arrival to Michigan, and a narcotics dog alerted the officers that drugs were inside the vehicle. A police search revealed cocaine. Fisher was arrested and later indicted on drug charges.[119]

Defendant Fisher argued that the warrantless installation and tracking by police of his vehicle using a GPS device violated his Fourth Amendment rights, and therefore this evidence should be suppressed.[120] During the course of the litigation, *Jones* was decided, and both the lower (district court) and the Court of Appeals for the Sixth Circuit essentially treated *Jones* as controlling for the purposes of their determination that police searched defendant Fisher's vehicle when they installed the GPS device and used it to monitor the vehicle's movements.[121]

However, under the good faith exception to the exclusionary rule, the Court of Appeals ultimately deemed the actions undertaken by the officers, in this case the warrantless attachment and use of a GPS device, to be justifiable under Sixth Circuit binding precedent. Accordingly, defendant's motion to suppress the GPS evidence was denied.[122]

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117. U.S. v. Fisher, 745 F.3d 200, 201 (6th Cir. 2014).

118. *Id.* at 201–02.

119. *Id.* at 202.

120. *Id.*

121. *Id.* at 202, 203.

122. *Id.* at 203 ("At the time of the disputed GPS surveillance, the Supreme Court had strongly indicated, and the Sixth Circuit and three other circuits had held, that the warrantless use of electronic tracking devices was permissible. Given this uniform authority, the police conduct here was in good faith.") *See also id.* at 206 ("At the time the police placed the tracking device on Fisher's vehicle, the training and guidance provided to these officers by various police agencies and prosecutors all indicated that such conduct was consistent with the Constitution; no circuit authority had indicated that the use of a GPS tracker was unconstitutional, and three circuits had held that such conduct was lawful; the relevant Supreme Court case law had indicated such a practice was lawful; and our precedent also provided binding authority permitting such conduct. These are not the type of circumstances that warrant the application of the 'bitter pill' that is the exclusionary rule. As it is apparent that the police acted in reasonable, good-faith reliance and that their conduct was lawful, the exclusionary rule does not apply.")

8. *United States v. Pineda-Moreno.* In 2007, DEA agents suspected Juan Pineda-Moreno of cultivating marijuana. The DEA began investigating the men and visually monitored the movements of Pineda-Moreno and his associates.[123] Subsequently, the agents attached a mobile tracking device on various occasions to Pineda-Moreno's Jeep without a warrant. For the majority of these occasions, the Jeep was on public property. The DEA used the device when it had been installed on public property to track the Jeep's location, and agents discovered that it traveled to suspected marijuana grow sites.[124] Based on their surveillance, DEA and other police officers stopped Pineda-Moreno's vehicle. A subsequent search of Pineda-Moreno's residence with his consent led police to bags containing marijuana.[125]

The Court of Appeals for the Ninth Circuit examined the facts of the case-at-hand under *Jones*, and found that a search by the DEA agents had occurred:

> *Jones* has made clear that the agents [here] conducted Fourth Amendment searches when they attached tracking devices to Pineda-Moreno's Jeep and used the devices to monitor the Jeep's movements. Indeed, for purposes of this remand we will assume, without deciding, that those warrantless searches would be "unreasonable" under the Fourth Amendment after *Jones*.[126]

However, the Court of Appeals ruled that since the events surrounding the agents' attachment and monitoring of the GPS devices occurred before *Jones* had been decided, the DEA agents conduct was appropriate in light of binding appellate precedent from the circuit.[127] Therefore, agents acted in good faith, and the drug evidence was not subject to exclusion under *Davis*.[128]

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123. U.S. v. Pineda-Moreno, 688 F.3d 1087, 1088 (9th Cir. 2012).

124. *Id.* at 1089.

125. *Id.*

126. *Id.* at 1090.

127. *Id.* at 1090–91. The Court said: "But *Jones* had not been decided when those [GPS tracking] searches occurred. And when the agents attached and used the mobile tracking devices that yielded the critical evidence, they did so in objectively reasonable reliance on then-binding precedent." *Id.* at 1090.

128. *See id.* at 1091 ("In short, the agents' conduct in attaching the tracking devices in public areas and monitoring them was authorized by then-binding circuit precedent. Those attachments yielded the critical information that justified stopping Pineda-Moreno. Whatever the effect of *Jones*, then, the critical evidence here is not subject to the exclusionary rule. For today, it is enough to conclude that suppression is not warranted here because the agents

9. *United States v. Smith.* Law enforcement officers and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) agents suspected Smith had been transporting drugs between two states, Florida and Alabama.[129] Special Agent Davis obtained driver records from Florida state databases to assist him in linking Smith to particular vehicles. Davis placed GPS devices without a warrant on two of Smith's vehicles.[130] Officers monitored the movements of the vehicles, including a trip taken by Smith to a suspected drug house. Based, in part, on the tracking evidence revealed by the GPS device, the officers obtained a search warrant for Smith's residence. The search uncovered a large amount of cash, drugs, and a firearm, among other evidentiary items.[131]

Smith was indicted on drug and firearms charges and found guilty in the trial court on these charges. Smith appealed, claiming that law enforcement violated the Fourth Amendment in searching his residence because this search under warrant relied, in part, on information police had obtained during GPS surveillance without a warrant. Accordingly, he sought to suppress the evidence seized from his home.[132]

Significantly, the Court of Appeals found that *Jones* applies to the actions of law enforcement in placing GPS devices on defendant Smith's vehicles, and these actions constituted searches under the Fourth Amendment:

> On the merits, the rule announced by the Supreme Court in *Jones* applies to Smith's case. Since *Jones* was decided after Smith's trial, but notably before the availability of appeal was exhausted, the *Jones* rule applies here. Under that rule, the officers in this case twice conducted warrantless searches that implicated Fourth Amendment interests when they installed GPS trackers on Smith's vehicles.[133]

However, the court concluded that even assuming that police violated the Fourth Amendment in conducting the warrantless GPS searches, the evidence seized from defendant Smith's house remained admissible under

objectively relied on then-existing binding precedent when they approached Pineda-Moreno's Jeep in public areas, attached tracking devices to it, and used those devices to monitor the Jeep's movements.")

129. U.S. v. Smith, 741 F.3d 1211, 1214 (11th Cir. 2013).

130. *Id.* at 1215.

131. *Id.*

132. *Id.* at 1217–18.

133. *Id.* at 1221.

the good faith exception to the exclusionary rule. In particular, the court commented that "[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."[134]

10. *United States v. Davis* (2014). Police were alerted of a robbery that had occurred at an electronics store on March 3, 2011.[135] Soon after, FBI agents stopped a 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 attire matching the robbers' description as well as tools, weapons, and money. Baker and Davis were charged and convicted of armed robbery.[136] 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.[137] Prior to March 2, officers had obtained a warrant to monitor the GPS signal emitted from 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.[138]

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.[139] The district court failed to grant Davis'

134. *Id. See also id.* at 1225. In particular, the Court said: "At the time of the GPS searches, *Michael* was binding precedent that clearly dictated the constitutionality of warrantless GPS surveillance. In 1981, an *en banc* panel of the former Fifth Circuit held that reasonable suspicion was the appropriate standard against which to measure the warrantless installation of an electronic tracking device on a suspect's vehicles. A GPS tracker is an 'electronic tracking device,' and at the time the officers installed the trackers on Smith's vehicles, they had at least reasonable suspicion to believe Smith was engaged in criminal activity." *Id.* at 1221 (citing United States v. Michael, 645 F.2d 252, 254, 257 (5th Cir.1981) (en banc)).

135. U.S. v. Davis, 750 F.3d 1186, 1188 (10th Cir. 2014).

136. *Id.* at 1188.

137. *Id.*

138. *Id.*

139. *Id.*

motion. On appeal, the Court of Appeals for the Tenth Circuit 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.[140] 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."[141]

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 the defendant:

> The warrantless attachment and use of the GPS device was the Fourth Amendment violation—the poisonous tree—that allowed agents to locate, stop, and seize evidence from the car in which Mr. Davis was riding—the tainted fruit. [Defendant] Davis does not allege a possessory interest or reasonable expectation of privacy in Mr. Baker's girlfriend's car; the district court found he had neither. Because the poisonous tree was planted in someone else's orchard [i.e., vehicle], Mr. Davis lacks standing to challenge its fruits [e.g., the evidence found within the vehicle]."[142]

b. Post-*Jones* cases using *Katz* privacy test and finding "No Search"

1. *United States v. Wheelock.* Minneapolis Police Officer Dale Hanson discovered that child pornography was being downloaded from a specific

140. *Id.* at 1189.

141. For the mention of the basic holding of *Jones*, see *id.* at 1189. For the court's reference to police use of the GPS device as a search, see *id.* at 1191 ("The obvious difference between these cases and Mr. Davis's is that, in those cases, an *initial stop* led to a *subsequent search* of the car; in Mr. Davis's case, an *initial search* of the car led to a *subsequent stop*") (italics in original). Compare *id.* at 1190 ("The warrantless attachment and use of the GPS device was the Fourth Amendment violation. . . . ") with *id.* at 1191 ("[A]gents located and stopped the suspected getaway car based on information from a variety of sources—one of which happened to be an allegedly unconstitutional search. That search might have violated someone's rights, but not those of Mr. Davis."). For the reference to police use of the GPS device as a Fourth Amendment violation, see *infra* note 142 and accompanying text.

142. *Id.* at 1190. And in an another point in the opinion, the Court concluded, "Because Mr. Davis did not own or regularly drive the car to which the GPS device was attached, it appears he lacks a sufficient Fourth Amendment interest to challenge this derivative evidence." *Id.*

Internet Protocol (IP) address.[143] This information resulted in Officer Hanson obtaining an administrative subpoena that ordered the Internet Service Provider (ISP), Comcast Communications, to produce specific subscriber information linked to the IP address.[144] Comcast provided Wheelock's name and address, which were associated with the IP address. This information, along with the fact that Wheelock had previously been convicted on child pornography charges, was used to obtain a search warrant for Wheelock's residence. The search revealed hard drives, DVDs, and CDs that contained child pornography. Wheelock was later charged and pled guilty to child pornography charges.[145] Wheelock argued that Officer Hanson's use of the administrative subpoena violated his privacy rights, and that the evidence of child pornography should be suppressed.[146] More specifically, Wheelock contended that such rights were violated given Justice Sotomayor's concurring opinion in *United States v. Jones*.[147]

The Court of Appeals for the Eighth Circuit stated for Fourth Amendment protections to be bestowed upon 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.[148] 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.[149] Additionally, the court responded to Wheelock's reliance, in part, 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 country are bound by existing precedent.[150] The court held that the officers were not required to have a warrant

143. U.S. v. Wheelock, 772 F.3d 825, 827 (8th Cir. 2014).

144. Officer Hanson stated such information was "'relevant to an ongoing, legitimate law enforcement investigation of Distribution of Child Pornography.'" *Id.* at 827.

145. *Wheelock*, 772 F.3d at 828.

146. *Id.*

147. *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."

148. *Wheelock*, 772 F.3d at 828.

149. *Id.* at 829.

150. *Id.*

since Wheelock had no reasonable expectation of privacy in the information obtained from Comcast.[151] This case distinguished itself from *Jones* and instead relied upon the *Katz* test, with the court essentially finding no Fourth Amendment claim, or "search," existed because Wheelock lacked a reasonable expectation of privacy under the third-party doctrine by disclosing information to the ISP (i.e., his name, IP address, etc.).[152]

2. *United States v. Gomez.* In 2009, the DEA suspected defendant Axel Gomez of distributing drugs and organized an operation to have a government informant purchase 20 grams of heroin from Gomez.[153] The informant also shared with the DEA the number for 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 until August 18, 2009. The DEA was able to access phone numbers who called and were called by Gomez, with time stamps for when individuals called, and record multiple drug purchases.[154] 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 and court authorization. The DEA obtained a search warrant for Gomez's apartment based on the totality of the evidence it had obtained. The search of the apartment uncovered $6,000 in cash, a firearm, a digital scale, and materials for packing drugs.[155]

Gomez was immediately indicted and found guilty on charges related to drug distribution, conspiracy, and possession of a firearm. 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 U.S. Supreme Court justices effectively restrict the application of the third-party doctrine as enunciated in *Smith v. Maryland*.[156]

151. *Id.*

152. *Id.* at 828–29.

153. *U.S. v. Gomez*, 575 Fed. Appx. 84, 85 (3d Cir. 2014).

154. *Id.* at 86.

155. *Id.*

156. *Id.* at 87 n.5. *See also* Smith v. Maryland, 442 U.S. 735 (1979). The *Smith* court reiterated that an individual has "no reasonable expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743–44 (internal citations omitted).

The Court of Appeals for the Third Circuit held that defendant Gomez's Fourth Amendment privacy 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."[157] The court further explained that once this occurred, Gomez had relinquished any privacy interest in the data.[158] Additionally, the court rejected the argument that the concurring opinions in *Jones* had effectively revised or limited *Smith*.[159] Essentially, the Court of Appeals determined no Fourth Amendment claim existed (i.e., no governmental "search" had occurred) because Gomez did not have a reasonable expectation of privacy in information he disclosed to a third party, in this case Sprint, that was subsequently obtained by law enforcement officials.[160] With the focus in its decision on reasonable expectation of privacy, this case falls more in line with the inquiry used in *Katz* for Fourth Amendment searches.

3. *United States v. Wahchumwah.* Defendant Wahchumwah appealed his conviction for crimes concerning the sale of eagle parts. Defendant argued his Fourth Amendment rights were infringed upon when an undercover officer recorded a business deal he made in his home related to the crimes.[161] The Court of Appeals for the Ninth Circuit found that defendant was not entitled to Fourth Amendment protection because he "voluntarily exposed" to an undercover, governmental official the information related to the business deal.[162] Relying on *Katz*, the court commented that "[w]hen Wahchumwah invited [undercover] Agent Romero into his home, he forfeited his expectation of privacy as to those areas that were 'knowingly expose[d] to' Agent Romero. Wahchumwah cannot reasonably argue that the recording violates his legitimate privacy interests when it reveals no more than what was already visible to the agent."[163]

In sum, the court held that "an undercover agent's warrantless use of a concealed audio-video device in a home into which he has been invited by

157. *Gomez*, 575 Fed. Appx. at 87.
158. *Id.*
159. *Id.* at 87, n.5.
160. *Id.* at 87.
161. U.S. v. Wahchumwah, 710 F.3d 862, 865 (9th Cir. 2013).
162. *Id.* at 865.
163. *Id.* at 867 (quoting *Katz*, 389 U.S. at 351).

a suspect does not violate the Fourth Amendment."[164] Overall, in its decision, the court relied heavily on the notion that when defendant invited the undercover agent into his home, he forfeited his reasonable expectation of privacy regarding information he shared with the agent. Since the court determined that defendant's reasonable expectation of privacy under Katz was not violated, no "search" occurred for Fourth Amendment purposes.[165]

4. *United States v. Gibson.* DEA agent Greg Millard suspected James Gibson and his associates of drug trafficking.[166] As a result, another DEA agent placed a tracking device on a vehicle in the possession of Gibson, without a warrant on January 27, 2009. On February 18, 2009, Agent Millard obtained information indicating that Gibson may be traveling in the vehicle (an Avalanche). Between February 18 and February 20, the DEA used the tracking device to locate the whereabouts of James Gibson and his accomplices.[167] Agent Millard notified Deputy Sheriff Haskell, Madison County, Florida, of Gibson's estimated location. Agent Millard instructed Haskell to search the vehicle if the deputy was able to establish proper justification (i.e., probable cause) for the search. On February 20, Deputy Haskell stopped the vehicle based on his observations that the vehicle was not complying with local traffic laws. After the Deputy smelled marijuana, he was given consent to search the vehicle by its driver, and discovered cocaine within the vehicle.[168] The driver of the Avalanche was an individual named Burton.

Gibson argued that all evidence obtained from the tracking device on the vehicle should be suppressed because the placement and monitoring of a GPS device constitutes a search under the Fourth Amendment for which a warrant is required. Because police did not have a warrant, they violated the Fourth Amendment.[169] Though the Court of Appeals for the Eleventh Circuit mentioned *Jones*, it did not squarely rely on the case in its analysis

164. *Id.*

165. Regarding the possible application of *Jones*, the Court said that "[b]ecause [defendant] Wahchumwah has not argued that a Fourth Amendment violation under the trespass theory articulated in *Jones* occurred in this case, that issue is not properly before us, and we express no opinion concerning it." *Id.* at 868 n.2.

166. U.S. v. Gibson, 708 F.3d 1256, 1261 (11th Cir. 2013).

167. *Id.* at 1262.

168. *Id.* at 1263.

169. *Id.* at 1276.

of whether Gibson had Fourth Amendment protections concerning the police search of the vehicle. Instead, the court focused on whether defendant had Fourth Amendment protection in the vehicle (i.e., standing) under the reasonable expectation of privacy concept. Significantly, the court concluded that on the day the Avalanche was searched, February 20, 2009, Gibson had not established a reasonable expectation of privacy (i.e., standing) because he was neither driver nor passenger. In addition, he did not have custody or control of the Avalanche at the time of the search:

> [W]e conclude that James Gibson has not established that he had a reasonable expectation of privacy in the Avalanche only when it was searched on February 20, 2009, because he was not the legal owner of the Avalanche, he has not established that he had exclusive custody and control of the Avalanche, and he was neither a driver of, nor a passenger in, the Avalanche when it was searched.[170]

However, the court did mention that at other times, apart from the police vehicle search on February 20, Gibson had Fourth Amendment protection (i.e., standing) in the vehicle because of his privacy interest:

> We conclude that James Gibson has standing to challenge the installation and use of the tracking device while the vehicle was in his possession [for example, when the device was installed, Gibson had borrowed the vehicle] but not the use of the tracking device to locate the Avalanche when it was moving on public roads and he was neither the driver nor a passenger. [But] James Gibson had no possessory interest in the Avalanche on February 20, 2009, and he lacks standing to challenge the seizure and search of the vehicle that evening.[171]

Furthermore, the court stated that even if Gibson had standing to challenge the search of the vehicle when it was in his possession and control, the admission of any GPS-related evidence from this time frame into court was harmless.[172]

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170. *Id.* at 1278.

171. *Id.* at 1277. The Court also said: "James Gibson was not the owner of the Avalanche, but he paid for the insurance and maintenance of the Avalanche and often drove it. We have held that an individual who borrows a vehicle with the owner's consent has a legitimate expectation of privacy in the vehicle and standing to challenge its search while it is in his possession." *Id.* (citation omitted).

172. *Id.* at 1279.

5. *United States v. Gutierrez.* In November 2012, Indianapolis police learned through a tip that Oscar Gutierrez may be involved in drug trafficking.[173] A joint task force consisting of local law enforcement officers, detectives, and a DEA agent, as well as 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 had Fletch explore in the area around the front door, whereupon Fletch positively alerted the handler of the presence of narcotics.[174] Again, the officers knocked on the door and received no response. After consulting with the local prosecutor's office, officers forcefully entered the home and performed a sweep. Meanwhile, Detective Sergeant Cline left the scene to obtain a warrant based on the tip, the attempt to enter the residence, and Fletch's positive alert.[175] Detective Sergeant Cline was awarded the warrant. In the meantime, officers at the scene who had entered the home 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 discovered a duffel bag containing methamphetamines.[176]

The Court of Appeals held that the methamphetamines discovered during the search under warrant based on the drug dog's positive alert were not to be suppressed, even though it was later determined by the U.S. Supreme Court in *Florida v. Jardines* that the actions of a drug dog in sniffing within the curtilage of the home constitutes a search.[177] However, *Jardines* was decided after the facts of this case; as a result, the court had to decide between relying upon *Jones*, decided several months before the police search in the case-at-hand (with defendant Gutierrez claiming that the basic rule from *Jardines* was essentially in effect at the time of *Jones*), or its binding circuit precedent of *U.S. v. Brock*.[178] The court concluded that *Brock* remained good law after *Jones* and had not been overruled until the

173. U.S. v. Gutierrez, 760 F.3d 750, 752 (7th Cir. 2014).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 755–56, 759.

178. *Id.* at 755–56. *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." *Gutierrez*, at 755 (citing *Brock*, 417 F.3d 692, 696 (7th Cir. 2005)).

U.S. Supreme Court decided *Jardines*.[179] Thus, according to the *Brock* precedent, police were allowed to conduct dog sniffs in the area adjacent to residential premises without a warrant because these sniffs to detect contraband did not infringe upon an individual's reasonable expectations of privacy and therefore did not constitute searches under the Fourth Amendment.[180] Finally, the court stated because the officers' action in this case is sanctioned by binding appellate precedent, "the case falls within *Davis*' [good-faith] exception to the exclusionary rule."[181] 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. Because the court employed the privacy language from *Katz* in deciding the Fourth Amendment search question, this case has been categorized under that foundational search case.

c. Post-*Jones* cases using both privacy and property/trespass tests and finding "No Search"

1. *United States v. Mathias.* Officer Murray received information from an anonymous source that someone was growing marijuana plants in the back yard. Mathias's back yard was enclosed by a fence.[182] Officer Murray inspected the fence and on the north side was able to peek inside the area where he saw marijuana plants. He did not move or manipulate the fence in any way to make his observations. During this inspection, Officer Murray actually physically intruded upon Mathias' property (though he thought he was walking on a neighbor's property on which he had received permission to enter).[183] He later obtained a search warrant for Mathias, his wife, and their marital residence.[184] Police discovered marijuana and marijuana paraphernalia.[185] Mathias claimed that officer Murray physically intruded into his area when looking through the fence.[186]

179. *Gutierrez*, 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.

180. *Id.* at 755–56.

181. *Id.* at 758.

182. U.S. v. Mathias, 721 F.3d 952, 954 (8th Cir. 2013).

183. *Id.*

184. *Id.*

185. *Id.* at 954–55.

186. *Id.* at 955.

The Court of Appeals for the Eighth Circuit in *Jones* first noted that "[a] *Jones* trespassory search . . . requires the challenged intrusion to be into a constitutionally protected area enumerated within the text of the Fourth Amendment."[187] The court proceeded to hold that "[a]s officer Murray was within an open field when he looked through Mathias's fence, his actions did not constitute a trespassory search."[188] The court then turned to the *Katz* test of reasonable expectation of privacy. Though noting that Mathias had exhibited a subjective privacy expectation in his backyard by erecting a fence around it, the court concluded that this expectation was not a reasonable one.[189] Taking into consideration that officer Murray had a right to be in the public vantage point from which he viewed Mathias' back yard, and the fact that Mathias's fence had small gaps allowing an individual like Murray to see into the back yard, the court ruled that Mathias had no reasonable expectation of privacy and ultimately had no Fourth Amendment protection in the back yard.[190] Therefore, no law enforcement search occurred under *Jones* or *Katz*.

2. *United States v. Davis* (2015). 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 is possible to obtain more generalized location information, it is not possible to pinpoint an individual's specific location from the information.[191] 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, by gathering that data without a warrant, the government did not violate Davis' Fourth Amendment rights.[192] The Court of Appeals for the Eleventh Circuit examined this Fourth Amendment issue using a combination of the trespass and privacy tests. More specifically, the court acknowledged that since there was no physical trespass or intrusion by the government onto Davis' property, *Jones* did not apply to provide Fourth

187. *Id.* at 956.

188. *Id.* at 955–56 (finding that the area where officer entered defendant's property constituted the "open fields"). *See also id.* at 957 (noting no search occurred).

189. *Id.* at 957.

190. *Id.* at 958 (affirming district court judgment that Officer Murray's actions did not violate the Fourth Amendment).

191. U.S. v. Davis, 785 F.3d 498, 501–02 (11th Cir. 2015).

192. *Id.* at 513.

Amendment protections to Davis. Rather, the cell site location data was held by a private telephone company and obtained by the government through court order.[193] In addition, the U.S. 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."[194] Accordingly, the court in *Davis* turned to the *Katz* reasonable expectation of privacy test to analyze the Fourth Amendment "search" issue. The court essentially determined that a search had not occurred under *Katz*:

> More importantly, like the bank customer in *Miller* and the phone customer in *Smith* [i.e., two precedent cases by the U.S. Supreme Court involving the third-party doctrine], Davis has no subjective or objective reasonable expectation of privacy in MetroPCS's business records showing the cell tower locations that wirelessly connected his calls at or near the time of six of the seven robberies.
>
> As to the subjective expectation of privacy, we agree . . . that cell users know that they must transmit signals to cell towers within range, that the cell tower functions as the equipment that connects the calls, that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower's range, and that cell phone companies make records of cell-tower usage. Users are aware that cell phones do not work when they are outside the range of the provider company's cell tower network. . . .
>
> Even if Davis had a subjective expectation of privacy, his expectation of privacy, viewed objectively, is not justifiable or reasonable under the particular circumstances of this case. The unreasonableness in society's eyes dooms Davis's position under *Katz*. We find no reason to conclude that cell phone users lack facts about the functions of cell towers or about telephone providers' recording cell tower usage.[195]

And later on in its opinion, the court relies even more squarely on the third-party doctrine to find that no search has occurred:

> The longstanding third-party doctrine plainly controls the disposition of this case. Cell phone users voluntarily convey cell tower location information to telephone companies in the course of making and receiving calls on their cell phones. Just as in *Smith*, users could not complete their calls without necessarily exposing this information to the equipment of third-party service

193. *Id.* at 514.
194. U.S. v. Jones, 132 S.Ct. 945, 953 (2012).
195. *Davis*, 785 F.3d at 511.

> providers. The government, therefore, did not search Davis when it acquired historical cell tower location information from MetroPCS.[196]

In sum, the Eleventh Circuit in *Davis* found that "the government's obtaining a . . . court order for production of MetroPCS's business records . . . did not constitute a search and did not violate the Fourth Amendment rights of Davis."[197]

3. *In re Application of the United States for Historical Cell Site Data.* In October 2010, the United States sought to obtain three applications under § 2703(d) of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701–2712.[198] The purpose was to obtain information pertaining to three independent criminal investigations. The applications requested "the cell phone service provider for a particular cell phone to produce sixty days of historical cell site data and other subscriber information for that phone. The Government requested the same cell site data in each application: 'the antenna tower and sector to which the cell phone sends its signal.'"[199]

It requested this information during the times when the phone was actively sending a signal to a tower to obtain service as well as when the phone was inactive. The American Civil Liberties Union (ACLU) argued that individuals "have a reasonable expectation of privacy in their location information when they are tracked" in certain ways.[200] The ACLU depended on the concurrence of Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan in *Jones*, "which concluded that prolonged GPS monitoring of a vehicle could constitute a search."[201] It was further argued by the ACLU that individuals are only in their vehicles for certain amounts of time, but most people have a cell phone on or near their person at all times.

The Court of Appeals for the Fifth Circuit ruled that cell site data are business records, and this significantly alters the district court's decision by applying a different legal standard.[202] Since a third-party telephone company

196. *Id.* at 512 n.12.

197. *Id.* at 513.

198. In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 602 (5th Cir. 2013).

199. *Id.* at 602 (quoting *In re Application of the United States for Historical Cell Site Data,* 747 F.Supp.2d 827, 829 (S.D.Tex.2010).

200. *Id.* at 608.

201. *Id.* (citing U.S. v. Jones, 132 S.Ct. 945, 964 (2012)).

202. In re Application of the U.S. for Historical Cell Site Data, 724 F.3d at 611–12.

was collecting and recording the data (i.e., the records), and not the government, there was no physical intrusion upon defendant's property by the government when it obtained that data from the third party (that is, there was no direct "'. . . use of GPS tracking technology for [governmental or] law enforcement purposes'").[203] Furthermore, the *Katz* reasonable expectations of privacy notion does not apply to the data because "[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protections." By choosing to have and use a cell phone to make a call, the defendant voluntarily exposed the data, including information about his location, to others such as the government, and therefore lost Fourth Amendment protection for that data.[204] The court concluded that there are indeed changes in society's reasonable expectations of privacy with technological advances; however, any remedy for privacy concerns must be made through the legislative body or, alternatively, through the economic marketplace.[205]

In closing, the court found that "Section 2703(d) orders to obtain *historical* cell site information for specified cell phones at the points at which the user places and terminates a call are not categorically unconstitutional."[206] Furthermore, the court determined that "the SCA's authorization of § 2703(d) 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 per se unconstitutional."[207] Thus, the court ultimately concluded that no search occurred under *Jones* or *Katz*.

4. *United States v. Castellanos.* On September 2010, Reeves County Sheriff, Captain Roberts was patrolling a particular truck stop.[208] Captain Roberts

203. *Id.* at 610 (citing *Jones*, at 964).

204. *Id.* at 609–10, 612–13 (citing Katz v. U.S., 389 U.S. 347, 351 (1967)). See also *id.* at 614 ("Because a cell phone user makes a choice to get a phone, to select a particular service provider, and to make a call, and because he knows that the call conveys cell site information, the provider retains this information, and the provider will turn it over to the police if they have a court order, he voluntarily conveys his cell site data each time he makes a call.")

205. *Id.* at 615.

206. *Id.*

207. *Id.* In addition, the Court found that ". . . as long as the Government meets the statutory requirements, the SCA does not give the magistrate judge discretion to deny the Government's application for such an order." *Id.*

208. U.S. v. Castellanos, 716 F.3d 828, 830 (4th Cir. 2013).

focused his attention on a commercial car carrier because one of the vehicles being transported on the car carrier bore a dealership placard instead of a normal license plate. From the driver of the car carrier, Roberts learned that the owner of the vehicle was Wilmer Castenada.[209]

The officer asked and received consent from the car carrier driver to search the vehicle after being unable to contact Castenada. In the vehicle, Captain Roberts found fresh tool marks near the rear of the seats, encountered a strong smell of Bondo, and when he pounded on the rear floorboard, he noticed inconsistent sounds above the gas tank.[210] Using a fiber optic scope he examined the inside of the gas tank and saw several blue bags floating in the tank which turned out to be 23 kilogram-sized bricks of cocaine.[211]

Captain Roberts falsely informed Castenada that the car carrier driver had been arrested and his cargo seized. A few days later, Roberts learned that someone had arrived at the location of the cargo and was attempting to claim the vehicle. This individual was subsequently identified as Arturo Castellanos.[212] Police located and detained Castellanos.[213] He stated he knew of Castenada and was there to pick up the vehicle. Police also seized two duffle bags.[214]

Castellanos denied that they were his bags. Officers searched the bags and found a cell phone whose number was the same as the one Roberts had been using to contact Castenada. Castellanos was subsequently indicted on drug (i.e., cocaine) conspiracy charges.[215] Castellanos sought to suppress under the Fourth Amendment the items from the duffle bag and cocaine located in the gas tank.

The Court of Appeals for the Fourth Circuit first cited *Katz*, among other cases, in its description of the applicable threshold standard for Fourth Amendment claims (i.e., the reasonable expectation of privacy standard).[216] The court also relied on *Jones*, however, to note that parties "other than owners may possess a reasonable expectation of privacy in the

209. *Id.* at 830.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 831.
214. *Id.*
215. *Id.*
216. *Id.* at 832–33.

contents of a vehicle" (for example, those who have a possessory interest in the vehicle).[217] However, according to the court, Castellanos had neither established ownership of the vehicle nor successfully claimed he was its "exclusive driver" (for example, that he had a possessory interest in the vehicle as a result of permission from the actual owner to drive the vehicle).[218] In short, the court found that "this is not the type of case where a defendant has established such a close connection to the vehicle that is subject to the search that he may claim a possessory interest in it."[219] Therefore, Castellanos lacked a reasonable expectation of privacy in the vehicle at the time police conducted any search of it.

In addition, 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 he may have been using at the time of the search.[220] Originally Castellanos' position at the suppression hearing demonstrated that the name "Wilmer Castenada" was another individual engaged in a sale transaction.[221] In short, according to the court, "Castellanos lacks standing because he failed to carry his burden to show that he had a constitutionally sufficient connection to the [vehicle] to demonstrate an objectively reasonable expectation of privacy."[222] In sum, the court relied upon *Jones* and *Katz* to find that defendant Castellanos was not entitled to the protections of the Fourth Amendment (i.e., defendant lacked "standing" to bring a claim under the Amendment).

5. *United States v. Anderson-Bagshaw.* Karen Bagshaw worked at a mail carrier in 1998 in the city of Wickliffe, Ohio.[223] 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.[224] She was required to report any earnings from employment or other business involvement during that time. However, in 2008, a claim

217. *Id.* at 834 (citing *Jones*, 132 S.Ct. at 949 n.2).
218. *Id.* (citing *Jones*, 949 n.2).
219. *Id.* at 834.
220. *Id.*
221. *Id.*
222. *Id.* at 835.
223. U.S. v. Anderson-Bagshaw, 509 Fed. Appx 396, 398 (6th Cir. 2012).
224. *Id.* at 399.

examiner had notified Special Agent Stephanie Morgano of the U.S. Postal Service Office the Inspector General of possible business activities with Bagshaw and an alpaca farm.[225]

Following an investigation of the alpaca farm, agents began conducting surveillance of Bagshaw. This included following her while she took a Caribbean cruise as well as recording her "moving luggage, walking, sunbathing, and playing bingo."[226] 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 inside of the house.[227] Karen Bagshaw argued that "the use of the pole camera violated the Fourth Amendment because her backyard was within the curtilage of her home, and she therefore had a reasonable expectation of privacy in that area."[228] 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* may not apply to the events in this case because GPS tracking may be considered a much greater privacy intrusion than a fixed point of camera surveillance.[229] The court stated that this surveillance 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."[230] This form of surveillance only displayed Bagshaw's activities in her backyard, which was an area capable of being observed by the public. The court also mentioned, in line with the *Jones* precedent, that the government "never physically invaded the 'backyard.'"[231]

225. *Id.* at 400.

226. *Id.* at 401.

227. *Id.*

228. *Id.* at 403.

229. *Id.* at 406.

230. *Id.* at 405 (citing *Jones*, 132 S.Ct. at 955).

231. *Id.* at 405. The Court also examined, under the Fourth Amendment "search" inquiry, the views captured by the government's camera of the defendant's barnyard and pasture. It said that "[w]ithout a doubt, the 'barnyard' and 'pasture' areas were outside the curtilage of Bagshaw's home. These areas constitute 'open fields,' and Bagshaw had no reasonable expectation of privacy in them. Surveillance of these areas did not constitute a Fourth Amendment search." *Id.* at 404–05.

The court also examined this case under *Katz*. Due to the "backyard" being easily visible from various public locations, the government agents were constitutionally permitted to view inside the "curtilage" area (i.e., the backyard) from these locations. Accordingly, relying directly upon *Katz*, the court mentioned that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[232]

The court held that any possible Fourth Amendment violations in this case would be harmless and declined to resolve whether long-term video surveillance of curtilage would require a warrant (which lasted continuously for twenty-four days in this case).[233] Furthermore, the court concluded that "the clips showing Bagshaw in the 'backyard' were 'utterly insignificant' to her convictions. Therefore, [it held] that the introduction of these clips at trial was harmless beyond a reasonable doubt and affirm[ed] the denial of her suppression motion."[234] In sum, the court found no search occurred under either *Jones* or *Katz*.

6. *United States. v. Skinner.* In May and June 2006, 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. This tracking by DEA agents had been authorized by a federal magistrate judge.[235] By continuously "pinging" the phone, agents tracked the whereabouts of Melvin Skinner from Arizona to Texas. Agents tracked Melvin Skinner to a truck stop in Texas where they located a motorhome.[236] An officer knocked on the door and Skinner answered; however, Skinner did not provide consent to the officer to search the motorhome. Accordingly, officers arranged for a police canine to sniff around the motorhome, and the dog positively alerted to drugs inside.[237] Subsequently, officers entered the motorhome and found drugs (i.e., marijuana) and handguns as well as two cell phones. Police arrested Skinner.[238]

232. U.S. v. Anderson-Bagshaw, 509 Fed. Appx 396, 405 (6th Cir. 2012) (citing Katz v. U.S., 389 U.S. 347, 351 (1967)).

233. *Id.* at 403, 406.

234. *Id.* at 406.

235. U.S. v. Skinner, 690 F.3d 772, 776 (6th Cir. 2012).

236. *Id.*

237. *Id.*

238. *Id.*

Skinner claimed that the use of the GPS location information from his cell phone violated his Fourth Amendment rights.[239] The Sixth Circuit Court of Appeals 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."[240] The court concluded that no physical intrusion occurred in this case because Skinner voluntarily acquired the cell phone for use as a communication device, and the phone itself came pre-installed with the relevant GPS technology used by police to discover its location.[241]

Moreover, *Jones* does not apply 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.'"[242] Furthermore, the government's tracking of defendant Skinner does not implicate Justice Alito's concern expressed in his concurrence in *Jones* that long-term GPS monitoring by police may violate the Fourth Amendment. For example, the court explained that in *Jones*, Justice Alito had commented that the "'constant monitoring of the location of [Jones'] vehicle for four weeks . . . would have required a large team of agents, multiple vehicles, and perhaps aerial assistance.'"[243] However, according to the court, police surveillance on Skinner was for three days and therefore does not give rise to the Fourth Amendment concern raised by Justice Alito.[244] In fact, the court points out that Justice Alito in *Jones* explicitly stated that "'relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable.'"[245]

Because authorities tracked a known cell phone number that was voluntarily used while traveling on public thoroughfares, Skinner also did not have a reasonable expectation of privacy under *Katz* in the GPS data and location of his cell phone. In this regard, the court commented that "[defendant] Skinner was traveling on a public road before he stopped at

239. *Id.* at 777.
240. *Id.* at 779 (citing U.S. v. Jones, 132 S.Ct. 945, 951 (2012)).
241. *Id.* at 780.
242. *Id.* at 780 (citing *Jones*, 132 S.Ct. at 955 (Sotomayor, J., concurring)).
243. *Id.* at 780 (citing *Jones*, 132 S.Ct. at 963 (Alito, J., concurring)).
244. *Id.* at 780.
245. *Id.* at 780 (citing *Jones*, 132 S.Ct. at 964 (Alito, J., concurring)).

a public rest stop. While the cell site information aided the police in determining Skinner's location, that same information could have been obtained through visual surveillance. . . . Skinner did not have a reasonable expectation of privacy in the location of his cell phone while traveling on public thoroughfares."[246] Accordingly, under either the *Jones* or *Katz* reasonable expectation of privacy criteria, no search occurred.[247] Therefore, suppression is not warranted and the district court correctly denied Skinner's motion to suppress.

7. *United States v. Cowan.* Using both information obtained from a confidential informant and their own police work, including surveillance, officers had reason to believe crack cocaine was being transported into and sold from Johnny Booth's apartment.[248] During the surveillance, officers observed two subjects in vehicles next to the apartment, who they believed to be involved in a drug trafficking scheme. The officers obtained a warrant to search the apartment, the defendant, and the parking areas for controlled substances and other items, including keys.[249]

Upon executing the warrant, officers discovered eight adults inside, including Cowan. 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 arrived to the apartment and suspected Cowan's responses were not truthful.[250] After officers found crack cocaine in several locations within the apartment, Detective Canas removed the handcuffs from Cowan and explained to him that "he could leave if the keys did not match a vehicle parked outside the apartment."[251] The detective walked outside with Cowan and kept pressing an alarm on the key fob until it set off an alarm on a car located in front of the apartment.[252] Another officer restrained Cowan and police brought a drug dog to the scene, who alerted officers to the presence of drugs in Cowan's vehicle. A search revealed cocaine.[253]

246. *Id.* at 778.
247. *Id.* at 779.
248. U.S. v. Cowan, 674 F.3d 947, 951 (8th Cir. 2012).
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*

The Court of Appeals for the Eighth Circuit applied both "search" tests to this case; according to the court, "[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.'"[254] First, the court found that police use of the alarm on the key fob did not violate defendant Cowan's reasonable expectations of privacy because defendant "did not have a reasonable expectation of privacy in the [mere] identity of his car."[255] Second, applying *Jones* to this case, police did not physically intrude or "trespass on the key fob itself because [Detective Canas] lawfully seized it [under warrant and as part of a valid *Terry* pat-down]."[256] Therefore, under both the *Katz* and *Jones* tests, the court concluded that no search had occurred.[257]

8. *United States v. Jackson.* On May 26, 2011, officers obtained two bags of trash from a garbage can.[258] This trash can was located directly behind the rented apartment of Ms. Sierra Cox. The officers had received a tip from a confidential informant that defendant Dana Jackson was selling narcotics from the apartment. Jackson was Sierra Cox's boyfriend.[259] During the trash pull, officer's recovered items from the bags related to drug trafficking. Subsequently, the police officers obtained a warrant to search the apartment. The officers found evidence of drug trafficking, and Jackson was convicted based on this evidence.[260] Jackson argued that the trash pull violated his Fourth Amendment right as the police "physically intruded upon

254. *Id.* at 955 (citing *Jones,* 132 S.Ct. 945, 950–53 (2012) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring), & United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring in judgment)).

255. U.S. v. Cowan, 674 F.3d 947, 955–56 (8th Cir. 2012).

256. *Id.* at 953–55, 956. The Court said that "[t]here is no trespass when the government comes into physical contact with or possession of an item when the government is authorized to do so and the mere transmission of electric signals alone is not a trespass." *Id.* at 956 (citing *Jones*, 132 S.Ct. at 951–53).

257. *Cowan*, 674 F.3d at 956. The Court did include in its analysis the conclusion that "[e]ven if Detective Canas' use of Cowan's key fob to locate the car was a search or seizure, it would be reasonable under the Fourth Amendment's automobile exception." *See id.* at 955. *See also id.* at 956.

258. U.S. v. Jackson, 728 F.3d 367, 369 (4th Cir. 2013).

259. *Id.*

260. *Id.*

a constitutionally protected area" to obtain the trash.[261] Furthermore, Jackson argued his reasonable expectation of privacy was violated during the trash pull.

The Court of Appeals for the Fourth Circuit stated under *Jardines*—which is an extension of *Jones*—that this conduct by the officers would be considered a search within the meaning of the Fourth Amendment if it occurred within the curtilage of Cox's apartment.[262] However, the court ultimately concluded based on several factors 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."[263] No search occurred.

Next, the court decided whether Jackson had a reasonable expectation of privacy under *Katz* in the trash can's contents since "'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.'"[264] The court held that defendant Jackson did not have a reasonable expectation of privacy in the trash because the trash can was "'readily accessible to animals, children, scavengers, snoops, and other members of the public.'"[265] In addition, defendant lacked privacy in the trash can's contents because the location of the trash can was accessible to the public: "[it] was sitting in the common area of the apartment complex courtyard, which included the grass areas and common sidewalks [shared by other residents], readily accessible to all who passed by."[266] Therefore, the court concluded that the trash pull was "a lawful investigatory procedure."[267] As a result of its application of *Jones* and *Katz*, the court found that no search by law enforcement had occurred.

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261. *Id.*

262. *Id.* at 373.

263. *Id.* at 374. The factors examined by the Court to determine whether the location of the trash can was curtilage, included: (1) proximity of the can to the apartment; (2) the presence or absence of enclosures around the location and apartment; (3) any steps taken by the apartment occupant to hide the location from passers-by; and (4) the primary use given to the location. *Id.* at 374.

264. *Id.* (citing Florida v. Jardines, 133 S.Ct. 1409, 1414 (2013)).

265. *Id.* at 375 (citing California v. Greenwood, 486 U.S. 35, 40 (1988)).

266. *Id.*

267. *Id.*

9. *United States v. Duenas.* On April 19, 2007, Guam Police Department (GPD) officers, DEA, and ATF agents executed a search warrant at the Duenas family residence for evidence of drug trafficking.[268] Officers found Ray and Lou Duenas asleep. The residential search area established by the officers was described as "chaotic."[269] No single officer was identified as the leader or manager of the search scene even though approximately forty officers were at the scene. As a result, civilians and journalists were able to go on Duenas' property. Though law enforcement instructed media members to "remain in the front yard" and to not pass a certain shipping container, the media was permitted to film and photograph the scene, including seized evidence.[270] In fact, several officers, including a police chief, escorted members of the media around the scene. One of the stated purposes in having citizens and media film the scene was that any stolen property could be more easily returned to its rightful owner.[271] Indeed, some individuals arrived at the scene to claim what they believed was their property, and manipulated or took possession of these items of property.[272] During the execution of the warrant, which lasted two days, police found drugs, drug paraphernalia, ledgers, and weapons as well as stolen property.

Regarding the presence of the media on the Duenas' front lawn, the Court of Appeals for the Ninth Circuit first agreed with the lower court's finding that the Fourth Amendment was not violated because there was no violation of the Duenas' reasonable expectation of privacy (and hence no "search" under the *Katz* test):

> The district court did not err by denying the Duenases' motions to suppress the physical evidence seized from their property. The district court found that the media were present on the front yard of the Duenas compound, but that their presence did not violate the Fourth Amendment because the front yard was not curtilage, and there was no basis to find a reasonable expectation of privacy in the front yard.[273]

Next, the Court of Appeals relied upon *Jones* (and *Katz*) to reach the following conclusion: "[w]hether [defendants] have standing thus turns

268. U.S. v. Duenas, 691 F.3d 1070, 1075 (9th Cir. 2012).
269. *Id.*
270. *Id.* at 1076.
271. *Id.*
272. *Id.*
273. *Id.* at 1079.

on the same determination as the Fourth Amendment claim itself: whether the media entered the Duenases' home or its curtilage [by trespassing], or [entered] any place in which they had a reasonable expectation of privacy."[274]

In this case, the court agreed with the assessment made by the district court in which the front yard was not considered curtilage; according to the court, the yard was not enclosed, its use was unclear, and there was no evidence of steps taken by defendants to prevent others from viewing the yard.[275] Therefore, since the media did not intrude upon curtilage, there was no Fourth Amendment violation, or "search" (i.e., under *Jones*).[276]

However, some journalists were escorted by law enforcement throughout the property, including into the rear, or backyard, of the property where a marijuana patch was found. Because the record was incomplete, the court could not make a firm determination about whether the media intruded upon curtilage when it entered the backyard of the Duenas property. The court commented that "[o]n this record, it is not clear whether the media entered the Duenases' curtilage when it walked through the rear of the property to view the marijuana patch."[277] Thus, the court could not definitively find that a Fourth Amendment violation, or "search," occurred when the media entered the backyard escorted by law enforcement (although the court did "assume" a violation occurred for purposes of analyzing the distinct question of excluding evidence).[278]

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274. *Id.* at 1081.

275. *Id.*

276. *Id.* The Court said: "We therefore agree with the district court that the front yard was not curtilage, and the presence of the media there did not violate the Fourth Amendment." *Id.*

277. *Id.* at 1082.

278. The Court said: "Although the district court decided that the media's presence beyond the front yard was a Fourth Amendment violation, the record does not necessarily support this finding. However, this lack of clarity is at least partially attributable to the GPD's 'woefully inadequate' management of the search scene. Given the district court's ruling that the evidence was nevertheless non-excludable, and the government's responsibility for this murky record, we assume, without deciding, that a Fourth Amendment violation occurred, and turn our attention to whether the district court properly held that the evidence should not be excluded." *Id.* at 1082. Regarding the exclusion issue, the court held that the media presence was a violation of the Duenas' Fourth Amendment rights, but it does not warrant the exclusion of evidence because the media did not play a role in finding or developing any evidence used in the later trial. *Id.* at 1083.

10. *United States v. Wilfong.* On January, 15, 2011, Neil Wilfong arrived at his mother's house and got into a dispute with his brother, Eric.[279] Wilfong retrieved a gun and fired a shot at his brother's feet, hitting the floor. Wilfong took the keys to his mother's vehicle and departed the premises. Eric called the police.[280] Wilfong had a pending warrant out for his arrest because he failed to comply with the terms of his supervised release from prison. Local officers and U.S. Marshall Albright learned of the whereabouts of the vehicle and began surveillance, but Wilfong never arrived at the vehicle.[281] Deputy Albright obtained consent from Eric to install a GPS device on the vehicle. The next morning, the GPS signaled the vehicle's movements, and law enforcement were able to track the vehicle to another apartment complex. A dangerous car chase ensued with Wilfong driving the vehicle.[282] 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.[283]

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. He also argued that his privacy rights were violated when police installed and monitored the GPS.[284] Recently, the Supreme Court had held in *Jones* that a GPS tracking device attached to a vehicle by law enforcement does constitute a search.[285] The Court of Appeals for the Tenth Circuit explained, using the privacy language also relied upon in *Katz*, that Wilfong had no Fourth Amendment privacy protection in the vehicle because the vehicle was stolen (thus, Wilfong did not have "standing," according to the court, to challenge any police search using the GPS device).[286]

Furthermore, the court reasoned, "[e]ven if Wilfong had standing, his attempt to suppress the gun would likely be unsuccessful. . . ."[287] For example, the court cited the fact that police could "reasonably believe" that Eric had the authority to consent to the installation by police of the

279. U.S. v. Wilfong, 528 Fed. Appx. 814, 815 (10th Cir. 2013).
280. *Id.*
281. *Id.*
282. *Id.* at 816.
283. *Id.*
284. *Id.*
285. *Id.* (citing *Jones,* 132 S.Ct. 945, 948 (2012)).
286. *Id.* at 817.
287. *Id.* at 816.

GPS device on the vehicle.[288] In addition, the court mentioned that even assuming that a search was a Fourth Amendment violation under *Jones*, the exclusionary rule would not apply due to the likely application of the attenuation doctrine.[289]

Finally, and most relevant to the study, the court reasoned that *Jones* may not be applicable here because the presence of exigent circumstances consisting of defendant, an armed felon, fleeing from an outstanding arrest warrant may have justified the police conduct in this case (i.e., the installation of the GPS device without a search warrant to track defendant's vehicle, but not necessarily link him to a crime, as in *Jones* itself).[290] In sum, the court essentially found no search had occurred under either the privacy or trespass tests.

d. Post-*Jones* cases using both privacy and property/trespass tests and finding "Search"

1. *United States v. Ganias.* During the 1980s, Ganias began his own business after working for the Internal Revenue Service (IRS) for fourteen years.[291] In 1998, Ganias had offered his professional services to James McCarthy and his businesses, American Boiler and Industrial Property Management (IPM). IPM had been later contracted by the Army to maintain and keep secure a vacant facility in Stratford, Connecticut. In August 2003, a confidential source came forward and tipped off the Criminal Investigative Command of the Army that some individuals within IPM were engaging in stealing copper wire and other valuable items, while

288. *Id.*

289. *Id.* at 818–19.

290. *Id.* at 819. The Court said: "[I]t is not clear *Jones* would be dispositive here. *Jones* held the placement of a GPS device is a search if there is a trespass and the device is used to obtain information. But, the Supreme Court declined to consider whether the result would be the same if the 'officers had reasonable suspicion, and indeed probable cause, to believe that [Jones] was a leader in a large-scale cocaine distribution conspiracy.' It concluded the government had forfeited that argument. Here, Wilfong was subject to an existing warrant for his arrest, and the placement of the GPS was not to obtain information connecting him to a crime but to find and arrest him. The situation looks much like exigent circumstances (an armed felon making an escape) since Wilfong was using the truck to escape arrest and could return any moment and drive away." *Id.* at 819 (citing and quoting *Jones*, 132 S.Ct. at 954).

291. U.S. v. Ganias, 755 F.3d 125, 128 (2d Cir. 2014).

simultaneously billing the Army for work.[292] 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 day later. The investigators were assisted by computer specialists, who made identical copies of all hard drives at the offices.

As evidence was being reviewed, the Army investigators discovered that payments were being made by IPM to an unregistered corporation.[293] As a result, the IRS began to assist in the investigation. By December 2004, the two groups of investigators uncovered data relevant to their investigations, and were careful at that time to review only data pertinent to the November 2003 warrant. However, investigators failed to discard any unrelated data. "Accounting irregularities" were discovered within the data. The IRS case agent wanted to review the data obtained on the hard drive, but knew that the data was outside the scope of the initial warrant.[294] In February 2006, Ganias was asked for his consent so the United States government could access the computer files that were outside 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 were in its possession for two and a half years.[295]

Ganias argued that the government's seizure and long-term retention of his business records violated his Fourth Amendment rights.[296] Relying upon both *Katz* and the *Jones-Jardines* precedents, the Court of Appeals for the Second Circuit first noted that Fourth Amendment protections apply if there is a search by government officials, and such a search occurs if there is either a physical intrusion by those officials or a violation by them of defendant's reasonable expectations of privacy.[297] The court next acknowledged that Fourth Amendment protections do apply to the government's examination of a suspect's computer files (i.e., there is a "search" under that Amendment):

292. *Id.*
293. *Id.* at 129.
294. *Id.*
295. *Id.* at 130.
296. *Id.* at 131.
297. *Id.* at 133–34 & n.8.

> [F]ourth Amendment protections apply to modern computer files. Like 18th Century "papers," computer files may contain intimate details regarding an individual's thoughts, beliefs, and lifestyle, and they should be similarly guarded against unwarranted Government intrusion [i.e., of a physical nature]. If anything, even greater protection is warranted.[298]

In particular, the court 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.[299] The court's analysis focused on the limited question of whether the Fourth Amendment permits the indefinite retention of every computer file on a target computer subsequent to the execution of a warrant for particular data on that computer.[300] The Ganias court concluded in the negative.[301]

2. *United States v. Davis* (2012). On August 29, 2000, Davis sought treatment at Howard County General Hospital for a gunshot wound on his leg.[302] He claimed to have been been shot while being robbed. Officer King visited Davis in the hospital. Davis' clothing had been inserted into plastic bags under the bed by hospital staff.[303] Officer King viewed Davis' gunshot wound, and without a warrant or consent seized his clothing as evidence of the shooting/robbery. In addition, without a warrant, police and forensic specialists obtained DNA from the blood stains on Davis' pants, and created a "DNA profile" based on the results.[304] The DNA profile was used to compare with samples found at the scene of the murder of an individual named Neal; however, there was not a match. Nevertheless, the DNA profile was kept in local police databases.[305] Subsequently, during another murder investigation of an individual named Schwindler, police were able to match DNA from that murder scene with the DNA they had already obtained from Davis' pants. Police then obtained a warrant to extract a DNA sample directly from Davis, which also matched the

298. *Id.* at 135,
299. *Id.* at 139.
300. *Id.* at 137.
301. *Id.*
302. U.S. v. Davis, 690 F.3d 226, 230 (4th Cir. 2012).
303. *Id.*
304. *Id.* at 231.
305. *Id.* at 232.

samples from the Schwindler murder scene. This evidence was used against Davis at trial.[306]

Davis argued to suppress the DNA evidence under the Fourth Amendment.[307] As a result, the Court of Appeals for the Fourth Circuit examined whether the creation and retention of the DNA profile, was lawful. The court concluded that though Davis may not have had a reasonable expectation of privacy in the clothing, the extraction of DNA from that clothing and the retention of his DNA profile fall within the scope of an individual's reasonable expectation of privacy. In part, this is because DNA evidence may reveal a host of private facts about a person, including those of a health, or medical, nature.[308] In particular, the court held that Davis, as a victim of a crime, retained a privacy interest in the DNA on the clothing (i.e., the pants) in police custody; as a result, according to the court, "the extraction of Davis' DNA sample from his clothing and the creation of his DNA profile constituted a search for Fourth Amendment purposes."[309]

Though the court found a search under the *Katz* reasonable expectation of privacy test, it did not find a search under *Jones*' trespass test:

> In the case at bar, once the police had lawful possession of Davis' clothing, there was no further intrusion of, or trespass upon, his property rights. Thus, the only basis on which the later testing of the clothing could constitute a search is if Davis retained a reasonable expectation of privacy [under *Katz*] in his clothing or the blood on it.[310]

3. *United States v. Patel.* Dr. Patel was a cardiologist in Louisiana who was indicted on ninety-one (91) counts of health care fraud.[311] In February 2002, Neil Kinn, a nurse, contacted the U.S. Department of Health and Human Services (HHS) with concerns of Dr. Patel's possibly illegal behavior. During a meeting with HHS Agent Alleman on March 15, 2002, Nurse Kinn provided HSS various documents from a laboratory used by Patel. After the meeting, on March 26, Nurse Kinn provided additional patient records to HHS that he obtained from Dr. Patel's laboratory.[312] Based on

306. *Id.*
307. *Id.*
308. *Id.* at 243, 246.
309. *Id.* at 246.
310. *Id.* at 241 n.23.
311. U.S. v. Patel, 485 Fed.Appx. 702, 705 (5th Cir. 2012).
312. *Id.* at 705, 710.

the evidence received, Agent Alleman was granted a search warrant for "documents and electronic storage media" in Dr. Patel's permanent and mobile offices.[313]

Dr. Patel argued, in part, that his Fourth Amendment rights were violated and the warrant was based on evidence obtained in an earlier warrantless (and illegal) search by Nurse Kinn.[314] The Court of Appeals for the Fifth Circuit stated when the U.S. Supreme Court had decided *Jones*, it gave new guidance about what constitutes a search; however, the Court of Appeals found that it did not need to squarely address how *Jones* would affect the search determination made by the lower (district) court. Thus, the Court of Appeals essentially left intact the "search" finding by the district court, and proceeded to *assume* there was a search under *Jones* (and *Katz*):

> 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.[315]

4. *United States v. Flores-Lopez.* Police officers believed that defendant Flores-Lopez was supplying illegal drugs to another drug dealer.[316] Police listened to a phone conversation between an individual named Santana-Cabrera and the defendant, who stated he would be providing a delivery of meth to Santana-Cabrera at a garage. Police immediately arrested both Flores-Lopez and Santana-Cabrera.[317] Flores-Lopez had driven a truck containing the drugs, and officers found a cell phone on Flores-Lopez and two additional cell phones in the truck. Flores-Lopez admitted that the cell phone found on his person belonged to him; however, he denied owning the other cell phones. Because police obtained the number of the cell phones, they were able to subpoena the telephone company for the phones' call histories, which itself provided incriminating evidence against defendant

313. *Id.* at 705.
314. *Id.* at 710.
315. *Id.* at 711.
316. U.S. v. Flores-Lopez, 670 F.3d 803, 804 (7th Cir. 2012).
317. *Id.*

(i.e., conversations related to illegal drugs). Flores-Lopez argued that the search of his cell phone violated his rights as it was not conducted under warrant.[318] According to defendant's argument, "The [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."[319]

The Court of Appeals for the Seventh Circuit focused its inquiry on whether the search of the defendant's phone (i.e., its number) incident to his arrest was reasonable. But the court did address, albeit in passing, the question of whether police obtaining defendant's number from his cell phone constituted a "search" under both the notions of property and privacy.

Regarding the property, or trespass, test from *Jones*, the court essentially found a search occurred under that test when police obtained defendant's cell phone number from his phone following his arrest:

> But was there any *urgency* about searching the cell phone for its phone number? Yet even if there wasn't, that bit of information might be so trivial that its seizure would not infringe the Fourth Amendment. In *United States v. Concepcion*, police officers tested the keys of a person they had arrested on various locks to discover which door gave ingress to his residence, and this we said was a search—and any doubts on that score have been scotched by *United States v. Jones*, which holds that attaching a GPS device to a vehicle is a search because "the Government physically occupied private property for the purpose of obtaining information." But we went on to hold in *Concepcion* that a minimally invasive search [such as that involved in police accessing the phone number from a cell phone they have seized] may be lawful in the absence of a warrant. . . .[320]

The court also determined in various parts of its decision that the police conduct consisting of obtaining the number from defendant's cell phone constituted a search because it infringed upon defendant's privacy, albeit minimally. The court first established that searching a cell phone *in general* is a search under the privacy concept:

318. *Id.* at 805.
319. *Id.*
320. *Id.* at 806, 807.

> A modern cell phone is in one aspect a diary writ large. Even when used primarily for business it is quite likely to contain, or provide ready access to, a vast body of personal data. The potential invasion of privacy in a search of a cell phone is greater than in a search of a "container" in a conventional sense. . . . [321]

And later its opinion, the court concedes that even by only accessing defendant's number on his cell phone, police have nonetheless committed a privacy intrusion, however minimal, and hence a "search":

> [A]ssume that justification is required for police who have no warrant to look inside a cell phone even if all they're looking for and all they find is the phone number. Other conspirators were involved in the distribution of methamphetamine besides Santana-Cabrera and the defendant, and conceivably could have learned of the arrests . . . and wiped the cell phones remotely before the government could obtain and execute a warrant and conduct a search pursuant to it for the cell phone's number. . . . "Conceivably" is not "probably"; but set off against the modest benefit to law enforcement of being able to obtain the cell phone's phone number immediately was only a modest cost in invasion of privacy [in obtaining the cell phone's number].[322]

Since the officers 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.[323] The search did

321. *Id.* at 805.

322. *Id.* at 807–08. Also, in another passage, the Court comments, "And if the phone is either turned off or powered down to a level at which it appears to be turned off, the police can't obtain information from it, even its phone number, knowledge of which as we said is minimally invasive of privacy." *Id.* at 809.

323. *Id.* at 809. Regarding the Court's finding that a warrant was not required to search defendant's phone for its number (and hence the search was reasonable), the Court said: "We said it was conceivable, not probable, that a confederate of the defendant would have wiped the data from the defendant's cell phone before the government could obtain a search warrant; and it could be argued that the risk of destruction of evidence was indeed so slight as to be outweighed by the invasion of privacy from the search. But the 'invasion,' limited as it was to the cell phone's number, was also slight. And in deciding whether a search is properly incident to an arrest and therefore does not require a warrant, the courts do not conduct a cost-benefit analysis, with the invasion of privacy on the cost side and the risk of destruction of evidence (or of an assault on the arresting officers) on the benefit side of allowing the immediate search. Toting up costs and benefits is not a feasible undertaking to require of police officers conducting a search incident to an arrest. Thus, even when the risk either to the police officers or to the existence of the evidence is negligible, the search is

technically occur under *Jones*' trespass notion and *Katz*' privacy notion; however, it was minimally invasive.

5. *Patel v. City of Los Angeles.* The municipal code of Los Angeles "requires hotel and motel operators to keep records with specified information about their guests."[324] These records must contain detailed, specific information about the guest, including his or her identifying information (name, address, etc.), the number of people accompanying the guest, vehicle information for guest vehicles parked at the motel or hotel, arrival and departure information, payment information, and room number. These records must be maintained for ninety (90) days.[325] This case is, however, focused on the constitutionality of the warrantless inspection requirement under the code. The relevant provision 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.'"[326] The City of Los Angeles contended that this provision authorized warrantless, non-consensual inspections by its officers. If hotel or motel operators refused to comply with the provision, they could be subject to a misdemeanor charge and, if convicted, possible jail time and a fine.[327]

The plaintiffs argued that the warrantless, non-consensual inspection of hotel guest records by officers under the municipal code violates the Fourth Amendment. The Court of Appeals for the Ninth Circuit first found that the inspection by officers of guests' records under the code constituted a search under the trespass and privacy tests (i.e., under *Jones* and *Katz*, respectively):

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allowed, provided it's no more invasive than, say, a frisk, or the search of a conventional container, such as Robinson's cigarette pack, in which heroin was found. If instead of a frisk it's a strip search, the risk to the officers' safety or to the preservation of evidence of crime must be greater to justify the search. Looking in a cell phone for just the cell phone's phone number does not exceed what [relevant precedent] decisions allow." *Id.* at 809, 810 (citations omitted).

324. Patel v. City of Los Angeles, 738 F.3d 1058, 1060 (9th Cir. 2013).

325. *Id.* For certain short-term guests, records must contain information regarding a form of identification presented by the guest.

326. *Id.* at 1061.

327. *Id.*

> [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*. Such inspections involve both a physical intrusion upon the hotel's private papers and an invasion of the hotel's protected privacy interest in those papers for the purpose of obtaining information.[328]

The court reasoned that the guests' records are

> the hotel's private property, and the hotel therefore has both a possessory and an ownership interest in the records. By virtue of those property-based interests, the hotel has the right to exclude others from prying into the contents of its records, which is also the source of its expectation of privacy in the records. That expectation of privacy is one society deems reasonable because businesses do not ordinarily disclose, and are not expected to disclose, the kind of commercially sensitive information contained in the records—e.g., customer lists, pricing practices, and occupancy rates. The hotel retains that expectation of privacy notwithstanding the fact that the records are required to be kept by law.[329]

In addition, the court proceeded to find that the municipal code provision authorizing warrantless, non-consensual police inspections of hotel guests' records was unconstitutional under the Fourth Amendment. In particular, the court held that "[the relevant municipal code provision's] requirement that hotel guest records 'shall be made available to any officer of the Los Angeles Police Department for inspection' is facially invalid under the Fourth Amendment insofar as it authorizes inspections of those records without affording an opportunity to 'obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.'"[330]

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328. *Id*. at 1062.

329. *Id*.

330. *Id*. at 1065. The U.S. Supreme Court granted certiorari in this case, and affirmed the judgment of the Ninth Circuit Court of Appeals. *See* City of Los Angeles v. Patel, 135 S.Ct. 2443 (2015). The Court "agree[d] with the Ninth Circuit that [the municipal code provision authorizing police inspection of guest records] is facially invalid [under the Fourth Amendment] insofar as it fails to provide any opportunity for precompliance review before a hotel must give its guest registry to the police for inspection." *Id*. at 2456. *See also id*. at 2447. Instead of addressing whether the inspections by police of guest records constituted a search, the Court instead focused on whether these inspections were reasonable under the Fourth Amendment. The Court essentially found the non-consensual inspections allowed under the ordinance unreasonable because of the law's failure to provide hotel operators with an opportunity for pre-compliance review, which it noted was required under the

6. *Free Speech Coalition, Inc. v. Attorney General of United States.* Plaintiffs, who are individuals and entities involved with various facets of the adult media industry, brought an action challenging the legality of certain federal statutes (i.e., 18 U.S.C. §§ 2257 and 2257A) and associated regulations.[331] These statutes are "criminal laws imposing recordkeeping, labeling, and inspection requirements on producers of sexually explicit depictions."[332] In addition to other federal constitutional challenges, plaintiffs argue that the statutes and regulations violate the Fourth Amendment because they improperly allow governmental searches and seizures without a warrant.[333] With regard to the Fourth Amendment claim, the relevant portion of the federal statutes states that adult media producers make their records "available to the Attorney General 'for inspection at all reasonable times.'"[334] The relevant regulatory provisions "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."[335] In addition, under the applicable regulations, "[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."[336]

When deciding whether a Fourth Amendment 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 [Plaintiff Free Speech Coalition, Inc. (FSC)] were searched; when and where the search of FSC members and others occurred (i.e., offices or homes); and the conduct of the government during the search (e.g., what specific information the government reviewed and whether the government exceeded its authority under the applicable regulations)."[337] According to the court,

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administrative search exception. *Id.* at 2452–53. The Court also found that the inspections did not fall under a warrantless exception for "closely regulated businesses." *Id.* at 2454–55.

331. Free Speech Coalition, Inc. v. Attorney General of U.S., 677 F.3d 519, 524–25 (3d Cir. 2012).

332. *Id.* at 524.

333. *Id.* at 525.

334. *Id.* at 541–42 (quoting 18 U.S.C. §§ 2257(c) and 2257A(c).)

335. *Id.* at 542 (citing 28 C.F.R. § 75.5(a) and (b)).

336. *Id.* (citing 28 C.F.R. § 75.5(c)(1) and (d)).

337. *Id.* at 543–44.

"This 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 described in *Jones*."[338] 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*."[339]

On remand, the District Court determined a search occurred under both the *Katz* reasonable expectation of privacy test and the *Jones* trespass test; this determination was subsequently upheld by the Court of Appeals for the Third Circuit, which reviewed the case again:

> [On remand] we directed the District Court to consider whether an inspection under [the relevant regulatory provision] "was a 'search' under the Fourth Amendment pursuant to either the reasonable-expectation-of-privacy test set forth in *Katz v. United States* or the common-law-trespass test described in *United States v. Jones*." After developing a thorough record, the District Court concluded that the warrantless inspections conducted pursuant to regulation were searches under both tests. As to the *Katz* analysis, the inspections invaded areas to which the public did not have access and in which there was a reasonable expectation of privacy (e.g., private offices, storage rooms, and residences). And the physical presence of law enforcement officers in those areas also constituted trespasses under the *Jones* framework. The Government does not contest this analysis, and we see no reason to reach a different conclusion.[340]

e. Post-*Jones* cases relying upon binding precedent or involving a procedural error

Finally, regarding the study's overall findings, ten (10) cases appearing in the citator results for this study were excluded from the full, descriptive case

338. *Id.* at 544.

339. *Id.* at 542–43.

340. Free Speech Coalition, Inc. v. Attorney General of U.S., 787 F.3d 142 (3d Cir. 2015) (quoting Free Speech Coalition, Inc. v. Attorney General of U.S., 677 F.3d at 544 (3d Cit. 2012)) (citing Free Speech Coalition Inc. v. Holder, 957 F. Supp. 2d 564, 602–04 (E.D. Pa. 2013)). Note that Free Speech Coalition, Inc. v. Holder, 957 F. Supp. 2d 564 (E.D. Pa. 2013), was vacated and remanded on other grounds by Free Speech Coalition, Inc. v. Attorney General of U.S., 825 F.3d 149 (3d Cir. 2016)

findings above because they relied upon pre-*Jones* law to decide the Fourth Amendment "search" question. These cases were categorized as "then-binding precedent," and are summarized in this footnote.[341] In addition,

341. *See* Elkins v. Elenz, 516 Fed. Appx. 825, 828 (11th Cir. 2013) ("Because *Jones* was decided after the challenged actions here, it did not clearly establish the relevant law"); United States v. Baez, 744 F.3d 30, 33, 36 (1st Cir. 2014) (applying pre-*Jones* search law to police installation and monitoring of defendant's vehicle using a GPS device) ("But Agent Oppedisano, who placed the GPS device on [defendant] Baez's car in August 2009, did not have the benefit of *Jones*, which was decided almost two and a half years later."); United States. v. Sparks, 711 F.3d 58, 65, 67 (1st Cir. 2013) (declining to squarely decide Fourth Amendment search question under *Jones* and instead applying pre-J*ones* binding circuit precedent to find warrantless attachment and monitoring of defendant's vehicle for 11 days by police using a GPS device was permissible; therefore, GPS evidence was admissible under good faith doctrine); United States v. Aguiar, 737 F.3d 251, 255, 261–62 (2d Cir. 2013) (applying pre-J*ones* binding circuit precedent to find warrantless placement and monitoring of a GPS device by police on defendant's vehicle was permissible; accordingly, GPS evidence was admissible under good faith doctrine); U.S. v. Katzin, 769 F.3d 163, 174–75, 180, 182–84 (3d Cir. 2014) (applying pre-*Jones* binding circuit precedent to determine whether a search occurred and whether good faith doctrine should apply to admit evidence in circumstances where police attach and monitor a GPS device on defendant's vehicle without a warrant); United States v. Brown, 744 F.3d 474, 476, 478 (7th Cir. 2014) (bypassing Fourth Amendment search question under *Jones* and applying pre-*Jones* law to decide both whether police use of a GPS device is a search and whether good faith exception to exclusionary rule applies) ("No matter how these substantive issues come out [including whether GPS attachment to a vehicle and monitoring by police constitutes a search in particular circumstances under *Jones*], it would be inappropriate to use the exclusionary rule to suppress evidence derived from this GPS locator before the Supreme Court's decision in *Jones*. Until then, precedent would have led reasonable officers to believe that using GPS to track a car's location was not a search [in this circuit].)"; United States v. Thomas, 726 F.3d 1086, 1093, 1095 (9th Cir. 2013) (declining to make a finding under *Jones* whether a search had occurred when a police canine made contact with a truck and toolbox in the truck's bed, and instead finding admissible the drug evidence discovered in the toolbox under the police good faith exception in binding precedent) ("[I]t is conceivable that by directing the drug dog to touch the truck and toolbox in order to gather sensory information about what was inside, the border patrol agent committed an unconstitutional trespass or physical intrusion [under *Jones*]. *Yet we need not decide whether it violated or even implicated the Fourth Amendment when agents directed the dog to touch Thomas's vehicle because . . . not every constitutional violation leads to application of the exclusionary rule.* . . . It is beyond dispute that as of February 2010, when Agent LeBlanc acted, Supreme Court precedent specifically authorized law enforcement to use a drug-detection dog to seek out illegal narcotics on a validly detained vehicle. Because LeBlanc acted in accord with then-binding precedent, the marijuana seized is not subject to exclusion on the basis of an unconstitutional trespass or physical intrusion.") (emphasis added); United States v. Oladosu, 744 F.3d 36, 37–39 (1st Cir. 2014) (declining to address whether there was a Fourth Amendment search under *Jones*

six (6) cases appearing in the citator results for this study were excluded from the full, descriptive case findings above because they did not address the merits of the Fourth Amendment "search" question. This failure occurred because defendant committed some type of procedural error. These cases were categorized as "procedural error," and are summarized in this footnote.[342]

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when officers installed and monitored a GPS device on defendant's vehicle for 47 days without a warrant, and instead finding suppression of evidence from device unwarranted in light of good faith police reliance on binding circuit precedent); United States v. Ransfer, 749 F.3d 914, 921, 925, 938 (11 Cir. 2014) (declining to address whether Fourth Amendment search occurred under *Jones* when officers placed GPS device on vehicle without a warrant and instead holding officers' conduct pre-*Jones* permissible under binding circuit precedent, since officers reasonably suspected individual associated with vehicle to be involved in a crime; good faith doctrine applies to admit evidence stemming from GPS device); United States v. Barraza-Maldonado, 732 F.3d 865, 869 (8th Cir. 2013) (declining to squarely decide Fourth Amendment search question under *Jones* and instead finding GPS evidence admissible under good faith doctrine) ("Assuming without deciding the DEA agents violated [defendant] Barraza-Maldonado's Fourth Amendment rights as construed in *Jones* by installing the GPS device in Phoenix, or by using the device to monitor the car as it traveled from Arizona into Minnesota, we conclude the district court properly denied Barraza-Maldonado's motion to suppress because the evidence seized as a result of the installation and monitoring was admissible under the good faith exception to the Fourth Amendment exclusionary rule.")

342. *See* United States v. Baker, 713 F.3d 558, 560 (10th Cir. 2013) ("Defendant argues that the GPS evidence of his location at the time of the crimes should have been excluded because the GPS device was installed without a warrant in violation of the Fourth Amendment. He relies on [*Jones*], in which the Supreme Court held that attachment of a GPS tracking device to monitor movement of a suspect's car is a search governed by the Fourth Amendment. Although he did not move to suppress this evidence in district court, he now asks us to grant relief. . . . We hold that Defendant has waived his right to raise the issue. . . . "); United States v. Curbelo, 726 F.3d 1260, 1265–67 (11th Cir. 2013) (finding waiver of Fourth Amendment claim to suppress GPS evidence under *Jones* because defendant did not file timely motion in lower court); Jones v. Warden, 520 Fed. Appx. 942, 944–46 (11th Cir. 2013) (per curiam) (affirming District Court's finding that defendant's claims, including a claim under *Jones*, are procedurally barred and subject to dismissal, in part, because *Jones* is not retroactive); United States v. Glay, 550 Fed. Appx. 11 (D.C. Cir. 2014), at *12 (by pleading guilty, defendant Glay waived challenge under Fourth Amendment and *Jones* to police use of a tracking device without a warrant) ("In light of *Jones*, Glay appealed his conviction, arguing that the district court must revisit its suppression ruling and determine whether the warrantless use of the tracking device rendered the search warrant defective. But Glay waived his challenge to the warrantless use of the tracking device by pleading guilty. Furthermore, Glay's Fourth Amendment argument does not implicate either exception to the waiver rule. Accordingly, Glay waived his challenge"); United States

PART V. DISCUSSION

The study's detailed findings consist of a total of thirty-one (31) significant federal appellate court citing cases for *Jones* which relied upon the *Jones* trespass test and/or the *Katz* privacy test to decide the question of whether a Fourth Amendment "search" occurred in the aftermath of *Jones*.[343] Of the 31 cases, 16 court cases (52%) used a combination of the *Katz* and *Jones* tests in their Fourth Amendment search inquiries (i.e., the privacy and property/trespass tests, respectively). In particular, this research study revealed that the federal appellate courts were using a combination of both tests more often than either test alone.[344] Such dual reliance on the rules or criteria from *Katz* and *Jones* to decide Fourth Amendment search questions is beneficial for the continued development and refinement of Fourth Amendment search jurisprudence, though it does further add to its complexity. In particular, robust judicial interpretation of the Fourth Amendment search question under both *Katz* and *Jones* will provide police, who must enforce the law, and citizens, who must abide by it, a potentially clearer understanding of their respective rights and duties. Moreover, by frequently employing and applying both the *Jones* and *Katz* precedents in this context, the federal appellate courts are providing increased guidance in the form of precedent to lower courts tasked with deciding threshold Fourth Amendment "search" questions.

v. Rayford, 556 Fed. Appx. 678, 679, 681 (10th Cir. 2014) (dismissing defendant's appeal and agreeing with district court that defendant's claim that attorney's failure to move to exclude evidence under *Jones* as a result of police attachment of GPS device to vehicle without warrant, constituted ineffective assistance of counsel is without merit, since *Jones* not decided at time of defendant's trial); United States v. Johnson, 537 Fed. Appx. 717, 718 (9th Cir. 2013) (finding district court properly denied defendant's motion for a new trial "based on the government's warrantless use of a global positioning system ("GPS") device during its investigation of his crimes . . . " because defendant "failed to move to suppress the GPS evidence at trial . . . , and thus he waived this argument.") (internal citations omitted).

343. The date range for the study is from January 23, 2012, the date *Jones* was decided, until December 31, 2014. Note that a few cases instead decided the related issues of Fourth Amendment standing or whether a police seizure had occurred. For an explanation of why these cases were maintained in the study's final data set, see *supra* note 36. One of the cases technically fell outside the date range for this study, but the overall litigation commenced during the date range. *See supra* note 57.

344. *See supra* note 52 and accompanying text. *See also* Appendix A & Figure 1. Thirty-two percent (32%) of the cases used *Jones* alone, and sixteen percent (16%) used *Katz* alone. *See supra* notes 53–54 and accompanying text. *See also* Appendix A & Figure 1.

Regarding potential complications arising from the existence of two tests to determine a Fourth Amendment search after *Jones*, the federal appellate courts included in this study appear to be struggling somewhat with how much preference to give one test over the other, and how to approach or structure their analyses under the post-*Jones* paradigm for determining a Fourth Amendment search. This observation is reflected in the lack of uniformity among these courts following *Jones* over which test to use to evaluate the Fourth Amendment search question (i.e., *Jones*, *Katz*, or both).

Notably, when the federal appellate courts in this study applied both tests, they almost always came to the same conclusion under each test about whether a search did or did not occur. For example, in this context, when a court determines that an individual's property has been physically intruded upon and hence a search has occurred for Fourth Amendment purposes, it also almost always finds that an individual's reasonable expectation of privacy has been violated and consequently a search has also occurred under this criterion (and vice versa).[345] This is so in a variety of diverse factual contexts, including searches by law enforcement of cell site tower information,[346] cell phone numbers,[347] computer files,[348] open fields or other areas of property outside the curtilage,[349] vehicles (including GPS placement),[350] private officers and residences,[351] hotel guests' records,[352] key fobs,[353] trash containers outside the curtilage,[354] and in other public

345. Of the sixteen (16) cases that employed both *Katz* and *Jones* to decide the "search" question, only one (1) case found that a search had occurred under *Katz* but did not occur under *Jones*. *See* U.S. v. Davis, 690 F.3d 226 (4th Cir. 2012) (DNA extraction and creation of DNA profile by law enforcement from defendant's clothing removed by hospital emergency department personnel and later taken by police violated defendant's privacy interest under *Katz* and hence constituted a search under that rubric, but these police actions did not intrude upon defendant's property interests under *Jones*). *See also supra* notes 302–309 and accompanying text. *See also* generally Part IV.B.c. & d.

346. U.S. v. Davis, 785 F.3d 498 (11th Cir. 2015).

347. U.S. v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012).

348. U.S. v. Ganias, 755 F.3d 125, 130 (2d Cir. 2014).

349. U.S. v. Mathias, 721 F.3d 952 (8th Cir. 2013); U.S. v. Duenas, 691 F.3d 1070 (9th Cir. 2012) (front lawn).

350. U.S. v. Castellanos, 716 F.3d 828 (4th Cir. 2013); U.S. v. Wilfong., 528 Fed. Appx. 814 (10th Cir. 2013) (GPS placement and monitoring).

351. Free Speech Coalition, Inc. v. Attorney General of U.S., 677 F.3d 519 (3d Cir. 2012).

352. Patel v. City of Los Angeles, 738 F.3d 1058 (9th Cir. 2013).

353. U.S. v. Cowan, 674 F.3d 947 (8th Cir. 2012).

354. U.S. v. Jackson, 728 F.3d 367 (4th Cir. 2013).

locations.[355] The fact that the federal appellate courts in this context are reaching similar conclusions under either "search" test suggests that the fundamental Fourth Amendment "search" concepts of property and privacy, at least as interpreted by federal appellate courts, are overlapping to a large degree.

Of the courts that used both types of tests, a majority (10 court cases or 63%) found no search had occurred. This would suggest that these courts are leaning somewhat more toward a pro–law enforcement, crime-control model in the wake of *Jones*. Overall, Herbert Packer conceptualizes two competing models for how the criminal justice system handles offenders and individual rights.[356] First, there is the crime control model, which generally forgoes the rights of the individual in the interest of catching and punishing as many offenders as possible. Second, there is the due process model, which is focused on 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.[357] In other words, during time periods associated more with the crime control model, one should expect that the courts are generally more inclined to find no police search has occurred, and hence the defendant does not gain Fourth Amendment protections and in fact may lose them. Conversely, during periods associated with the due process model, courts may sway more toward protecting defendant's Fourth Amendment claims, and find a police "search" has occurred.

However, for all the cases included in this study's findings, there was not a clear trend in the wake of *Jones* toward or away from increased Fourth Amendment protections for defendants. Indeed, almost an equal number of court cases included in the study found "search" and "no search" (i.e., 16 "search" cases and 15 "no search" cases). Thus, although some authors believed the new trespass test established in *Jones* would lead to additional Fourth Amendment protection for citizens (i.e., a more due process–oriented response from the courts), this research study does not support such an assessment, at least not overall.[358]

355. U.S. v. Anderson-Bagshaw, 509 Fed. Appx. 396 (6th Cir. 2012).

356. *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). For the finding that a majority of the cases (10) included in this study using both the *Jones* and *Katz* tests found "no search," see *supra* note 52 and accompanying text. *See also* Appendix B.

357. Packer, *supra* note 356.

358. *See, e.g.*, Sean M. Kilbane, *Drones and* Jones*: Rethinking Curtilage Flyover in Light of the Revived Fourth Amendment Trespass Doctrine*, 42 CAP. U.L. REV. 249, 282 (2014). For the

In addition, in the wake of *Jones*, federal appellate courts are still relying heavily upon the *Katz* test. In particular, on the federal appellate level, the *Katz* test was used in twenty-one (21) cases in this study as either a stand-alone test or in combination with *Jones*. This amount represents 68 percent of all the cases included in the study's main findings.[359] Therefore, in the wake of *Jones*, the federal appellate courts are still relying frequently on *Katz*, whether in combination with *Jones* or alone. This may be because considerable modern precedent is available for these courts to rely upon for guidance that either uses or applies the *Katz* test, including relevant precedent from the Supreme Court itself.[360] Indeed, *Katz* has been generally regarded as the sole lens to evaluate Fourth Amendment searches for almost forty-five years (i.e., from 1967 to 2012, the year *Jones* was decided). As a result, judges have had more recent exposure and familiarity with *Katz* and therefore may be more likely to select its reasonable expectation of privacy test to apply to various factual scenarios involving police searches under the Fourth Amendment.

In addition, the frequent reliance on *Katz* to decide Fourth Amendment search questions 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*. For example, *Jones* was decided

study's overall findings regarding whether or not courts found a search had occurred, see *supra* notes 52–54 and accompanying text. *See also* Appendix B & Figure 1. Note that when courts *only* apply *Jones* to decide whether a search has occurred, they have uniformly found "a search" under the Fourth Amendment, thereby supporting in this more narrow way the argument that *Jones* would lead courts to a more due process orientation. *See supra* note 53 and accompanying text.

359. Some scholars have apparently expressed a concern that *Jones* may lead to the decline of *Katz*' privacy approach to Fourth Amendment search questions. *See* 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). For the number of court cases in the study relying on *Katz* alone or in combination with *Jones*, see *supra* notes 52 & 54 and accompanying text. *See also* Appendix A & Figure 1.

360. *See, e.g.*, Maryland v. Macon, 472 U.S. 463 (1985) (no privacy expectation in areas of a store accessible by public and in items available for purchase by public); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) (privacy expectation by shop owner in packaged, unopened items that have not been paid for); United States v. Dionisio, 410 U.S. 1 (1973) (no privacy expectation in handwriting sample or sample of one's voice obtained by police for identification purposes at the request of a grand jury).

recently, and there is less precedent applying it in general and outside the GPS area in particular.[361] Moreover, the Supreme Court decision in *Jones* itself left some prominent gaps even in the area of GPS searches by police, including whether police need a warrant or something less (e.g., reasonable suspicion of wrong-doing) to conduct a reasonable search.[362]

Thus, these circumstances may have caused the circuit courts to be somewhat more hesitant in their application of *Jones* as the sole measure to decide the Fourth Amendment search question. Indeed, only ten (10) of the thirty-one cases from the study (32%) used *Jones* as the sole lens through which to evaluate the Fourth Amendment search question (though a considerable larger number, sixteen [16] cases, did use *Jones in combination* with *Katz*). And of these ten (10) cases using *Jones* as the sole criterion, most (7) applied *Jones* in the context of the same or very similar factual circumstances that were present in *Jones* itself (i.e., the application and monitoring of vehicles by police using GPS devices).[363] As future Supreme Court cases further interpret and apply *Jones*, including in circumstances distinct from the GPS context, more cases may emerge from the federal appellate courts using *Jones* as the sole criterion with which to decide Fourth Amendment

361. Florida v. Jardines, 133 S.Ct. 1409 (2013), however, stands out as one recent precedent from the U.S. Supreme Court applying the *Jones* trespass test in circumstances apart from the application and monitoring of vehicles by police using GPS devices. *See generally id.* (applying *Jones* trespass criterion to circumstances involving police dog sniffs near a residence in the curtilage).

362. *See* C.D. Totten, *More than Just the "GPS" Case—The Resurgence of Property Rights in Fourth Amendment Search Analysis in* United States v. Jones, 48 CRIM. L. BULL. 1343, 1347–54 (2012).

363. For the overall number of cases in the study applying *Jones* alone or in conjunction with *Katz* to decide the Fourth Amendment search question, see *supra* notes 52–53 and accompanying text. *See also* Appendix A & Figure 1. The following cases from the study applied *Jones* as the sole criterion to evaluate the "search" question, in circumstances involving police attachment and monitoring of vehicles using a GPS device (i.e., circumstances identical or very similar to Jones itself): (1) U.S. v. Smith, 741 F.3d 1211 (11th Cir. 2013); (2) U.S. v. Pineda-Moreno, 688 F.3d 1087 (9th Cir. 2012); (3) U.S. v. Fisher, 745 F.3d 200 (6th Cir. 2014); (4) U.S. v. Sellers, 512 Fed. Appx. 319 (4th Cir. 2013); (5) U.S. v. Stephens, 764 F.3d 327, 329 (4th Cir. 2014); (6) U.S. v. Martin, 712 F.3d 1080 (7th Cir. 2013); and (7) U.S. v. Davis, 750 F.3d 1186 (10th Cir. 2014). *But see* Florida v. Jardines, 133 S. Ct. 1409 (2013) (applying *Jones* trespass criterion to circumstances involving police dog sniffs near a residence in the curtilage); Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir. 2012) (applying *Jones* to police seizure and destruction of homeless individuals' un-abandoned items of property); U.S. v. Perea-Rey, 680 F.3d 1179 (9th Cir. 2012) (applying Jones to police entry into defendant's carport, which the court determined to be curtilage).

"search" questions. Thus, any change in Fourth Amendment "search" law as a result of *Jones* appears likely to be more gradual and incremental, at least in the federal courts.

Nonetheless, the effects of the change in Fourth Amendment search law following *Jones* are becoming apparent. For example, twenty-six (26) of the thirty-one (31) federal appellate cases in the study (84%) applied the *Jones* trespass test either alone or in combination with *Katz* to determine whether a Fourth Amendment search had occurred. When these courts applied both the *Jones* criterion and the *Katz* criterion to decide the search question, they did so in a diverse array of factual settings, as noted previously.[364] This suggests that federal appellate court precedent interpreting *Jones* is actively developing and maturing, albeit in tandem with *Katz*.

Interestingly, when the federal appellate courts in the study applied *Jones* as the sole criterion to determine the Fourth Amendment search issue, they uniformly held that a search had occurred (i.e., 10, or 100%, of these cases found a "search"). Hence, federal appellate court selection of *Jones* as the sole criterion to evaluate searches appears to significantly affect or determine the outcome of the overall search finding. This may be because the trespass test for Fourth Amendment searches—at least in the few contexts that it has been applied by the U.S. Supreme Court in the modern era (i.e., police GPS use and canine searches near residences), but also as a general proposition—is less flexible and more concrete in its application.[365] For example, in general, if police attach a GPS device to a vehicle and monitor its movements or use a canine to explore for drug-emitting odors in the area immediately around a residence, a trespass has occurred, and a hence a "search" for Fourth Amendment purposes.[366] Accordingly, there may

364. For the number of courts applying *Jones* by itself or in conjunction with *Katz*, see *supra* notes 52–53 and accompanying text. *See also* Appendix A & Figure 1. See *supra* notes 346–355 for a description of these various settings.

365. *See generally Jones*, 132 S.Ct. at 945 (police GPS context). *See also generally* Florida v. Jardines 133 S.Ct. 1409 (2013) (police canines at residences context). For the overall number of *Jones* cases finding a search occurred for Fourth Amendment purposes, see *supra* note 53 and accompanying text. *See also* Appendix B & Figure 1. For pre-*Katz* cases applying the trespass concept, or test, to decide "search" questions, all stemming from the early or middle part of the twentieth century, see *supra* note 14.

366. *See generally Jones*, 132 S.Ct. at 945 (search under Fourth Amendment when police attach a GPS device to a vehicle and monitor its movements). *See also generally* Florida v. Jardines, 133 S.Ct. 1409 (2013) (Fourth Amendment search when police use canines in area surrounding a residence to detect drugs).

be less interpretive wiggle-room with the *Jones* property-based approach to Fourth Amendment search analysis than with the *Katz* criterion, with its more nebulous and imprecise privacy measure.

Thus, the choice by federal appellate courts to determine Fourth Amendment "search" questions solely using *Jones*—whose majority opinion was authored by Justice Scalia, who is generally viewed as a conservative, crime control–oriented judge whose "originalist" or "textualist" approach to constitutional interpretation was certainly reflected in *Jones*—has had the result of leading to more findings that a police search occurred.[367] Such outcomes, of course, translate into Fourth Amendment protections applying to the police conduct in question, with the accompanying limitations that finding may bring to the exercise of police powers. In other words, the choice by federal appellate courts to apply *Jones* alone to analyze the Fourth Amendment search question has thus far led those courts to more due process–oriented results.

On the contrary, the choice by federal appellate courts to use *Katz* alone to decide Fourth Amendment search questions has led those courts uniformly to find "no search" occurred (i.e., of the five federal appellate cases using *Katz* alone, all five found "no search" occurred).[368] This may be because, unlike *Jones* and its trespass concept, the privacy notion endorsed by *Katz* to determine Fourth Amendment search questions can be more flexible in its interpretation and application. For example, if a court is inclined from a policy perspective or philosophical orientation to provide law enforcement with increased leeway and powers to accomplish its crime-fighting duties and objectives (i.e., apprehending criminals and preventing or solving crime), the choice of the privacy test may better facilitate this approach or desire. In particular, several of the cases in the study's sample that used *Katz* alone drew upon the various, well-developed legal doctrines surrounding *Katz*, such as the public exposure and third-party doctrines, to find "no search" occurred under the Fourth Amendment.[369] Thus, the

367. For an analysis of Justice Scalia's style of constitutional interpretation (i.e., originalism or textualism), *see* Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Content, Clarity and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 181 (2015). For support that the majority opinion by Justice Scalia in *Jones* reflects an originalist or textualist approach to constitutional interpretation, see *supra* notes 28–29 and accompanying text.

368. *See supra* note 54 and accompanying text. *See also* Appendix B & Figure 1.

369. For a case using the third-party doctrine, see *U.S. v. Gomez*, 575 Fed.Appx. 84, 85 (3d Cir. 2014). For a case using the public exposure doctrine, see *U.S. v. Wahchumwah*, 710 F.3d

various legal doctrines, or rules, that have developed as part of and in response to the Katz privacy test may offer courts the interpretive leeway they need to reach more crime control–oriented results in the context of Fourth Amendment "search" law.

Limitations for this research study include the relatively smaller number of cases that fit the parameters of this study. For example, because of how relatively recent *Jones* was decided, a number of cases had to be eliminated from the final data set. Namely, this included cases applying pre-*Jones* law to facts occurring prior to *Jones* ("binding appellate precedent" cases).[370] Also, certain cases had to be eliminated because of procedural errors by the defendant that precluded the courts from considering the merits of the Fourth Amendment search question under *Jones*.[371]

CONCLUSION

Overall, based on the results of this research study, it does appear that the *Jones* decision and subsequent return of the trespass doctrine has had an impact, albeit a gradual and incremental one, on Fourth Amendment law in general and Fourth Amendment search law in particular. In particular, the federal appellate courts after *Jones* continue to rely upon the *Katz* privacy criterion to evaluate Fourth Amendment searches. In fact, the federal appellate courts included in this study most often apply the *Jones* trespass test *in conjunction with* the *Katz* privacy test in evaluating Fourth Amendment search questions. Furthermore, in the wake of *Jones*, these courts at times still employ the *Katz* test by itself.[372] When used in conjunction with the *Katz* privacy concept, the *Jones* trespass test has been

862, 865 (9th Cir. 2013). For U.S. Supreme Court cases on the third-party doctrine, or concept, see *U.S. v. Miller*, 425 U.S. 435 (1976) (no privacy expectation in bank records voluntarily handed over to a bank) and *Smith v. Maryland*, 442 U.S. 735 (1979). For a list of additional third-party doctrine cases, see *Smith*, 442 U.S. at 744. *See also* Rawlings v. Kentucky, 448 U.S. 98 (1980) (one who carelessly surrenders items to another may "lose" privacy interest in those items). The public exposure doctrine, or at least the concept underlying it, is addressed in *Katz* itself. *See supra* note 16 and accompanying text. *See also* United States v. Dionisio, 410 U.S. 1 (1973) (no Fourth Amendment interest in sample of one's handwriting or voice because frequently exposed to public).

370. *See supra* note 341 for a full listing as well as the basic holding of these cases.

371. *See supra* note 342 for a full listing as well as the basic holding of these cases.

372. *See supra* notes 52 and 54 and accompanying text.

applied expansively to police conduct occurring in a large number of diverse factual contexts.[373] Lastly, when these courts applied both tests, they nearly uniformly arrived at the same conclusion under each test concerning whether a search had occurred.[374]

In addition, though the application of *Jones* by itself has uniformly led to more findings by the federal appellate courts of "search" and hence increased Fourth Amendment protections for defendants in this context, overall in the wake of *Jones* there are almost an equal number of federal appellate court cases finding "search" and "no search."[375] This latter finding suggests that at least thus far, there is no clear trend among federal appellate courts in the wake of *Jones* toward a more due process or crime control–oriented approach to Fourth Amendment search questions. Furthermore, when these courts did apply *Jones* by itself to decide Fourth Amendment search questions, they mostly chose to do so in the same factual circumstances that were present in *Jones* itself (or at least very similar ones).[376] Overall, most federal appellate court cases in the wake of *Jones* are applying Jones in some capacity to decide Fourth Amendment search questions (i.e., 84% of these court cases apply the *Jones* trespass test alone or in combination with the *Katz* privacy test).[377]

When the federal appellate courts included in this study applied the *Katz* privacy test by itself to decide a Fourth Amendment search question, they uniformly have found that no search occurred.[378] This suggests that these courts may be choosing *Katz* as the sole criterion because its privacy measure for Fourth Amendment searches is more inherently flexible than the *Jones* trespass test, thus allowing these courts more interpretive space to find defendant is not entitled to Fourth Amendment protections. Such a finding is more consistent with the crime control model, or perspective, of the criminal justice system.

373. *See supra* notes 346–355 and accompanying text.

374. *See supra* note 345 and accompanying text.

375. *See supra* note 53 and accompanying text. *See also supra* notes 52–54. *See also* Appendix B & Figure 1.

376. *See supra* note 363 and accompanying text.

377. *See supra* notes 52 and 53 and accompanying text. *See also* Appendix A & Figure 1.

378. *See supra* note 54 and accompanying text. *See also* Appendix B & Figure 1.

APPENDIX A. FEDERAL APPELLATE CASES POST-*JONES*: CATEGORY BREAKDOWN

Jones (J): 10 Cases
Katz (K): 5 Cases
Both (B): 16 Cases
Binding Precedent (BP): 10 Cases
Procedural Error (PE): 5 Cases

APPENDIX B. FEDERAL APPELLATE CASES POST-*JONES* FINDING SEARCH OR NO SEARCH

Jones—Search (S): 10
Jones—No Search (NS): 0
Katz—Search (S): 0
Katz—No Search (NS): 5
Both—Search (S): 6
Both—No Search (NS): 10