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REPLY BRIEF FOR APPELLANT

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CO-162

UNITED STATES OF AMERICA, Appellant,

v.

DAMAIRZIO M. WELLS, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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INTRODUCTION

Before applying the exclusionary rule, a court must engage in a "rigorous weighing of its costs and deterrence benefits." *(Willie Gene) Davis v. United States*, 564 U.S. 229, 238 (2011). It is not enough that exclusion "could provide some incremental deterrent[.]" *Illinois v. Krull*, 480 U.S. 340, 352 (1987). Rather, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *(Willie Gene) Davis*, 564 U.S. at 237. Appellee Damairzio Wells exaggerates those deterrence benefits and downplays the costs. In terms of deterrence, there is no evidence that the Court Services and Offender Supervision Agency (CSOSA) is "'inclined to ignore or subvert the Fourth Amendment[.]'" *Krull*, 480 U.S. at 350 (quoting *United States v. Leon*, 468 U.S. 897, 916 (1984)). CSOSA enacts regulations and policies "for broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations." *Id.* at 352. In adopting GPS monitoring as an administrative sanction, CSOSA possessed none of the "culpability required to justify the harsh sanction of exclusion." *(Willie Gene) Davis*, 564 U.S. at 237. On the other side of the balance, "'the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.' *Herring v. United States*, 555 U.S. 135, 141 (2009) (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364-65 (1998)). That toll would be especially heavy here, affecting numerous cases rather than just this one.

ARGUMENT

I. The Cost-Benefit Analysis Heavily Disfavors Exclusion.

A. Exclusion of Evidence Will Not Have a Significant Deterrent Effect on CSOSA.

Wells's argument in favor of exclusion hinges on his assertion that it can "be expected to deter CSOSA like it would any other law enforcement actor" (Brief for Appellee (Br.) at 22). Not so. CSOSA's supervisory mission gives it no stake in the outcome of any particular prosecution. And, unlike individual police officers, CSOSA faces far greater systemic deterrents than the exclusion of evidence in a criminal case. That is sufficient, by itself, to weigh against exclusion here.

Both the Supreme Court and this Court have recognized that probation and parole officers have supervisory goals that differ from traditional law enforcement objectives. In *Scott*, the Supreme Court explained that parole officers' "primary concern is whether their parolees should remain free on parole. Thus, their relationship with parolees is more supervisory than adversarial." 524 U.S. at 368. In *Jackson v. United States*, this Court recognized that CSOSA has the "distinctive probation mission to reform convicted offenders and deter them from committing new crimes." 214 A.3d 464, 473 (D.C. 2019). Although "the objectives and duties of probation officers and law enforcement personnel are often parallel and frequently intertwine," *id.* at 484 (quotation marks omitted), a probation officer is not a "police officer who normally conducts searches against the ordinary citizen. He is . . .

charged with protecting the public interest, [but] also supposed to have in mind the welfare of the probationer[.]" *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987); *see Samson v. California*, 547 U.S. 843, 853 (2006) (noting state interest in "promoting reintegration and positive citizenship among probationers and parolees"). "Parole agents, in contrast to police officers, are not engaged in the often competitive enterprise of ferreting out crime[.]" *Scott*, 524 U.S. at 369 (quotation marks omitted).

This is even more true of an agency like CSOSA, which enacts policies for "broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations." *Krull*, 480 U.S. at 352. CSOSA's "distinctive probation mission," *Jackson*, 214 A.3d at 473, is to "[e]ffectively supervise adults under [its] jurisdiction to enhance public safety, reduce recidivism, support the fair administration of justice, and promote accountability, inclusion and success[.]" CSOSA: Who We Are, https://www.csosa.gov/mission-goals-guiding-principles. Although CSOSA works closely with the Metropolitan Police Department (MPD), it does so to achieve its own independent objectives, such as its "strategic goal" of "reduc[ing] recidivism by targeting criminogenic risk and needs." CSOSA, Strategic Plan: Fiscal Years 2022–2026 at 16, 22. Ultimately, CSOSA "strive[s] to enable an environment that is conducive to offenders' success." *Id.* at 3.

Even as to GPS monitoring specifically, CSOSA employs it not to "procur[e] evidence in particular criminal investigations," *Krull*, 480 U.S. at 352, but rather to

"promot[e] [its] interests in deterring recidivism and encouraging . . . reformation," *Jackson*, 214 A.3d at 479. In *Jackson*, CSOSA placed the defendant on GPS "only after determining that he met its own criteria for employing GPS monitoring to further the objectives of his probation supervision." *Id.* GPS monitoring furthers "legitimate and important interests in the effective supervision of a high-risk probationer." *Id.* at 480. Indeed, by holding that CSOSA's GPS monitoring is a constitutional special-needs search, *id.* at 467, this Court necessarily found that "the primary purpose of the[se] searches is distinguishable from the general interest in crime control," *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) (cleaned up).

As an organization, CSOSA has "no stake in the outcome of particular criminal prosecutions." *Arizona v. Evans*, 514 U.S. 1, 15 (1995). Instead, it is motivated by its goal of rehabilitating offenders and ensuring they successfully complete supervision. Thus, "although [CSOSA] is a law enforcement agency as that term is broadly defined," there is "no reason to think that possible admission of . . . evidence in a future criminal proceeding [i]s 'important enough to [CSOSA] to encourage [it] to violate Fourth Amendment rights[.]'" *Blair v. United States*, 114 A.3d 960, 975 (D.C. 2015) (quoting *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976)). To the contrary, programmatic unconstitutional searches would undermine the "ongoing supervisory relationship," *Griffin*, 483 U.S. at 879, between a probation officer and his or her supervisees. *See Samson*, 547 U.S. at 856 (recognizing that

unjustified searches can "inflict[ ] dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society").

Other deterrents also provide powerful incentives for CSOSA to ensure that its policies comply with the Constitution. Before adopting a regulation, CSOSA must publish the proposed rule and accept public comments. *See generally Cigar Ass'n of Am. v. FDA*, 964 F.3d 56, 63-64 (D.C. Cir. 2020). When issuing a final rule, CSOSA "must address significant comments," which is what "forms the basis for judicial review[.]" *Id.*; *see* 5 U.S.C. § 706 (allowing courts to set aside agency action that is, *inter alia*, "contrary to constitutional right" or "in excess of statutory jurisdiction"). Wells's assertion that this process "does not diminish the need for deterrence" (Br. at 20), cannot be squared with the Supreme Court's recognition, almost 20 years ago, that there is both "increasing evidence that police forces across the United States take the constitutional rights of citizens seriously" and "also evidence that the increasing use of various forms of citizen review can enhance police accountability." *Hudson v. Michigan*, 547 U.S. 586, 599 (2006). Moreover, CSOSA's regulations can be challenged in court, review that "prevents the rule of administrative policy judgment from supplanting the rule of law." David Tatel, *The Admin. Process and the Rule of Env't Law*, 34 HARV. ENVTL. L. REV. 1, 3 (2010).

The threat of civil lawsuits against its employees also surely deters CSOSA from implementing illegal policies. *See Hudson*, 547 U.S. at 598 ("As far as we

know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."). And CSOSA and its Director are subject to congressional oversight, which also serves to deter the agency from violating the Constitution. *See Leon*, 468 U.S. at 918 n.18 (explaining that, for magistrate judges, "closer supervision or removal provides a more effective remedy than the exclusionary rule"); *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982) ("[v]igilant oversight by Congress also may serve to deter Presidential abuses of office"). CSOSA is thus already incentivized in myriad ways to ensure that its regulations and policies are constitutional, as evidenced by the fact that, before *Davis v. United States*, 306 A.3d 89 (D.C. 2023), the agency never had a regulation or policy declared unconstitutional. *Cf. Krull*, 480 U.S. at 351 (declining to apply exclusionary rule where there was "no evidence" that legislatures had "enacted a significant number of [unconstitutional] statutes").

Even if suppression may have some incremental deterrent effect on CSOSA, the Supreme Court has never "require[d] adoption of every proposal that might deter police misconduct." *United States v. Calandra*, 414 U.S. 338, 350 (1974). Rather, the Court has "limited the rule's operation to situations in which this purpose is thought most efficaciously served. Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted." *(Willie Gene) Davis*, 564 U.S. at 237.

There is no reason to believe that applying the exclusionary rule in this case will appreciably deter CSOSA from future Fourth Amendment violations. CSOSA

has a different mission than traditional law enforcement, one that would be undermined by a policy of unconstitutional searches. As an agency, CSOSA has "no stake in the outcome of particular criminal prosecutions." *Leon*, 468 U.S. at 917. Those prosecutions "fall[] outside [CSOSA's] zone of primary interest," and thus "imposition of the exclusionary rule . . . is unlikely to provide significant, much less substantial, additional deterrence." *Janis*, 428 U.S. at 458; *see also Blair*, 114 A.3d at 975 (same). Rather, "it is logical to assume that the greatest deterrent to the enactment of unconstitutional" policies by CSOSA "is the power of the courts to invalidate [them.]" *Krull*, 480 U.S. at 352. Notice-and-comment rulemaking, congressional oversight, and the possibility of civil liability also provide "extant deterrences" that "are substantial[.]" *Hudson*, 547 U.S. at 599.[1] "There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to [CSOSA's regulations] prior to the declaration of [their] invalidity will act as a significant, additional deterrent." *Krull*, 480 U.S. at 352.

B. Even if Exclusion Could Deter CSOSA in Some Circumstances, it Would Have no Such Value Here

Even if the exclusion of evidence could potentially deter CSOSA as an agency from violating the Fourth Amendment, there is no reason to believe that suppression

[1] The cases Wells relies upon (at 18-19) addressing the deterrent effect of exclusion on individual parole officers are thus inapt. Those individual officers are not subject to the same incentives and oversight as their agencies as a whole.

would have such an effect here. Application of the exclusionary rule requires a "case-by-case, multifactored inquiry[.]" *Herring*, 555 U.S. at 158 (Breyer, J., dissenting). The "focus of [that] inquiry [is] on the flagrancy of the police misconduct at issue": "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *(Willie Gene) Davis*, 564 U.S. at 238 (cleaned up).

As the government demonstrated in its opening brief (at 33-38), in enacting the regulation and policy at issue in this case, CSOSA did not act with "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." *(Willie Gene) Davis*, 564 U.S. at 238 (quotation marks omitted). CSOSA first promulgated its regulation allowing electronic monitoring as an administrative sanction in 2001, more than 20 years before *Davis* held that regulation unconstitutional. *See* 66 Fed. Reg. 48336, 48338 (Sept. 20, 2001). It did so shortly after the Parole Commission promulgated a rule requiring D.C. supervised releasees to submit to sanctions imposed by CSOSA, which "may include . . . curfew with electronic monitoring[.]" 65 Fed. Reg. 70466, 70469 (Nov. 24, 2000). CSOSA began using GPS as a form of electronic monitoring under its sanctions regime in fiscal year 2004, *Davis*, 306 A.3d at 115, and issued its GPS monitoring policy in 2009. *See* Policy Statement 4008, "Global Positioning System (GPS) Tracking of Offenders" (May 7, 2009). The

following year, the Parole Commission's Manual stated that appropriate sanctions may include "curfew with electronic monitoring . . . as set forth in the schedule of graduated sanctions adopted by" CSOSA. Parole Commission, Rules and Procedures Manual § 2.204-21 (2010).

All of this occurred many years before *Grady v. North Carolina*, 575 U.S. 306 (2015), held that GPS monitoring is a search. After that decision, nobody suggested that CSOSA lacked authority to continue its then-decade-long use of GPS monitoring as a sanction imposed with the Parole Commission's blessing. Instead, in 2016, Congress expanded CSOSA's authority so that it could offer incentives in addition to imposing sanctions. *See* 130 Stat. 9, 13 (2016). In 2017, the D.C. Council amended D.C. Code § 22-1211 to make tampering with a GPS device a crime when the device was imposed by CSOSA rather than as a condition of release. *See* 64 D.C. Reg. 168, 169 (Jan. 13, 2017). And in a series of decisions beginning in 2019, this Court repeatedly upheld CSOSA's use of GPS monitoring against constitutional challenge. *See Jackson*, 214 A.3d at 480-81; *Atchison v. United States*, 257 A.3d 524, 531 (D.C. 2021); *Young v. United States*, 305 A.3d 402, 432 (D.C. 2023). In doing so, the Court emphasized the benefits of CSOSA's use of GPS monitoring as a sanction imposed without court or Parole Commission approval. *See Jackson*, 214 A.3d at 480. As this history shows, CSOSA wholly lacked the "culpability required to justify the harsh sanction of exclusion." *(Willie Gene) Davis*, 564 U.S. at 237.

Wells argues that this Court should ignore culpability and categorically require exclusion when law enforcement "'act[s] outside the scope of a statute, albeit in good faith'" (Br. at 24 (quoting *Krull*, 480 U.S. at 360 n.17)). But the Supreme has "been consistent in requiring a case-specific analysis of whether the exclusionary rule applies, rather than a categorical approach." *United States v. Franz*, 772 F.3d 134, 145 (3d Cir. 2014).[2] It has mandated that courts "focus the[ir] inquiry on the flagrancy of the police misconduct," and emphasized that exclusion is inappropriate "when the police act with an objectively reasonable good-faith belief that their conduct is lawful[.]" *(Willie Gene) Davis*, 564 U.S. at 238.

The Supreme Court has never held that "exclusion is automatic when an officer, acting under a statute not obviously unconstitutional, mistakenly exceeds its scope." *Zadeh v. State*, 299 A.3d 49, 76 n.15 (Md. App. Ct. 2023). To the contrary, in *Heien v. North Carolina*, the Court found no constitutional violation where an officer seized a person based on a mistaken, but reasonable, reading of a statute. 574 U.S. 54, 57 (2014). In so doing, the Court recognized "that in a number of decisions we have looked to the reasonableness of an officer's legal error in the course of considering the appropriate remedy for a constitutional violation, instead of whether

[2] Unlike Wells, the government does not seek a categorical rule (see Br. at 3 (claiming that the government is seeking "an exception to the exclusionary rule when law enforcement agents rely on their own department's search policies")). Rather, exclusion is unwarranted on these specific, unique facts.

there was a violation at all." *Id.* at 65. As Justice Sotomayor explained in her dissent, "[i]f an officer makes a stop in good faith but it turns out that . . . the officer was wrong about what the law proscribed or required," it would not "often be the case that any evidence that may be seized during the stop will be suppressed, thanks to the exception to the exclusionary rule for good-faith police errors." *Id.* at 75.[3]

Nor did CSOSA act "in defiance of" limits on its statutory authority and that its conduct was otherwise "objectively unreasonable" (Br. at 25, 30 (quotation marks omitted)). Wells asserts that CSOSA's 2009 GPS policy "unreasonably relied" "on a Parole Commission regulation, 28 C.F.R. § 2.85, that said *nothing* about warrantless searches" (Br. at 29-30).[4] But the Supreme Court did not find GPS monitoring to be a search until 2015, six years later. *See Grady*, 575 U.S. at 309. Wells also faults CSOSA for failing to "cite any new authority for its GPS policy" after *Grady* (Br. at 13). But by then, CSOSA had every reason to believe that it was

[3] Rejecting Wells's categorical rule would not "eviscerate the exclusionary rule," or incentivize law enforcement agencies to "defy the plain language of statutes" (Br. at 25 (quotation marks omitted)). If an agency's interpretation is not "objectively reasonable," the good-faith exception does not apply. *Cf. Krull*, 480 U.S. at 355 ("A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws.").

[4] Wells makes much of CSOSA's citation to "28 C.F.R. § 2.85(a)(15) (Conditions of release; D.C. Code parolees)." Policy Statement 4008 at 2. This appears to be no more than a scrivener's error. Before it was amended in 2003, that regulation required each D.C. parolee to "submit to the sanctions imposed by his Supervision Officer[.]" 28 C.F.R. § 2.85(a)(15) (2002). The Parole Commission imposed the same requirement in 2009, but in a different section. *See* 28 C.F.R. § 2.204(a)(6)(vi).

acting lawfully (*see supra* at 8-9; Brief for Appellant (Gov't Br.) at 11-17, 33-38). Wells thus assumes, rather than shows, that CSOSA's post-*Grady* decisionmaking was somehow more culpable than "isolated negligence," *Herring*, 555 U.S. at 137. But even if CSOSA should have recognized that its GPS monitoring authority was suspect after *Grady*, this failure was not a "gross[] and flagrant[]" violation seeking to create evidence in a criminal proceeding. *See Blair*, 114 A.3d at 975 (declining to apply exclusionary rule to Bureau of Prisons' unlawful collection of DNA samples sent for inclusion in FBI database; "Although the BOP is a law enforcement agency as that term is broadly defined, . . . BOP staff were not authorized to conduct criminal investigations using the DNA samples they collected, and we have no reason to think that possible admission of DNA evidence in a future criminal proceeding was important enough to them to encourage them to violate Fourth Amendment rights.") (cleaned up); *see also Utah v. Strieff*, 579 U.S. 232, 241 (2016) (declining to apply exclusionary rule where officer made "two good-faith mistakes" that were "at most negligent" rather than "purposeful or flagrant").[5]

[5] Wells's hypothetical (at 27-28) overreaches in declaring that "regardless of what the officer believed," the exclusionary rule applies because "the unconstitutional search was, by definition, objectively unreasonable." As the Court recognized in *Strieff*, this reasoning "conflates the standard for an illegal stop with the standard for flagrancy. For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." 579 U.S. at 242-43. Indeed, Wells's position seemingly would preclude *any* exception to the exclusionary rule.

(continued . . .)

This Court's post-*Grady* decisions likewise undermine any suggestion that CSOSA acted culpably here. Those decisions upheld CSOSA's use of GPS monitoring against constitutional challenge without questioning its statutory authority. In fact, *Jackson* cited D.C. Code § 24-133(b)(2)(F) as the source of CSOSA's sanctions authority and emphasized the benefits of "CSOSA's ability to employ such focused GPS monitoring as an intermediate sanction without judicial approval." *Jackson*, 214 A.3d at 475, 480.

Wells appears to argue (at 25-29) that, because *Jackson*, *Atchison*, and *Young* did not reject the statutory authority argument adopted by the Court in *Davis*, those decisions are immaterial to the good-faith analysis. But those cases necessarily inform the Court's decision whether CSOSA's conduct here was sufficiently culpable to justify exclusion, both by upholding CSOSA's use of GPS monitoring as a constitutional matter and by demonstrating that it would have been objectively

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Underscoring the flaw in Wells's logic, Wells incorrectly insists that the good-faith exception cannot apply when, in the absence of binding authority, an officer relies on authority from other jurisdictions to conclude that a search is lawful. *See, e.g.*, *United States v. Mitchell*, 653 F. App'x 651, 654 (10th Cir. 2016) (Gorsuch, J.) (declining to apply exclusionary rule where four circuits had found search constitutional, one had not, and the Tenth Circuit had not ruled on the issue, because exclusion would "condemn the[police] for conforming their behavior to the vision of four rather than the voice of one—and to demand of them a degree of legal foresight even four out of five circuit courts of appeal could not muster. That much we're not prepared to do. . . . Neither, it seems, is any other circuit, for every one to have faced a case like ours has resolved it much as we do[.]").

reasonable for CSOSA to locate its authority to impose GPS monitoring in D.C. Code § 24-133(b)(2)(F). Indeed, that is precisely what this Court did in *Jackson*, 214 A.3d at 475 & nn.32-33. Wells's argument (at 29-32) that this statutory interpretation was "unreasonable" ignores *Jackson* and attributes a clarity to the statutory scheme belied by history. Were the statute so plain, one would expect *someone* to have noticed in the many years before the divided opinion in *Davis*.

Contrary to Wells's assertion (at 28), *Jones v. United States*, 168 A.3d 703 (D.C. 2017), and *United States v. Debruhl*, 38 A.3d 293 (D.C. 2012), do not require exclusion. *Jones* noted that "[t]he Supreme Court has implicitly foreclosed the government's argument that police can reasonably conclude from the complete lack of judicial precedent that their conduct is lawful," because police there were "not acting pursuant to a seemingly valid warrant, statute, or court opinion," but instead used "a secret technology that they had shielded from judicial oversight and public scrutiny." 168 A.3d at 720 & n.33. Here, by contrast, CSOSA's policy *was* "seemingly valid," as it had been repeatedly subjected to, rather than shielded from, judicial oversight and public scrutiny for many years. A lack of adverse precedent *despite* such scrutiny supports reasonableness in a way that a lack of precedent caused by police secrecy does not. *See id.* (police "could not have reasonably relied on [a] belief" that the warrantless use of a cell-site simulator was lawful "given the secrecy surrounding the device and the lack of law on the issue").

In any event, there was no "complete lack of judicial precedent" here. *Debruhl* held that, to be "binding appellate precedent" for purposes of *(Willie Gene) Davis*, a case must be "binding under *M.A.P. v. Ryan*." 38 A.3d at 298. But nowhere did *Debruhl* hold that an opinion is relevant for judging the flagrancy of police misconduct only if it is binding under *M.A.P.* Nor has the Supreme Court ever *required* exclusion "[a]bsent 'explicit protection or cover'" (Br. at 28). To the contrary, in *Michigan v. DiFillippo*, 443 U.S. 31 (1979), the Court "[a]ccept[ed] the unconstitutionality of [an] ordinance as a given, [but] nonetheless reversed," because "there was no controlling precedent that this ordinance was or was not constitutional," and suppression "would serve none of the purposes of the exclusionary rule." *Heien*, 574 U.S. at 63-65 (quotation marks omitted). Wells's proposed approach "would make the good-faith exception a nullity because the exception would only apply when the search was necessarily constitutional under existing precedent." *United States v. Lustig*, 830 F.3d 1075, 1082 (9th Cir. 2016).

Wells's remaining arguments are red herrings. The government is not, as Wells claims (at 37-43), advocating a "subjective bad faith" standard. The inquiry is objective: "whether [CSOSA's] conduct manifested objective good faith." *Leon*, 468 U.S. at 924. But this objective inquiry considers more than whether "the police who conduct the search or seizure are responsible for the unconstitutional action" (Br. at

41).[6] Wells's reductive analysis is inconsistent with *Hudson*, where the police who conducted the search themselves violated the Constitution. 547 U.S. at 589-90, and with the Supreme Court's declaration that the propriety of exclusion "is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Leon*, 468 U.S. at 906 (quotation marks omitted). And it ignores the Court's admonition that the exclusionary rule inquiry must "focus . . . on the flagrancy of the police misconduct at issue[.]" *(Willie Gene) Davis*, 564 U.S. at 238 (quotation marks omitted).[7]

That required focus is why Wells's argument (at 33-37) about the deterrent effect of exclusion on policy choices misses the mark. Policymaking is "significantly different from the hurried judgment of a law enforcement officer engaged in the

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[6] Evaluating "culpability" solely by "the objective determination of whether the officers conducting the search or seizure are (or should be) deemed responsible for the constitutional violation" (Br. at 39), would largely restore the long-ago rejected regime that treated "a Fourth Amendment violation as synonymous with application of the exclusionary rule[.]" *Evans*, 514 U.S. at 13. And that approach ignores the many cases where courts have refused to apply the rule despite a lack of directly on point precedent. *See, e.g.*, *Mitchell*, 653 F. App'x at 654; *Lustig*, 830 F.3d at 1082; *United States v. Katzin*, 769 F.3d 163, 182 (3d Cir. 2014) (en banc) (relying on "[t]he constellation of circumstances that appeared to authorize the[officers'] conduct").

[7] *See also Blair*, 114 A.3d at 972 ("Determining when the likelihood of substantial deterrence justifies excluding evidence requires some assessment of the motives of the officials who seized [it]. . . . [T]he key question is whether the particular challenged use of the evidence is one that the seizing officials were likely to have had an interest in at the time—whether it was within their predictable contemplation and, if so, whether it was likely to have motivated them.") (cleaned up).

often competitive enterprise of ferreting out crime," *Krull*, 480 U.S. at 351 (quotation marks omitted), and is subject to numerous deterrents that do not apply to individual officers (*see supra* at 3-7). It is thus unclear that exclusion of evidence necessarily would "provide significant, much less substantial, additional deterrence." *Janis*, 428 U.S. at 458. But even if it could in some circumstances, when, as here, a policy decision is made "with an objectively reasonable good-faith belief" that it is lawful, "the deterrence rationale loses much of its force, and exclusion cannot pay its way." *(Willie Gene) Davis*, 564 U.S. at 238 (cleaned up).

C. The Cost of Exclusion is Unusually High.

Wells inaccurately minimizes the cost of exclusion, erroneously claiming that "the costs to suppression here are no higher than in the typical case" (Br. at 44). The typical cost of suppression is that the court must "ignore reliable, trustworthy evidence bearing on guilt or innocence," with the effect of "suppress[ing] the truth and set[ting] the criminal loose in the community without punishment." *(Willie Gene) Davis*, 564 U.S. at 237. This is a "bitter pill" to swallow, *id.*, one "that offends basic concepts of the criminal justice system," *Herring*, 555 U.S. at 141 (quotation marks omitted), even when it involves a single defendant.

Suppression here would require society to swallow that bitter pill not once, but over and over again. Although there is no public information about the number of pending cases in which pre-*Davis* GPS monitoring imposed by CSOSA is part of

the government's evidence, the numerous cases decided by this Court that involve GPS monitoring (*see* Gov't Br. at 46), and cases such as this one and *United States v. Johnson*, No. 2022-CF1-005136, show that the number is considerable. Generally, "rates of rearrest among parolees and probationers are astounding[.]" *United States v. Kincade*, 379 F.3d 813, 839 (9th Cir. 2004) (en banc). And CSOSA's GPS monitoring focused on "high-risk offenders whose behavior under less intensive supervision demonstrably support[ed] the need to monitor them more closely." *Jackson*, 214 A.3d at 479. Even if "only a tiny fraction" of those offenders committed new crimes (Br. at 45), suppression would result in letting a large number of "guilty and possibly dangerous defendants go free[.]" *Herring*, 555 U.S. at 141.

Wells stresses the "indignities" that offenders placed on GPS monitoring by CSOSA may have suffered (Br. at 45). But "[e]xclusion is not . . . designed to redress the injury occasioned by an unconstitutional search." *(Willie Gene) Davis*, 564 U.S. at 236. "The rule is unsupportable as reparation or compensatory dispensation to the injured criminal[.]" *Janis*, 428 U.S. at 454 n.29 (quotation marks omitted). Any harms suffered by offenders improperly placed on GPS monitoring by CSOSA, while unfortunate, play no role in calculating the costs of exclusion.

II. Wells's CSO Complied with CSOSA Policy.

Wells is incorrect that "suppression is independently required because the GPS policy statement that the CSO relied on to search Mr. Wells plainly did not

permit that search" (Br. at 46 (capitalization omitted)). CSOSA's GPS policy statement broadly provides that, "[i]n response to non-compliant behavior or identified risk, the CSO may implement GPS monitoring as a sanction on the offender for up to thirty (30) calendar days." Policy Statement 4008 at 5. Although it also lists specific circumstances under which offenders may be placed on GPS monitoring, *id.* at 5-7, nothing in CSOSA's policy limits the kind of "non-compliant behavior or identified risk" justifying GPS monitoring to *only* those circumstances.[8]

Any question about the meaning of CSOSA's GPS policy statement is answered by reference to CSOSA's other regulations and policies. Under CSOSA's regulations, "[s]ubstance abuse violations" can lead to the imposition of sanctions, including "electronic monitoring[.]" 28 C.F.R. §§ 810.2(b), 810.3(b)(6). GPS is simply "a specific form of electronic monitoring[.]" Policy Statement 4008 at 1. CSOSA policy further establishes that "submission of a bogus sample" is a "substance abuse violation" that may lead to sanctions.[9] And other CSOSA materials demonstrate that the agency allows GPS monitoring to be imposed as a sanction on

[8] Indeed, under Wells's reading, only offenders who test positive for PCP could be placed on GPS to begin with (Br. at 48), but any "positive drug tests" would allow the CSO to extend GPS monitoring from 30 days to "up to a total of ninety (90) calendar days," Policy Statement 4008 at 5. That interpretation makes no sense.

[9] *See* Policy Statement 4004, "Accountability Contract" (Nov. 8, 2006) at 3, https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2018/03/4004_accountability_contract_110806.pdf.

offenders who commit substance abuse violations, including by submitting bogus samples.[10] CSOSA's interpretation of its own policy is entitled to deference. *See, e.g.*, *Neb. HHS v. HHS*, 435 F.3d 326, 331 (D.C. Cir. 2006) ("it is for HHS to interpret its own policies in the first instance . . . subject only to quite deferential review by the courts"). Given all of this, Wells's supervision officer acted in good faith when she sanctioned him with GPS monitoring. *Cf. United States v. Pimental*, 26 F.4th 86, 91-93 (1st Cir. 2022) (applying good-faith exception to claim "that the execution of a search warrant exceeded the warrant's scope").

CONCLUSION

WHEREFORE, the trial court's suppression ruling should be reversed.

Respectfully submitted,

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[10] *See* CSOSA FY 2020 Budget Request (March 18, 2019) at 27 (chart & n.1), https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2019/03/CSOSA-FY-2020-CBJ-Summary-Statement-FAQs-3-18-2019.pdf.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Paul Maneri, Esq., Public Defender Service, pmaneri@pdsdc.org, on this 23rd day of May, 2024.

/s/
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