UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15-2443

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAMIAN PATRICK,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Case No. 13-Cr-234

THE HONORABLE RUDOLPH T. RANDA,
UNITED STATES DISTRICT JUDGE, PRESIDING

BRIEF OF PLAINTIFF-APPELLEE

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JURISDICTIONAL STATEMENT

The United States provides the following jurisdictional statement pursuant to Circuit Rule 28(b) because the jurisdictional statement provided by Damian Patrick ("Patrick") is not complete and correct.

Patrick appeals from a conditional guilty plea and sentence imposed in the United States District Court for the Eastern District of Wisconsin, the Honorable Rudolph T. Randa, presiding. The district court entered judgment on June 29, 2015. On July 8, 2015, Patrick filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(b).

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231 and the underlying federal criminal statutes, 18 U.S.C. §§ 922(g)(1) and 924(a)(2). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and Federal Rule of Appellate Procedure 4(b).

STATEMENT OF THE ISSUES

I. Did the state court properly issue a search warrant to identify the location of Patrick's cell phone based on his status as the subject of an arrest warrant, and probable cause to believe that the location information sought would aid in his apprehension?

II. Did the arrest warrant for Patrick allow officers to determine the location of the cell phone in Patrick's possession in order to facilitate his arrest?

III. Did the officers act in good faith reliance on the warrant authorizing them to identify the location of Patrick's phone?

STATEMENT OF THE CASE

I. Procedural History

On November 26, 2013, a grand jury sitting in the Eastern District of Wisconsin returned a one-count indictment against Damian Patrick charging him with being a convicted felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). R.1.[1] The indictment charged that on October 28, 2013, Patrick possessed a Smith and Wesson .40 caliber pistol. R.1.

On January 11, 2014, Patrick filed an initial motion to suppress, arguing that officers had seized him pursuant to a *Terry* stop without reasonable suspicion. R.12.

On February 4, 2014, Magistrate Judge Patricia J. Gorence held an evidentiary hearing on Patrick's suppression motion. At the hearing, officers testified that when they apprehended Patrick, they were aware that Patrick was the subject of an arrest warrant and that officers located Patrick via electronic information from tracking his cell phone. Tr. at 9-11, 34. At the end of the hearing, Patrick withdrew his initial motion to suppress. Tr. at 37.

On August 1, 2014, Patrick filed a new motion to suppress evidence obtained from tracking his cell phone. R.44. He argued that a state court order

[1] In this brief, "R." followed by a number is a reference to an entry on the district court's docket. "Tr." is a reference to the transcript of the evidentiary hearing held on February 4, 2014.

authorizing the government to obtain the location of Patrick's cell phone did not "amount to a warrant under the Fourth Amendment." R.44 at 13.

On September 30, 2014, Magistrate Judge William E. Callahan, Jr. recommended that Patrick's suppression motion be denied. R.47. The magistrate judge found that the state court order was a warrant for Fourth Amendment purposes, and that the issuing state court judge "had a 'substantial basis' for concluding that probable cause existed when she issued the state court order authorizing the disclosure of location information related to Patrick's cell phone because the information sought would 'aid in a particular apprehension.'" R.47 at 13.

On January 7, 2015, Judge Rudolph T. Randa adopted the magistrate judge's recommendation and denied Patrick's motion to suppress. R.54. On February 25, 2015, Patrick conditionally pled guilty, reserving his right to appeal the district court's denial of his suppression motion. R.57. Patrick was sentenced on June 29, 2015. R.64.

II. Statement of the Facts

On October 27, 2013, Milwaukee Circuit Court Judge Carolina Maria Stark issued a court order, based on a finding of probable cause, that authorized law enforcement to obtain location and other information of a cell

phone used by Patrick. R.42-1 at 1-5. In particular, the order identified "the cellular telephone assigned the number 414-484-9162" as being used by Patrick. R.42-1 at 1. For this targeted phone, the order approved:

> "installation and use of a trap and trace device or process";
>
> "installation and use of a pen register device/process or Dialed Number Recorder";
>
> the release of information, including specified cell phone identifiers, such as an Electronic Serial Number, cell tower activity and location, text header information, cellular toll information, and "global positioning system (GPS) location information or other precision location information"; and
>
> "the identification of the physical location of the target cellular phone."

R.42-1 at 2-3.

The order was based on a finding that "[t]here is probable cause to believe that the physical location of the target cellular telephone will reveal evidence of the Violation of Parole in violation of Wisconsin Statutes § 973.10." *Id*. at 2. The order cited multiple statutory authorities, including the federal tracking device statute (18 U.S.C. § 3117), state and federal pen register statutes (Wisconsin Statute § 968.35, and 18 U.S.C. § 3127(2)(B)), and the Stored Communications Act (18 U.S.C. §§ 2703(c)(1)(B) and (d), 2711(3)). R.42-1 at 1. It also directed Sprint to assist with "precision location based information queries" and to "lend all

reasonable assistance to permit [law enforcement agencies] to triangulate target location." R.42-1 at 3.

Milwaukee County Assistant District Attorney Christopher Ladwig applied for the cell phone location order on October 27, 2013. R.42-1 at 9-10. Milwaukee Police Department Officer Mark Harms submitted a sworn affidavit in support of the application. R.42-1 at 6-8. The affidavit stated that on July 27, 2013, "the Wisconsin Department of Corrections entered a valid felony warrant" for Patrick based on violation of parole, and that the warrant remained valid. R.42-1 at 8. The affidavit also included facts establishing that Patrick was in possession of the cell phone with number 414-484-9162. It stated that a cooperating witness who knew Patrick had "been talking and texting" with him at that number, and that the witness had called Patrick in the presence of law enforcement at that number. R.42-1 at 8.

On October 28, 2013, Milwaukee police officers sought to apprehend Patrick, who they knew was the subject of an arrest warrant. Tr. at 10-11, 28-29. The Milwaukee officers worked as a team with FBI agents to locate Patrick via cell phone tracking. Tr. at 13, 30, 34-36. They located him sitting in the front passenger seat of a parked vehicle. Tr. at 13-15, 31. Patrick was taken into custody, and officers observed a firearm in the passenger foot area of the car. Tr.

at 18, 32.

III. Ruling Under Review

The ruling under review is the district court's denial of Patrick's motion to suppress. R.54.

SUMMARY OF THE ARGUMENT

First, a search warrant supported by probable cause authorized law enforcement officers to identify the physical location of Patrick's cell phone. The warrant was amply supported by facts in a sworn affidavit establishing that Patrick was the subject of an outstanding arrest warrant and that he was in possession of the targeted cell phone. These facts established probable cause to believe that obtaining Patrick's cell phone location information would aid law enforcement in apprehending Patrick, and such probable cause supports issuance of a warrant under *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

Steagald v. United States, 451 U.S. 204 (1981), confirms that a search warrant may be issued to aid the apprehension of a wanted person and that its use is not limited to obtaining evidence for use at trial. In *Steagald*, the Supreme Court mandated that law enforcement obtain a search warrant in order to enter a third party's home to effectuate an arrest. *Id.* at 222. As the government can obtain a search warrant to search for a defendant in a particular place, it is similarly reasonable for the government to obtain a search warrant like the one used here to locate Patrick.

The government has strong interests in bringing offenders to justice and locating dangerous criminals in exigent circumstances. Both of these interests

would be substantially impaired if the Fourth Amendment's probable cause standard did not permit evidence to be sought to aid in a particular apprehension.

Second, even in the absence of the search warrant for the location of Patrick's cell phone, the arrest warrant for Patrick implicitly authorized the government to locate Patrick's phone to effectuate his arrest. The Supreme Court has held that an arrest warrant "implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980). Because a home receives the highest levels of protection under the Fourth Amendment, it is also reasonable for officers to use electronic means to determine the location of a cell phone when there is reason to believe that the phone is possessed by the subject of an arrest warrant.

Finally, even if there were a flaw with the search warrant in this case, the good-faith exception of *United States v. Leon*, 468 U.S. 897 (1984), would preclude suppression in this case. Patrick cannot show that the issuing judge abandoned her neutral role, that the officer was dishonest or reckless in preparing the affidavit, or that the warrant was so lacking in probable cause that no officer could have reasonably relied on it.

ARGUMENT

I. This Court Should Assume that Obtaining Patrick's Cell Phone Location Information was a Search.

The government did not dispute below that it conducted a search for Fourth Amendment purposes when it obtained Patrick's cell phone location information. Thus, although a defendant may in some circumstances lack a reasonable expectation of privacy in certain cell phone location information,[2] it is appropriate for this Court to assume for purposes of this appeal that obtaining Patrick's cell phone location information was a search. *See, e.g., United States v. Barajas*, 710 F.3d 1102, 1108 (10th Cir. 2013) ("we will assume without deciding that [cell phone] pinging is a search"). That search was reasonable, however, both because it was authorized by a search warrant and because it was a reasonable search made to facilitate execution of an arrest warrant.

[2] *See, e.g., United States v. Davis*, 785 F.3d 498, 513 (11th Cir. 2015) (en banc) (finding no reasonable expectation of privacy in historical cell-site records). This Court has not yet addressed whether and when obtaining cell phone location information is a search. *See United States v. Daniels*, 803 F.3d 335, 351 (7th Cir. 2015).

II. The Search for the Location of Patrick's Cell Phone Complied with the Fourth Amendment.

A. Standard of Review

This Court reviews *de novo* "purely legal issues of Fourth Amendment doctrine," including "a search warrant affidavit's sufficiency." *United States v. Reichling*, 781 F.3d 883, 888 (7th Cir. 2015). "[I]n applying those principles in a given case," this Court "afford[s] great deference to the decision of the judge issuing the warrant." *Id.*

B. The search warrant properly authorized a search for information to aid in the apprehension of the subject of an arrest warrant.

The warrant to obtain Patrick's cell phone location satisfied the Fourth Amendment because it was issued by a court based on a finding of probable cause, and because it specified its object with particularity. Patrick argues that the warrant lacked "adequate probable cause," see Patrick Brief at 17, but his argument is inconsistent with Supreme Court precedent providing that a search warrant may be issued to facilitate execution of an arrest warrant. In addition, although there is relatively little case law addressing searches for evidence leading to apprehension of wanted persons, the bulk of that case law supports such searches. Finally, if Patrick's argument were accepted by this Court, it

would have a significant negative impact on law enforcement's ability to bring offenders to justice and protect the public in exigent circumstances.

1. The state court order was a warrant.

To obtain Patrick's location information, the government obtained a warrant. According to the Supreme Court, a search warrant complies with the Fourth Amendment when it satisfies three requirements: it must be issued by a neutral magistrate, it must be based on a showing of probable cause, and it must satisfy the particularity requirement. *See Dalia v. United States*, 441 U.S. 238, 255 (1979). Patrick concedes that the first and third of these elements are met in this case, see Patrick Brief at 17, as the warrant was issued by Judge Carolina Maria Stark and authorized identification of the location of Patrick's cell phone. R. 42-1 at 3, 5.

Regarding the second element, the order explicitly included a finding of probable cause, *see* R. 42-1 at 2, and that finding was well-supported by facts in the sworn affidavit. First, the affidavit established that there was an outstanding felony warrant for the arrest of Patrick. R. 42-1 at 8. Second, the affidavit linked the target cell phone to Patrick. In particular, it stated that a cooperating witness who knew Patrick had "been talking and texting Damian Patrick over the past two days" on the target cell phone. *Id.* The witness confirmed Patrick's use of

the target cell phone by calling it in the presence of law enforcement. *Id.* These facts provided a substantial basis for the court's determination that there was probable cause to issue a warrant for Patrick's cell phone location information because it would provide evidence of his whereabouts that would facilitate his arrest. Because the issuing court's order authorizing the identification of the location of Patrick's cell phone included the three essential elements of a search warrant, it was a warrant for Fourth Amendment purposes.

Patrick argues that citations in the affidavit, application, and order to statutory investigative authorities other than search warrants demonstrate a lack of probable cause, see Patrick Brief at 23-24, but he is mistaken. The order relied on multiple investigative authorities because it sought multiple categories of information, including dialed telephone number information, certain subscriber information (such as the Electronic Serial Number associated with Patrick's phone), and "the physical location of the target cellular telephone." R. 42-1 at 2-3. Patrick has not argued that the government needed a warrant to obtain his dialed telephone number or subscriber information, and the government properly obtained that information pursuant to the pen register statute and the Stored Communications Act, which the order referenced. *See* Wisconsin Statutes § 968.35; 18 U.S.C. §§ 2703(d), 3127; R. 42-1 at 1. However, the order was also a

warrant. Had the government only sought a pen register order and a court order under 18 U.S.C. § 2703(d), it would not have needed a sworn affidavit in support of the order, which it submitted. *See* R. 42-1 at 6-8. Had the order not been a warrant, it would not have needed a finding of probable cause, which it contained. *See* R. 42-1 at 3. Moreover, in seeking the warrant, the government also relied on the tracking device statute 18 U.S.C. § 3117, which is used in connection with tracking warrants. *See* R. 42-1 at 1.

2. *Supreme Court precedent supports issuance of warrants in aid of apprehension of subjects of arrest warrants.*

Nearly fifty years ago, in *Warden v. Hayden*, 387 U.S. 294, 307 (1967), the Supreme Court rejected the rule that law enforcement could not use a warrant to seize "mere evidence," and it set forth a new standard for establishing probable cause to obtain a search warrant. The Court held that "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular *apprehension* or conviction." *Id.* (emphasis added). Since *Hayden*, the Court has frequently reiterated this standard for probable cause, as has this Court. *See, e.g.*, *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1247 (2012); *Dalia v. United States*, 441 U.S. 238, 255 (1979); *Andresen v. Maryland*, 427 U.S. 463, 483 (1976); *United States v. Sweeney*, 688 F.2d 1131, 1137 (7th Cir. 1982). In this case, the Wisconsin court properly issued the search warrant for the location of

Patrick's phone because the government established probable cause to believe that Patrick was the subject of an arrest warrant and that obtaining his cell phone location information would aid in his apprehension.

The Supreme Court's expansion of warrant authority in *Hayden* to evidence that will aid in apprehension or conviction was motivated by "the reality that government has an interest in solving crime." *Hayden*, 387 U.S. at 306. The Court further observed that the prevention of crime was served "by allowing the Government to identify and *capture* the criminal." *Id.* at 306 n.11 (emphasis added). Similarly, in the context of a *Terry* stop for a wanted person, the Court has recognized the strong government interest in "bringing offenders to justice." *United States v. Hensley*, 469 U.S. 221, 229 (1985). To achieve these functions—solving crime and capturing criminals—the government needs to obtain evidence of crime, to locate the individuals responsible, and to arrest them. Under *Hayden*, warrants are appropriately issued in furtherance of these interests.

Patrick objects that *Hayden* requires a nexus between seized evidence and criminal activity. *See* Patrick Brief at 20-21. But the *Hayden* standard for probable cause sets forth the appropriate nexus: "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular

apprehension or conviction." *Hayden*, 387 U.S. at 307. The warrant in this case satisfied that nexus because there was reason to believe that determining the location of Patrick's cell phone would enable law enforcement to apprehend him.[3]

Steagald v. United States, 451 U.S. 204 (1981), confirms that search warrants are not limited to seizing evidence to be used for purposes of obtaining a conviction. In *Steagald*, the Supreme Court directed that "a search warrant was required" in order to enter a third party's home to effectuate an arrest. *Id.* at 222. *See also* Fed. R. Crim. P. 41(c)(4) (stating that a search warrant may be issued for "a person to be arrested"). *Steagald* demonstrates that, consistent with the probable cause standard of *Hayden*, a search warrant may be issued in aid of apprehension of a wanted person and is not limited to obtaining evidence for use at trial.

Patrick's attempts to limit or distinguish *Steagald* are unavailing. He objects that "the information sought here is extremely broad," and that the warrant here sought information concerning "an individual's ongoing location," whereas a search of a third party's house to execute an arrest warrant involves "*a*

[3] Patrick also objects that the probation statute referenced in the search warrant is not a criminal statute. *See* Wisconsin Statute § 973.1, Patrick Brief at 18. But the government interest that the Supreme Court recognized in *Hayden* in apprehending offenders extends to apprehending the subjects of arrest warrants for violating probation.

particular place." Patrick Brief at 21 (emphasis in original). But this objection merely involves the distinction between a tracking warrant and a warrant to search a particular location, and the Supreme Court has determined that the Fourth Amendment permits issuance of both kinds of warrants. To be sure, in the tracking device case *United States v. Karo*, 468 U.S. 705, 718 (1984), the Supreme Court stated that an application for a warrant to track an item's location must describe the object to be tracked, the circumstances justifying the tracking, and the length of surveillance. The warrant for the location of Patrick's cell phone satisfied these requirements; it thus satisfied the Fourth Amendment and was not overly broad.

Patrick argues that obtaining cell phone location information can be more intrusive than the home invasion approved in *Steagald*, *see* Patrick Brief at 22, but his argument is both mistaken and irrelevant. As an initial matter, using electronic means to determine the location of a cell phone used by the subject of an arrest warrant is far less intrusive than the search of a third party's home authorized by *Steagald*: it does not involve the risks and burdens associated with a physical intrusion into a home, it exposes a narrower set of information to law enforcement, and it does not significantly impact the privacy interests of innocent third parties. More generally, Patrick's argument is irrelevant: *Steagald*

held that a search warrant was required to enter a third party's home to effectuate an arrest, but it simply did not address standards for determining when the manner of executing a search warrant was unreasonable, including when it was unreasonably intrusive.[4] Warrants to obtain cell phone location information are reasonable because they are consistent with the warrant standards of *Karo*, and they have been upheld when used to obtain evidence of crime for purposes of conviction. *See, e.g., United States v. Turner*, 781 F.3d 374, 384 (8th Cir. 2015); *United States v. Barajas*, 710 F.3d 1102, 1108-11 (10th Cir. 2013). As cell phone location warrants are reasonable under the Fourth Amendment when used to obtain evidence of crime, there is no reason why they would be unreasonable when used to obtain evidence in aid of apprehension.

Patrick fails to explain why a warrant to determine the location of the subject of an arrest warrant is unreasonable in light of *Steagald*. And such a warrant is not unreasonable in this case given Patrick's status as the subject of an active felony arrest warrant. As the magistrate judge reasoned, given that "the

[4] As the magistrate judge correctly observed, Patrick in his arguments below did "not specifically attack the reasonableness of the order's execution." R. 47 at 13; *see also* R. 44 & R. 46 (addressing, in suppression brief and reply, the validity of the order, rather than how law enforcement executed it). Because Patrick never argued that the government's execution of the order was unreasonable, the record in this case does not address how the government located Patrick's phone, including the extent to which the government relied on both location information from Sprint and its own use of a cell-site simulator device. Patrick is now attempting to raise this issue in the district court. R. 74.

government can obtain a warrant to search for a defendant subject to an arrest warrant in a particular place," it would "defy common sense" to hold that "the government cannot obtain a search warrant to obtain data that would assist in locating the same defendant." R. 47 at 12-13.

Patrick finally attempts to limit *Steagald* by asserting that, under *Illinois v. Gates*, 462 U.S. 213, 238 (1983), a probable cause determination should be based on whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *See* Patrick Brief at 17-18. However, for the reasons set forth above, and as noted by the magistrate, *Steagald* suffices to show that the probable cause standard of *Gates* is not comprehensive: if *Gates* set forth the only circumstances in which a search warrant could be issued, a court could not issue a search warrant under *Steagald* for the subject of an arrest warrant.[5] Moreover, *Gates* is distinguishable because it addressed a warrant for the seizure of evidence for purposes of conviction, and the Court had no need to consider the probable cause required for a warrant in aid of apprehension.

[5] The magistrate relied on *Steagald* because it recognized that the *Gates* standard "is incomplete." R. 47 at 11.

3. *Other precedent supports the rule that probable cause includes cause to believe that evidence sought will aid in a particular apprehension.*

Although there is relatively little appellate case law addressing searches for evidence leading to apprehension of wanted persons, cases from the Second and D.C. Circuits have approved such searches. In *United States v. Ellis*, 461 F.2d 962, 966 (2d Cir. 1972), the court upheld under the automobile exception a police officer's warrantless search, based on probable cause, of a car used by bank robbers. The court explained that the officer "thought that the automobile contained evidence which might aid in the apprehension of the two criminals still at large and that waiting for a warrant might enable them to evade capture." Similarly, in *United States v. Robinson*, 533 F.2d 578, 583 (D.C. Cir. 1976), the court held that exigent circumstances justified a search of a car used by bank robbers because "[a]n immediate search of the car could well produce the information needed to speedily apprehend the culprits." Neither of these cases involves warrants, but both involve probable cause, because searches based on exigency or the automobile exception must be supported by probable cause. *See United States v. Leo*, 792 F.3d 742, 749 n.2 (7th Cir. 2015) (stating that exigent circumstances "excuse getting a *search warrant* but not the absence of *probable cause*"); *United States v. Charles*, 801 F.3d 855, 860 (7th Cir. 2015) ("automobile exception permits the police to search a vehicle if there is probable cause to

believe it contains evidence of criminal activity"). Thus, the probable cause that justified searches in *Ellis* and *Robinson* for evidence in aid of apprehension of wanted persons would also have provided probable cause to obtain search warrants.

One magistrate judge did refuse to issue a warrant for cell phone location information of the subject of an arrest warrant. *See In re Application*, 849 F. Supp. 2d 526 (D. Md. 2011). But that magistrate judge improperly dismissed the Supreme Court's probable cause formulation in *Hayden* as "intriguing dicta," despite acknowledging that "it is likely that the Supreme Court would sanction" a search for the location of the cell phone of the subject of an arrest warrant. *Id.* at 552, 561. In contrast, another magistrate judge declined to follow the Maryland magistrate judge's opinion, concluding that it was "inconsistent with [probable cause] standards and common sense." *In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d 129, 136 (E.D.N.Y. 2013). That court concluded that "where, as here, the Government demonstrates probable cause to believe that the prospective geolocation data will aid in the apprehension of a defendant, a court may issue a search warrant to authorize access to such data." *Id.* at 137.

4. Strong public policies support issuing warrants for evidence in aid of apprehension of wanted persons.

The Supreme Court has recognized the "strong government interest in solving crimes and bringing offenders to justice." *Hensley*, 469 U.S. at 229. Holding that the government cannot obtain a search warrant to locate a person who is the subject of an arrest warrant would impair the government's substantial interest in apprehending such persons.

But there is more. It is important to note that the holding sought by Patrick—that probable cause does not include cause to believe that evidence sought will aid in a particular apprehension—would impact not only cases like this one, in which law enforcement seeks to find and apprehend the subject of an arrest warrant, but also cases in which law enforcement seeks to find and apprehend a dangerous criminal in exigent circumstances. *See, e.g.*, *United States v. Takai*, 943 F. Supp. 2d 1315, 1323 (D. Utah 2013) (government obtained cell phone location information where it was reasonable for officer to conclude that another violent robbery "might be imminently forthcoming"); *United States v. Caraballo*, 963 F. Supp. 2d 341, 364 (D. Vt. 2013) (government obtained cell phone location information after homicide where "[l]aw enforcement reasonably believed there was a serious public safety risk if Defendant was not swiftly apprehended"). Law enforcement may not conduct an exigency-based search for

law enforcement purposes unless there is also probable cause for the search. *See, e.g.*, *Leo*, 792 F.3d at 749 n.2 ("Exigent circumstances might excuse getting a search warrant but not the absence of probable cause."); *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (holding that officers need "either a warrant or probable cause plus exigent circumstances" to enter a home). Thus, unless courts were to develop more expansive probable cause standards for warrantless searches in exigent circumstances than for search warrants—a doctrinal development inconsistent with the favored role of warrants under the Fourth Amendment—Patrick's argument that probable cause does not extend to obtaining evidence in aid of apprehension of wanted persons would preclude law enforcement from locating dangerous criminals in exigent circumstances.

For these reasons, the search warrant for the location of Patrick's cell phone complied with the Fourth Amendment, and the district court properly denied Patrick's motion to suppress.

C. The Search for the Location of Patrick's Cell Phone was Reasonable Pursuant to the Warrant for Patrick's Arrest

There is another closely-related reason why the search for the location of Patrick's cell phone was reasonable: the arrest warrant for Patrick implicitly authorized the government to determine the location of his cell phone in order to effectuate his arrest. Although not argued by the government below, this Court

may affirm on any basis supported by the record. *See United States v. Reaves*, 796 F.3d 738, 742 (7th Cir. 2015).

It is well-settled that an arrest warrant "implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980); *United States v. Jackson*, 576 F.3d 465, 468 (7th Cir. 2009). A search of the home of the suspect pursuant to an arrest warrant is allowed in these circumstances even though "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585-86 (quoting *United States v. United States District Court*, 407 U.S. 297 (1972)); *United States v. Sabo*, 724 F.3d 891, 893 (7th Cir. 2013). As the Supreme Court explained in *Steagald*, "[b]ecause an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." *Steagald*, 451 U.S. at 214 n.7.

The principles of *Payton* and *Steagald* apply equally to allow a search to locate the cell phone of the subject of an arrest warrant when there is reason to believe the suspect is in possession of the phone. At least three courts have endorsed this corollary of *Payton* and *Steagald*. In *Meisler v. State*, 321 P.3d 930,

933 (Nev. 2014), the Supreme Court of Nevada held that "[b]ecause an arrest warrant would have justified an entry into Meisler's home, an arrest warrant likewise justifies a digital entry into his cell phone to retrieve GPS coordinates for the purpose of locating him." In addition, in *In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d at 147, the court reasoned that "[t]he Fourth Amendment cannot accord protection to geolocation data associated with a defendant's cell phone while denying such protection against a physical invasion of his home, as the latter is entitled to the highest order of defense." Finally, in *United States v. Bermudez*, 2006 WL 3197181, at *11 (S.D. Ind. June 30, 2006), *aff'd on other grounds* 509 F.3d 820 (7th Cir. 2007), the court reasoned that an arrest warrant "gave law enforcement the authority to physically enter a target's home in order to search for the target; . . . and also gave law enforcement the authority to conduct a less intrusive search for the fugitive by tracking cell location information in an effort to locate him, even if it invaded the apartment he rented."

In this case, because Patrick was the subject of an arrest warrant and because officers had reason to believe he was in possession of the targeted cell phone, a search to determine the location of that phone was reasonable for purposes of the Fourth Amendment.

III. The Government Obtained Patrick's Cell Phone Location Information in Good Faith Reliance on the Search Warrant.

A. Standard of Review

This Court reviews de novo the application of the good faith exception to a particular warrant. *United States v. Miller*, 673 F.3d 688, 693 (7th Cir. 2012).

B. *Leon*'s good faith exception applies in this case.

In *United States v. Leon*, 468 U.S. 897, 926 (1984), the Supreme Court rejected suppression of evidence obtained by officers acting in objectively reasonable reliance on a search warrant. The magistrate judge did not formally rule on the government's argument that the good faith exception of *Leon* would apply to this case, though the court observed that "it seems certain that the exception would apply." R. 47 at 13.

The good-faith exception to the exclusionary rule of *Leon* does apply here. Overcoming the *Leon* exception is difficult. An officer's "decision to obtain a warrant is *prima facie* evidence that he was acting in good faith." *United States v. Peck*, 317 F.3d 754, 757 (7th Cir. 2004). To rebut the presumption of *Leon*, the defendant must show that the issuing judge abandoned her neutral role, that the officer was dishonest or reckless in preparing the affidavit, or that the warrant

was so lacking in probable cause that no officer could have reasonably relied on it. *See United States v. Garcia*, 528 F.3d 481, 487 (7th Cir. 2008).

Patrick cannot rebut the application of *Leon* in this case. Patrick may argue that probable cause was lacking, but it was not unreasonable for an officer to rely on a warrant based on facts showing that Patrick was the subject of an arrest warrant and was in possession of the targeted cell phone. R. 42-1 at 8. Patrick's argument that the affidavit did not establish adequate probable cause is at bottom an argument that the issuing judge made a legal error in concluding that a warrant could be issued in aid of the apprehension of a wanted person. The exclusionary rule does not apply where "it was the judge, not the police officers, who made the critical mistake." *Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984). If there were a mistake of law regarding probable cause in issuing the warrant—and there was not—it was a reasonable one given the probable cause formulation of *Hayden* and *Steagald*'s rule that a search warrant may be issued in aid of apprehension of the subject of an arrest warrant. The exclusionary rule does not even apply to a reasonable mistake of law concerning probable cause by a law enforcement officer. *See Heien v. North Carolina*, 135 S. Ct. 530, 540 (2015). Thus, even if this Court finds any error in the search warrant for Patrick's cell phone location information, it should reject suppression.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's denial of Patrick's motion to suppress.

Dated at Milwaukee, Wisconsin, this 15th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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