ALAN WILSON
ATTORNEY GENERAL

April 5, 2012

Brian Buck, Chief of Police
Irmo Police Department
P.O. Box 406
Irmo, SC 29063

Dear Chief Buck:

We received your letter requesting that we address the recent decision of the United States Supreme Court ("USSC") in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) as it pertains to S.C. Code Ann. §17-30-140 and the use of Global Positioning System ("GPS") tracking devices.

Law/Analysis

In Jones, the USSC addressed the issue of whether the attachment of a GPS device to an individual's vehicle, and the subsequent use of the device to track the vehicle's movements, constitutes a search under the Fourth Amendment. The Government applied for and was granted a search warrant authorizing it to install a GPS tracking device on a vehicle that was registered to Jones's wife. The warrant authorized the Government to install the GPS device in the District of Columbia within 10 days of the issuance of the warrant. The Government installed the GPS device one day after the warrant expired. In addition, at the time the device was installed, the vehicle was located in Maryland and not in the District of Columbia. The Government then used the device to track the vehicle's movements for 28 days. Id., 132 S.Ct. at 948. The Government later secured an indictment charging Jones and other alleged co-conspirators with several crimes. Id.

Prior to trial, Jones moved to suppress the evidence the Government obtained through the use of the GPS device. The district court held that the data obtained from the GPS device while the vehicle was on public streets was admissible because "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Id., 132 S.Ct. at 949 [quoting United States v. Jones, 451 F.Supp.2d 71, 88 (D. D.C. 2006)]. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the admission of the evidence obtained by the warrantless use of a GPS device violated the Fourth Amendment. Jones, 132 S.Ct. at 949 [citing United States v. Maynard, 615 F.3d 544, 568 (D.C. Cir. 2010)].

The USSC granted certiorari and affirmed the holding of the District of Columbia Circuit. The Court unequivocally held that:

> the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' [Emphasis added].

Jones, 132 S.Ct. at 949.

In reaching its decision, the Court acknowledged two separate tests for identifying a Fourth Amendment search: the "physical trespass test" and the Katz "reasonable expectation of privacy" test.[1] Justice Scalia, writing for the five-Justice majority, reached his conclusion under a trespass rationale, *i.e.*, that by attaching an information-gathering device to an "effect" (Jones' vehicle), the Government "physically occupied private property for the purpose of obtaining information," which constitutes a search. Jones, 132 S.Ct. at 949.[2] Justice Alito, writing for the four Justices concurring in the judgment, based his conclusion on the Katz "reasonable expectation of privacy" test. The point of disagreement in the concurring opinion in Jones was the re-emergence of a trespass theory for Fourth Amendment searches rather than application of existing reasonable expectation of privacy doctrine. Id., 132 S.Ct. at 957-61. Justice Alito reasoned that the case should be analyzed "by asking whether [Jones'] reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." Id., 132 S.Ct. at 958. Without identifying the specific point at which the surveillance became a Fourth Amendment search, Justice Alito concluded that the driver of the vehicle had an expectation of privacy that he would not be monitored for four weeks with Government agents "track[ing] every movement that respondent made in the vehicle he was driving." Id., 132 S.Ct. at 964.[3]

In light of the USSC's holding in Jones, we note that the Fourth Amendment guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const., amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a

---

[1]Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring).

[2]The majority's opinion in Jones expressly noted that Jones "was 'the exclusive driver'" of the vehicle, and that if he "was not the owner he had at least the property rights of a bailee." Id., 132 S.Ct. 949, n.2. Thus, as the effective property owner or bailee of the vehicle, Jones was said to have standing to challenge the infringement on his property. In fact, the majority emphasized that Jones "possessed the Jeep at the time the Government trespassorily inserted the information-gathering device." Id., 132 S.Ct. at 952. This was determined to distinguish Jones' situation from earlier cases in which the USSC had upheld the use of electronic beepers that had been placed inside packages before they were transferred to the defendant challenging their use. Id. [distinguishing Karo v. United States, 468 U.S. 705, (1984), because "Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the containers location"].

[3]Although Justice Sotomayor joined in the majority opinion, she wrote separately that the Government's physical invasion of personal property (Jones' vehicle) to gather information was a search under the Fourth Amendment's long-standing trespass test, which she concluded the Katz reasonable expectation of privacy test augmented but did not displace. Id., 132 S.Ct. at 954-55.

safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 541 S.E.2d 837, 840 (2001); S.C. Const., art. I, §10.[4] Both of these provisions require that a warrant be issued upon probable cause supported by "oath or affirmation." State v. White, 275 S.C. 500, 272 S.E.2d 800, 801 (1980); State v. Woods, 376 S.C. 125, 654 S.E.2d 867, 869 (Ct. App. 2001); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216, 222 (2006) [holding that a request for a court order to procure evidence constitutes a search and must comply with constitutional guidelines for search warrants]. Further, §17-13-140, the general search warrant statute, mandates a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record. . . ." See State v. Covert, 382 S.C. 205, 675 S.E.2d 740, 742 (2009).[5] Generally, evidence obtained in violation of the Fourth Amendment is inadmissible in federal and State courts. Forrester, 541 S.E.2d at 840; cf. State v. Bultron, 318 S.C. 323, 457 S.E.2d 616, 621 (Ct. App. 1995) [holding ". . . a warrantless search is *per se* unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures [but] a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule"].

Relevant to the use of GPS tracking devices, we note the court in State v. Holden, 2010 WL 5140744, *2 (Del. Super. 2010) recognized that:

> GPS technology greatly enhances law enforcement's ability to effectively monitor and locate suspects. When synchronized with mapping software, it allows investigators a constant real-time view of the target's position. GPS

---

[4]In Forrester, the South Carolina Supreme Court explained that the relationship between the Federal and State Constitutions is significant, because "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." Id., 541 S.E.2d at 840 [citing State v. Easler, 327 S.C. 121, 489 S.E.2d 617, 625 n.13 (1997)]. The Court stated:

> [t]herefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights. [Citation omitted]. This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling. [Citation omitted]. Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution.

Forrester, 541 S.E.2d at 840. The Forrester Court especially recognized South Carolina's explicit constitutional right to privacy. The Court explained that the South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment. Id.

[5]This provision imposes stricter warrant requirements than the constitutional provisions. State v. McKnight, 291 S.C. 110, 352 S.E.2d 471, 472 (1987); State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615, 619 (Ct. App. 2004), *cert. dismissed as improvidently granted*, 371 S.C. 594, 641 S.E.2d 435 (2007); see footnote 4, supra.

> receivers equipped with a transmitter can easily record and relay relatively accurate positional information 24 hours a day to third-parties.
>
> GPS technology is growing increasingly more sophisticated, concealable, inexpensive and pervasive. Law enforcement can use GPS far more widely than they were ever able to use visual surveillance, thereby significantly increasing the number of vehicles exposed to the 24/7 monitoring facilitated by this technology.

One commentator noted that "one of the hallmarks of new surveillance technologies is the degree to which they lower the costs, both in time and expense, of round-the-clock monitoring. Real-time human monitoring is no longer necessary, as videos and tracking devices can be supplemented with devices that automatically record a person's movements for viewing at a later time." Marc Jonathan Blitz, Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity, 82 Tex. L. Rev. 1349, 1375 (2004).

In 2002, the Legislature enacted the "Homeland Security Act" (the "Act"), expressly finding that legislative enhancements were required to ensure the safety of South Carolina's citizens, including the enhancement of tools available to law enforcement, in light of "the tragic events of September 11, 2001, involving acts of terrorism against the people of the United States and . . . continued threats against the peace and safety of our nation." See 2002 S.C. Acts No. 339, §2. The express purpose of the Act is clearly to enhance, not restrict, law enforcement's ability to conduct investigations in South Carolina.

As part of the Act, Chapter 30 of Title 17 deals primarily with the interception of wire, electronic or oral "communications." However, §17-30-140 specifically addresses the use of tracking devices, and (1) gives the Attorney General and Circuit solicitors express authority to request a court order for a tracking device and (2) makes the USSC standards for the installation and monitoring of tracking devices apply. The statute states:

> (A) The Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State.
>
> (B) An application under subsection (A) of this section must include:
>
> (1) a statement of the identity of the applicant;
>
> (2) a certification by the applicant that probable cause exists to believe that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State which may provide evidence relating to any

> offense or any evidence of any conspiracy or solicitation to commit any violation of the laws of this State;
>
> (3) a statement of the offense to which the information likely to be obtained relates; and
>
> (4) a statement whether it may be necessary to use and monitor the mobile tracking device outside the jurisdiction of the court from which the authorization is being sought.
>
> (C) Upon application made as provided under subsection (B), the court, upon a finding that the certification and statements required by subsection (B) have been made in the application and probable cause exists, must enter an ex parte order authorizing the installation and use of a mobile tracking device. The order may authorize the use of the device within the jurisdiction of the court and outside that jurisdiction but within the State of South Carolina if the device is installed within the jurisdiction of the court.
>
> (D) A court may require greater specificity or additional information beyond that which is required by this section as a requisite for issuing an order.
>
> (E) The standards established by the United States Supreme Court for the installation and monitoring of mobile tracking devices apply to the installation and use of any device as authorized by this section.
>
> (F) As used in this section, a "tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object.

Accordingly, the Attorney General or Circuit solicitor[6] may obtain an order from a court of competent jurisdiction for the installation and use of a mobile tracking device upon submitting a certification that probable cause exists to believe that the information likely to be obtained is relevant to an ongoing criminal investigation by SLED or any law enforcement agency of this State which may provide evidence relating to an offense in violation to the laws of this State. Moreover, we note that subsection (D) provides that a judge "may require greater specificity or additional information beyond that which is required" by the statute before issuing an order to allow the installation and use of the tracking device. Therefore, provided the application for an order includes certain information about why

---

[6]Significantly, there is no mechanism for law enforcement to directly seek an order for a tracking device under §17-30-140.

the tracking device is necessary, and probable cause exists, then the order for the installation and use of a mobile tracking device is authorized and would meet the constitutional requirements for the search.[7]

Other states have enacted legislation addressing the lawful use of tracking devices by law enforcement. See, *e.g.*, Haw. Rev. Stat. §803-44.7(b) [warrant required based on probable cause]; Minn. Stat. §626A.37 [warrant required based on a reason to believe GPS information will lead to relevant evidence]; Okla. Stat., tit. 13, §177.6 [requiring a warrant to be issued upon "probable cause . . . shown for believing that such installation or use will lead to the discovery of evidence"]; Utah Code Ann. §77-23a-15.5 [requiring judicial authorization to attach a mobile tracking device]; but see Fla. Stat. §934.42 [certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the investigating agency]; 18 Pa. Cons. Stat. §5761 [permits the Court of Common Pleas to issue an order authorizing the use of mobile tracking devices upon a showing of "reasonable suspicion that criminal activity has been, is or will be in progress and that the use of a mobile tracking device will yield information relevant to the investigation of the criminal activity." Further, a showing of exigent circumstances or probable cause is required if the mobile tracking device moves "within an area protected by a reasonable expectation of privacy"]. In addition, courts in other jurisdictions have determined that law enforcement officers or prosecutors must first obtain a warrant upon probable cause before using a tracking device. See, *e.g.*, Holden, 2010 WL 5140744, *8; Commonwealth v. Connolly, 454 Mass. 808, 913 N.E.2d 356, 369 (2009); People v. Weaver, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1201 (2009); State v. Campbell, 306 Or. 157, 759 P.2d 1040, 1041 (1988); State v. Jackson, 150 Wash.2d 251, 76 P.3d 217, 224 (2003).

You further reference the provision of §17-13-140, which states that: "[a]ny warrant issued hereunder shall be executed and return made only within ten days after it is dated." Besides the express intent of the Legislature, our appellate courts have recognized the importance of the time element in search and seizure cases. For example, in State v. Baker, 251 S.C. 108, 160 S.E.2d 556, 557 (1968), which was decided before the adoption of the statute, the South Carolina Supreme Court said: "[w]e are of the opinion that the search warrant had, by reason of the 42-day unexplained delay, become stale and ineffective as a matter of law." Because there was no controlling statute at the time, the Court in effect held that a search warrant had to be executed within a reasonable time, depending upon the circumstances. In light of the above authority, we advise that a mobile tracking device should be installed within 10 days of the judge authorizing the use of the device, in accordance with §17-13-140.

Moreover, the requirement of a prompt return and inventory safeguards the property rights of individuals by ensuring that they are not permanently deprived of having access to and control over their property seized pursuant to a search warrant. With this in mind, we note it is well-settled that the timely return of a warrant to the issuing judge is a ministerial duty which our courts consistently hold does not otherwise affect the validity of a search, in the absence of prejudice shown by the person subjected to the

---

[7]As noted, the police obtained a warrant in Jones, but they failed to comply with two restrictions set forth therein: (1) they failed to install the GPS tracking device within the 10-day period required by the terms of the warrant and the Federal Criminal Procedure Rules, and (2) they installed the GPS tracking device in Maryland rather than the District of Columbia as required by the terms of the warrant.

search. See State v. Wise, 272 S.C. 384, 252 S.E.2d 294, 295 (1979); State v. Mollison, 319 S.C. 41, 459 S.E.2d 88, 92 (Ct. App. 1995). It is doubtful whether any person would be able to demonstrate prejudice by a failure to comply with this procedural requirement in the situation presented here. No tangible evidence is seized; but instead intangible electronic data. There is no property to return to the party and, therefore, no property to safeguard prior to its return to the party. Further, the person at all times will have access to and control over the location of the vehicle. While a court would likely find no prejudice to a person where a mobile tracking device is installed and no return is made, a judge may nevertheless require (and we advise) that the applicant notify the judge, in writing, within 10 days after the mobile tracking device has been activated and placed on or within the vehicle or item, to comply with §17-13-140. See also 18 Pa. Cons. Stat. §5761(d) [requiring the court to be notified in writing within 72 hours of the time the mobile tracking device has been activated and in place or within vehicles or items]; Utah Code Ann. §77-23a-15.5(5) [requiring the applicant to notify the judge, in writing, within 10 days after the mobile tracking device has been activated and if no notice is received within 10 days after the issuance of the order, the order shall be returned to the judge to be recalled].

We also note that the Act provides for reports to be given to the authorizing judge. Pursuant to §17-30-90:

> [e]very order . . . must contain a provision that the authorization . . . must be executed as soon as practicable. . . . When an order . . . is entered . . . the order must require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective. . . The reports must be made at such intervals as the judge may require.

Although §17-30-140 is part of Chapter 30 of Title 17, §17-30-90 is clearly intended to encompass the interception of wire, electronic or oral communications. Therefore, we would look to this provision only as guidance with respect to returns to *ex parte* orders pertaining to mobile tracking devices issued pursuant to §17-30-140. Of course, the Legislature may wish to consider additional legislation clarifying the provisions of the Act in this regard.

Lastly, you ask whether notice must be provided to an individual pursuant to §17-13-150, which provides: "[w]hen any person is served with a search warrant, such person shall be furnished with a copy of the warrant along with the affidavit upon which such warrant was issued." However, we note that §17-30-100(C) provides, in pertinent part, that: "[a]pplications made and orders granted under this chapter must be sealed by the judge. . ." [Emphasis added]. While other provisions of the Act generally address the interception of wire, electronic or oral communications, an argument could be made that the intent of this provision would apply to all orders issued pursuant to the Act, including those for mobile tracking devices. The Legislature is presumed to have fully understood the import of words used in a statute. Powers v. Fidelity and Deposit Company of Maryland, 180 S.C. 501, 186 S.E. 523 (1936); Op. S.C. Atty. Gen., November 13, 1986. It is not for the courts or this office to inquire into the motives of the Legislature or what may have motivated them. Id. [citing Scovill v. Johnson, 190 S.C. 457, 3 S.E.2d 543 (1939)]. The Legislature is presumed to know the law and not to do a futile thing. Graham v. State, 109 S.C. 301, 96 S.E. 138 (1918). It must be presumed the Legislature knew its own intention and that when such intention is couched in unambiguous terms, the Act expresses that intention. In enacting the Act, it

must be presumed the Legislature acted with deliberation and with full knowledge of the effect of the Act and with full information as to the subject matter, existing conditions, and relevant facts. See Op. S.C. Atty. Gen., August 5, 2010 [citing 82 C.J.S. Statutes §361; 73 Am.Jur.2d Statutes §28]. Moreover, pursuant to principles of statutory construction, when comparing statutory provisions applicable to a given situation, "[i]f an irreconcilable conflict exists, the statute later in time will prevail as the later expression of legislative will." Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22, 24 (1943); Ops. S.C. Atty. Gen., October 31, 2005; June 13, 2003. In addition, ". . . later specific statutes will prevail over earlier general ones." Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242, 243 (1993); Ops. S.C. Atty. Gen., October 12, 2010; April 29, 2003; November 20, 1997. Consistent with such, inasmuch as §17-30-90 (C) is the more specific and later in time statute, its mandate for sealing applications and orders issued by the judge pursuant to the Act must prevail.

Regardless, protecting and safeguarding the integrity of an ongoing criminal investigation is a compelling government interest. To be sure, the release of any documents associated with such an investigation might seriously jeopardize the investigation of criminal activity. We therefore advise an applicant seeking an order pursuant to §17-30-140 to move before the judge to seal the application and order regarding a mobile tracking device. Such motion should demonstrate the interests of the public and the government in not hindering or undermining an investigation of criminal activity through the revelation of these and other facts.

Conclusion

The installation of a GPS tracking device on person's vehicle by the Government, and the use of such a device to monitor the vehicle's movements, constitutes a search. Subject to the proscriptions of the Federal and the South Carolina Constitutions against unreasonable searches and seizures, a warrant must issue upon a finding of probable cause supported by "oath or affirmation." The Attorney General and Circuit solicitors are given express authority under §17-30-140 to request a court order from a judge of competent jurisdiction for a tracking device.[8] Upon a finding by the judge that probable cause is established, an *ex parte* order for the installation and use of a mobile tracking device is authorized by the Act. The procedures set forth in §17-30-140 meet the constitutional requirements for issuance of the order upon probable cause. The application and order under this provision must be sealed or, in the alternative, the applicant should move before the judge to seal the application and order so as to protect and safeguard the integrity of the underlying criminal investigation. Finally, we advise that the applicant should notify the issuing judge, in writing, within 10 days after the mobile tracking device has been activated and placed on or within the vehicle or item.

---

[8]We are informed that on March 21, 2012, the Office of Court Administration instructed magistrates and municipal judges that, pursuant to §17-30-140, they "do not have jurisdiction to sign search warrants regarding the installation and monitoring of a mobile tracking devices." The Office of Court Administration is the administrative arm of the Chief Justice of the South Carolina Supreme Court. See S.C. Const. art. V, §4 [Chief Justice is administrative head of judicial system and shall make rules governing administration, practice, and procedure in all courts of the State]. Any clarification of these instructions lay with the Court through issuance of an order or by further instructions from the Office of Court Administration.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General