

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 13-CR-234

DAMIAN PATRICK,

Defendant.

DEFENDANT’S REPLY TO GOVERNMENT’S RESPONSE BRIEF

Throughout its response brief, *see* Docket Entry 52, the government continues to confuse probable cause to believe that tracking Mr. Patrick’s cell phone would lead to his location with probable cause sufficient to justify the issuance of a search warrant under the Fourth Amendment. *See id.* at 2 (stating the “warrant was reasonable under the Fourth Amendment because... there was probable cause to believe that evidence of the defendant’s whereabouts would likely be found by obtaining his telephone location data...”). Magistrate Judge Callahan noted the difference between these two concepts of probable cause, *see* Docket Entry 47 at 10, and also noted that Mr. Patrick conceded the former but not the latter. Unlike the government, Magistrate Judge Callahan correctly focused on the Fourth Amendment probable cause analysis, and whether that was met by the state court order issued in this case. Finding that *Warden v. Hayden*, 387 U.S. 294 (1967), allows search warrants to be issued “for the purpose of obtaining evidence which would aid in apprehending and convicting criminals,” he found that the state court order did satisfy the Fourth Amendment. In short, the government’s response does not shed

any further light on this Fourth Amendment analysis, and to that end Mr. Patrick stands on his objections arguing why Magistrate Judge Callahan's reliance on *Hayden* and *Steagald v. United States*, 451 U.S. 204 (1981) is misplaced, and he will not repeat those arguments here.

One other point of reply: the government criticizes Mr. Patrick's reliance on *In the Matter of an Application of the United States of America for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone*, 849 F.Supp.2d 526 (D. Maryland 2011) as "contrary to Supreme Court and Seventh Circuit precedent." See Docket Entry 52 at 2. The Supreme Court precedent the government alludes to and that is actually cited by *In re Smartphone Geolocation Data Application*, 977 F.Supp.2d 129, 134 (E.D.N.Y. 2013), all leads back to *Hayden* (which as already mentioned was addressed in Mr. Patrick's objection and will not be repeated here). Besides observing that *Wireless Telephone* is not binding precedent in this circuit (of course, neither is *Smartphone*), the government offers nothing new to rebut Mr. Patrick's arguments regarding why *Hayden* does not sanction the state court order and ensuing search that occurred here. Finally, the government repeats Magistrate Judge Callahan's citation to *United States v. Lisk*, 522 F.2d 228, 230-31 (7th Cir. 1975), but that case relies on *Hayden's* holding and so its applicability rises and falls with that of *Hayden*.

Because the government's response basically reargues the points raised in Magistrate Judge Callahan's recommendation, that recommendation must be rejected by this Court and Mr. Patrick's motion to suppress be granted for the reasons argued in his original objection to this Court.

Respectfully submitted at Milwaukee, Wisconsin this 10th day of December, 2014.

/s/ _____
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