NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN JOSE LOPEZ-ZUNIGA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

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INDEX OF APPENDICES

United States Court of Appeals
For the Eighth Circuit

No. 17-3261

United States of America

Plaintiff - Appellant

v.

Juan Lopez-Zuniga

Defendant - Appellee

Appeal from United States District Court
for the Northern District of Iowa - Sioux City

Submitted: October 19, 2018
Filed: November 26, 2018

Before WOLLMAN, ARNOLD, and BENTON, Circuit Judges.

ARNOLD, Circuit Judge.

After the government indicted him for conspiring to distribute methamphetamine, *see* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, Juan Lopez-Zuniga moved to suppress evidence obtained from tracking devices that the government placed on his car. He maintained that probable cause did not support any of the four warrants authorizing installation of the trackers. In fact, he argued,

probable cause was so lacking that the officers who executed the warrants could not have believed in good faith that probable cause supported them. *See United States v. Leon*, 468 U.S. 897 (1984). Adopting a magistrate judge's report and recommendation, the district court agreed with Lopez-Zuniga and granted his motion to suppress. The government files this interlocutory appeal, *see* 18 U.S.C. § 3731, arguing that the district court erred in suppressing the evidence. We affirm the district court's suppression of evidence obtained from the first two warrants but reverse the suppression of evidence obtained from the third and fourth warrants and remand.

In December, 2015, a special agent with the Minnesota Bureau of Criminal Apprehension applied for a warrant that would allow him to place a GPS tracker on Lopez-Zuniga's car so he could monitor the car's movements for sixty days. He provided an affidavit detailing a drug investigation into one Rogelio Magana Garcia-Jimenez. The affidavit noted several controlled drug transactions involving Garcia-Jimenez, including transactions at an apartment where he was believed to live. Near the end of the affidavit, the special agent explained that, sometime before a controlled drug transaction at the apartment complex where Garcia-Jimenez was believed to live, he saw someone in Lopez-Zuniga's car "drop off an individual who resembled Garcia-Jimenez." The special agent then explained that another agent later observed Lopez-Zuniga and Garcia-Jimenez get into the same car at the same apartment complex and drive to a restaurant and mall in Sioux Falls, South Dakota. The special agent said that he and other officers believed that Lopez-Zuniga and Garcia-Jimenez were conspiring to sell illegal drugs and that Lopez-Zuniga was transporting Garcia-Jimenez for that purpose in the car.

A Minnesota state court issued a warrant on the basis of this affidavit, and police attached a GPS tracker to the car and began monitoring its movements. After sixty days, the special agent returned to the court for a second warrant to monitor the car for another sixty days. The second affidavit included the same information as the first as well as the results of the first sixty days of tracking the car. It also noted that

law enforcement officers had obtained a pen register on Garcia-Jimenez's phone, which showed that he and Lopez-Zuniga had had 154 "contacts" in about a two-month period. The district court held that the information provided in the first and second warrants did not establish probable cause to track the car. The court further held that evidence of probable cause was so lacking that the officers could not have relied on the warrants in good faith.

"Placement of a GPS tracking device on a vehicle is a 'search' within the meaning of the Fourth Amendment, requiring probable cause and a warrant." *United States v. Faulkner*, 826 F.3d 1139, 1144 (8th Cir. 2016). Probable cause exists when, considering all the circumstances, there is a fair probability that evidence of a crime will be found in a particular place. *Id.* "Probable cause is a fluid concept that focuses on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *United States v. Colbert*, 605 F.3d 573, 576 (8th Cir. 2010), and so we review the affidavit for probable cause using a common sense approach, not a hypertechnical one. *United States v. Grant*, 490 F.3d 627, 632 (8th Cir. 2007).

Even if probable cause for issuing a warrant did not exist, courts will not suppress the evidence obtained from it where it was objectively reasonable for the officer executing the warrant to have relied in good faith on the issuing judge's determination that probable cause existed. *United States v. Johnson*, 848 F.3d 872, 878–79 (8th Cir. 2017). In making this determination, we ask "whether a reasonably well trained officer would have known that the search was illegal despite a judge's issuance of the warrant." *United States v. Jackson*, 784 F.3d 1227, 1231 (8th Cir. 2015). This so-called "good-faith exception" does not apply when the application is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.*

On appeal, the government has abandoned its argument that probable cause supported the first warrant; it argues only that the good-faith exception saves evidence obtained from the issuance of the first warrant from suppression. We disagree. Lopez-Zuniga makes only a brief appearance in the affidavit in support of the first warrant application, and the only information about him is that he dropped off someone appearing to be Garcia-Jimenez at his apartment and then days later picked him up to go to a restaurant and mall. The first affidavit does not connect Lopez-Zuniga to any of Garcia-Jimenez's suspected illicit activities. As the magistrate judge in this case said, if this amounts to probable cause, "then *anyone* who drops a drug trafficker off at the trafficker's residence and travels with the trafficker for innocent activity, such as the trafficker's grandmother or mere acquaintance, would be subject to search." We agree, and we think the warrant was so lacking in indicia of probable cause that belief in its existence would have been entirely unreasonable.

In reaching this conclusion, we find instructive our court's decision in *United States v. Herron,* 215 F.3d 812 (8th Cir. 2000). In that case, affidavits used in support of a search-warrant application requesting permission to search the defendant's home described a marijuana-trafficking ring, but we observed that the defendant "play[ed] only a small part in the[ ] affidavits." The only information provided about the defendant was that he had two prior convictions for cultivating marijuana, that he was related to some of the traffickers, and that one of those relatives had said four months before the search warrant was sought that he had stayed with the defendant to help harvest corn. *Id.* at 813–14. We held this was insufficient to show probable cause and that no reasonable officer could think probable cause existed, so the good-faith exception did not apply. *Id.* at 814–15. As in *Herron*, very little, if anything, connects the defendant to the trafficking activities set forth in the affidavit in this case.

We reach the same conclusion as to the second warrant even though it contained additional information. We do not consider the additional information obtained from the GPS tracker because, as we just explained, that evidence should be

suppressed. And we do not think the information derived from the pen register is enough—all it showed was that Garcia-Jimenez and Lopez-Zuniga had had 154 "contacts" between December 21 and February 11. The affidavit did not explain what did or did not constitute a "contact." For example, we do not know whether one text-message conversation constituted a single contact or, say, twenty, depending on how many separate messages were sent. But more important, nothing in the affidavit indicates that the contacts involved something criminal, or even a statement by the affiant that the supposedly high number of contacts were likely the product of a criminal conspiracy. In short, the affidavits demonstrate merely that Lopez-Zuniga was acquainted with Garcia-Jimenez.

The third and fourth warrant applications, however, are a different matter. In the third warrant application, a special agent in Iowa who was investigating narcotics trafficking sought a warrant from an Iowa state court that would allow him to monitor the car's movements for an additional sixty days after the second warrant expired. His affidavit described the incident where Lopez-Zuniga and Garcia-Jimenez went to the restaurant and mall in Sioux Falls and recited that a Minnesota state court had already granted a warrant authorizing the installation of the tracker and the monitoring of the car's movements. In addition to some of the information obtained from the tracker, which we again do not consider, the affidavit contained updated pen register figures, which showed "that Lopez-Zuniga had made 245 contacts to and from Garcia-Jimenez between January 24, 2016 and April 18, 2016." But there was more. The affidavit revealed that a confidential informant had arranged to buy methamphetamine from Garcia-Jimenez, who then told the informant where to meet to effect the transaction. When the informant went to that location, Lopez-Zuniga met him and handed over the methamphetamine.

This controlled purchase where Lopez-Zuniga sold drugs on Garcia-Jimenez's behalf is significant, we believe, because it connects Lopez-Zuniga to illegal activity. The magistrate judge asserted, however, that even if he were connected to the illegal

activity being investigated, nothing connected his car to the illegal activity. As a result, the magistrate judge concluded, the affidavit failed to contain the required "nexus between the contraband and the place to be searched." *See Johnson*, 848 F.3d at 878. The district court apparently adopted this reasoning, and Lopez-Zuniga urges us to do so as well.

We think that, at a minimum, the good-faith exception saves the evidence obtained from the third warrant from suppression because the affidavit was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *See Jackson*, 784 F.3d at 1231. We have emphasized that the Supreme Court's use of the phrase "entirely unreasonable" in *Leon* was a "particularly strong choice of words" that we should not dilute. *See United States v. Carpenter*, 341 F.3d 666, 670 (8th Cir. 2003). In *Carpenter*, our court applied the good-faith exception to the search of a residence "even though the affidavit did not present facts to indicate the existence of a nexus between [the] residence and the suspected contraband." *Id.* at 670–71. We explained that it was not entirely unreasonable for the officer to rely on the warrant because, "[a]s a matter of common sense, it is logical to infer that someone in possession of valuable contraband would store that contraband in a safe, accessible location such as his or her residence." *Id.* at 671. Likewise here, we do not think it entirely unreasonable for an officer to think that Lopez-Zuniga might use his car to move about in furtherance of a drug conspiracy, especially when he has been in frequent contact with a known drug distributor who has ridden in the very car to be tracked. And we don't think it entirely unreasonable for an officer to conclude that a connection between the car and the contraband need not be as strong when the warrant merely authorizes tracking the car's movement (and thus its driver) rather than searching the car itself. The point of putting a tracker on a car is not to reveal what the car contains but to reveal the locations and movements of those within it. So, it seems to us, the search is more about Lopez-Zuniga's movements than the car itself.

Because the fourth warrant application contained the same relevant information as the third, we conclude that evidence obtained from that warrant should not have been suppressed either.

Reversed and remanded.

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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November 26, 2018

Mr. Shawn Wehde
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RE: 17-3261 United States v. Juan Lopez-Zuniga

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Mr. Juan Lopez-Zuniga
Mr. Jim K. McGough
Mr. Rob Phelps

District Court/Agency Case Number(s): 5:17-cr-04009-LTS-1

United States Court of Appeals
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November 26, 2018

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RE: 17-3261 United States v. Juan Lopez-Zuniga

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant and appeared on the appellant brief was Shawn Wehde, AUSA, of Sioux City, IA.

Counsel who presented argument on behalf of the appellee and appeared on the appellee brief was Jim K. McGough, of Omaha, NE.

The judge who heard the case in the district court was Honorable Leonard T. Strand. The judgment of the district court was entered on September 18, 2017.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 5:17-cr-04009-LTS-1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3261

United States of America

Plaintiff - Appellant

v.

Juan Lopez-Zuniga

Defendant - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City
(5:17-cr-04009-LTS-1)

JUDGMENT

Before WOLLMAN, ARNOLD and BENTON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part, and remanded to the district court for proceedings consistent with the opinion of this court.

November 26, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JUAN LOPEZ-ZUNIGA Defendant.	No. 17-CR-4009 **ORDER REGARDING REPORT AND RECOMMENDATION**

This matter is before me on a Report and Recommendation (R&R) (Doc. No. 32) in which the Honorable Kelly K.E. Mahoney, United States Magistrate Judge, recommends that I grant defendant's amended motion to suppress (Doc. No. 18).

I. APPLICABLE STANDARDS

A district judge must review a magistrate judge's R&R under the following standards:

> Within fourteen days after being served a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b). Thus, when a party objects to any portion of an R&R, the district judge must undertake a de novo review of that portion.

Any portions of an R&R to which no objections have been made must be reviewed under at least a "clearly erroneous" standard. *See, e.g. Grinder v. Gammon*, 73 F.3d

793, 795 (8th Cir. 1996) (noting that when no objections are filed "[the district court judge] would only have to review the findings of the magistrate judge for clear error"). As the Supreme Court has explained, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). However, a district judge may elect to review an R&R under a more exacting standard, even if no objections are filed:

> Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, sua sponte or at the request of a party, under a *de novo* or any other standard.

Thomas v. Arn, 474 U.S. 140, 150 (1985).

II. BACKGROUND

A. Procedural History

On February 23, 2017, the grand jury returned an indictment (Doc. No. 2) charging defendant with one count of conspiracy to distribute methamphetamine. Defendant filed a motion (Doc. No. 15) to suppress evidence on May 15, 2017, and an amended motion (Doc. No. 18) to suppress on June 2, 2017. The Government filed a resistance (Doc. No. 26) to the amended motion on June 12, 2017. Judge Mahoney conducted a hearing on June 28, 2017, and issued her R&R on August 10, 2017. The Government filed objections (Doc No. 38) and defendant has responded (Doc. No. 42).

B. Relevant Facts

This case involves the use of a GPS tracking device on defendant's vehicle. Special Agent Dan Louwagie of the Minnesota Bureau of Criminal Apprehension submitted an application for the first state warrant authorizing the use of the GPS device

on December 21, 2015. Ex. A at 1-7.[1] A state judge for Nobles County, Minnesota, issued a warrant (Warrant 1) authorizing the use of a GPS device for 60 days the same day. Ex. A at 8-9. The 60-day warrant was renewed three times (Warrants 2, 3 and 4), following an application for an extension in Nobles County on February 18, 2016, and subsequent extensions granted upon application of Special Agent Chris Nissen, Iowa Department of Public Safety, Narcotics Enforcement Division, in Clay County, Iowa, on April 22, 2016, and June 22, 2016. *See* Exs. B, C, D. While the device was in place, police officers also obtained a warrant to conduct a pen registry search on defendant's phone. Ex. C at 6. Additionally, during the pendency of the second GPS device warrant, a confidential informant executed a controlled buy of amphetamines involving defendant. Ex. C at 7.

The main issue is whether the warrants authorizing the use of the GPS device were supported by probable cause. The relevant facts from each warrant, along with Judge Mahoney's findings, are summarized below. Also at issue is whether the good faith exception applies, negating the need to suppress.

C. The R&R

Because much of the information in the four warrants is the same, Judge Mahoney began by determining whether Warrant No. 1 (Ex. A) was supported by probable cause. Warrant 1 contains the following statements regarding defendant:

> On November 24, 2014 Iowa Department of Narcotics Enforcement [Agent] who was acting in an undercover capacity along with [Named Individual (NI)] went to Garcia Jimenez [at Known Address]. [Agent] stayed in the vehicle while [NI] went inside of the apartment complex.
>
> While [Agent] and [NI] were driving back to Iowa [NI] informed [Agent] that his guy (Garcia Jimenez) was out of methamphetamine earlier

[1] Both defendant and the Government filed all four warrants as exhibits A through D and exhibits 1 through 4, respectively. I will refer to the exhibits by their letters A through D.

in the day and that Garcia Jimenez would be getting in a shipment in [sic] on Monday, November 30, 2015.

Several minutes later [NI] exited the apartment complex and got back into [Agent]'s vehicle. [NI] was arrested several minutes later for an outstanding arrest warrant. While [NI] was being searched a quantity of methamphetamine was recovered.

Prior to the transaction with [Agent] and [NI] your Affiant was conducting surveillance at [Known Address]. While conducting surveillance your Affiant observed MN License 498-MHJ pull into [Known Address] and drop off an individual who resembled Garcia Jimenez.

On 12/15/2015 members of the Buffalo Ridge Drug Task Force were conducting surveillance at [Known Address].

During surveillance Buffalo Ridge Drug Task Force Agent Joe Joswiak observed Juan Jose Lopez-Zuniga and Rogelio Magana Garcia Jimenez get into MN Lic[.] 498-MHJ. Surveillance personnel followed Lopez-Zuniga and Garcia Jimenez to Sioux Falls, SD.

Surveillance personnel followed Garcia Jimenez and Lopez Zuniga to a restaurant and the shopping mall in Sioux Falls, SD before they returned to Worthington, MN.

***

Your affiant with other law enforcement personnel believe that [Garcia]Jimenez, Lopez-Zuniga and [Named Individual] are conspiring to sell illegal drugs through [Restaurants] and possibly laundering some of these drug proceeds through the [Restaurant] and area casinos and that Lopez Zuniga is transporting Jimenez and or other individuals in the 1995 LeSabre for this purpose.

Ex. A, at 6. Following this recitation, along with five additional pages of evidence which do not relate to defendant, Louwagie was granted permission to install the GPS device on defendant's vehicle.

Judge Mahoney found probable cause was lacking:

First, there is very little information about Lopez-Zuniga. What information is included involves innocent activity. Unlike the facts in

Faulkner, 826 F.3d at 1142-43, neither affidavit contains information about Lopez-Zuniga's engagement in criminal activity, let alone that such activity was ongoing in nature and involved use of Lopez-Zuniga's vehicle. The present case also differs from the facts in *Colbert*, 828 F.3d at 726-27, where witness information and the target's own statements from intercepted calls showed the defendant sold drugs and supported a finding that evidence related to drug-trafficking proceeds would be found at the target's residence (and thus probable cause existed to search the residence).

The facts underlying Warrants #1 and #2 are most similar to the facts in *United States v. Herron*, 215 F.3d 812 (8th Cir. 2000). In that case, the supporting affidavit contained significant information about the defendant's relatives and their involvement in cultivating marijuana on a target relative's property. *Id.* at 813-14. The only evidence regarding the defendant was his relationship to the targets, the fact that he had two prior convictions for cultivating marijuana, and that a target relative said he had recently resided at the defendant's residence to help harvest corn. *Id.* at 813-14 & nn. 1-2. The Eighth Circuit found no "reasonable officer would believe that these facts established probable cause to search [the defendant]'s residence for marijuana or the implements of its cultivation." *Id.* at 814. The Court went on to state that the officers who issued the affidavits in support of the warrant at issue "should have been fully aware of the deficiencies of their affidavits" because unlike "a technical legal deficiency[,] the affidavits simply d[id] not say very much about [the defendant] or his residence." *Id.*

At best, the affidavit for Warrant #1 shows that Lopez-Zuniga's vehicle dropped Garcia-Jimenez off at a location where a possible drug transaction occurred. The first problem is that there was no controlled purchase, and so there is no reliable information about where NI obtained the methamphetamine from. The NI went into the Apartments, but it is unclear which apartment (if any) the NI entered and who (if anyone) the NI met with. It is also not clear from the affidavit at what point, in relation to NI arriving at the Apartments, someone in Lopez-Zuniga's vehicle dropped Garcia-Jimenez off at that location. Furthermore, since there had been prior drug transactions at the Known Address (none involving Lopez-Zuniga or his vehicle), it is more likely that the drugs found on NI (even if there had been a controlled transaction) came from the Known Address rather than Lopez-Zuniga's vehicle. The later travel to a restaurant and mall in Lopez-Zuniga's vehicle involved innocent activity and does not support a finding of probable cause. If the facts presented in the affidavit for Warrant #1 amount to probable cause, then *anyone* who drops a drug

> trafficker off at the trafficker's residence and travels with the trafficker for innocent activity, such as the trafficker's grandmother or mere acquaintance, would be subject to search. Warrant #1 is not supported by probable cause and accordingly, evidence obtained from that warrant should be suppressed.

Doc. No. 32 at 9-12.

Warrant 2 contained little additional information involving defendant. Judge Mahoney summarized the information in Warrant 2's affidavit as follows, and concluded that it also was not supported by probable cause:

> The affidavit for Warrant #2 contained the same information as the affidavit for Warrant #1, plus information obtained from use of the tracker, which I believe should be suppressed and therefore excised from the affidavit. The only additional information contained in Warrant #2's affidavit is that Lopez-Zuniga and Garcia-Jimenez had telephone contact 154 times between December 21, 2015 and February 11, 2016. Although controlled purchases made from Garcia-Jimenez and others (not including Lopez-Zuniga) involved the use of telephones, there is no information in the affidavit, based on an officer's training and experience of otherwise, that the telephone contact between Lopez-Zuniga and Garcia-Jimenez might have involved drug trafficking or other criminal activity. Accordingly, there is no indication that the telephone contacts were anything other than innocent in nature. The remaining information is the belief statement that officers believed that Lopez-Zuniga "may" be assisting Garcia-Jimenez and other Targets in drug trafficking and "possibly laundering some of these drug proceeds" through the Restaurant and area casinos, and that Lopez-Zuniga was using his vehicle to transport Garcia-Jimenez and others. There is no information, however, to indicate that Garcia-Jimenez or other Targets were engaged in laundering drug proceeds at casinos, not even a statement that officer training and experience shows that drug traffickers commonly launder proceeds at casinos. There is also no information, aside from the summary sentence above, to show that Lopez-Zuniga or his vehicle went to any casinos. While anything may be possible, probable cause requires facts showing a fair probability that use of a tracker on Lopez-Zuniga's vehicle will likely lead to the discovery of drug-trafficking evidence. The facts contained in the affidavit for Warrant #2 fall short of this standard.

Doc. No. 32 at 11-12.

Judge Mahoney next addressed whether the "good faith reliance" exception established in *United States v. Leon*, 468 U.S. 897 (1984), applies with regard to Warrants 1 and 2. Judge Mahoney found that the exception does not apply because "no officer could have reasonably believed that the affidavits for Warrants #1 and #2 established probable cause to believe that Lopez-Zuniga or his vehicle were involved in drug trafficking or related activities." *Id.* at 12. Excluding the data obtained during the pendency of the first invalid warrant, both warrants were facially devoid of "information to show that Lopez-Zuniga or his vehicle were involved in ongoing drug trafficking, [or] statements showing why evidence of such activity would be revealed through the location of his vehicle." *Id.* at 13.

The affidavits for Warrants 3 and 4 were drafted by Nissen. As with Warrants 1 and 2, much of the information contained in Nissen's affidavit is duplicative. Excluding the GPS data, Warrant 3 included the following evidence in support of the request for a 60 day extension for the GPS tracker:

> Law enforcement applied for and was granted a Pen register order for the phone number belonging to Garcia-Jimenez . . . , as a result of this Pen register order your affiant learned that Garcia-Jimenez has received/made phone calls and or text messages to/from Lopez Zuniga.
>
> On January 24, 2014 Law enforcement began to monitor the phone tolls of Lopez-Zuniga's phone number . . . pursuant to a pen register order. While monitoring those tolls law enforcement learned that Lopez-Zuniga had made 245 contacts to and from Garcia-Jimenez between January 24, 2016 and April 18, 2016. It was also learned that Lopez-Zuniga is regularly in contact with additional suspected methamphetamine traffickers . . . .
>
> On March 9, 2016 [the CI] made arrangements with Garcia-Jimenez to purchase one ounce of methamphetamine. During this controlled purchase the CI was instructed by Garcia-Jimenez to go to the Thompson Apartments located [at Known Address].
>
> Garcia-Jimenez informed the CI that once the CI arrived the CI was to go inside the [Apartments] and go to the elevator and go to the 3rd floor.

> The CI took the elevator to the 3rd floor and when the elevator doors opened the CI was met by a Hispanic male later identified as Lopez-Zuniga.
>
> Lopez-Zuniga gave the CI one plastic bag containing approximately one ounce of purported methamphetamine and the CI paid Zuniga $1,300 in pre-recorded BCA confidential buy funds.
>
> On April 20, 2016[,] Law enforcement, [while] monitoring Lopez-Zuniga's cell phone based on the court issued pen order, [learned] that Lopez-Zuniga's phone was currently located within the country of Mexico.
>
> Law enforcement personnel believe that Lopez-Zuniga and Garcia-Jimenez are conspiring to sell methamphetamine in the Worthington, MN area and that Lopez-Zuniga travels to Denison, IA to purchase or obtain quantities of methamphetamine and then transports the methamphetamine to Worthington, MN to be distributed.

Ex. C at 6-7. The affidavit in support of Warrant 4 is virtually identical to the affidavit for Warrant No. 3, except that it contains GPS data for an additional 60 days and states that law enforcement learned Lopez-Zuniga re-entered the United States via the Laredo, Texas, port of entry on June 9, 2016. Ex. D at 7.

Judge Mahoney found that this additional information was not probable cause to support the extended GPS tracking of defendant's vehicle:

> As with the affidavit for Warrant #2, there is no explanation of why the travel activity of Lopez-Zuniga's vehicle is indicative of drug trafficking or other criminal activity. The affidavit also contains information about frequent telephone contacts between Lopez-Zuniga and Garcia-Jimenez, but no indication about why these telephone contacts relate to drug-trafficking activity, especially in light of the fact that there is no information in this affidavit that telephones were used to arrange controlled purchases. The affidavit does include a statement that Lopez-Zuniga was "regularly in contact with additional suspected methamphetamine traffickers," but does not describe the source or reliability of information as to why these persons are suspected drug traffickers. Therefore, I do not believe these facts support a finding of probable cause to use a tracker on Lopez-Zuniga's vehicle.

> The affidavit does show that Lopez-Zuniga handed methamphetamine to a confidential informant during a controlled purchase on March 9, 2016, although there was no information that Lopez-Zuniga drove his vehicle to or from the controlled purchase. Probable cause requires some indication that the property to be searched will be involved in future illegal activity. *See Ross*, 487 F.3d at 1123-24 (finding reasonable inference that evidence will be found at drug trafficker's residence based on evidence of defendant's ongoing drug-trafficking activity combined with officer's statement that evidence is often found at drug-trafficker's residences); *Simpkins*, 914 F.2d at 1058 (noting implication from evidence in affidavit that the defendant was currently converting cocaine to crack at his residence). The affidavit for Warrant #3 contains no information, even based on the affiant's training and experience, to support an inference that Lopez-Zuniga's vehicle would likely be used in future drug transactions or otherwise lead to evidence of criminal activity. There must be a connection between the item to be search and the criminal activity under investigation. *See Colbert*, 828 F.3d at 726; *see also Herron*, 215 F.3d at 814-15. Furthermore, the affidavit included information that while his vehicle was located in Denison, Lopez-Zuniga was in Mexico on April 20, 2016 (two days before Warrant #3 was issued). This negates an inference, if one could be made, that Lopez-Zuniga's vehicle would be used in future drug-trafficking activity, since the real link to drug-trafficking in this affidavit was Lopez-Zuniga (and not his vehicle). Therefore, I do not believe that Warrant #3 is supported by probable cause.

Doc. No. 32 at 14-15. Judge Mahoney further found that the inclusion of defendant's return from Mexico in Warrant 4 was not enough to establish probable cause.

Turning to the issue of good faith reliance on Warrants 3 and 4, Judge Mahoney noted it was a much closer question than whether investigating officers had reasonably relied on Warrants 1 and 2. Judge Mahoney stated:

> It is possible that Lopez-Zuniga drove his vehicle to or from the drug transaction on March 9, 2016, from which the affiant could have inferred that it was likely he used the vehicle to transport drugs or drug proceeds. It is also possible that information from the tracker (if considered) coincided to locations associated with additional "suspected" drug traffickers. I imagine that the locations and short duration of travels revealed from use of the tracker were significant to law enforcement officers. The affidavit contains no information regarding any of these possibilities, nor was such information introduced at the suppression hearing. Without knowing if and

> why these facts were significant to officers' beliefs that Lopez-Zuniga's vehicle was being and would be used in drug trafficking, or additional information known to the officers but not contained in the affidavit, I cannot say that officers reasonably relied on the search warrant that I believe clearly lacks probable cause.

Doc. No. 32 at 15-16.

Based on these findings, Judge Mahoney recommends that I grant defendant's motion to suppress the GPS evidence.

III. DISCUSSION

A. Warrants 1 and 2

1. Probable Cause

The Government objects to Judge Mahoney's findings, arguing she "misses the mark in that the focus of the search warrants is on the totality of the circumstances involving Lopez-Zuniga's *vehicle* and not Lopez-Zuniga himself." Doc. No. 38 at 3. The Government argues it has established a nexus between a known drug dealer, Garcia-Jimenez, and defendant's vehicle, thereby establishing probable cause to track the vehicle's movements by GPS device.

"Placement of a GPS tracking device on a vehicle is a 'search' within the meaning of the Fourth Amendment, requiring probable cause and a warrant." *United States v. Faulkner*, 826 F.3d 1139, 1144 (8th Cir. 2016) (citing *United States v. Jones*, 565 U.S. 400, 404 (2012)). Probable cause exists when, "under the totality of the circumstances, there is a fair probability evidence of a crime will be found in a particular place" or the requested search will "lead to the discovery of evidence." *Id.* at 1144, 1146. This requires a nexus between the items officers are searching for and the place or item to be searched. *See United States v. Johnson*, 848 F.3d 872, 878 (8th Cir. 2017). "Factors to consider in determining if a nexus exists include 'the nature of the crime and the reasonable, logical likelihood of finding useful evidence.'" *Id.* (quoting *United States v. Colbert*, 828 F.3d 718, 726 (8th Cir. 2016)); *see also United States v. Schermerhorn*, 71

F. Supp. 3d 948, 956 (E.D. Mo. 2014) (probable cause was lacking where the government failed to establish "a relationship between either, the *known drug dealer* and the ***driver of the specific car***, or the *known drug dealer* and the ***specific car***") (emphasis in original).

Both sides below argue that the facts of this case are best explained by comparison to *Schermerhorn*. According to defendant, his case is directly analogous to *Schermerhorn*, requiring a finding that probable cause is lacking. Doc. No. 18 at 5-7. The Government argues that all that was lacking in *Schermerhorn* was a nexus between the known drug dealer and the driver or the known drug dealer and the car, and that the Government has established probable cause by showing a connection between the known drug dealer, Garcia-Jimenez, and defendant's car on two occasions. Doc. No. 38 at 4-5.

In *Schermerhorn*, the court held that the Government failed to establish the required nexus between the place to be searched by GPS device (a car) and the drug dealer. 71 F. Supp. 3d at 956. The warrant at issue in *Schermerhorn* was similar to the warrant in the present case: officers described surveillance efforts regarding a known drug dealer, Nguyen. *Id.* at 952-53. During surveillance, a DEA agent observed the following related to Schermerhorn:

> 1. A blue Honda Civic pulled into the parking lot of Nguyen's place of work. Nguyen entered the Civic. The Civic pulled out of the parking lot; officers followed the car and ran a records check for the license on the Civic, learning that it was registered to Schermerhorn.
>
> 2. The Civic travelled to an apartment building. Both the driver and Nguyen exited the car and entered the apartment building. Roughly ten minutes later, the pair exited the building and returned to the Civic. Before sitting in the front passenger seat, Nguyen placed a duffel bag that he carried from the building into the trunk.
>
> 3. Officers followed the Civic to Arkansas. The surveillance officers briefly lost sight of the Civic, but found it parked in front of a residence approximately fifteen minutes later. Nguyen was standing

> in the street talking on his cell phone, several black males were on the front porch of the residence, but the driver was not seen. The Officer testified that he does not know what happened to the duffel bag or what was in the duffel bag.
>
> 4. The local DEA Field Office informed surveillance officers that the residence where the Civic was parked was the focus of an ongoing investigation and was "believed to be at the center of a large scale marijuana and methamphetamine distribution operation."

Id. The subsequent GPS warrant, which was based solely on the above information, was held to be unsupported by probable cause because the above information did not establish the required nexus between the evidence to be seized and the place to be searched. *Id.* at 953, 56. Although "[i]t is true that the fact that a *known drug dealer* travelled with a driver in a specific car on one occasion to a *known drug supplier's residence* may establish a fair probability that the car will be used to make future trips to facilitate drug trafficking activities," the above facts did not provide enough information to justify the installation of a GPS device. *Id.* at 957 (emphasis in original). Put another way, even though this one trip was suspicious, the officers were required to provide some evidence that this suspicious event was not an isolated event before they tracked the car for a lengthy period of time.

Defendant's case is distinguishable from *Schermerhorn* in two ways. First, the events in *Schermerhorn* were *more* likely to indicate a drug deal involving Schermerhorn's vehicle than were the facts of the present case. As Judge Mahoney explained, there is nothing to suggest defendant's two interactions with Garcia-Jimenez were anything other than innocent. Although anything is possible, officers applying for a warrant are required to identify facts which support a probability that the search will uncover evidence or contraband. If the two interactions described in Louwagie's affidavit are sufficient to establish probable cause, *anyone* could become subject to 240 days of GPS tracking. In *Schermerhorn*, there was at least some evidence that the Schermerhorn's vehicle was used in a drug transaction observed by officers (although it

was not enough to justify GPS tracking). Second, and less significantly, the warrant application here described two interactions between the defendant's car and Garcia-Jimenez, in *Schermerhorn* there was only one recorded interaction between the known drug dealer and the defendant's car. *Id.* at 952-53.

The Government focuses much of its argument on the second distinction between *Schermerhorn* and the present case—that there were *two* interactions observed between defendant's car and Garcia-Jimenez, as opposed to the *one* interaction observed in *Schermerhorn*. The Government argues that considering the totality of the evidence, two interactions with a known drug dealer establishes the nexus that was missing in *Schermerhorn*. This argument misses the mark. The fact that there was a second innocent interaction between defendant and Garcia-Jimenez does not make it more likely defendant's vehicle is being used in trafficking activities. In *Schermerhorn*, the one-time use of a car to complete a likely drug transaction was not enough to support an inference the same car would be used in the future. *Id.* at 957. The fact that there were two innocent interactions between a known drug dealer and a car is equally not enough to support an inference the same car will be used in future drug transactions. This case is akin to cases such as *United States v. Herron*, 215 F.3d 812 (8th Cir. 2000), in which officers had a hunch based on a mere relationship with a target drug dealer, and included the defendant in their warrant application based solely on an innocent connection. Like the defendant in *Herron*, defendant takes up so little space in the overall affidavit that it seems as though his information was pasted into the ongoing investigation against Garcia-Jimenez as an afterthought. *Id.* at 814 n.1, 815.

I agree with Judge Mahoney that there is nothing in the affidavit attached to Warrant 1 to establish defendant's car has been or is likely to be used in trafficking activities. Warrant 2 adds nothing to the analysis that could be used to create the required nexus between defendant's *vehicle* and the drug trafficking activities at issue. The Government's objections to Judge Mahoney's R&R are overruled.

2. The Good Faith Exception

The Government next argues Judge Mahoney erred in finding no reasonable officer could rely on Warrants 1 and 2 because she relied on a case that was distinguishable and inapplicable to the present situation. Doc. No. 38 at 9.

Where it is later determined a warrant is not supported by probable cause, evidence from a warrant need not be excluded if officers reasonably relied in good faith on the judge's issuance of the warrant. *United States v. Carpenter*, 341 F.3d 666, 669 (8th Cir. 2003) (discussing the good faith exception outlined in *Leon*). To determine whether an officer's reliance on a warrant was objectively reasonable, a reviewing court considers the totality of the circumstances, including information known to officers but not presented to the judge who issued the warrant. *United States v. Jackson*, 784 F.3d 1227, 1231 (8th Cir. 2015). Officers cannot rely in good faith on a warrant when the supporting affidavit is "so lacking in indicia of probable cause as to render [officers' belief in its existence *entirely unreasonable*." *Carpenter*, 341 F.3d at 670 (quoting *Leon*, 468 U.S. at 923). The issue is "whether a reasonably well trained officer would have known that the search was illegal despite a judge's issuance of the warrant." *Jackson*, 784 F.3d at 1231.

The Government spent considerable time objecting to Judge Mahoney's use of the *Herron* case, which it argues is factually distinguishable and therefore inapplicable. Doc. No. 38 at 8-9. Specifically, "*Herron* is inapplicable because [of its] context (i.e. house versus GPS tracking device on a vehicle), target (i.e. person versus vehicle), and information relied upon by law enforcement (i.e. historical versus direct evidence). . . Here, agents sought the search warrants in the form of placing a GPS tracking device on a vehicle for suspected drug transportation—which is a mobile, less predictable form of drug trafficking." *Id.* at 9. This argument is unconvincing. First, as discussed above, the use of a GPS device is a search subject to the requirements of the Fourth Amendment. *Faulkner*, 826 f.3d at 1144. The use of a GPS device requires a warrant, and a warrant

requires probable cause. *Id.* The Fourth Amendment protections do not disappear because the protected area is a car instead of a home.

Second, the argument that officers were not targeting defendant, but rather were targeting his vehicle, does not overcome my finding that they failed to develop probable cause to search the vehicle. Again, vehicles are protected by the Fourth Amendment. The Government's contention that this case involves historical rather than direct evidence of defendant's alleged involvement in drug trafficking does distinguish this case from *Herron* in terms of the probable cause analysis. However, as discussed above, the alleged "direct evidence" of defendant's involvement, as used to obtain the first two warrants, shows only innocent behavior. Clearly, the fact that behavior may have an innocent explanation does not preempt a finding of good faith reliance. *See United States v. Simpkins*, 914 F.2d 1054, 1058 (8th Cir. 1990). Here, though, the totality of the circumstances enumerated in Warrants 1 and 2 failed to support an inference that defendant was involved in drug trafficking. Finally, the distinction between drug transporting and drug trafficking is not explained, either in the subsequent sections of the Government's briefs or by citation. Regardless, the type of crime under investigation does not affect the level of probable cause required before officers are permitted to track a suspect's car.

The Government next argues *Schermerhorn* supports a finding of good faith reliance. Doc. No. 38 at 9. In *Schermerhorn*, the court held that officers relied in good faith on a facially deficient warrant because they had knowledge of additional information which would have established probable cause. 71 F. Supp. 3d at 957-59. Officers testified to these facts during a hearing on the motion to suppress. *Id.* at 960-62. Several cases demonstrate that officers can overcome the lack of probable cause supporting a warrant by testifying to the facts they relied on in seeking the warrant, establishing that their reliance on the warrant was in fact in good faith. *See, e.g., United States v. Pruett*, 501 F.3d 976, 981 (8th Cir. 2007) (recounting testimony of affiant at suppression hearing regarding additional information that corroborated information from an informant

contained in the affidavit), *vacated on other grounds*, 552 U.S. 1241 (2008), *reinstated in relevant part*, 523 F.3d 863 (8th Cir. 2008); *Johnson*, 848 F.3d at 870 (noting affiant also knew in search for sex abuse evidence that defendant was a registered sex offender, had previously failed to register as a sex offender, lived with the victim's mother during the time of alleged abuse and occasionally lived at the residence searched); *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) (discussing affiant's testimony at suppression hearing about additional surveillance at the place to be searched and that cocaine found prior to search warrant was consistent with distribution).

Here, the Government did not attempt to establish the facts that were missing from the affidavit, such as facts analogous to those in *Schermerhorn* that the apartment the drug dealer and the defendant visited to retrieve a duffel bag of potential drugs was in fact the defendant's residence. 71 F. Supp. 3d at 956-57. Thus, despite minor factual variations between this case and *Herron*, Judge Mahoney did not err in relying on *Herron* where the Government offered no further evidence to overcome the deficiencies of the facially invalid warrant. Accordingly, the Government's objection is overruled.

B. Warrants 3 and 4

1. Probable Cause

After striking the illegally-obtained GPS data from the applications for Warrants 3 and 4, there is little information to support prolonged GPS tracking of defendant's vehicle. The Government again objects that Judge Mahoney did not take into account the "totality of the circumstances" in evaluating probable cause in support of these warrants. The Government relies on the allegations that defendant was in regular phone contact with Garcia-Jimenez and "other suspected methamphetamine dealers," defendant's participation in a controlled buy and the inferences the Government alleges officers could make from the GPS data.

The Government's argument that Judge Mahoney failed to consider the inferences which officers could draw from defendant's movements is problematic for two reasons.

First, although officers certainly could infer from the GPS tracking that the defendant was making frequent, short trips between restaurants that were being targeted as a part of the methamphetamine conspiracy, they could not reach this inference without relying on the GPS data, which will be suppressed. Second, even if officers could consider these inferences in support of Warrants 3 and 4, there is no evidence as to what they may or may not have inferred. Nissen did not explain what inferences he was drawing, or how the GPS data supported defendant's involvement in the alleged conspiracy. He did, however, provide an innocent explanation for the frequent trips to Denison, Iowa, where one of the target restaurants was located: defendant's brother lived there. Ex. D at 6. During one of the periods during which defendant's car was in the same town as the target restaurant, defendant was actually in Mexico. *Id.* at 15. Again, virtually anything may be possible, but probable cause requires facts showing a fair probability that use of a tracker on defendant's vehicle will likely lead to the discovery of drug-trafficking evidence. The Government had the opportunity during the June 28, 2017, hearing to explain the inferences officers made in support of the warrant applications. However, it did not call any witnesses and instead stood on its brief and the warrant applications. Doc. No. 35 at 4.

Additionally, I agree with Judge Mahoney that the phone contacts with Garcia-Jimenez and the circumstances of the controlled buy are not sufficient to establish probable cause to support GPS tracking of defendant's vehicle. Certainly, these phone contacts could suggest that defendant was in a conspiracy with Garcia-Jimenez to distribute methamphetamine using their cell phones, especially when considered in conjunction with the evidence of the controlled buy. *See, e.g. Simpkins*, 914 F.2d at 1058. However, this case is distinguishable from *Simpkins*. In *Simpkins*, a series of controlled buys and the use of a cell phone to complete a controlled buy, combined with the timing of the defendant coming and going from his house before and after the controlled buys, was sufficient to support an inference that contraband would be found at the his house. *Id.* However, unlike *Simpkins*, nothing about the phone contacts or the

controlled buy in this case indicate that defendant or Garcia-Jimenez were using defendant's car as a part of their alleged conspiracy. If a potential drug sale involving defendant's vehicle was not enough to establish probable cause for GPS tracking, as in *Schermerhorn*, a buy without the vehicle, and without evidence the vehicle was involved, likewise failed to support GPS tracking.

2. The Good Faith Exception

The Government argues that the totality of the circumstances surrounding the investigation of defendant allowed officers to rely in good faith on Warrants 3 and 4. The problem with this argument is that it offers no evidence in support of the officer's reliance on the warrants. The Government fails to explain how the officers could assume there was a nexus between the drug trafficking and defendant's vehicle, without ever establishing that there was a connection between the two.

In *Schermerhorn*, officers had reason to suspect the defendant was assisting a known drug dealer with transportation based on the facts that officers followed defendant and the drug dealer to the defendant's house, then watched them apparently retrieve a duffel bag from the house and deliver the duffel bag to a second residence that was under investigation for drug trafficking. 71 F. Supp. 3d at 957. The fatal flaw in the warrant was that some of the above information was missing from the affidavit, although it was known to the officers. Here, as discussed above, it is impossible to discern whether the officers were in possession of additional information establishing the missing nexus between defendant's vehicle and the drug trafficking at issue so as to justify 240 days of GPS tracking. Thus, their record contains no evidence from which I could conclude that the officers relied in good faith on Warrants 3 and 4.

IV. CONCLUSION

1. For the reasons set forth herein, I **adopt** the Report and Recommendation (Doc. No. 32) **without modification**.

2. The Government's objection (Doc. No. 38) to the Report and Recommendation is **overruled**

3. Defendant's amended motion to suppress evidence (Doc. No. 18) is **granted**. All information obtained as a result of the GPS tracking device installed on defendant's vehicle is hereby **suppressed** on grounds that it was gathered in violation of defendant's Fourth Amendment rights.

IT IS SO ORDERED.

DATED this 18th day of September, 2017.

Leonard T. Strand, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JUAN LOPEZ-ZUNIGA, Defendant.	Case No. 17-CR-4009-LTS **REPORT AND RECOMMENDATION**

TABLE OF CONTENTS

This matter is before the court on Defendant Juan Lopez-Zuniga's Amended Motion to Suppress (Doc. 18). Lopez-Zuniga seeks to suppress evidence obtained from the use of mobile tracking devices on his vehicle, arguing the four warrants authorizing the use of the tracking devices each lacked probable cause. The United States filed a

written resistance (Doc. 26) asserting that the warrants are supported by probable cause, and, if not, that the agents relied on the warrants in good faith. I recommend granting the motion to suppress.

I. BACKGROUND

A. Warrant #1 (Exhibit A)

On December 21, 2015, Special Agent Dan Louwagie with the Minnesota Bureau of Criminal Apprehension submitted an application and affidavit for a state warrant authorizing the use of a mobile tracking device on Lopez-Zuniga's vehicle. Ex. A, at 1-7.[1] The affidavit contained approximately four pages supporting the application for the tracking device warrant. A large majority of those facts involved drug-trafficking activities of multiple named persons other than Lopez-Zuniga ("Targets"), including Rogelio Garcia-Jimenez, at an address in Worthington, Minnesota ("Known Address"), comprised of a restaurant ("Restaurant"), and an apartment complex ("Apartments"). This included information from witnesses about drug trafficking and controlled purchases at the Known Address. Ex. A, at 2-5. The affidavit included a statement from a person who wished to remain anonymous that individuals from Storm Lake, Iowa, met with employees at the Restaurant to purchase drugs. Ex. A, at 2. The only information that involved Lopez-Zuniga or his vehicle consisted of the following:

1. On November 24, 2015, the affiant saw Lopez-Zuniga's vehicle drop off a person who resembled Garcia-Jimenez at the Known Address. Sometime later (it is unclear when), a named individual ("NI") and an undercover

[1] "Exhibit" and "Ex." refer to the exhibits included with Lopez-Zuniga's motion, which were admitted as evidence at the suppression hearing. Each side submitted a copy of the four warrants at issue, including their supporting applications and affidavits, with their pleadings. Defense Exhibit A corresponds to government Exhibit 1, and so on. For the sake of ease, I will refer to the exhibits by their letters A through D.

officer went to the Known Address. The NI went inside the Apartments and came out "[s]everal minutes later." The NI was arrested on an outstanding warrant several minutes after that, during which time officers found methamphetamine on the NI's person. The NI had told the undercover officer at some point that "his guy" (identified as Garcia-Jimenez) did not have any methamphetamine that day. It is unclear when the NI conveyed this information because the affidavit says it happened on the way "back to Iowa," which would imply after the NI went into the Apartments, but it seems from the context of the affidavit (including that the NI was arrested shortly after leaving the Apartments) that these statements were made before they arrived at the Apartments. The affidavit contains no information to show who, if anyone, the CI met with at the Apartments, which (if any) apartment the NI entered, and if that apartment was associated with Garcia-Jimenez or any Target.

2. On December 15, 2015, officers conducting surveillance at the Known Address saw Lopez-Zuniga and Garcia-Jimenez drive in Lopez-Zuniga's vehicle from the Known Address to a restaurant and shopping mall in Sioux Falls, South Dakota, and then back to the Known Address.

3. Over several months, officers conducted surveillance at the Known Address and a casino. The affiant believed that Lopez-Zuniga, Garcia-Jimenez, and other Targets were conspiring to sell drugs through the Restaurant and "possibly laundering" drug proceeds at the Restaurant and casinos, and that Lopez-Zuniga transported co-conspirators in his vehicle for those purposes.

Ex. A, at 6.

A state district court judge for Nobles County, Minnesota, issued the requested warrant[2] the same day and authorized the use of a mobile tracking device ("tracker") on Lopez-Zuniga's vehicle for a period of 60 days. Ex. A, at 8-9.

B. Warrant #2 (Exhibit B)

On February 18, 2016, Special Agent Louwagie applied for a second warrant to use a tracker on Lopez-Zuniga's vehicle. Ex. B, at 1-8. The affidavit contained the same information as the affidavit in support of Warrant #1, excluding the general statement that officers conducted surveillance for several months at the Known Address (part of paragraph 3 above). The affidavit for Warrant #2 included the following additional information:

4. Use of the tracker pursuant to Warrant #1 showed that Lopez-Zuniga's vehicle traveled to the Known Address for short durations on nine specific dates between December 29, 2015, and February 9, 2016.

5. The use of the tracker pursuant to Warrant #1 showed that Lopez-Zuniga's vehicle made four trips from Worthington to Denison, Iowa, located approximately 125 miles south of Worthington and where a second establishment of the Restaurant was located. During the first trip, Lopez-Zuniga's vehicle stayed in Denison approximately eleven hours before returning to Worthington. During the next two trips, Lopez-Zuniga's vehicle traveled to Denison one day and returned the following day. On the fourth trip, Lopez-Zuniga's vehicle traveled to Denison and the

[2] The application and search warrant each refer to the vehicle by license plate number, year and color, vehicle identification number (VIN), and registered owner and address, but do not contain the make or model of the vehicle. In the supporting affidavit, the vehicle is referred to by license plate number (such as officers "observed MN License XXXXXX pull into" the Known Address), and one time as "the 1995 LeSabre."

following day drove thirteen miles to a gas station in Schleswi[g], Iowa, where it remained for a few minutes before returning to Denison. Lopez-Zuniga's vehicle then traveled back to Worthington two days later to the Known Address.

6. The use of the tracker pursuant to Warrant #1 showed that on January 19, 2016, Lopez-Zuniga's vehicle traveled approximately 40 miles from Worthington to Primghar, Iowa, where it stayed at a gas station for 25 minutes before returning to Worthington.

7. Information from use of a court-authorized pen register on Garcia-Jimenez's telephone numbers showed 154 telephone contacts between Garcia-Jimenez and Lopez-Zuniga between December 21, 2015, and February 11, 2016.

Ex. B, at 6-7.

A state district court judge for Nobles County, Minnesota, issued the requested warrant the same date, authorizing use of a tracker on Lopez-Zuniga's vehicle for a period to not exceed 60 days. Ex. B, at 9-10.

C. Warrant #3 (Exhibit C)

On April 22, 2016, Special Agent Chris Nissen with the Iowa Division of Narcotics Enforcement submitted an application and supporting affidavit for a warrant to use a tracker on Lopez-Zuniga's vehicle. This affidavit included the same information regarding surveillance of Lopez-Zuniga and Garcia-Jimenez (described as "a known methamphetamine distributor in Southwest Minnesota and Northwest Iowa") going to a restaurant and mall in Sioux Falls on December 15, 2015 (paragraph 2 above). The affidavit also included the tracker information from Lopez-Zuniga's vehicle obtained

pursuant to Warrant #1 (paragraphs 4 and 5 above). The affidavit included the following new information, which did not appear in the prior affidavits:

8. Information obtained from use of the tracker pursuant to Warrant #2 that Lopez-Zuniga's vehicle traveled between Worthington and Denison six times between February 26 and April 14, 2016. These trips to Denison lasted from two to seven days. On two occasions, Lopez-Zuniga's vehicle traveled from Denison to Worthington and back to Denison the same day. During two trips to Worthington, Lopez-Zuniga's vehicle stopped at Garcia-Jimenez's residence (a new residence different than the Known Address) but never at Lopez-Zuniga's residence.

9. A statement that Lopez-Zuniga's vehicle was currently located in Denison at the residence of Lopez-Zuniga's brother.

10. Use of a court-authorized pen register showed 245 telephone contacts between Lopez-Zuniga and Garcia-Jimenez from January 24 to April 18, 2016, and regular contacts between Lopez-Garcia and "additional suspected methamphetamine traffickers to include" two named individuals, one from Denison and one from Sac City, Iowa.

11. On March 9, 2016, a confidential informant ("CI") made a controlled purchase of methamphetamine in Worthington. The CI arranged the controlled purchase through contact with Garcia-Jimenez, and Lopez-Zuniga was later identified as the person who then met with and provided the CI with approximately one ounce of methamphetamine and collected $1,300 from the CI.

12. A statement that based on use of a court-authorized pen register, officers believed that Lopez-Zuniga was currently located in Mexico.

13. A statement that officers believed Lopez-Zuniga and Garcia-Jimenez were conspiring to distribute methamphetamine in the Worthington area and that Lopez-Zuniga obtained methamphetamine in Denison, which he transported to Worthington for distribution.

Ex. C, at 4-7.

The affidavit did not contain information included in the prior affidavits regarding:

- drug-trafficking activities involving Garcia-Jimenez, other Targets, and the Known Address (Ex. A, at 2-5; Ex. B, at 2-5);
- that Lopez-Zuniga's vehicle was seen at the Known Address on November 24, 2015, prior to the "transaction" with NI (paragraph 1 above);
- surveillance over the course of months prior to use of the tracking device and belief statements that Lopez-Zuniga was involved in drug-trafficking and money-laundering activities (paragraph 3 above);
- travel of Lopez-Zuniga's vehicle to a gas station in Primghar on January 19, 2016 (paragraph 6 above); or
- telephone contacts between Garcia-Jimenez and Lopez-Zuniga between December 21, 2015, and February 11, 2016 (paragraph 7 above).

A state judge for Clay County, Iowa, issued the requested warrant the same day, authorizing the use of a tracker on Lopez-Zuniga's vehicle for a period of 60 days. Ex. C, at 13-14.

D. Warrant #4 (Exhibit D)

On June 22, 2016, Special Agent Nissen applied for another warrant for use of a tracker on Lopez-Zuniga's vehicle. Ex. D, at 1-11, 14-15. The affidavit in support of

that warrant contained the exact same information as the affidavit submitted in support of Warrant #3 (Exhibit C) and included the following additional information:

14. On June 9, 2016, information from Homeland Security Investigations showed that Lopez-Zuniga reentered the United States through Texas. Lopez-Zuniga's vehicle began to travel around Denison the following day, on June 10, 2016.[3]

15. On June 12, 2016, Lopez-Zuniga's vehicle traveled from Denison to Worthington and "directly to the residence of Garcia-Jimenez." The vehicle stayed at that location overnight and returned to Denison the following day, June 13, 2016.

The same day, a state court judge for Clay County, Iowa, issued a warrant authorizing use of a tracker on Lopez-Zuniga's vehicle for another period of 60 days. Ex. D, at 12-13.

II. LEGAL PRINCIPLES

"Placement of a [mobile] tracking device on a vehicle is a 'search' within the meaning of the Fourth Amendment, requiring probable cause and a warrant." *United States v. Faulkner*, 826 F.3d 1139, 1144 (8th Cir. 2016) (citing *United States v. Jones*, 565 U.S. 400, 404 (2012)). Probable cause exists when, "under the totality of circumstances, there is a fair probability [that] evidence of a crime will be found in a particular place" or that the requested search will "lead to the discovery of evidence." *Id.* at 1144, 1146. This requires a nexus between the items officers are searching for and the place or item to be searched. *See United States v. Johnson*, 848 F.3d 872, 878

[3] Although unclear, I presume this latter information came from use of the tracker pursuant to Warrant #3.

(8th Cir. 2017). "Factors to consider in determining if a nexus exists include 'the nature of the crime and the reasonable, logical likelihood of finding useful evidence.'" *Id.* (quoting *United States v. Colbert*, 828 F.3d 718, 726 (8th Cir. 2016)).

Even if it is later determined that a warrant is not supported by probable cause, evidence obtained from that warrant need not be excluded if officers reasonably relied in good faith on the judge's issuance of the warrant. *United States v. Carpenter*, 341 F.3d 666, 669 (8th Cir. 2003) (discussing the good faith exception outlined in *United States v. Leon*, 468 U.S. 897 (1984)). In determining the objective reasonableness of an officer's reliance on a warrant, a reviewing court looks at the totality of circumstances, including information known to officers but not presented to the judge who issued the warrant. *United States v. Jackson*, 784 F.3d 1227, 1231 (8th Cir. 2015). Officers cannot rely in good faith on a warrant when the supporting affidavit is "so lacking in indicia of probable cause as to render [officers'] belief in its existence *entirely unreasonable*." *Carpenter*, 341 F.3d at 670 (quoting *Leon*, 468 U.S. at 923). Put another way, the issue is "whether a reasonably well trained officer would have known that the search was illegal despite a judge's issuance of the warrant." *Jackson*, 784 F.3d at 1231.

III. ***DISCUSSION***

A. Warrant #1 (Exhibit A) and Warrant #2 (Exhibit B)

The affidavits submitted in support of Warrant #1 and Warrant #2 lack probable cause to show that Lopez-Zuniga's vehicle would be used in drug-trafficking or money-laundering activities. First, there is very little information about Lopez-Zuniga. What information is included involves innocent activity. Unlike the facts in *Faulkner*, 826 F.3d at 1142-43, neither affidavit contains information about Lopez-Zuniga's engagement in criminal activity, let alone that such activity was ongoing in nature and involved use

of Lopez-Zuniga's vehicle. The present case also differs from the facts in *Colbert*, 828 F.3d at 726-27, where witness information and the target's own statements from intercepted calls showed the defendant sold drugs and supported a finding that evidence related to drug-trafficking proceeds would be found at the target's residence (and thus probable cause existed to search the residence).

The facts underlying Warrants #1 and #2 are most similar to the facts in *United States v. Herron*, 215 F.3d 812 (8th Cir. 2000). In that case, the supporting affidavit contained significant information about the defendant's relatives and their involvement in cultivating marijuana on a target relative's property. *Id.* at 813-14. The only evidence regarding the defendant was his relationship to the targets, the fact that he had two prior convictions for cultivating marijuana, and that a target relative said he had recently resided at the defendant's residence to help harvest corn. *Id.* at 813-14 & nn. 1-2. The Eighth Circuit found no "reasonable officer would believe that these facts established probable cause to search [the defendant]'s residence for marijuana or the implements of its cultivation." *Id.* at 814. The Court went on to state that the officers who issued the affidavits in support of the warrant at issue "should have been fully aware of the deficiencies of their affidavits" because unlike "a technical legal deficiency[,] the affidavits simply d[id] not say very much about [the defendant] or his residence." *Id.*

At best, the affidavit for Warrant #1 shows that Lopez-Zuniga's vehicle dropped Garcia-Jimenez off at a location where a possible drug transaction occurred. The first problem is that there was no controlled purchase, and so there is no reliable information about where NI obtained the methamphetamine from. The NI went into the Apartments, but it is unclear which apartment (if any) the NI entered and who (if anyone) the NI met with. It is also not clear from the affidavit at what point, in relation to NI arriving at the Apartments, someone in Lopez-Zuniga's vehicle dropped Garcia-Jimenez off at that location. Furthermore, since there had been prior drug transactions at the Known

Address (none involving Lopez-Zuniga or his vehicle), it is more likely that the drugs found on NI (even if there had been a controlled transaction) came from the Known Address rather than Lopez-Zuniga's vehicle. The later travel to a restaurant and mall in Lopez-Zuniga's vehicle involved innocent activity and does not support a finding of probable cause. If the facts presented in the affidavit for Warrant #1 amount to probable cause, then *anyone* who drops a drug trafficker off at the trafficker's residence and travels with the trafficker for innocent activity, such as the trafficker's grandmother or mere acquaintance, would be subject to search. Warrant #1 is not supported by probable cause and accordingly, evidence obtained from that warrant should be suppressed.

The affidavit for Warrant #2 contained the same information as the affidavit for Warrant #1, plus information obtained from use of the tracker, which I believe should be suppressed and therefore excised from the affidavit. The only additional information contained in Warrant #2's affidavit is that Lopez-Zuniga and Garcia-Jimenez had telephone contact 154 times between December 21, 2015, and February 11, 2016. Although controlled purchases made from Garcia-Jimenez and others (not including Lopez-Zuniga) involved the use of telephones, there is no information in the affidavit, based on an officer's training and experience or otherwise, that the telephone contact between Lopez-Zuniga and Garcia-Jimenez might have involved drug trafficking or other criminal activity. Accordingly, there is no indication that the telephone contacts were anything other than innocent in nature. The remaining information is the belief statement that officers believed that Lopez-Zuniga "may" be assisting Garcia-Jimenez and other Targets in drug trafficking and "possibly laundering some of these drug proceeds" through the Restaurant and area casinos, and that Lopez-Zuniga was using his vehicle to transport Garcia-Jimenez and others. There is no information, however, to indicate that Garcia-Jimenez or other Targets were engaged in laundering drug proceeds at casinos, not even a statement that officer training and experience shows that drug

traffickers commonly launder proceeds at casinos. There is also no information, aside from the summary sentence above, to show that Lopez-Zuniga or his vehicle went to any casinos. While anything may be possible, probable cause requires facts showing a fair probability that use of a tracker on Lopez-Zuniga's vehicle will likely lead to the discovery of drug-trafficking evidence. The facts contained in the affidavit for Warrant #2 fall short of that standard.

The "extreme sanction" of the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges . . . ." *Carpenter*, 341 F.3d at 669 (quoting *Leon*, 468 U.S. at 916); *accord United States v. Simpkins*, 914 F.2d 1054, 1058 (8th Cir. 1990). With this in mind, I believe that no officer could have reasonably believed that the affidavits for Warrants #1 and #2 established probable cause to believe that Lopez-Zuniga or his vehicle were involved in drug trafficking or related activities. "The fact that an innocent purpose might explain [a person]'s conduct does not preclude the officers' good faith belief that evidence of drug trafficking would be found at the residence [where defendant traveled to and from] nor negate the officers' objectively reasonable belief that the warrant they obtained was valid." *Simpkins*, 914 F.2d at 1058. In *Simpkins*, the officers had information that defendant was directly involved in controlled purchases of drugs. The affidavits supporting Warrants #1 and #2, on the other hand, provide no indication that Lopez-Zuniga or his vehicle were involved in drug trafficking, and the only information regarding the vehicle's connection to Garcia-Jimenez entails innocent activity. Therefore, the facts in this case do not support a finding of good faith based on *Simpkins*.

Officers may also rely in good faith on a warrant to search a location connected to a defendant when an affiant describes the defendant's "continuous course of drug trafficking activity" and states that based on the affiant's training and experience, the warrant will likely lead to evidence of drug trafficking. *United States v. Ross*, 487 F.3d

1120, 1123-24 (8th Cir. 2007) (finding officer reasonably relied on warrant to search defendant's residence when no information connected residence to drug trafficking, but an informant provided information that a load of marijuana in a controlled delivery was destined for defendant, that the group used trucks to haul marijuana, and that the informant had delivered drugs to the defendant six months prior; and the defendant arrived at a location to meet a member of the group in a truck that had been at his residence earlier that morning). These situations involve inferences that the property to be searched will be involved in future drug-trafficking activity. *See id*; *United States v. Schermerhorn*, 71 F. Supp. 3d 948, 960-61 (E.D. Mo. 2014) (discussing additional information known to the affiant and the permissible inference that defendant's vehicle would likely be used in future drug trafficking in finding officers relied in good faith on tracking-device warrant). The affidavits for Warrants #1 and #2 do not contain information to show that Lopez-Zuniga or his vehicle were involved in ongoing drug trafficking, nor statements showing why evidence of such activity would be revealed through the location of his vehicle.

In other cases where officers were found to have relied in good faith on a warrant, evidence was presented regarding additional information the officers knew that made their reliance on the warrant objectively reasonable. *See Johnson*, 848 F.3d at 879 (noting affiant also knew in search for sex abuse evidence that defendant was a registered sex offender, had previously failed to register as a sex offender, lived with the victim's mother during the time of alleged abuse, and occasionally lived at the residence searched); *United States v. Pruett*, 501 F.3d 976, 981 (8th Cir. 2007) (recounting testimony of affiant at suppression hearing regarding additional information that corroborated information from an informant contained in the affidavit), *vacated on other grounds*, 552 U.S. 1241 (2008), *reinstated in relevant part*, 523 F.3d 863 (8th Cir. 2008); *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) (discussing affiant's testimony at

suppression hearing about additional surveillance at the place to be searched and that cocaine found prior to search warrant was consistent with distribution). In this case, there was no evidence presented about additional information the officers knew that would show they relied in good faith on either Warrant #1 or Warrant #2. The only indication that officers may have had additional information comes from the general statements that officers believed that Lopez-Zuniga was involved in drug-trafficking and money-laundering activities. Without knowing if officers had additional information and the nature of such information, those statements constitute mere suspicion that Lopez-Zuniga may have been engaged in illegal activity based on his association with Garcia-Jimenez. I am therefore unable to find that additional information supported officers' good-faith reliance on Warrant #1 or Warrant #2.

I do not believe Warrant #1 nor Warrant #2 are supported by probable cause to believe that information about the location of Lopez-Zuniga's vehicle would lead to the discovery of evidence. I also believe that because the supporting affidavits were so lacking in probable cause, any reliance on the warrants was unreasonable. Therefore, I recommend suppressing any evidence obtained pursuant to Warrant #1 and Warrant #2.

B. Warrant #3 (Exhibit C)

The affidavit in support of Warrant #3 (Exhibit C) contains information from the tracker used pursuant to Warrants #1 and #2. As with the affidavit for Warrant #2, there is no explanation of why the travel activity of Lopez-Zuniga's vehicle is indicative of drug trafficking or other criminal activity. The affidavit also contains information about frequent telephone contacts between Lopez-Zuniga and Garcia-Jimenez, but no indication about why these telephone contacts relate to drug-trafficking activity, especially in light of the fact that there is no information in this affidavit that telephones were used to arrange controlled purchases. The affidavit does include a statement that Lopez-Zuniga was

"regularly in contact with additional suspected methamphetamine traffickers," but does not describe the source or reliability of information as to why these persons are suspected drug traffickers. Therefore, I do not believe these facts support a finding of probable cause to use a tracker on Lopez-Zuniga's vehicle.

The affidavit does show that Lopez-Zuniga handed methamphetamine to a confidential informant during a controlled purchase on March 9, 2016, although there was no information that Lopez-Zuniga drove his vehicle to or from the controlled purchase. Probable cause requires some indication that the property to be searched will be involved in future illegal activity. *See Ross*, 487 F.3d at 1123-24 (finding reasonable inference that evidence will be found at drug trafficker's residence based on evidence of defendant's ongoing drug-trafficking activity combined with officer's statement that evidence is often found at drug traffickers' residences); *Simpkins*, 914 F.2d at 1058 (noting implication from evidence in affidavit that the defendant was currently converting cocaine to crack cocaine at his residence). The affidavit for Warrant #3 contains no information, even based on the affiant's training and experience, to support an inference that Lopez-Zuniga's vehicle would likely be used in future drug transactions or otherwise lead to evidence of criminal activity. There must be a connection between the item to be searched and the criminal activity under investigation. *See Colbert*, 828 F.3d at 726; *see also Herron*, 215 F.3d at 814-15. Furthermore, the affidavit included information that while his vehicle was located in Denison, Lopez-Zuniga was in Mexico on April 20, 2016 (two days before Warrant #3 was issued). This negates an inference, if one could be made, that Lopez-Zuniga's vehicle would be used in future drug-trafficking activity, since the real link to drug-trafficking in this affidavit was Lopez-Zuniga (and not his vehicle). Therefore, I do not believe that Warrant #3 is supported by probable cause.

It is a much closer call whether the officers relied in good faith on this warrant. It is possible that Lopez-Zuniga drove his vehicle to or from the drug transaction on

March 9, 2016, from which the affiant could have inferred that it was likely he used the vehicle to transport drugs or drug proceeds. It is also possible that information from the tracker (if considered) coincided to locations associated with the additional "suspected" drug traffickers. I imagine that the locations and short duration of travels revealed from use of the tracker were significant to law enforcement officers. The affidavit contains no information regarding any of these possibilities, nor was such information introduced at the suppression hearing. Without knowing if and why these facts were significant to officers' beliefs that Lopez-Zuniga's vehicle was being and would be used in drug trafficking, or additional information known to the officers but not contained in the affidavit, I cannot say that officers reasonably relied on the search warrant that I believe clearly lacks probable cause. Accordingly, I recommend suppressing evidence obtained through the use of Warrant #3.

C. Warrant #4 (Exhibit D)

The only new facts contained in the affidavit for Warrant #4 was information that Lopez-Zuniga had returned from Mexico around June 9, 2016, that his vehicle (according to excludable information from the use of the tracker pursuant to Warrant #3) began to travel in the Denison area around June 10, 2016, and that the vehicle went to Garcia-Jimenez's residence where it remained overnight from June 12-13, 2016. For the reasons discussed above, I do not believe this, even in combination with the other facts in the affidavit, establishes probable cause to believe that the location of Lopez-Zuniga's vehicle would reveal evidence of drug trafficking. Likewise, I do not believe there is any basis to find that officers reasonably relied on the warrant. Thus, I recommend suppressing evidence that resulted from the use of the tracker pursuant to Warrant #4.

IV. CONCLUSION

For the foregoing reasons, I RESPECTFULLY RECOMMEND that Defendant's motion to suppress (Doc. 18) be **granted**.

Objections to this Report and Recommendation, in accordance with 28 U.S.C. § 636(b)(1), Federal Rule of Criminal Procedure 59(b), and Local Criminal Rule 59, must be filed within fourteen days of the service of a copy of this Report and Recommendation; any response to the objections must be filed within seven days after service of the objections. A party asserting such objections must arrange promptly for the transcription of all portions of the record that the district court judge will need to rule on the objections. LCrR 59. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Crim. P. 59. Failure to object to the Report and Recommendation waives the right to de novo review by the district court of any portion of the Report and Recommendation, as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

DATED this 10th day of August, 2017.

Kelly K.E. Mahoney
United States Magistrate Judge
Northern District of Iowa

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3261

United States of America

Appellant

v.

Juan Lopez-Zuniga

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Sioux City
(5:17-cr-04009-LTS-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly and Judge Kobes did not participate in the consideration or decision of this matter.

January 09, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff(s), vs. JUAN LOPEZ-ZUNIGA, Defendant(s).	No. 17-CR-4009 MOTION TO SUPPRESS

COMES NOW the Defendant, by and through his undersigned attorney, and respectfully moves this Honorable Court to suppress all evidence obtained from the illegal search (GPS tracking) of his vehicle and the movements thereof, as well as any and all fruits of the illegal search.

In support of this Motion, Defendant states as follows:

1. On December 21, 2015, Law Enforcement Officer Dan Louwagie applied for a search warrant to install a mobile tracking device on a vehicle registered to the Defendant, Juan Lopez-Zuniga;

2. The Affidavit in Support of the Search Warrant lacked sufficient probable cause because it contained no information that provided a nexus between the Defendant and any criminal activity;

3. In the absence of probable cause, the warrant was issued and allowed the use of the mobile tracking device for a period not to exceed 60 days;

4. On February 18, 2016, prior to the completion of the 60 day period, Officer Louwagie applied for another mobile tracking device warrant to extend the use of the device for an additional 60 days;

5. The Affidavit in Support of this search warrant contained the same information as the previous affidavit, but included some information regarding the location of the Defendant's vehicle since December 21, 2015;

6. On February 18, 2016, a subsequent search warrant was authorized for an additional period in the absence of probable cause;

7. The search warrants lack probable cause and the officers who executed the warrants knew of the deficiency and their execution of the warrant was therefore not objectively reasonable. Officers had no good faith excuse in executing a warrant that lacked probable cause; and

8. The Defendant requests an evidentiary hearing and oral argument on this Motion.

WHEREFORE, following a hearing on this Motion, Defendant respectfully requests that all evidence obtained by law enforcement be suppressed as a result of the violation of the Defendant's Fourth Amendment rights.

JUAN LOPEZ-ZUNIGA, Defendant,

BY: /s/Jim K. McGough

Jim K. McGough
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CERTIFICATE OF SERVICE

I certify that on May 15, 2017, I electronically filed the foregoing Motion to Suppress with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

Mr. Shawn Wehde
Assistant United States Attorney
United States Attorney's Office
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Sioux City, IA 51101
shawn.wehde@usdoj.gov

/s/Jim K. McGough
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff(s), vs. JUAN LOPEZ-ZUNIGA, Defendant(s).	No. 17-CR-4009 MOTION TO SUPPRESS

COMES NOW the Defendant, by and through his undersigned attorney, and respectfully moves this Honorable Court to suppress all evidence obtained from the illegal search (GPS tracking) of his vehicle and the movements thereof, as well as any and all fruits of the illegal search.

In support of this Motion, Defendant states as follows:

1. On December 21, 2015, Law Enforcement Officer Dan Louwagie applied for a Federal search warrant to install a mobile tracking device ("GPS") on a vehicle registered to the Defendant, Juan Lopez-Zuniga;

2. The Affidavit in Support of the Search Warrant lacked sufficient probable cause because it contained no information that provided a nexus between the Defendant and any criminal activity;

3. The warrant was issued that same day and allowed the use of the mobile tracking device for a period not to exceed 60 days;

4. On February 18, 2016, prior to the completion of the 60 day period, Officer Louwagie applied for another Federal mobile tracking device warrant to extend the use of the device for an additional 60 days;

5. The Affidavit in Support of this search warrant contained the same information as the previous affidavit, but included some information regarding the location of the Defendant's vehicle since December 21, 2015;

6. That same date, the successive Federal search warrant was authorized for an additional period of 60 days;

7. The Federal search warrants lacked probable cause and the officers who executed the warrants knew of the deficiency and their execution of the warrant was therefore not objectively reasonable. Officers had no good faith excuse in executing warrants that lacked probable cause;

8. On April 22, 2016, a State GPS warrant was sought through Clay County, Iowa and referenced within the affidavit in support the Federal GPS warrants, along with the information gained from those warrants. The warrant sought to place a GPS tracking device on the vehicle belonging to the Defendant;

9. On June 22, 2016, a subsequent State search warrant, again through Clay County, Iowa was requested, asking to reissue the State GPS warrant for an additional 60 days;

10. The State GPS warrants contain information gained from the Federal GPS which should be excised from the affidavit in support, given the Federal GPS warrants were authorized in the absence of probable cause;

11. Following excision, the State search warrants lack probable cause and the officers had no good faith basis in executing the deficient warrants which included unlawfully obtained information; and

12. The Defendant requests an evidentiary hearing and oral argument on this Motion.

WHEREFORE, following a hearing on this Motion, Defendant respectfully requests that all evidence obtained by law enforcement be suppressed as a result of the violation of the Defendant's Fourth

Amendment rights, including all subsequently obtained evidence as fruit of the poisonous tree.

JUAN LOPEZ-ZUNIGA, Defendant,

BY: /s/Jim K. McGough

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CERTIFICATE OF SERVICE

I certify that on June 2, 2017, I electronically filed the foregoing Motion to Suppress with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

Mr. Shawn Wehde
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shawn.wehde@usdoj.gov

/s/Jim K. McGough
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 17-CR-4009-LTS
	)	
vs.	)	
	)	
JUAN LOPEZ-ZUNIGA,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL AND CERTIFICATION TO DISTRICT COURT

Plaintiff, United States of America, pursuant to 18 U.S.C. § 3731 and Federal Rule of Appellate Procedure 4(b), appeals to the United States Court of Appeals for the Eighth Circuit from the district court's Order Regarding Report and Recommendation on Defendant's Motion to Suppress, filed September 18, 2017. (Docket No. 43).

The United States Attorney, pursuant to 18 U.S.C. § 3731, certifies that the appeal filed in this case is not taken for purpose of delay and that the evidence suppressed is a substantial proof of a fact material in the proceeding.

Respectfully submitted,

PETER E. DEEGAN, JR.
United States Attorney

111 Seventh Avenue SE, Box 1
Cedar Rapids, Iowa 52401
(319) 363-6333 / (319) 363-1990 (fax)

CERTIFICATE OF SERVICE

I hereby certify that, on October 16, 2017, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to the parties or attorneys of record.

UNITED STATES ATTORNEY

BY: /s/ Jean Wordekemper