

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2017

5 (Argued: February 20, 2018

Decided: July 25, 2018)

6 Docket No. 16-4296

7 _____
8 UNITED STATES OF AMERICA,

9 *Appellant,*

10 - v. -

11 KAMEL LAMBUS, AKA Kamel Angevine, AKA K, AKA Kamel
12 Angenevine, STANLEY FULLER, AKA Wardy, AKA Webo,

13 *Defendants-Appellees.**
14 _____

15 Before: KEARSE and LIVINGSTON, *Circuit Judges*, and MEYER, *District Judge***.

* The Clerk of Court is directed to amend the official caption to conform with the above.

** Judge Jeffrey A. Meyer, of the United States District Court for the District of Connecticut, sitting by designation.

1 Appeal by the United States from so much of two pretrial orders of the
2 United States District Court for the Eastern District of New York, Jack B. Weinstein,
3 *Judge*, as (1) granted motions by defendants Kamel Lambus and Stanley Fuller to
4 suppress evidence obtained pursuant to one of several court-authorized wiretaps,
5 and (2) granted a motion by Lambus to suppress location data generated by a GPS
6 tracking device attached to his ankle by his New York State parole officers. The
7 district court ruled that the wiretap applicant had knowingly withheld from and
8 misrepresented to the authorizing judge information that was required by 18 U.S.C.
9 § 2518(1)(e), and the court suppressed the evidence gained from that wiretap, citing
10 its inherent authority. *See* 221 F.Supp.3d 319 (2016). The court suppressed location
11 data generated by the GPS device, ruling that Lambus's Fourth Amendment
12 expectations of privacy were infringed on the ground that the device was used for a
13 two-year period, without a warrant, not for purposes of State parole supervision but
14 only for the collection of evidence that would permit the federal government to
15 prosecute Lambus for drug trafficking. *See* 251 F.Supp.3d 470 (2017).

16 On appeal, the government challenges the suppression of the wiretap
17 evidence, contending (a) that the district court clearly erred in finding that the
18 mistakes by the wiretap applicant were intentional rather than inadvertent, and (b)

1 that the court did not find the applicant's mistakes to have been material, and it erred
2 in failing to apply the test established by *Franks v. Delaware*, 438 U.S. 154 (1978), under
3 which such evidence should not be suppressed unless the mistakes were material.
4 The government challenges the suppression of GPS data, contending principally that
5 (a) the GPS monitoring of Lambus was permissible because it was reasonably related
6 to his parole officers' duties; (b) in light of Lambus's acknowledgements of his parole
7 officers' authority to search his person and to attach a GPS tracker, evincing little
8 expectation of privacy, the use of the tracker was not unreasonable under the Fourth
9 Amendment; and (c) in any event, suppression should have been denied under the
10 good-faith doctrine of *Davis v. United States*, 564 U.S. 229 (2011).

11 Finding merit in the government's contentions, we conclude that the
12 district court erred in suppressing the wiretap evidence and the GPS data.

13 Reversed.

14 MICHAEL P. ROBOTTI, Assistant United States
15 Attorney, Brooklyn, New York (Bridget M.
16 Rohde, Acting United States Attorney for the
17 Eastern District of New York, David C. James,
18 Lauren H. Elbert, Marcia M. Henry, Assistant
19 United States Attorneys, on the brief,
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1 RONALD RUBINSTEIN, New York, New York
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5 *Lambus.*

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9 Lindsay A. Lewis, New York, New York (National
10 Association of Criminal Defense Lawyers,
11 New York, New York; Michael C. Miller,
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16 Lawyers, Albany, New York, of counsel), *filed*
17 *a brief for Amici Curiae National Association of*
18 *Criminal Defense Lawyers and New York State*
19 *Association of Criminal Defense Lawyers in*
20 *support of Defendants-Appellees.*

21 KEARSE, *Circuit Judge:*

22 The United States appeals pursuant to 18 U.S.C. § 3731 from so much of
23 two orders of the United States District Court for the Eastern District of New York,
24 Jack B. Weinstein, *Judge*, as (1) granted motions by defendants Kamel Lambus and

1 Stanley Fuller to suppress evidence obtained pursuant to one of several court-
2 authorized wiretaps, and (2) granted a motion by Lambus to suppress location data--
3 apparently reflected on maps on which dots pinpointed the presence of Lambus at
4 the times indicated--directly obtained from a GPS tracking device attached to his
5 ankle by his New York State (or "State") parole officers. The district court ruled that
6 the wiretap applicant had knowingly withheld from and misrepresented to the
7 authorizing judge information that was required by 18 U.S.C. § 2518(1)(e), and the
8 court suppressed the evidence gained from that wiretap, citing its inherent authority.
9 *See United States v. Lambus*, 221 F.Supp.3d 319 (E.D.N.Y. 2016) ("*Lambus I*"). The
10 district court suppressed the location data generated by the GPS device, ruling that
11 Lambus's Fourth Amendment expectations of privacy were infringed on the ground
12 that the device was used for a two-year period, without a warrant, not for purposes
13 of State parole supervision but only for the collection of sufficient evidence to permit
14 the federal government to prosecute Lambus for drug trafficking. *See United States*
15 *v. Lambus*, 251 F.Supp.3d 470 (E.D.N.Y. 2017) ("*Lambus II*").

16 On appeal, the government challenges the suppression of the wiretap
17 evidence, contending (a) that the district court clearly erred in finding that the
18 mistakes by the wiretap applicant were intentional rather than inadvertent, and (b)

1 that the court did not find the applicant's mistakes to have been material, and it erred
2 in failing to apply the test established by *Franks v. Delaware*, 438 U.S. 154 (1978), under
3 which such evidence should not be suppressed unless the mistakes were material.
4 The government challenges the suppression of GPS data, contending principally that
5 (a) the GPS monitoring of Lambus was permissible because it was reasonably related
6 to his parole officers' duties; (b) in light of Lambus's acknowledgements of his parole
7 officers' authority to search his person and to attach a GPS tracker, evincing little
8 expectation of privacy, the use of the tracker was not unreasonable under the Fourth
9 Amendment; and (c) in any event, suppression should have been denied under the
10 good-faith doctrine of *Davis v. United States*, 564 U.S. 229 (2011).

11 Finding merit in the government's contentions, we reverse both
12 decisions, concluding that the district court erred in suppressing the wiretap evidence
13 and the GPS data.

14 I. BACKGROUND

15 Lambus and Fuller are accused of being leaders and organizers of a
16 group of individuals that referred to itself as the Paper Chasing Goons or POV City

1 and was a drug trafficking organization (or the "DTO"). Beginning in 2015, Lambus
2 and Fuller, along with 10 others, were indicted principally on charges of conspiring
3 to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C.
4 § 846, and/or possession of heroin with intent to distribute, in violation of 21 U.S.C.
5 § 841. The indictments followed investigations that dated back to mid-2012, after
6 Lambus had been released from State prison, and that included controlled purchases
7 of narcotics, physical and electronic surveillances of suspected sites of narcotics
8 activity, subpoenas, pen registers, and several 2015 wiretaps on telephones associated
9 with Lambus, Fuller, certain of the codefendants, and other suspected DTO members.
10 The 10 codefendants have pleaded guilty to various charges; Lambus and Fuller
11 remain to be tried.

12 In 2016, Lambus and Fuller moved to suppress all evidence obtained or
13 resulting from five 2015 wiretap orders on the ground that the first wiretap
14 application omitted certain material facts and contained misrepresentations of fact.
15 In addition, Lambus moved to suppress all evidence obtained or resulting from the
16 GPS tracking device attached to his ankle by his State parole officers from May 2013
17 to early July 2015, arguing that those officers impermissibly disclosed the resulting
18 data to the federal government throughout its investigation leading to the present
19 case.

1 The district court, as discussed in greater detail in Part I.B.1 below,
2 granted defendants' motion to suppress evidence of statements intercepted pursuant
3 to the first wiretap authorization, but not evidence obtained through the subsequent
4 authorizations. As discussed in Parts I.B.2. and I.B.3. below, the court initially denied
5 Lambus's motion to suppress GPS-related evidence; but it granted his motion for
6 reconsideration and, upon reconsideration, granted the motion to suppress
7 information obtained as a direct--but not as an indirect--result of the GPS device.

8 Two sets of evidentiary hearings were held with respect to the motions
9 to suppress: the first in 2016 on the original motions, and the second in 2017
10 following Lambus's motion for reconsideration. The evidence at these hearings
11 included the following, largely as described by the district court in its decisions, or
12 as provided by a witness--Thomas Scanlon--whom the district court found "very
13 credible" (Hearing Transcript, March 15, 2017 ("Mar. 15, 2017 Tr."), at 88; *id.* at 16 ("I
14 consider you a highly credible witness")); *see Lambus I*, 221 F.Supp.3d at 337 ("The
15 court finds Investigator Scanlon's testimony credible.").

1 A. *Evidence at the Suppression Hearings*

2 1. *Lambus Becomes a Parolee*

3 Prior to 2012, Lambus had been convicted of several New York State
4 crimes, including criminal possession of a controlled substance in the 5th degree, *see*
5 N.Y. Penal L. § 220.06; attempted criminal possession of a controlled substance in the
6 5th degree, *see id.*, and in the 3rd degree, *see id.* § 220.39; and attempted criminal
7 possession of a weapon in the 2nd degree, *see id.* § 265.03. He had served prison
8 terms and been subject to post-release supervision by the New York State Department
9 of Corrections and Community Supervision ("NYSDOCCS" or "DOCCS"). Persons
10 on post-release supervision are supervised by parole officers, are subject to the same
11 conditions as those imposed on parolees, *see id.* § 70.45(3) ("conditions of post-release
12 supervision" are required to be imposed "in the same manner and to the same extent
13 as . . . [the] conditions . . . upon persons who are granted parole or conditional
14 release"), and are referred to as "parolees" (*e.g.*, Hearing Transcript, December 1, 2016
15 ("2016 Tr."), at 58); *see generally Lambus I*, 221 F.Supp.3d 319 (*passim*).

16 On March 7, 2012, Lambus was released from prison and began a term
17 of post-release supervision that was scheduled to end on August 2, 2015. Before his
18 release, Lambus had signed a Certificate of Release to Parole Supervision ("PRS

1 Certificate") that specified those two dates, and in which he stated, *inter alia*, as
2 follows:

3 I, Kamel Lambus, voluntarily accept Parole Post-Release
4 supervision. *I fully understand that my person, residence and property*
5 *are subject to search and inspection. I understand that Parole Post-*
6 *Release Supervision is defined by these Conditions of Release and all*
7 *other conditions that may be imposed upon me by the Board of Parole or*
8 *its representatives. I understand that my violation of these*
9 *conditions may result in the revocation of my release.*

10 (Lambus's March 5, 2012 PRS Certificate (emphases added).) Lambus also stated his
11 agreement to numerous specified conditions, including the following:

12 4. *I will permit . . . the search and inspection of my person,*
13 *residence and property. . . .*

14

15 7. I will not be in the company of or fraternize with any
16 person I know to have a criminal record . . . except for accidental
17 encounters in public places, work, school or in any other instance
18 with the permission of my Parole Officer.

19 8. *I will not behave in such manner as to violate the provisions*
20 *of any law to which I am subject which provide for a penalty of*
21 *imprisonment, nor will my behavior threaten the safety or well-*
22 *being of myself or others.*

23 9. I will not own, possess, or purchase any shotgun, rifle or
24 firearm of any type without the written permission of my Parole
25 Officer. . . .

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12. I will abide by a curfew established by the P[arole] O[fficer].

13. *I will fully comply with the instructions of my Parole Officer and obey such special additional written conditions as he or she . . . may impose.*

(Lambus's March 5, 2012 PRS Certificate ¶¶ 4, 7-9, 12, 13 (emphases added).)

In June 2012, Lambus sent a letter ("Lambus Letter" or "Letter") to Christopher Jones, who was still an inmate at the State correctional facility from which Lambus had been released in March. The Letter, which enclosed photographs that showed, *inter alia*, Lambus with large amounts of cash and with persons making gang-related signs, was intercepted by DOCCS's Office of the Inspector General ("IG"-now called Office of Special Investigations), and the IG referred the Letter to the parole bureau that was then supervising Lambus. That bureau in July referred the Letter to DOCCS's Bureau of Special Services ("BSS"--now called Community Supervision, Operations Center), whose function was to investigate criminal activity that had a nexus to a particular parolee. At BSS, the Lambus Letter was assigned to Scanlon, who was then an investigating parole officer.

1 Scanlon testified that, in accordance with the NYSDOCCS Parole
2 Handbook (or "Handbook"), State parole officers are responsible not only for
3 providing parolees with counseling and other assistance in adjusting to life after
4 release from imprisonment but also for "ensur[ing] that individuals under parole
5 supervision are obeying the laws of society and the rules of parole." (Mar. 15, 2017
6 Tr. 32.) Scanlon's duties as a parole investigator included "conduct[ing] threat
7 assessment investigations, any threat to the community," and "investigat[ing]
8 individuals that are under supervision that may be involved in criminal activity
9 beyond what a bureau would be capable of investigating," in order to "uncover the
10 *full scope of a parole violation,*" which would encompass "drug possession . . . [and/or]
11 drug trafficking by a parolee." (*Id.* at 31-32 (emphasis added).)

12 Scanlon testified that he interpreted the IG-intercepted Lambus Letter as
13 referring to narcotics and gang activity, and in particular as indicating, *inter alia*, that
14 Jones had narcotics that Lambus wanted to buy. In August 2012, Scanlon contacted
15 a BSS investigator who was assigned to a United States Drug Enforcement
16 Administration ("DEA") task force. He was informed that the DEA task force had
17 been investigating Lambus. But finding no evidence that Lambus was supplying
18 narcotics in the prison facility, the DEA task force terminated its investigation of
19 Lambus in September or October 2012.

1 Scanlon nonetheless suspected, in light of Lambus's history of narcotics
2 dealing and his Letter, that Lambus was probably again engaged actively in the
3 distribution of narcotics. He attempted to determine the source of the inordinately
4 large sums of money shown in the pictures sent with the Lambus Letter.

5 Lambus, upon his release from prison, resided in an area of Queens
6 County managed by DOCCS's "Queens II Bureau" where he was supervised by Parole
7 Officer (or "P.O.") Trudy Kovics and Supervising Parole Officer (or "S.P.O.") Hubert
8 Browne. Scanlon discussed the Lambus Letter with Kovics and informed her of the
9 negative results of the DEA task force's investigation into whether Lambus was
10 sending drugs into the prison facility. Kovics said she had experienced no problems
11 with Lambus, and she speculated that in the photographs Lambus was posing with
12 bills that were counterfeit.

13 Scanlon doubted that the money was counterfeit and proceeded for the
14 next several months to attempt to identify the persons shown with Lambus in the
15 photographs and the places Lambus was frequenting. He conducted surveillances
16 of Lambus's residences and places of employment. Although at some point Lambus
17 claimed to hold two jobs, he reported earning just \$200 per week; such wages could
18 not account for the mounds of money with which Lambus was photographed. Nor

1 was it clear that he actually held the jobs he claimed: During Scanlon's numerous
2 surveillances, Lambus never appeared for work at the times or on the dates he was
3 supposedly working.

4 In February 2013, Lambus moved to an area of Queens in which he was
5 supervised by DOCCS's "Queens III Bureau." On March 17, his new parole officer
6 found that he was not at home for his curfew. On April 5, Scanlon sent an email to
7 the Queens III Bureau Chief, to a Queens III Bureau S.P.O., and to Scanlon's own BSS
8 supervisor ("Scanlon April 5, 2013 Email") to provide an interim update on his
9 investigation of Lambus for possible violations of the conditions of his release. That
10 email stated, *inter alia*, that "Lambus's employment and residence are suspect," and
11 that Lambus's Letter, his history of narcotics distribution, and "his recent changes in
12 residence when his PO obtains curfew violations" indicate that he may be violating
13 his release conditions. (Scanlon April 5, 2013 Email at 2.) It noted that BSS would
14 assist Queens III Bureau with respect to a search of Lambus's residence and
15 appropriate follow-up measures.

16 On April 9, 2013, several Queens III Bureau parole officers searched areas
17 of Lambus's residence. In an ashtray in the living room area, they found remnants
18 of marijuana cigarettes. Lambus claimed none of them belonged to him. Shortly after

1 that search, Lambus moved back to the area managed by Queens II Bureau. P.O.
2 Kovics resumed responsibility for his direct supervision.

3 *2. Queens II Bureau Places Lambus on GPS Monitoring*

4 On or about May 2, 2013, an anonymous email was sent to the
5 NYSDOCCS website, "complain[ing] about a person on parole"--to wit, "Kamel
6 Lambus." The email stated that

7 Mr. Lambus is currently still selling drugs. He is driving around
8 in a . . . 6000 Audi with no job. Mr. Lambus is also having a party
9 on May 5th at Club Allure from 4:00 pm to 10:00 pm. He also
10 r[uns] with a crew . . . by the name of PCG Pov City Goons, Paper
11 Chasing Goons. There are plenty of videos with him in it with
12 guns, money, et cetera. Also the house he is living in they sell
13 drugs out of the back of the apartment. Please keep this
14 anonymous and forward to his parole officer T. Kovics
15 diversion[sic] Queens.

16 (2016 Tr. 94-95 (anonymous email as read by Scanlon).) On May 5, during the time
17 of Lambus's predicted party, Kovics, at the direction of Queens II Bureau Chief Mark
18 Parker, conducted a curfew check at Lambus's residence. Lambus was not there.

19 On May 6, Parker and S.P.O. Browne decided that on May 8, during
20 Lambus's next scheduled visit to the parole office, Lambus would be placed on GPS
21 monitoring. Scanlon testified that DOCCS procedures for supervision of recalcitrant

1 parolees, short of returning them to prison, included "graduated sanctions" such as
2 "electronic monitoring" (Mar. 15, 2017 Tr. 11); parole officials were instructed that
3 such GPS monitoring could properly be imposed without court orders because of
4 parolees' "diminished expectation of fourth amendment rights" (*id.* at 13).

5 Browne testified that the decision to place Lambus on GPS monitoring
6 was based "*primari[ly]*" on Lambus's curfew violations (*see* Hearing Transcript, April
7 11, 2017 ("Apr. 11, 2017 Tr."), at 133 (emphasis added); *see also id.* at 113 ("a curfew
8 violation and . . . a report of illegal activities in the residence")), but that "[i]n addition
9 to the curfew violation, allegations of drug dealings came up too, and the [May 5]
10 party was supposed to happen in the club. All of those factors played into placing
11 him on electronic monitoring" (*id.* at 135).

12 Thus, on May 8, 2013, a GPS tracking device was attached to Lambus's
13 ankle. According to Lambus's March 5, 2012 PRS Certificate, his post-release-
14 supervision period was to end on August 2, 2015. (*See also* Affidavit of Kamel
15 Lambus dated April 14, 2016, in support of his suppression motion ("Lambus Aff."),
16 ¶ 28 ("My term of post-release supervisors [*sic*] was scheduled to end on August 2,
17 2015.")) On May 8, 2013, Lambus signed forms acknowledging that GPS monitoring
18 was being imposed as a special condition of his release and that the monitoring

1 would "remain in effect until the termination of my legal period of supervision . . . [u]nless
2 otherwise amended in writing by the Division of Parole." (Lambus's Special
3 Conditions/GPS Monitoring Form, signed May 8, 2013, at 1 (emphases added); *see also*
4 *id.* at 4, ¶ 7 ("I will not tamper with the transmitter on my person [or] the monitor");
5 *id.* at 4, ¶ 3 ("I agree to wear the transmitter on my person and to keep the monitor plugged
6 into and attached to my telephone, and to do both for twenty-four hours a day, seven days
7 a week, during the period of my participation in the program." (emphases added)).)

8 Lambus's affidavit in support of suppression explained his acceptance
9 of GPS monitoring as follows:

10 14. Parker advise[d] me in sum and substance that he
11 would violate me and send me back upstate to prison unless I
12 agreed to have a GPS ankle bracelet installed on me.

13 15. Based on the choice between those two options, I signed
14 the consent form and allowed them to put the GPS location
15 monitoring bracelet on my person that day.

16

17 25. I only signed the consent form to put the GPS ankle
18 monitor on me because I feared being sent back to prison.

19 (Lambus Aff. ¶¶ 14-15, 25.)

1 BSS had not been forewarned of Queens II Bureau's intention to place
2 Lambus on GPS monitoring. Scanlon learned of it only when Kovics called him on
3 May 8 and informed him that it had been done "because of [Lambus's] curfew
4 violation." (2016 Tr. 98.) Scanlon's initial reaction to the GPS monitoring was
5 somewhat negative because he thought it could compromise his investigation by
6 making Lambus more circumspect and thereby making his criminal activity more
7 difficult to detect and prove. A year later, however, Scanlon would recommend that
8 the monitoring be continued because it was in fact assisting his investigation. (*See*
9 Parts I.A.3. and I.A.4. below.)

10 3. *Scanlon Seeks Federal Assistance*

11 From the fall of 2012--when the DEA task force terminated its
12 investigation into whether Lambus was sending drugs into prison--until early June
13 2013, no federal agencies were involved in the investigation of Lambus by BSS. The
14 May 2013 decision to place the tracking device on Lambus had been made solely by
15 members of Queens II Bureau, not at the behest the federal government, and indeed
16 without any input or foreknowledge by BSS.

1 Once the GPS tracker was installed, only Queens II Bureau and BSS had
2 independent access to the GPS data. Those data aided Scanlon's investigative efforts
3 by identifying places that Lambus was frequenting, allowing surveillances in
4 promising areas. As a result, Scanlon got confirmation that Lambus was, *inter alia*,
5 associating with known felons, frequenting known stash houses, and attempting to
6 obtain a weapon. Lambus was also wearing gang colors, and he was found in
7 possession of an unexplained amount of cash. Scanlon was persuaded that Lambus
8 was not adhering to the conditions of his release, and it appeared that Lambus was
9 a high-ranking member of the DTO. But Scanlon doubted that he had enough
10 evidence to have Lambus returned to prison for parole violations.

11 Scanlon testified that BSS had limited resources; and as he began to
12 fathom "the apparent scope of [Lambus's] involvement" in the DTO, he realized that
13 he "needed assistance to investigate the case further" (Hearing Transcript, March 17,
14 2017 ("Mar. 17, 2017 Tr."), at 141), in the form of "additional manpower" and "funding
15 . . . to assist us in identifying the whole crew and pursuing the investigation to
16 dismantle that crew" (2016 Tr. 106). Such personnel identifications were important
17 because it was part of Scanlon's job to determine whether other DTO members were
18 also parolees; and dismantling "the rest of Mr. Lambus'[s] criminal organization" was
19 important to "public safety." (Mar. 17, 2017 Tr. 145.)

1 Accordingly, in early June 2013, Scanlon called Special Agent Steve Lee
2 at the United States Department of Homeland Security, Immigration and Customs
3 Enforcement ("ICE"). This was Scanlon's first Lambus-related contact with federal
4 law enforcement agents in 2013. In mid-June, Scanlon met with Special Agent
5 Christopher Popolow of Homeland Security Investigations ("HSI"), a branch of ICE.
6 Scanlon described the information that BSS's investigation had developed with regard
7 to Lambus, several other identified individuals, and their apparent narcotics
8 trafficking activity. Scanlon testified that HSI "agreed to assist us with the case."
9 (2016 Tr. 106.)

10 Scanlon testified that HSI was designated the lead agency because it
11 supplied, *inter alia*, manpower, undercover agents, and money for controlled
12 purchases (*see id.* at 107; Mar. 17, 2017 Tr. 143); but BSS shared control of the
13 investigation (*see id.*). GPS monitoring data provided starting points for surveillances,
14 but the federal agents had no direct access to those data. Scanlon passed the GPS data
15 to members of the joint investigation.

16 Scanlon "was one of the lead investigators on the team" (*id.* at 170) and
17 was "considered one of the lead case agents" (*id.* at 142). The federal agents did not
18 give Scanlon instructions, and he did not give instructions to them. Scanlon took

1 investigative steps on his own initiative. He also had strategy meetings with the
2 federal agents and "would request certain activities be performed, such as
3 surveillance, request for pole cameras." (*Id.*) When actions were agreed upon,
4 Popolow, the other lead agent in the first year of the joint investigation, would
5 typically deploy the federal personnel.

6 In August of 2014, HSI and BSS contacted the DEA, and three DEA
7 agents--who were also working on other cases--joined the investigation of Lambus.
8 (*See, e.g.*, Apr. 11, 2017 Tr. 178; *see also* Mar. 17, 2017 Tr. 200 (still later, they were
9 joined by agents of the Federal Bureau of Investigation ("FBI")).) DEA Special Agent
10 Gerald Russell testified that Scanlon was "a key member of the [Lambus-
11 investigation] group" (Apr. 11, 2017 Tr. 202); he was "the leader from [the
12 NYSDOCCS] side, working jointly with the leaders from [HSI] and the DEA" and
13 "help[ed] in drawing up the plan" (*id.* at 225, 198). In addition to providing the rest
14 of the team with data from the GPS monitoring device, Scanlon participated in
15 surveillances, attended controlled drug purchases, monitored wiretaps, and
16 participated in meetings. (*See id.* at 188, 201-02, 205, 222; *see also id.* at 226 (Scanlon
17 "provided a great deal of intel, so he assumed a role of a leader, . . . sharing all of that
18 kind of data amongst the agencies involved").)

1 4. *Lambus's GPS Monitoring Is Continued Until Mid-2015*

2 Lambus states that he "never agreed that the GPS device would remain
3 on [him] indefinitely" (Lambus Aff. ¶ 26); and there is no dispute that, after a few
4 months, he "repeatedly asked" to have the device removed (*id.* ¶ 18; *see* Hearing
5 Transcript, April 10, 2017 ("Apr. 10, 2017 Tr."), at 96). S.P.O. Browne testified that his
6 understanding was that Lambus would be on GPS monitoring for a "minimum" of six
7 months, which was the normal minimum for non-sex offenders, and that such
8 monitoring would seldom end on the originally scheduled date. (*E.g.*, Apr. 11, 2017
9 Tr. 153-54, 160-61, 167.) Bureau Chief Parker indicated that he likely told Lambus that
10 the need for GPS monitoring would be reevaluated in three-to-six months.

11 Despite Lambus's repeated requests for the GPS tracker's removal, he
12 was subjected to GPS monitoring until July 2015, *i.e.*, for more than two years.
13 Browne testified that at some point during that period it was his view that that
14 monitoring should end. However, Parker--who had authority to terminate the
15 monitoring--had received a memorandum from the BSS bureau chief in early July
16 2013, requesting that BSS be informed and consulted with respect to changes in
17 Lambus's supervision (*see* Apr. 10, 2017 Tr. 101-02). The memorandum stated as
18 follows:

1 "Please note that the *BSS continues* to actively investigate the
2 [*Lambus*] case. *To date this investigation has pointed towards his*
3 *involvement in a significant Narcotics operation, the scope of which has*
4 *not yet been determined. The BSS is now working closely with ICE and*
5 *a protracted investigation is expected.* This memo is considered
6 strictly confidential and all measures should be taken to prevent
7 our Target from knowledge of this investigation. *It is further*
8 *requested that any change in his supervision program be communicated*
9 *to the BSS and that BSS be consulted prior to any consideration of*
10 *revocation."*

11 *Lambus II*, 251 F.Supp.3d at 485 (quoting July 2, 2013 memorandum to Parker from
12 BSS Bureau Chief James Shapiro (emphases ours)).

13 Scanlon testified that DOCCS is not required to "violate" a parolee--*i.e.*,
14 to initiate violation proceedings against him--for "every" violation; and the most likely
15 punishment for a minor violation "such as a curfew violation or possession of
16 marijuana" would be "just a verbal admonishment." (Mar. 17, 2017 Tr. 139-140.) In
17 Scanlon's view, imposition of such punishment on Lambus for a minor violation
18 would not have deterred Lambus from continuing to engage in drug trafficking. (*See*
19 *id.* at 140.) Thus, "[d]uring the course of GPS monitoring," Scanlon asked Lambus's
20 "parole officer not to initiate violation proceedings for minor violations" because "[a]t
21 that point we were trying to determine the broader scope of his involvement with
22 drug trafficking and . . . I was concerned that if we violated him on minor violations,

1 we would compromise the investigation and not have defined his role in the entirety."

2 (*Id.* at 139.)

3 Scanlon also testified that although he periodically gave Parker general
4 updates on the BSS/HSI investigation, he shared only limited details because he had
5 become wary of alerting Lambus. (*See* Mar. 17, 2017 Tr. 148-49.) For example, prior
6 to May 2013, Scanlon had been able to get information about Lambus's activities
7 through his social media pages; but Lambus, learning that certain of his posts had
8 come to Parker's attention, promptly curtailed his use of such pages, thereby closing
9 a useful investigative avenue. (*See* Mar. 15, 2017 Tr. 40-41.)

10 In the spring of 2014, when Parker was considering ending Lambus's
11 GPS monitoring, he consulted with BSS, with the DOCCS regional director, and with
12 DOCCS Deputy Commissioner Thomas Herzog, as to whether to do so. Scanlon
13 testified that he recommended that the GPS monitoring of Lambus be continued.
14 While in most cases six months would be a sufficient monitoring period, "individuals
15 that [BSS] deems as high risk in the community would stay on [monitoring]
16 *indefinitely, until the maximum.*" (Mar. 15, 2017 Tr. 15 (emphases added).) Scanlon
17 viewed Lambus as a high risk parolee in this respect because of his "[g]ang
18 involvement, his past history, and his apparent level of narcotics trafficking." (*Id.*)

1 However, at that time, Scanlon did not believe DOCCS had sufficient evidence to
2 prove a major parole violation; indeed, in his view, the investigators did not obtain
3 such evidence until they listened to wiretaps in 2015. (*See id.* at 122-23; *id.* at 123 (the
4 pre-wiretap evidence "raised [Scanlon's] suspicions that [Lambus] was engaging in
5 drug trafficking," but Scanlon "did not have sufficient evidence to prove a violation
6 of parole").) In December 2013, Scanlon and Popolow had met with an Assistant
7 United States Attorney ("AUSA") to discuss their investigation and were informed
8 that their evidence "didn't meet the threshold" for federal prosecution. *Lambus II*, 251
9 F.Supp.3d at 479 (internal quotation marks omitted). Scanlon testified that it would
10 be many months before it was determined that there would be a federal prosecution.

11 "After being told" by an AUSA in December 2013 "that the federal
12 prosecutors would consider prosecution only if the investigation turned up 'evidence
13 of more drugs [and] more weight,' the investigators did not inquire whether a state
14 prosecution would be possible" *Lambus II*, 251 F.Supp.3d at 479 (quoting Mar.
15 17, 2017 Tr. 209). Scanlon testified that, after reviewing the evidence indicating that
16 "previous State incarcerations did not deter Mr. Lambus from continuing in his drug
17 distribution ring," and after speaking with his BSS supervisors and DOCCS Deputy
18 Commissioner Herzog, Scanlon "thought federal prosecution along with the[] [more

1 severe] penalties would be the best outcome to stop this behavior." (Mar. 17, 2017
2 Tr. 147, 156.) Accordingly, Scanlon's recommendation to Parker in the spring of 2014
3 was to continue the GPS monitoring of Lambus for the duration of the joint BSS-HSI
4 investigation, based on Scanlon's DOCCS training and existing DOCCS protocols (*see*
5 Mar. 15, 2017 Tr. 45), and based on evidence that Lambus had persisted in ignoring
6 curfews, was associating with known felons, and appeared to be a leader of the
7 narcotics activity--and that Lambus "was tampering with the GPS" (*id.* at 44).

8 Parker decided to continue the GPS monitoring of Lambus based on the
9 recommendations of BSS, and of the regional director and Deputy Commissioner
10 Herzog--Parker's "higher up[s]" in NYSDOCCS. (Apr. 10, 2017 Tr. 97.) Federal agents
11 never made any recommendation to Scanlon as to whether GPS monitoring should
12 continue. The GPS tracker remained on Lambus until he was arrested on the present
13 federal charges in July 2015.

14 5. *Federal Agents Request Authorization for Wiretaps*

15 In the meantime, in early 2015, it was decided that federal court
16 authorizations for wiretaps would be sought to assist the investigation of the DTO.
17 Eventually, five wiretap applications were made; all were granted.

1 An affidavit in support of the first application was prepared on January
2 9, 2015 ("First Wiretap Affidavit") by an HSI agent to whom we refer as the "HSI
3 Agent" (the name being undisclosed here, as it was redacted in the district court, *see*,
4 *e.g.*, *Lambus I*, 221 F.Supp.3d at 327-31). The First Wiretap Affidavit requested
5 authorization to intercept, for up to 30 days, telephone calls and text message
6 transmissions to and from a certain number ending in 5283 (the "5283 telephone" or
7 "subject telephone"), for a mobile telephone known to be used by one of the targets
8 of the proposed wiretap. The law enforcement officers had learned of that number
9 from a confidential informant ("CI") who had been found credible and reliable, some
10 of his information having been corroborated by subsequent narcotics seizures.

11 The First Wiretap Affidavit stated that HSI agents and other law
12 enforcement officers were investigating numerous persons for narcotics and firearms
13 offenses, including distribution of controlled substances and conspiracy to do so, use
14 of firearms in furtherance of those offenses, and dealing in firearms. It defined as
15 wiretap "Target Subjects" a dozen persons including Lambus and Fuller and stated
16 that the drug trafficking organization also included other persons whom law
17 enforcement had not been able to identify.

1 The HSI Agent stated that the affidavit was based on, *inter alia*: personal
2 participation in the investigation of the offenses referred to; reports by other special
3 agents; information received from the CI; reports of physical surveillances conducted
4 between July 17, 2013, and November 21, 2014, which identified stash houses;
5 consensually intercepted wire communications; controlled purchases by the CI from
6 suspected members of the DTO; and the seizure, during a judicially authorized
7 search, of cocaine base and drug paraphernalia from a residence at which Lambus
8 and two other wiretap targets were present.

9 The affidavit described various other investigative techniques the officers
10 involved in the investigation had used or attempted in the past. They included, in
11 addition to the methods referred to above, other judicially-issued search warrants;
12 analysis of toll records; pen registers for telephones that had contact with the 5283
13 telephone and that were used by known narcotics traffickers; use of pole cameras;
14 and subpoenas to financial and penal institutions in an effort to locate documentary
15 evidence. The HSI Agent stated that those methods had not proven effective in
16 determining the extent of the DTO or the identity of its suppliers; further, it was
17 unlikely that the CI or undercover officers would be able to penetrate more deeply
18 into the drug trafficking organization, given that such organizations tend to be

1 compartmentalized and that the members of the DTO, wary of law enforcement, were
2 reluctant to do business with persons other than trusted associates.

3 In a section of the First Wiretap Affidavit titled "Prior Applications," the
4 HSI Agent also stated as follows:

5 As of December 22, 2014, a check of federal law enforcement
6 databases, including FBI, DEA, ATF, and HSI databases, indicate
7 [sic] that *there have been no prior applications seeking Court*
8 *authorization to intercept the wire, oral, or electronic communications*
9 *of the Target Subjects or over the SUBJECT TELEPHONE.*

10 (Emphasis added.) This statement, however, was not true.

11 As the HSI Agent's affidavits in pursuit of the next wiretap
12 authorizations revealed, prior to January 9, 2015, there had in fact been several
13 wiretap applications leading to orders authorizing interception of communications
14 of some persons identified as wiretap targets in the First Wiretap Affidavit. The
15 orders included a total of four authorizations in 2011 with regard to Fuller and one
16 other Target Subject; an order in 2003 with regard to a third Target Subject; and two
17 orders in 2004 with regard to an individual who was not literally a Target Subject as
18 that term was defined in the First Wiretap Affidavit but who was listed in that
19 affidavit's subsequent description of "Targets."

1 The HSI Agent who authored the First Wiretap Affidavit--and who had
2 requested the check of the federal law enforcement databases referred to in its "Prior
3 Applications" section--testified at the 2016 suppression hearing that the error in that
4 section of the First Wiretap Affidavit resulted from a flawed request on the electronic
5 surveillance ("ELSUR") form that was submitted to request the database checks. The
6 HSI Agent testified that instead of listing on the ELSUR form all of the wiretap targets
7 later named in the First Wiretap Affidavit, "I put in [on the ELSUR form] who I
8 expected to actually intercept on that phone" (2016 Tr. 161), and that in stating that
9 the databases had been searched with respect to all of the individuals named in the
10 affidavit, "I misunderstood what I was saying" (*id.* at 157).

11 In preparing an affidavit to support the second wiretap application, the
12 HSI Agent learned from an AUSA that the "Prior Applications" statement in the First
13 Wiretap Affidavit was inaccurate. Thus, the errors were not repeated in connection
14 with the second and subsequent wiretap applications. New ELSUR requests were
15 completed, and all known prior applications with respect to all identified targets were
16 listed in the affidavits that were submitted in support of those later applications.

1 The HSI Agent testified that the initial errors had not been intentional:

2 THE COURT: Did you do that deliberately to mislead the
3 Judge?

4 THE WITNESS: No, sir.

5 THE COURT: How did you know to correct it?

6 THE WITNESS: I believe after we went to put the second
7 wire affidavit together, I discussed it with the AUSA at the time
8 and he was . . . like, no, you did it wrong the first time.

9 (2016 Tr. 160.)

10 THE COURT: Did you do that deliberately [in your first
11 submission] to [then-Judge] Gleeson?

12 THE WITNESS: No, sir.

13 THE COURT: Did you correct it with the next application?

14 THE WITNESS: I believe I did, sir, yes.

15

16 THE COURT: This hearing is closed.

17 [Fuller's Attorney]: Well, Judge--

18 THE COURT: I don't want to go over what is obviously an
19 error on his part. Whether that's sufficient to suppress is a matter
20 you will brief.

1 (Id. at 164-65.) The court indicated, however, that it was inclined to grant at least that
2 aspect of the motions to suppress:

3 THE COURT: When I get an application coming
4 before me, I have to have *absolute* reliance on the fact that the
5 affidavits are as *carefully* made out as possible.

6 Here *they were done carelessly*, I don't say that critically, by an
7 experienced man. Whatever you got from that wiretap is not
8 coming in. It's going to be suppressed. Because I am not
9 convinced that [then-Judge] Gleeson would have signed it if he
10 knew this. Brief it and be prepared to try the case without that
11 material.

12 (Id. at 166 (emphases added).)

13 B. *The District Court's Decisions*

14 Following the hearings in 2016, the district court in *Lambus I*, granted
15 defendants' suppression motions only to the extent of excluding conversations
16 intercepted pursuant to the first wiretap authorization. Eventually, in *Lambus II*, the
17 court also partially granted Lambus's motion to exclude GPS-related evidence.

18 1. *Suppression as to the January 9 Wiretap Authorization*

19 In *Lambus I*, the district court found that the HSI Agent's error in the First
20 Wiretap Affidavit's description of prior applications with respect to Target Subjects

1 was not inadvertent; and in the exercise of supervisory authority, the court precluded
2 the government from introducing evidence of conversations intercepted pursuant to
3 the January 9, 2015 wiretap authorization.

4 The court observed that the federal wiretap statute requires, *inter alia*, as
5 follows:

6 "Each application shall include the following information: [. . .] (e)
7 *a full and complete statement of the facts concerning all previous*
8 *applications* known to the individual authorizing and making the
9 application, made to any judge for authorization to intercept, or
10 for approval of interceptions of, wire, oral, or electronic
11 communications involving any of the same persons, facilities or
12 place specified in the application, and the action taken by the
13 judge on each such application."

14 *Lambus I*, 221 F.Supp.3d at 328 (quoting 18 U.S.C. § 2518(1)(e) (emphasis in *Lambus I*)).

15 The court also noted that this Court in *United States v. Rajaratnam*, 719 F.3d 139 (2d
16 Cir. 2013) ("*Rajaratnam*"), *cert. denied*, 134 S. Ct. 2820 (2014), had held it appropriate to
17 apply the *Franks v. Delaware* standard in deciding a suppression motion based on
18 errors in an application for a wiretap authorization:

19 "Under *Franks [v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d*
20 *667 (1978)]* and its progeny, if a search warrant contains a false
21 statement or omission, and the defendant makes a substantial
22 preliminary showing (1) that the false statement or omission was
23 knowingly and intentionally, or with reckless disregard for the

1 truth, included by the government in a search warrant affidavit,
2 (2) that the information was material, and (3) that *with the*
3 *affidavit's false or omitted material aside, the affidavit's remaining*
4 *content is insufficient to establish probable cause, then the fruits of the*
5 *search must be suppressed."* *United States v. Bianco*, 998 F.2d 1112,
6 1125 (2d Cir. 1993) (citing *Franks*, 438 U.S. at 155-56, 98 S.Ct. 2674)
7 (emphasis added). "[T]o suppress evidence obtained pursuant to
8 an affidavit containing erroneous information, the defendant must
9 show that: (1) the claimed inaccuracies or omissions are the result
10 of the affiant's deliberate falsehood or reckless disregard for the
11 truth; and (2) the alleged falsehoods or omissions were necessary
12 to the [issuing] judge's probable cause [or necessity] finding."
13 [*Rajaratnam*, 719 F.3d] at 146 (internal quotation marks omitted).

14 *Lambus I*, 221 F.Supp.3d at 331-32.

15 Discussing the federal wiretap statute's "own exclusionary rule," which
16 had been addressed in *United States v. Giordano*, 416 U.S. 505 (1974), the district court
17 noted that the statute

18 provides that no intercepted communications can be received in
19 evidence in any trial . . . if the disclosure of that information
20 would be in violation of this chapter. 18 U.S.C. § 2515. The
21 specific grounds for exclusion . . . are that: (i) the
22 communication was unlawfully intercepted; (ii) the order of
23 authorization or approval under which it was intercepted is
24 insufficient on its face; or (iii) the interception was not made in
25 conformity with the order of authorization or approval. 18 U.S.C.
26 § 2518(10)(a). . . . *Only violations of statutory requirements that*
27 *"play[] a substantive role with respect to judicial authorization of*
28 *intercept orders and consequently impose[] a limitation on the use of*
29 *intercept procedures" require suppression.* *United States v. Donovan*,

1 429 U.S. 413, 435, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977) (internal
2 quotation marks omitted). The *Donovan* court's holding was
3 limited to cases where the defective affidavit was only
4 "unlawfully made" inadvertently.

5 *Lambus I*, 221 F.Supp.3d at 332 (other internal quotation marks omitted) (emphasis
6 ours).

7 Notwithstanding the grounds for exclusion specified in the wiretap
8 statute and the standards stated in *Franks* and its progeny, the court stated that "[t]he
9 specific grounds stated above do not divest the court of its 'inherent authority to
10 regulate the administration of criminal justice among the parties before the bar'
11 through its general suppression powers." *Id.* at 332 (quoting *United States v. Cortina*,
12 630 F.2d 1207, 1214 (7th Cir. 1980) (citing *McNabb v. United States*, 318 U.S. 332,
13 (1943))).

14 "Federal courts may use their supervisory power in some
15 circumstances to exclude evidence taken from the defendant by
16 willful disobedience of the law." *United States v. Payner*, 447 U.S.
17 727, 735 n. 7, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980) (internal
18 quotation marks and emphasis omitted). "The inherent
19 supervisory power serves to ensure that the courts do not lend a
20 judicial imprimatur to any aspect of a criminal proceeding that
21 smacks of lawlessness or impropriety." *United States v. HSBC Bank*
22 *USA, N.A.*, 2013 WL 3306161, at *6 (E.D.N.Y. July 1, 2013). "The
23 courts have wielded this authority substantively, that is, to
24 provide a remedy for the violation of a recognized right of a

1 criminal defendant." *Id.* at *4 (citing cases). . . . See[also] *Elkins v.*
2 *United States*, 364 U.S. 206, 222-24, 80 S.Ct. 1437, 4 L.Ed.2d 1669
3 (1960) (holding that "the imperative of judicial integrity" requires
4 illegally gathered evidence to be suppressed).

5 *Lambus I*, 221 F.Supp.3d at 332-33. Still, the court had noted that

6 [e]xclusion of the fruits of an unconstitutional search is not
7 required in every case. "For exclusion to be appropriate, *the*
8 *deterrence benefits of suppression must outweigh its heavy costs.*"
9 "[T]he deterrence benefits of exclusion vary with the culpability
10 of the law enforcement conduct at issue." "[W]hen the police
11 act with an objectively reasonable good-faith belief that their
12 conduct is lawful . . . the deterrence rationale loses much of its
13 force." "[S]earches conducted in objectively reasonable
14 reliance on binding appellate precedent are not subject to the
15 exclusionary rule."

16 *Id.* at 331 (quoting *Davis v. United States*, 564 U.S. at 237, 238, 232 (emphasis in
17 *Lambus I*)).

18 The court ultimately found pertinent two pre-*Rajaratnam* decisions:

19 In *Bianco*, the Court of Appeals held that a violation of
20 section [2518](1)(e) is "subject to the statutory exclusionary
21 provisions of [18 U.S.C.] §§ 2515 and 2518(10); that subsection
22 (1)(e) constitutes a non-central provision of Title III; that the
23 government's failure to comply with the requirements of
24 subsection (1)(e) was in good faith and inadvertent error, and
25 suppression is neither permissible [n]or appropriate." 998 F.2d
26 at 1128 (internal citation omitted). The court rested its decision to
27 affirm the denial on the fact that the "omission of the prior
28 surveillance applications" was "inadvertent" and the issue of "the

1 requirements of subsection (1)(e) as applied to a roving intercept
2 application had not been addressed in any reported decisions"
3 prior to the submission of the wiretap application. *Id.* Similarly,
4 in *United States v. Barnes*, the defendant argued that "the
5 government's failure to disclose the existence of concurrent state
6 wiretaps (which, in part, targeted Barnes) requires suppression of
7 the evidence obtained from the federal wiretaps." 411 Fed.Appx.
8 365, 368 (2d Cir. 2011). The court noted that "nothing in the record
9 suggests that the government's affiant was aware of the state
10 wiretaps, which were applied for after the state and federal
11 investigations were severed." *Id.* The court held that defendant's
12 mere speculation that the federal government must have been
13 aware of the state wiretaps "is insufficient to demonstrate a
14 knowing omission on the part of the government. Thus, the
15 affiant's omission 'was not intentional, but inadvertent' and does
16 not violate § 2518(1)(e)." *Id.* (quoting *Bianco*, 998 F.2d at 1128).

17 A natural implication of *Bianco* and *Barnes* is that section
18 2518(1)(e) of the wiretap statute is violated by the government's
19 "knowing," non-inadvertent omission. Where the government
20 knowingly omits information in violation of Title III's statutory
21 requirements, suppression is appropriate.

22 *Lambus I*, 221 F.Supp.3d at 345.

23 The court found that the HSI Agent's truncated list of persons for whom
24 the ELSUR search was to be made was knowing and non-inadvertent. In the First
25 Wiretap Affidavit, submitted on January 9, 2015,

26 the Special Agent wrongly stated: "As of December 22, 2014, a
27 check of federal law enforcement databases, including FBI, DEA,
28 ATF, and HSI databases, indicate that *there have been no prior*

1 *applications seeking Court authorization to intercept the wire, oral, or*
2 *electronic communications of the Target Subjects or over the SUBJECT*
3 *TELEPHONE."*

4 *Id.* at 328 (emphasis in *Lambus I*).

5 On February 12, 2015, Special Agent [REDACTED] applied
6 for a wiretap authorization for two more telephones believed to
7 be associated with the DTO The affidavit was largely the
8 same as the previous affidavit, with a few notable additions.
9 Whereas in the prior affidavit, Special Agent [REDACTED] had
10 averred that "[a]s of December 22, 2014 a check of federal law
11 enforcement databases . . . indicate that *there have been no prior*
12 *applications seeking Court authorization to intercept the wire, oral,*
13 *or electronic communications of the Target Subjects" . . . a check*
14 *of those same databases on January 29, 2015 revealed four prior*
15 *authorizations, from 2003 to 2011, that the government had*
16 *obtained to intercept the communications of some of the Target*
17 *Subjects. . . .*

18 When questioned about this discrepancy at the suppression
19 hearing before this court, the Special Agent conceded that
20 Paragraph 24 of the January 9 Affidavit was "absolutely wrong."
21 He testified that he checked the databases, "but not for the
22 full set of names . . . it was a couple names. It was not the entire
23 target list." The Special Agent apparently "misunderstood"
24 what he was saying in the affidavit . . . , and before he submitted
25 an affidavit in connection with the second wiretap application, an
26 AUSA told him that he "did it wrong the first time."

27 *Id.* at 330 (brackets and emphases in *Lambus I*).

1 The court found that "the omission was not 'inadvertent;' it was
2 knowing":

3 The Special Agent testified that despite having been an affiant in
4 previous wiretap applications . . . , he did not know that he
5 needed to check for prior wiretap applications related to all the
6 target interceptees. . . . This mistake alone, despite precedent to
7 the contrary, *may* have constituted mere inadvertence. But this
8 was not the Special Agent's only error. The HSI agent swore that
9 "a check of federal law enforcement databases, including FBI,
10 DEA, ATF, and HSI databases, indicate that there have been no
11 prior application seeking Court authorization to intercept the
12 wire, oral, or electronic communications of the *Target Subjects* or
13 over the SUBJECT TELEPHONE." [First Wiretap Affidavit] at
14 ¶ 24 (emphasis added). When he swore to this statement, he
15 knew it was false. This was not a "misunderstanding." It
16 was perjury.

17 *Id.* at 346 (emphases in *Lambus I*).

18 Concluding that "[s]uppression is an appropriate remedy for such an
19 omission," the court stated that it

20 need not rely on *Franks* or *Giordano* to rule that any evidence
21 gathered pursuant to the January 9, 2015 wiretap order is
22 suppressed. *It is within the court's inherent authority to suppress*
23 *evidence gathered unlawfully in order to maintain the integrity of its*
24 *own proceedings and of government affiants appearing before it--*
25 *particular[ly] in an in-chambers appearance without opposing counsel*
26 *present. See, e.g., Elkins, 364 U.S. at 222-24, 80 S.Ct. 1437; see also*
27 *Payner, 447 U.S. at 735 n. 7, 100 S.Ct. 2439; McNabb v. United States,*
28 *318 U.S. 332, 63 S.Ct. 608; Cortina, 630 F.2d at 1214; HSBC Bank*
29 *USA, NA., 2013 WL 3306161 at *4-6.*

1 Wiretap applications are made *ex parte*. Judges rely on the
2 absolute fidelity of the government agents and prosecutors who
3 swear to affidavits and answer questions before the court in
4 chambers attesting to the facts necessary to obtain a wiretap. In
5 reliance on their fidelity, courts almost always grant their
6 requests. See Wiretap Report 2015, *available at*
7 <http://www.uscourts.gov/statistics-reports/wiretap-report-2015> (in
8 2015 all [4,148] wiretap applications made pursuant to federal and
9 state law were granted). *Knowingly false* statements cannot be
10 tolerated, especially if those statements are made at proceedings
11 where the courts have little choice but to take the government at
12 its word. Any evidence of statements made on wiretaps gathered
13 pursuant to the January 9, 2015 wiretap order is suppressed.

14 *Lambus I*, 221 F.Supp.3d at 346 (emphases added).

15 2. *The Initial Denial of the Motion To Suppress GPS-Related Data*

16 In *Lambus I*, the district court denied Lambus's motion to suppress any
17 evidence obtained from or derived from the GPS monitoring device attached to his
18 ankle. While noting that the device had been attached initially for the proper purpose
19 of monitoring whether Lambus was abiding by his curfew, the court plainly
20 disapproved of NYSDOCCS' subjecting Lambus to such monitoring for more than
21 two years; it viewed NYSDOCCS officers, after the GPS tracker had been attached for
22 a month, as failing to perform their parole supervisory functions; and it condemned

1 federal officers' participation in the investigation of Lambus while knowing of the
2 GPS monitoring and failing to seek and obtain a judicial warrant for its use in the
3 criminal investigation. The court noted that

4 in the instant case, coordination by the agencies unwittingly
5 turned Lambus [*sic*] into a stalking horse for the federal agencies.
6 Lambus knowingly had a GPS tracking device placed on his ankle
7 on May 8, 2013, not because he was expected [*sic*] of any criminal
8 wrongdoing, but to monitor whether he was abiding by the
9 curfew condition of his parole. . . . This purpose shifted as federal
10 law enforcement began using the location data to build a narcotics
11 trafficking case against a dozen individuals. His ostensible
12 supervisors, NYSDOCCS, took no actions against him despite,
13 presumably, possessing evidence of criminal wrongdoing.

14 *Lambus I*, 221 F.Supp.3d at 344; *see also id.* at 342 (referring to the so-called "stalking
15 horse" theory (internal quotation marks omitted), which disapproves of a parole
16 officer's acting as a stalking horse for law enforcement officers by searching a parolee
17 not in the performance of the P.O.'s own duties but solely in response to a prior
18 request by, and in concert with, law enforcement officers--a theory adopted in some
19 Circuits but rejected by this Court, *see generally United States v. Reyes*, 283 F.3d 446,
20 462-65 (2d Cir.) ("*Reyes*"), *cert. denied*, 537 U.S. 822 (2002); *United States v. Newton*, 369
21 F.3d 659, 666-67 (2d Cir.) ("*Newton*"), *cert. denied*, 543 U.S. 947 (2004)).

1 Notwithstanding its disapproval of the treatment of *Lambus*, the district
2 court concluded, following the suppression hearings in 2016, that exclusion of GPS
3 data was not warranted.

4 "[W]hen the police act with an objectively 'reasonable good-
5 faith belief' that their conduct is lawful the deterrence
6 rationale [of the exclusionary rule] loses much of its force." *Davis*,
7 564 U.S. at 238, 131 S.Ct. 2419 (internal quotation marks and
8 citation omitted). . . . "[S]earches conducted in objectively
9 reasonable reliance on binding appellate precedent are not subject
10 to the exclusionary rule." *Davis*, 564 U.S. at 232, 131 S.Ct. 2419.

11 *Lambus I*, 221 F.Supp.3d at 341. The court noted that "[t]wo Second Circuit Court of
12 Appeals opinions"--*Reyes*, 283 F.3d 446, and *Newton*, 369 F.3d 659--"condone the
13 coordination between parole and general law enforcement." *Lambus I*, 221 F.Supp.3d
14 at 342.

15 Although viewing certain factual circumstances in *Reyes* and *Newton*--the
16 shorter durations of the privacy intrusions and the purposes of the intrusions--as
17 more appropriate than the facts here for application of the good-faith rule, *see id.*
18 at 342-44, the court noted that both *Reyes* and *Newton* had expressly rejected the
19 stalking-horse theory as a basis for suppression, *see id.* at 342. The district court
20 concluded that

1 [t]he unequivocal language in these two decisions--*Reyes*
2 and *Newton*--created a binding appellate precedent that police
3 involvement with a warrantless search of a parolee does not
4 stamp the search as unconstitutional *if it was initiated by a parole*
5 *officer pursuant to a legitimate supervisory objective.*

6 In the instant case, the search was initiated by NYSDOCCS
7 to monitor Lambus's adherence to his parole conditions;
8 specifically, his curfew. This is a legitimate supervisory objective.
9 *The decision by NYSDOCCS and the federal agents to coordinate*
10 *subsequently was reasonable given the Court of Appeals's Reyes and*
11 *Newton decisions. Neither the NYSDOCCS officers nor the federal law*
12 *enforcement officers behaved inappropriately.* There would therefore
13 be little deterrent value in excluding the evidence. The court
14 declines to suppress the location data evidence.

15 *Lambus I*, 221 F.Supp.3d at 342-43 (emphases added); *see id.* at 342 ("Reliance by the
16 parole officers and federal agents on the broad language in these appellate precedents
17 was objectively reasonable.").

18 3. *The Eventual Suppression of Certain GPS-Generated Data*

19 Following the district court's 2016 opinion in *Lambus I*, Lambus moved
20 for reconsideration of so much of that decision as denied his motion to suppress GPS-
21 related evidence. He pointed out that the court had not rejected his contention that
22 the GPS monitoring violated his Fourth Amendment rights but had instead found

1 that the violation did not merit a suppression order because the coordination between
2 DOCCS and the federal agencies was conducted in good faith, an issue that had not
3 been briefed by the parties. Following procedural events not material here, the
4 district court granted the motion for reconsideration; and in March and April 2017 it
5 held several days of hearings on the GPS suppression motion. On the first such day,
6 the district court said

7 I am prepared to suppress the ankle bracelet, beginning one
8 month after it was imposed, placed on [Lambus]. At which point
9 we know that the Feds knew about it. . . .

10

11 I am prepared to tentatively, subject to hearing from
12 everybody and briefing . . . , tentatively decide that it is to be
13 suppressed because the Feds depended on it and they should
14 have gone at that point to a Federal Judge, Magistrate Judge, or
15 District Judge to get an approval. . . .

16 (Mar. 15, 2017 Tr. 87.)

17 *I'm not saying it is illegal, your putting it on. But only that,*
18 *once the Feds effectively in this case, not as a general rule, but in this*
19 *specific case, I'm prepared to say, took control, from that point on,*
20 *they--and knowing that there was this bracelet[--]they should have gone*
21 *to a judicial officer. That is my present analysis.*

22 I understand that it is pushing the envelope fairly far and
23 some might read Second Circuit decisions[] as to suggest that it
24 goes too far. But I am prepared to do it.

1 (Id. at 92 (emphases added); see id. at 91 ("my tentative view of where the law should
2 be" (emphasis added)).)

3 Thereafter, the court heard additional testimony from Scanlon and
4 testimony from Bureau Chief Parker, S.P.O. Browne, and DEA Special Agent Russell,
5 the essence of which has been described in Parts I.A.1.-I.A.4. above. Following those
6 hearings, the court issued its decision in *Lambus II*, finding that "within one month of
7 placement of the tracking device on defendant's ankle, *the federal authorities*, working
8 closely with state authorities, *directed use of the [GPS] device to provide evidence for the*
9 *prospective federal criminal case*, and *not for any state parole supervision* or violation
10 charge," 251 F.Supp.3d at 475 (emphases added), and concluding that "[i]nformation
11 obtained as a direct--but not indirect--result of use of the device" should be
12 suppressed, *id.* at 474.

13 As detailed below, the court found, *inter alia*, that after being contacted
14 by Scanlon, the federal agents immediately took control of the investigation, *see id.*
15 at 478, 483; that from the start of their involvement, the federal agents were aware of
16 the GPS monitoring on Lambus, *see id.* at 477; that the federal agents knew a GPS
17 monitoring device could not lawfully be attached without judicial authorization, *see*

1 *id.* at 488, 501; that no one applied for such authorization, *see id.* at 487-88; that the
2 federal agents prevented Queens II Bureau from removing the GPS tracker until the
3 federal investigation was complete, *see id.* at 486; and that the only purpose of
4 continuing the GPS monitoring of Lambus was to further the federal investigation,
5 *see id.* at 487.

6 The court found that the initially appropriate curfew-related rationale for
7 placement of Lambus on GPS monitoring soon became an impermissible "pretext" for
8 general law enforcement searches without court approval:

9 Absent exigent circumstances, federal investigative or other
10 authorities must obtain a court order before installing or using a
11 location tracking device to monitor the movements of any person
12 or thing. State parole authorities assume they do not need such
13 an order; they placed a device on a state parolee, Kamel Lambus,
14 and kept it on for over two years under the pretext that it was
15 being used to ensure compliance with a curfew.

16 *Lambus II*, 251 F.Supp.3d at 474; *see also id.* at 496 ("[t]he evidentiary record developed
17 since the court issued its prior opinion confirms that the tracking device was *primarily*
18 used to enable [federal] police to gather evidence for law enforcement purposes"
19 (internal quotation marks omitted) (emphasis ours)); *id.* at 487 (Lambus's GPS tracker
20 was used "*solely*" to further the federal investigation, with the Queens II Bureau
21 supervisory officers "being kept in the dark" as to information gathered as a result of

1 the GPS monitoring, and "the state parole officers responsible for supervising
2 Lambus--Kovics, Browne, and Parker--rarely, if ever, look[ing] at the data being
3 generated by the tracking device." (emphasis added)). The court found that

4 almost from the moment of installation, information from the
5 device was exclusively relied upon by federal authorities working
6 cooperatively with a state official to conduct a complex federal
7 criminal investigation of a major heroin conspiracy that resulted
8 in a federal indictment of defendant.

9 Upon recognizing that they were relying on this device to
10 help track a large heroin distribution ring, federal officials should
11 have 1) checked to see if court approval had been given, and, if
12 not, 2) obtained approval from a federal district or magistrate
13 judge. They did not do so.

14 *Id.* at 474; *see id.* at 486 ("While the tracking device was not installed on Lambus at the
15 behest of BSS or federal law enforcement, they ensured the device remained on
16 him.").

17 Reiterating that "[t]he federal authorities were informed about the device
18 nearly 'contemporaneously' with its installation and almost simultaneously the
19 federal HSI became the 'lead agency' investigating the matter," *Lambus II*, 251
20 F.Supp.3d at 496--*but see id.* at 478 ("[t]hough HSI was designated the 'lead agency,'"
21 "BSS also exerted some control over the investigation"; HSI did "[n]o[t]" "[a]t any
22 point . . . have sole control of the investigation" (quoting Mar. 17, 2017 Tr. at 143))--

1 the court found that

2 [a]t that moment, *Lambus's parole officers ceased being his parole*
3 *officers for Fourth Amendment purposes and became conduits for the*
4 *collection of evidence for use by the federal criminal investigating team.*
5 *The state supervisory parole officers--whose activities generally may*
6 *fit within the "special needs" warrant exception--were instructed not*
7 *to alter his conditions of parole and hardly even glanced at the location*
8 *data continuously gathered for years at the request of the BSS,*

9 *Lambus II*, 251 F.Supp.3d at 496 (emphases added); *see generally Newton*, 369 F.3d
10 at 665 ("the operation of a *parole* system," like the "operation of a probation system[,]
11 . . . presents "special needs" beyond normal law enforcement that may justify
12 departures from the usual warrant and probable-cause requirements," if done
13 "pursuant to a rule or regulation 'that itself satisfies the Fourth Amendment's
14 reasonableness requirement'" (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)
15 (emphasis in *Newton*))). The district court found the special needs exception
16 inapplicable here, given that "BSS never shared any of the information it compiled
17 with the State supervisory bureau," *Lambus II*, 251 F.Supp.3d at 496, thereby depriving
18 those supervisors both of "full information on the parolee's conduct," needed "to
19 properly supervise a parolee," and of "the autonomy to loosen or tighten the parolee's
20 restrictions as necessary. *Lambus's* supervising parole officers were deprived of that
21 ability almost as soon as the federal investigation began," *id.* at 485; *see also id.* ("The

1 State's supervisory bureau, its officers, and its objectives were thus rendered a
2 nullity."). The court also noted that despite Lambus's arrest in July 2015 and the
3 "ample evidence of criminal activity," his parole was allowed simply to "lapse[]" a
4 month later, "without any charge of violation of state parole." *Id.* at 496. The court
5 concluded that

6 *the true nature of the long-continued search in the instant case . . . was*
7 *to permit a full scale federal criminal investigation and attendant*
8 *federal criminal prosecution that would rely in part on information*
9 *obtained directly and indirectly from the state installed device.*

10 *The search undertaken through use of the ankle bracelet tracking*
11 *device in the instant case was a search by federal law enforcement officers*
12 *to "generate evidence for law enforcement purposes." Ferguson v. City*
13 *of Charleston, 532 U.S. 67, 83, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001).*
14 *Such a search does not fall within the ambit of the "special needs"*
15 *exception to the warrant requirement. . . .*

16 *Lambus II*, 251 F.Supp.3d at 495 (emphases added).

17 The court further ruled that despite the State parole authorities'
18 assumption that they did not need court authorization for GPS monitoring of Lambus
19 because he was a parolee,

20 [s]earches initiated by state officers are subject to federal
21 rules of criminal procedure when evidence from those searches is
22 to be used in federal court. *United States v. Brown*, 52 F.3d 415, 420
23 (2d Cir. 1995) ("[F]ederal law is applicable in a federal prosecution
24 even when state police officers were involved."); *see also Preston v.*

1 *United States*, 376 U.S. 364, 366, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964)
2 ("The question whether evidence obtained by state officers and
3 used against a defendant in a federal trial was obtained by
4 unreasonable search and seizure is to be judge[d] as if the search
5 and seizure had been made by federal officers.").

6 *Lambus II*, 251 F.Supp.3d at 493. "[E]vidence obtained by state officers during a
7 search which, if conducted by federal officers, would have violated the defendant's
8 immunity from unreasonable searches and seizures under the Fourth Amendment
9 is inadmissible over the defendant's timely objection in a federal criminal trial." *Id.*
10 (quoting *Elkins v. United States*, 364 U.S. 206, 223 (1960)). Moreover,

11 [a] search [by state officers] may be deemed a "federal search"
12 subject to the strictures of [Fed. R. Crim. P.] 41 even where the
13 search is executed by state law enforcement personnel for the
14 purpose of detecting violations of state law if "federal officers '*had*
15 *a hand in it.*'" [*United States v. Turner*, 558 F.2d [46], 49 [(2d Cir.
16 1977)] (quoting *Lustig v. United States*, 338 U.S. 74, 78, 69 S.Ct.
17 1372, 93 L.Ed. 1819 (1949)) (emphasis added) For a federal
18 agent to have "had a hand" in a search,

19 *[i]t is immaterial whether a federal agent originated the idea or*
20 *joined in it while the search was in progress. So long as he was*
21 *in it before the object of the search was completely*
22 *accomplished, he must be deemed to have participated in*
23 *it.*

24 *Lustig*, 338 U.S. at 79, 69 S.Ct. 1372 (emphasis added).

25 *Lambus II*, 251 F.Supp.3d at 493. The district court stated that "[t]he *controlling* 'hand'

1 of the federal government in this continuing search of defendant Lambus through a
2 tracking device is unmistakable." *Id.* at 496 (emphasis added).

3 The court noted that Rule 41(e)(2)(C) of the Federal Rules of Criminal
4 Procedure provides, *inter alia*, that a judicial warrant authorizing a tracking device
5 "must . . . specify a reasonable length of time that the device may be used," and that
6 that "time must not exceed 45 days from the date the warrant was issued," although
7 "[t]he court may, for good cause, grant one or more extensions for a reasonable period
8 not to exceed 45 days each." *Lambus II*, 251 F.Supp.3d at 491 (internal quotation marks
9 omitted). The court stated that the Rule's temporal limitations prevent "open-ended
10 monitoring" such as that imposed on Lambus by NYSDOCCS, *id.* (internal quotation
11 marks omitted), and that a violation of Rule 41

12 merits exclusion if "(1) there was 'prejudice' in the sense that the
13 search might not have occurred or would not have been so
14 abrasive if the Rule had been followed, or (2) there is evidence of
15 intentional and deliberate disregard of a provision in the Rule."
16 *Burke*, 517 F.2d at 386-87 (Friendly, J.). *Courts may also exclude*
17 *evidence due to noncompliance with rules when exercising their*
18 *"supervisory powers over federal law enforcement agencies."* *Rea v.*
19 *United States*, 350 U.S. 214, 217, 76 S.Ct. 292, 100 L.Ed. 233 (1956),

20 *Lambus II*, 251 F.Supp.3d at 490 (emphasis added).

1 In the present case, the court found that

2 [t]he federal agents disregarded the rules they knew they
3 were bound by when they used the location data generated by the
4 ankle device for years without applying for and obtaining a
5 warrant. This failure to follow Federal Rule of Criminal
6 Procedure 41 "prejudiced" Lambus and warrants exclusion. The
7 tracking device search "would not have been so abrasive if the
8 Rule had been followed;" the search would not have lasted for
9 more than twenty-five months given that the rule only allows for
10 the gathering of location data in 45-day increments. *Burke*, 517
11 F.2d at 387.

12 Alternatively, exclusion is appropriate because the federal
13 authorities used evidence obtained from State authorities for a
14 purpose different than *the State's purported purpose*, without first
15 obtaining a warrant that they otherwise would have needed. *See*
16 *Birrell*, 470 F.2d at 117.

17 *Lambus II*, 251 F.Supp.3d at 497 (emphasis added).

18 The court also ruled that Lambus had not consented to the imposition of
19 GPS monitoring. Despite the fact that in May 2013, "[b]efore the tracking device was
20 installed, Lambus signed a form acknowledging that the 'special condition' of
21 electronic monitoring could last 'until the termination of [his] legal period of
22 supervision,'" *id.* at 476 (quoting Lambus's Special Conditions/GPS Monitoring Form
23 at 1), which was to occur in August 2015, *see Lambus II*, 251 F.Supp.3d at 483, the court
24 found that that did not mean that Lambus had validly consented to such monitoring:

1 The court finds that this extensive consent was not voluntarily
2 given. Lambus signed the acknowledgement form only upon
3 threat of incarceration. Lambus stated that he was []coerced[] into
4 giving his consent because Bureau Chief/Area Supervisor Mark
5 Parker, a supervisor at the DOCCS supervisory bureau
6 responsible for his rehabilitation, told Lambus that "he would
7 violate me and send me back upstate to prison unless I agree to
8 have a GPS ankle bracelet installed on me."

9 *Id.* at 476 (quoting Lambus Aff. ¶ 14).

10 Alternatively, the court found that "[t]o the extent that Lambus's consent
11 was voluntary, it was limited in scope to a search lasting only a few months."
12 *Lambus II*, 251 F.Supp.3d at 477. The court found that there was a "verbal
13 understanding between Lambus and his parole officers that the tracking device
14 would only remain on his person for a few months," so inferring: from Lambus's
15 affidavit so claiming; from the court's interpretation of testimony by Parker; from the
16 fact that the GPS monitoring service provider was informed on May 8, 2013, that the
17 scheduled end date was November 8, 2013; and from the DOCCS "Policy and
18 Procedures Manual" on "Electronic Monitoring," which the court read as stating that
19 the duration of monitoring will continue generally from four to six months as a
20 "maximum." *Id.* at 477, 476. Agreeing with concurring opinions in *United States v.*
21 *Jones*, 565 U.S. 400, 415, 430 (2012), that "[t]he use of longer term GPS monitoring in

1 investigations of most offenses impinges on expectations of privacy," *Lambus II*, 251
2 F.Supp.3d at 495 (internal quotation marks omitted) (emphasis in *Lambus II*), the
3 district court found that "the long-continued search in the instant case" unreasonably
4 infringed Lambus's expectation of privacy, *id.*

5 Because the government has not met its burden of showing
6 that the search of Lambus occasioned by the use of location data
7 by federal agents was reasonable, the search was unconstitutional
8 and violated Lambus's limited Fourth Amendment rights.

9 *Id.* at 499.

10 The court observed in *Lambus II*, as it had in *Lambus I*, see 221 F.Supp.3d
11 at 331, that

12 [n]ot every unlawful search requires exclusion of its fruits;
13 excluding evidence obtained through a search that violated the
14 Fourth Amendment should only be accomplished if exclusion will
15 "appreciab[ly] deter[]" future violations.

16 *Lambus II*, 251 F.Supp.3d at 489 (citing *Davis*, 564 U.S. at 237). However, upon
17 reconsideration in *Lambus II*, the court stated that in this case,

18 [b]alancing the deterrence value of excluding the location data
19 against the "heavy costs" of ignoring evidence of guilt (*see Davis*,
20 564 U.S. at 236-37, 131 S.Ct. 2419), the court finds exclusion to be
21 appropriate. Conducting an invasive search for years *for the sole*
22 *purpose of furthering a general criminal investigation* without any
23 form of judicial approval is a Fourth Amendment violation worth
24 deterring.

1 *Lambus II*, 251 F.Supp.3d at 499 (emphasis added).

2 Although in *Lambus I* the court had concluded that GPS data should not
3 be suppressed because, given this Court's decisions in *Reyes* and *Newton*, "[n]either
4 the NYSDOCCS officers nor the federal law enforcement officers behaved
5 inappropriately," *Lambus I*, 221 F.Supp.3d at 343, it concluded in *Lambus II* that *Reyes*
6 and *Newton* are applicable only to initial cooperation between state and federal
7 officers and should not be applied to continued cooperative efforts:

8 This court extrapolated too far in its previous opinion when
9 it held that . . . the location data evidence should not be
10 suppressed because of good-faith reliance on binding appellate
11 precedent by the federal officers.

12 *The hearings conducted [in 2017] . . . to reconsider this court's*
13 *earlier decision demonstrate that federal investigators knew they*
14 *should have obtained a warrant. Though there is appellate precedent*
15 *stating that the "stalking horse" theory is not viable, this conclusion*
16 *does not mandate that a search, once initiated validly pursuant to the*
17 *special needs doctrine, is immune from all scrutiny regardless of how it*
18 *evolves. Exempting the entire search from the warrant*
19 *requirement under the special needs exception because it may*
20 *have initially fallen under that exception, while ignoring clear*
21 *evidence that the vast bulk of the search had no special*
22 *supervisory objective, would be inappropriate.*

23 *Lambus II*, 251 F.Supp.3d at 500 (emphases added).

1 The court stated that Lambus's motion to suppress the GPS data would

2 be

3 granted in part. Information obtained as a direct--but not
4 indirect--result of use of the device is suppressed. Evidence
5 which may indirectly have been obtained from the device, that is
6 to say, evidence that was obtained with the aid of the device that
7 would have been obtained independently by visual surveillance
8 or otherwise, is not *now* suppressed.

9 *Id.* at 474 (emphasis added). The court predicted that

10 [t]he costs of exclusion are unlikely to be particularly heavy. The
11 government has amassed a tremendous amount of evidence
12 against this defendant not *directly* connected to the ankle device.
13 Exclusion of the location data is unlikely to "set the criminal loose
14 in the community without punishment." [*Davis*, 564 U.S.] at 237,
15 131 S.Ct. 2419.

16 *Lambus II*, 251 F.Supp.3d at 499 (emphasis added). However, while stating that only

17 "direct[ly] obtained" "location data generated by the tracking device attached to

18 Lambus's ankle is suppressed," *id.* at 474, 503, the court also said that "[a]ny fruit

19 derived indirectly from this poisonous tree is not suppressed, but the issue may be

20 raised anew with respect to particular items of evidence at the in limine hearing and

21 trial," *id.* at 503.

1 II. DISCUSSION

2 On appeal, the government challenges both of the district court's orders
3 of suppression. Reviewing the court's legal rulings *de novo* and its findings of fact for
4 clear error, *see, e.g., Rajaratnam*, 719 F.3d at 153; *United States v. Barner*, 666 F.3d 79, 82
5 (2d Cir. 2012), we find merit in the government's challenges.

6 A. *Suppression of January 9 Authorized Wiretapped Conversations*

7 The government contends that the district court's order excluding
8 evidence of conversations intercepted pursuant to the January 9, 2015 wiretap
9 authorization should be reversed, arguing that the court committed legal error in
10 failing to apply the standards set by *Franks v. Delaware*, 438 U.S. 154, and clearly erred
11 in finding that the HSI Agent's mistaken representation to the authorizing court was
12 perjurious or intentional. We agree.

13 1. *Legal Standards Governing Wiretap Suppression*

14 Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18
15 U.S.C. §§ 2510-2522 ("Title III"), sets out the minimum requirements for obtaining

1 judicial authorization to intercept wire, oral, or electronic communications. It
2 requires generally that a wiretap applicant, upon oath or affirmation, *see id.* § 2518(1),
3 provide "full and complete statement[s]" both as to probable cause for such
4 interceptions and as to the need to use such methods, *id.* § 2518(1)(b) and (c). In
5 particular, the application must indicate--as relevant here--the facts believed to show
6 probable cause that an individual connected with the requested communication
7 facilities is committing drug trafficking and firearms offenses and probable cause to
8 believe that particular communications concerning those offenses will be obtained
9 through the requested interception, *see id.* § 2518(1)(b); *id.* §§ 2516(1)(e) and (n). As
10 to the necessity for wiretapping, the application must state whether other
11 investigative procedures have been tried and failed, or reasonably appear likely to fail
12 if tried, or appear to be too dangerous. *See id.* § 2518(1)(c). In addition, the
13 application must provide a full statement as to the applicant's knowledge of "all
14 previous applications" for judicial authorization to intercept such communications
15 "involving any of the same persons . . . specified in the application, and the action
16 taken by the judge on each such application." *Id.* § 2518(1)(e).

17 Title III contains an exclusionary rule, specifying that a defendant may
18 make a motion

1 to suppress the contents of any [intercepted] wire or oral
2 communication . . . , or evidence derived therefrom, on the
3 grounds that

4 (i) the communication was unlawfully intercepted;

5 (ii) the order of authorization or approval under
6 which it was intercepted is insufficient on its face; or

7 (iii) the interception was not made in conformity with
8 the order of authorization or approval.

9 18 U.S.C. § 2518(10)(a). As there is no suggestion in the present case that the January
10 9 wiretap authorization was insufficient on its face or that the ensuing wiretaps were
11 not made in conformity with that authorization, the only possible basis for
12 suppression under § 2518(10) here would be that the conversations were intercepted
13 "unlawfully," within the meaning of subsection (10)(a)(i). However,

14 *"[not] every failure to comply fully with any requirement provided in*
15 *Title III would render the interception of wire or oral communications*
16 *'unlawful.'" [United States v. Chavez], 416 U.S.[562,] 574-575 . . .*
17 *[(1974)]. To the contrary, suppression is required only for a*
18 *"failure to satisfy any of those statutory requirements that directly*
19 *and substantially implement the congressional intention to limit*
20 *the use of intercept procedures to those situations clearly calling*
21 *for the employment of this extraordinary investigative device."*
22 *United States v. Giordano, . . . 416 U.S.[505,] 527 [(1974)]*

23 *United States v. Donovan*, 429 U.S. 413, 433-34 (1977) (emphasis ours). In *Donovan*, the
24 Court dealt with, *inter alia*, a Title III provision requiring the government to include

1 in its wiretap applications "the identity of the person, if known, committing the
2 offense and whose communications are to be intercepted," 18 U.S.C. § 2518(1)(b)(iv).
3 *See Donovan*, 429 U.S. at 416. The Court ruled that that provision was not satisfied by
4 the government's identification of only the proposed interception's "principal" targets,
5 omitting other known targets; rather, the *Donovan* Court concluded that Congress
6 intended that the "wiretap application must name an individual if the Government
7 has probable cause to believe that the individual is engaged in the criminal activity
8 under investigation and expects to intercept the individual's conversations over the
9 target telephone." *Id.* at 428. Nonetheless, while stating that that identification
10 provision is "undoubtedly important," *id.* at 434, the Court noted that "nothing in the
11 legislative history suggests that Congress intended this broad identification
12 requirement to play a central, or even functional, role in guarding against
13 unwarranted use of wiretapping or electronic surveillance," *id.* at 437 (internal
14 quotation marks omitted). The Court found that the intercept authorization "in all
15 other respects satisfie[d] the statutory requirements," *id.* at 434, and that "[i]n no
16 meaningful sense c[ould] it be said that the presence of that information as to
17 additional targets would have precluded judicial authorization of the intercept," *id.*
18 at 436. The Court concluded that the "failure to comply fully with" the § 2518(1)(b)(iv)

1 identification requirement did not render the intercepts "unlawful" within the
2 meaning of § 2518(10)(a)(i). *Donovan*, 429 U.S. at 434.

3 Although the district court in the present case viewed *Donovan* as
4 holding that suppression pursuant to § 2518(10)(a)(i) could be avoided "only" if the
5 defect in the wiretap application was "inadvertent[]," *Lambus I*, 221 F.Supp.3d at 332,
6 we disagree. In *Donovan*, the government in its relevant wiretap extension
7 application had elected to identify only its original--deemed principal--suspects and
8 had failed to identify as additional suspects respondents Donovan, Robbins, and
9 Buzzacco, whom the government admittedly had heard discussing the targeted illegal
10 activities in the originally authorized wiretap. *See* 429 U.S. at 419-20 & n.5. In
11 challenging the order granting the suppression motion of those three respondents, the
12 government expressly conceded that "Donovan and Robbins were 'known' within the
13 meaning of [§ 2518(1)(b)(iv)] at the time of" its extension application, and it did not
14 challenge the court of appeals' decision that Buzzacco also was known to the
15 government. *Id.* at 419-20 n.5. The Supreme Court ruled that suppression under
16 § 2518(10)(a)(i) was erroneous because the identifications were not central to the
17 determination of probable cause, although it was clear that the government's
18 omission of the names of Donovan, Robbins, and Buzzacco had not been inadvertent.

1 *See id.* at 435-36. Thus, when the Court noted that there was

2 no suggestion in this case that the Government agents
3 knowingly failed to identify respondents Donovan,
4 Robbins, and Buzzacco *for the purpose of keeping relevant*
5 *information from the District Court that might have prompted*
6 *the court to conclude that probable cause was lacking,*

7 *id.* at 436 n.23 (emphasis added), followed by the statement that "[i]f such a showing
8 had been made, we would have a different case," *id.*, that observation did not indicate
9 that the omission had been inadvertent or unknowing, but rather simply highlighted
10 the difference between knowledge and purpose.

11 In the present case, the HSI Agent erroneously stated to the authorizing
12 judge that a check of law enforcement agency databases indicated that there had been
13 no previous wiretap application or authorization for any of the target subjects. In fact
14 the HSI Agent's ELSUR inquiry had listed only some of the target subjects, and there
15 had in fact been prior wiretap authorizations for some of the persons not listed
16 ("Previous Authorizations"). Thus, although, as discussed in Part II.A.3. below, there
17 was no evidence of any intent to mislead the authorizing judge, the application
18 misrepresented the scope of the database searches, and information as to the Previous
19 Authorizations (unknown to the HSI Agent) was omitted.

1 However, there is no dispute that the other required contents of the
2 January 9 wiretap application were provided, were accurate, and were (as discussed
3 below) sufficient to establish the requisite probable cause and necessity. And given
4 that the purpose of the prior authorizations requirement seems even less central than
5 the identification requirement at issue in *Donovan*, we cannot conclude that the HSI
6 Agent's error and omission with respect to the Previous Authorizations rendered the
7 January 9 authorized interceptions "unlawful[]" within the meaning of § 2518(10)(a)(i).
8 The *Donovan* Court inferred that Congress may have included the § 2518(1)(b)(iv)
9 identification requirement to "reflect what Congress perceived to be the constitutional
10 command of particularization," *Donovan*, 429 U.S. at 437; see S. Rep. No. 90-1097,
11 at 101 (1968) (citing *Berger v. New York*, 388 U.S. 41, 58-60 (1967), and *Katz v. United*
12 *States*, 389 U.S. 347 (1967)), reprinted in 1968 U.S.C.C.A.N. 2112, 2189-90; and that in
13 any event, "Congress required law enforcement authorities to convince a district court
14 that *probable cause* existed to believe that a *specific person* was committing a *specific*
15 *offense using a specific telephone*," *Donovan*, 429 U.S. at 437 n.25 (emphases added).
16 These elements are indeed reflected in Title III's specifications as to what a judge must
17 find in order to find probable cause and necessity for an authorization to intercept:
18 Such authorization is appropriate "if the judge determines on the basis of the facts

1 submitted by the applicant [1] that . . . there is probable cause for belief that an
2 individual is committing, has committed, or is about to commit a [Title III
3 enumerated] offense," [2] that, except in circumstances not at issue here, "there is
4 probable cause for belief that the facilities . . . or place" from which the interception
5 is sought are "leased to, listed in the name of, or commonly used by such person," [3]
6 that "there is probable cause for belief that particular communications concerning that
7 offense will be obtained through such interception," and [4] that "normal investigative
8 procedures have been tried and have failed or reasonably appear to be unlikely to
9 succeed if tried or to be too dangerous." 18 U.S.C. §§ 2518(3)(a), (d), (b), and (c).

10 In contrast, we have found no legislative history as to Congress's purpose
11 in including the prior authorizations requirement in § 2518(1)(e), and nothing in
12 Title III requires the judge, in order to find probable cause or necessity, to make any
13 findings as to whether there had been interception authorizations for the target
14 subjects in the past.

15 Given *Donovan's* ruling that the government's failure to comply with the
16 § 2518(1)(b)(iv) requirement to identify all suspects whose communications were
17 sought to be intercepted did not make the ensuing interceptions "unlawful[]" within
18 the meaning of § 2518(10)(a)(i), we conclude *a fortiori* that the HSI Agent's failure to

1 provide the less important information that there had been some Previous
2 Authorizations did not make the ensuing interceptions here "unlawful[]." Thus, Title
3 III itself did not authorize suppression of conversations intercepted pursuant to the
4 January 9 authorization.

5 But the inapplicability of § 2518(10)(a) does not end the suppression
6 inquiry. In addressing a motion to suppress the proceeds of a wiretap on the ground
7 that the application contained misrepresentations or omissions, we, like every other
8 Circuit Court of Appeals, have concluded that the appropriate analytical framework
9 is that set forth in *Franks*, 438 U.S. 154. See, e.g., *Rajaratnam*, 719 F.3d at 143-44, 151-52;
10 *United States v. Miller*, 116 F.3d 641, 664 (2d Cir. 1997), *cert. denied*, 524 U.S. 905 (1998);
11 *United States v. Votrobek*, 847 F.3d 1335, 1342-44 (11th Cir. 2017); *United States v. Stiso*,
12 708 F. App'x 749, 753-54 (3d Cir. 2017); *United States v. Muldoon*, 931 F.2d 282, 286 (4th
13 Cir. 1991); *Rajaratnam*, 719 F.3d at 152 n.16 (citing cases from the other eight Circuits
14 "rel[ying] on *Franks* to analyze whether alleged misstatements and omissions in Title
15 III wiretap applications warrant suppression").

16 Under the *Franks* standard, as applied to a challenge to a wiretap
17 authorization's findings of probable cause or necessity,

18 "[t]o suppress evidence obtained pursuant to an affidavit
19 containing erroneous information, the defendant must show that:

1 (1) *the claimed inaccuracies or omissions are the result of the affiant's*
2 *deliberate falsehood or reckless disregard for the truth; and (2) the alleged*
3 *falsehoods or omissions were necessary to the [issuing] judge's probable*
4 *cause [or necessity] finding."* *United States v. Canfield*, 212 F.3d 713,
5 717-18 (2d Cir. 2000) (internal quotation marks omitted); *see also*
6 *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003) (noting
7 that "[i]n order to invoke the *Franks* doctrine, [a defendant] must
8 show that there were *intentional* and *material* misrepresentations
9 or omissions in [the] warrant affidavit." (emphases supplied)).

10 *Rajaratnam*, 719 F.3d at 146 (last two emphases in *Rajaratnam*; other emphases ours).

11 In the context of whether an allegedly false statement or omission in a wiretap
12 application was material to the probable cause determinations, materiality is a mixed
13 question of fact and law. *See, e.g., Rajaratnam*, 719 F.3d at 153. Whether the statement
14 was true or false, and whether the affidavit was complete or incomplete, are questions
15 of fact; the issue of whether misrepresentations or omissions were material is a
16 question of law. *See id.*

17 To determine whether misstatements are "material," a court
18 must "set[] aside the falsehoods" in the application, *United States*
19 *v. Coreas*, 419 F.3d 151, 155 (2d Cir. 2005), and determine
20 "[w]hether the untainted portions [of the application] suffice to
21 support a probable cause [or necessity] finding," *United States v.*
22 *Nanni*, 59 F.3d 1425, 1433 (2d Cir. 1995). If the untainted portions
23 of the application are sufficient to support the probable cause or
24 necessity findings, then the misstatements are not "material" and
25 suppression is not required.

1 *Rajaratnam*, 719 F.3d at 146. Where the defect in the affidavit is omissions, the
2 ultimate inquiry under the *Franks* standard

3 "is whether, after putting aside erroneous information and
4 [correcting] material omissions, there remains a residue of
5 independent and lawful information sufficient to support [a
6 finding of] probable cause [or necessity]." *Canfield*, 212 F.3d at 718
7 (internal quotation marks omitted); *see also United States v. Martin*,
8 615 F.2d 318, 328 (5th Cir. 1980) ("[W]e [are] required to determine
9 whether, if the omitted material had been included in the
10 affidavit, the affidavit would still establish probable cause [or
11 necessity]. . . . If it would not, we would be required to void the
12 warrant and suppress the evidence seized pursuant to it.").

13 *Rajaratnam*, 719 F.3d at 146.

14 2. *The Lack of Materiality of The HSI Agent's Misstatement and Omissions*

15 In the present case, despite noting that this Court had held that the *Franks*
16 analysis should be used in ruling on motions to suppress wiretap evidence based on
17 allegedly defective wiretap applications, *see Lambus I*, 221 F.Supp.3d at 331-32, and
18 despite having accurately described the *Franks* standard as allowing suppression only
19 where the errors were intentional or in reckless disregard for the truth "and" where
20 the falsehoods or omissions were material to the authorizing judge's findings of
21 probable cause or necessity, *id.* at 332 (internal quotation marks omitted), the district

1 court declined to use that analytical framework, *see id.* at 346. The court made no
2 determination as to materiality; it concluded that "[w]here the government knowingly
3 omits information in violation of Title III's statutory requirements, suppression is
4 appropriate," *id.* at 345. Even if we could uphold the factual findings as to knowledge
5 or intent (*but see* Part II.A.3. below), the court's conclusion was inconsistent with our
6 established legal standard.

7 There is no dispute as to the fact that the HSI Agent made errors: first
8 in failing to list in the ELSUR request for law enforcement agency database checks the
9 names of all of the persons who would later be listed as wiretap targets in the first
10 authorization application, leading to a failure to discover, and to disclose in the First
11 Wiretap Affidavit (or "Affidavit"), information as to several Previous Authorizations;
12 and second in stating in the Affidavit that a prior check had been made with respect
13 to all of the wiretap targets listed in the Affidavit. Thus, we turn to the legal aspect
14 of the materiality issue, *i.e.*, whether--putting aside the misrepresentation and adding
15 in the omitted information--there remains sufficient independent and lawful
16 information to support the authorizing judge's findings of probable cause and
17 necessity. Addressing that issue of law, we conclude that the HSI Agent's errors were
18 not material.

1 Disregarding the HSI Agent's misrepresentation that prior checks of the
2 law enforcement databases indicated that there were no Previous Authorizations, the
3 First Wiretap Affidavit amply set forth facts indicating probable cause to believe that
4 the target subjects were engaged in drug trafficking and firearms offenses, that
5 communications concerning those offense would be obtained through a wiretap, and
6 that they used or were associated with the 5283 telephone number as to which
7 interception authorization was requested. As set out in Part I.A.5, above, it described,
8 *inter alia*, an investigation spanning the prior 1½ years, which included consensual
9 telephone conversations on the 5283 telephone and controlled purchases of narcotics
10 by a CI, numerous surveillances by law enforcement agents, identification of drug
11 stash houses frequented by suspected members of the DTO, and a judicially
12 authorized search that led to the seizure of cocaine and drug paraphernalia from
13 premises at which several of the target subjects, including Lambus, were present. It
14 is plain that the untainted portions of the First Wiretap Affidavit were sufficient to
15 establish the requisite probable cause.

16 Nor can it be concluded that the omission of the fact that there had been
17 Previous Authorizations for some of the target subjects was material to the
18 authorizing judge's assessment of the need for the requested wiretaps. The Affidavit

1 described the several traditional investigative methods that had been tried, including
2 those referred to above in the description of probable cause and others including the
3 use of pole cameras, toll records, pen registers, and subpoenas; but none of the more
4 traditional methods had permitted the agents to identify all of the members of the
5 DTO or identify the organization's drug suppliers. Further, it was deemed unlikely
6 that the CI or undercover officers could safely ferret out such information, given the
7 DTO's compartmentalization and its institutional suspicions of and reluctance to deal
8 with persons other than trusted associates. These facts sufficed to show the need for
9 wiretaps.

10 If the First Wiretap Affidavit had contained the omitted information that
11 there were some Previous Authorizations (which was included in the second and
12 successive wiretap applications), that information would not have affected the
13 assessment of the need for wiretaps in 2015. As to two target subjects, prior
14 authorizations had been issued in 2004 and 2003, *i.e.*, 11-12 years prior to the
15 application at issue here; and another set of authorizations with respect to Fuller and
16 another target subject had been issued in 2011, some four years before the 2015
17 application--and a year before Lambus's most recent release from prison. No judge
18 would have concluded that those Previous Authorizations eliminated the need for

1 wiretaps in the investigation of Lambus that was begun after Lambus's release from
2 prison (and his ensuing Letter) in 2012 and joined by the federal agencies in 2013.
3 Further, given the nature of narcotics conspiracies as continuing enterprises, the fact
4 that Previous Authorizations had been issued for some of the January 2015 target
5 subjects--presumably upon showings including probable cause--would likely have
6 strengthened the January 2015 application's showing of probable cause.

7 In sum, the untainted portions of the First Wiretap Affidavit made ample
8 showings to support the authorizing judge's determinations of both probable cause
9 and necessity, and the inclusion of the omitted information as to Previous
10 Authorizations would not have diminished those showings. The HSI Agent's
11 misstatement and omissions were thus not material, and under that branch of the
12 *Franks* standard, suppression was error.

13 3. *The Record as to the Nature of the HSI Agent's Errors*

14 Under the other branch of the *Franks* standard, even if the
15 misrepresented or omitted information was material, a motion to suppress is to be
16 denied unless the misrepresentations or omissions were intentional or deliberate, or

1 were made in reckless disregard for the truth. *See, e.g., Franks*, 438 U.S. at 155-56.
2 Thus, "misstatements or omissions caused by 'negligence or innocent mistake[s]' do
3 not warrant suppression." *Rajaratnam*, 719 F.3d at 153 (quoting *Franks*, 438 U.S.
4 at 171).

5 Whether the affiant had an intent to deceive is a question of fact. *See, e.g.,*
6 *Rajaratnam*, 719 F.3d at 153 ("[w]hether an individual had a particular mental state 'is
7 a question of fact'" (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994))). Likewise,
8 "whether a person acted with 'reckless disregard for the truth' is 'a factual question
9 of intent.'" *Rajaratnam*, 719 F.3d at 153 (quoting *United States v. Trzaska*, 111 F.3d 1019,
10 1028 (2d Cir. 1997)). Thus, findings as to whether the affiant had such intention or
11 reckless disregard are reviewed for clear error. *See, e.g., Rajaratnam*, 719 F.3d at 153;
12 *United States v. Trzaska*, 111 F.3d at 1028.

13 However, "a district court's understanding of the 'reckless disregard'
14 *standard* is reviewed *de novo*." *Rajaratnam*, 719 F.3d at 153 (emphasis added).

15 A wiretap applicant does not *necessarily* act with "reckless
16 disregard for the truth" simply because he or she omits certain
17 evidence that a reviewing court, in its judgment, considers to be
18 "clearly critical." Rather, the reviewing court must be presented
19 with credible and probative *evidence* that the omission of
20 information in a wiretap application was "*designed to mislead*" or

1 was "*made in reckless disregard of whether [it] would mislead.*"
2 *Awadallah*, 349 F.3d at 68

3 *Rajaratnam*, 719 F.3d at 154 (first emphasis in *Rajaratnam*; other emphases ours).

4 While "every decision not to include certain information in the affidavit is 'intentional'
5 insofar as it is made knowingly," the court must bear in mind that "*Franks* protects
6 against omissions that are *designed to mislead*, or that are made in *reckless disregard of*
7 *whether they would mislead*, the [authorizing judge]." *Id.* (other internal quotation
8 marks omitted) (emphases in *Rajaratnam*).

9 Of course, the "reckless disregard" aspect of a *Franks* inquiry
10 can sometimes be *inferred* from the omission of critical information
11 in a wiretap application. . . . Recklessness *may* be inferred where
12 the omitted information was clearly critical to the probable cause
13 determination. . . . Subjective intent, after all, is often
14 demonstrated with objective evidence.

15 *Id.* (other internal quotation marks omitted) (emphases in *Rajaratnam*).

16 "But such an inference is not to be automatically drawn simply because
17 a reasonable person would have included the omitted information," *id.*; and indeed,
18 where the omitted facts would have provided an additional or stronger reason for the
19 judge or magistrate to authorize the requested warrant, a finding that those facts were
20 omitted with "reckless disregard for the truth" is counterintuitive, *see id.* at 155 ("we

1 cannot conclude that the government['s] omi[ssion of] certain information" was done
2 "with 'reckless disregard for the truth' when it is clear that fully disclosing the details
3 of that investigation would only have *strengthened* the wiretap application's 'necessity'
4 showing" (emphasis in *Rajaratnam*)); *see also id.* at 155 n.18 ("it is difficult to imagine
5 a situation where the government would intentionally or 'with reckless disregard'
6 omit information that would *strengthen* its 'probable cause' or 'necessity' showing"
7 (emphasis in *Rajaratnam*)).

8 In the present case, the HSI Agent, testifying at the 2016 hearing, stated
9 that the errors had not been made with any intent to mislead the authorizing judge;
10 the database check request itself was flawed because not all of the target subjects had
11 been listed in the request form; and in drafting the Affidavit's statement as to prior
12 authorizations, the HSI Agent testified, "I misunderstood what I was saying" (2016
13 Tr. 157).

14 In *Lambus I*, the district court found that the HSI Agent's misstatement
15 "was not a misunderstanding," that "he knew it was false," and that "[i]t was perjury."
16 221 F.Supp.3d at 346 (internal quotation marks omitted). However, the district court
17 did not point to any evidence to support the proposition that the HSI Agent's

1 misstatement to the authorizing judge as to previous wiretap applications was
2 intentional, or in reckless disregard of the truth, nor any analysis that could support
3 a finding of perjury.

4 Perjury is generally defined under federal law as a declarant's "willfully
5 . . . stat[ing] or subscrib[ing]" under oath "any material matter which he does not
6 believe to be true," 18 U.S.C. § 1621(1); *see also id.* § 1623(a) (forbidding "knowingly"
7 making to a court "any false material declaration . . . knowing the same to . . . [be]
8 false"). "The statutory text expressly requires that the false declaration be 'material.'" *Johnson v. United States*, 520 U.S. 461, 465 (1997) (discussing § 1623). As discussed in
9 Part II.A.2. above, the district court made no findings as to the materiality of the HSI
10 Agent's mistakes, and we have concluded they were not material.

12 In addition, the court cited no evidence to show that the HSI Agent's
13 errors were intentional, much less that they were made "willfully," a word that
14 implies both a "knowledge and a purpose to do wrong," *Spurr v. United States*, 174
15 U.S. 728, 734 (1899) (internal quotation marks omitted). There was no suggestion as
16 to any possible motive for the HSI Agent to commit the errors, nor any evidence that
17 the errors were designed to mislead the authorizing judge. Indeed, as mentioned in

1 the previous section, the inclusion of information as to the Previous Authorizations
2 would only have strengthened, not weakened, the application's proffer as to probable
3 cause. The district court's sole evidentiary findings in this regard were its
4 observations that the HSI Agent was "experienced" (2016 Tr. 166) and had "been an
5 affiant in previous wiretap applications," *Lambus I*, 221 F.Supp.3d at 346 (citing 2016
6 Tr. 159). But on this record, lacking any hint of a motive to conceal the Previous
7 Authorizations, these observations are more consistent with carelessness and
8 negligence than with knowing or deliberate falsehoods, reckless disregard, or perjury.

9 Finally, we note that in fact, in hearings both before and after *Lambus I*'s
10 language accusing the HSI Agent of knowing falsehood and perjury, the court's
11 statements clearly suggested that the errors had been merely careless rather than
12 intentional falsehoods. Thus, at the pre-*Lambus I* 2016 hearing in which the HSI Agent
13 stated that the errors had not been deliberate and, when the AUSA pointed them out,
14 had been corrected for the second and successive wiretap applications (*see* 2016
15 Tr. 160, 164), the court promptly ended the hearing, stating that it "[wa]s *obviously an*
16 *error*" on the HSI Agent's part (*id.* at 164-65 (emphasis added)), and that the First
17 Wiretap Affidavit had been "done *carelessly*" (*id.* at 166 (emphasis added)). And even

1 having made a perjury finding in *Lambus I*, when there was discussion at a
2 subsequent hearing as to what witnesses would testify the court referred to the HSI
3 Agent as "a witness [who] *made a mistake* or lied on one occasion," and "*I have not said*
4 *he lied.*" (Apr. 10, 2017 Tr. 5 (emphases added).)

5 We conclude that the district court neither conducted the necessary legal
6 analysis nor cited sufficient evidence to support the *Lambus I* findings that the HSI
7 Agent had engaged in knowingly false statements, reckless disregard of the truth, and
8 perjury.

9 We can appreciate the district court's frustration at careless government
10 representations that may impact the integrity of judicial decisions, especially proffers
11 in support of *ex parte* applications that an adversary has no opportunity to dispute.
12 However, while there are times when a district court may properly find it "absolutely
13 necessary[, in order] to preserve the integrity of the criminal justice system," to
14 suppress evidence under its inherent or supervisory authority, *United States v. Getto*,
15 729 F.3d 221, 229 (2d Cir. 2013), "the Supreme Court has explained that a 'court's
16 inherent power to refuse to receive material evidence is a power that must be
17 *sparingly exercised* [only in cases of] *manifestly improper conduct* by federal officials,"

1 *id.* at 230 (quoting *Lopez v. United States*, 373 U.S. 427, 440 (1963) (emphases ours)).
2 "We too have recognized that courts cannot fashion their own sub-constitutional
3 limitations on the conduct of law enforcement agents." *United States v. Ming He*, 94
4 F.3d 782, 792 (2d Cir. 1996) (internal quotation marks omitted). Accordingly, the
5 court should not exercise its inherent or supervisory power "as a substitute for Fourth
6 Amendment jurisprudence, which adequately safeguards against unlawful searches
7 and seizures." *Id.*; *cf. United States v. Payner*, 447 U.S. 727, 737 (1980) ("the supervisory
8 power does not extend so far" as to "confer on the judiciary discretionary power to
9 disregard the considered limitations of the law it is charged with enforcing").

10 *Franks* and our precedents detail the framework governing motions for
11 the suppression of evidence obtained pursuant to an allegedly defective Title III
12 wiretap affidavit. We conclude that the court in this case erred in disregarding these
13 standards, under which suppression was not merited, and suppressing such evidence
14 by invoking its inherent authority.

15 B. *The Suppression of Direct GPS Data*

16 The government contends that the district court's order excluding
17 location data generated by the GPS tracker attached to Lambus's ankle was erroneous,

1 arguing (1) that GPS monitoring of Lambus without judicial authorization was not
2 unreasonable under the Fourth Amendment in light of Lambus's status as a parolee,
3 his acknowledgements of parole officers' authority to search his person and to attach
4 a GPS tracker, and the monitoring's relationship to the parole officials' duties; and (2)
5 that, in any event, suppression should have been denied under the good-faith
6 doctrine of *Davis*, 564 U.S. 229. We find merit in these contentions.

7 1. *Parolees, Privacy Rights, and Reasonable Searches*

8 The Fourth Amendment protects people from "unreasonable searches
9 and seizures." U.S. Const. amend. IV. The government does not contest Lambus's
10 contention that the attachment of a GPS tracking device to his ankle constituted a
11 search, *see generally Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015); *cf. Jones*, 565
12 U.S. at 404 (installation of GPS on vehicle and subsequent use of that device to
13 monitor movements is a search); *Carpenter v. United States*, 138 S. Ct. 2206 (2018)
14 (accessing historical cell phone records is a search), and we will assume this point
15 *arguendo*. We note, however, that those cases concerned the installation or use of
16 tracking devices without the monitored individual's consent. *See, e.g., Grady*, 135 S.
17 Ct. at 1370; *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring); *id.* at 420 (Alito, J.,

1 concurring in the judgment). We need not opine whether an individual has been
2 "searched" for Fourth Amendment purposes where he is fully aware of a GPS monitor
3 and voluntarily consents to its placement on his person or property.

4 As indicated by its text, the Fourth Amendment's touchstone is
5 reasonableness. As a general matter, "[t]he reasonableness of a search depends on the
6 totality of the circumstances, including the nature and purpose of the search and the
7 extent to which the search intrudes upon reasonable privacy expectations." *Grady*,
8 135 S. Ct. at 1371; see, e.g., *Samson v. California*, 547 U.S. 843, 848 (2006); *United States*
9 *v. Knights*, 534 U.S. 112, 118 (2001).

10 Reasonableness in the totality of the circumstances "'is determined by
11 assessing, on the one hand, the degree to which it intrudes upon an individual's
12 privacy, and, on the other, the degree to which it is needed for the promotion of
13 legitimate government interests.'" *Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S.
14 at 118-19). The Fourth Amendment "protects the right[s] of private citizens to be free
15 from unreasonable government intrusions into areas where they have a legitimate
16 expectation of privacy." *Newton*, 369 F.3d at 664. But for the expectation of privacy
17 to be "legitimate," and therefore protected by the Fourth Amendment from
18 "unreasonable government intrusions," a parolee "must have exhibited an actual

1 (subjective) expectation of privacy *and the expectation must be one that society is prepared*
2 *to recognize as 'reasonable.'*" *Reyes*, 283 F.3d at 457 (internal quotation marks omitted)
3 (emphasis ours).

4 Probationers, parolees, and persons subject to supervised release have
5 "significantly diminished" expectations of privacy. *See Samson*, 547 U.S. at 848-50;
6 *Reyes*, 283 F.3d at 457-58. In *Knights*, the Supreme Court concluded that

7 the probation search condition of the defendant's state probation--
8 requiring him to submit to a search of his person, property,
9 residence, vehicle, or personal effects "at any time," with or
10 without a warrant or reasonable cause, "by any probation officer
11 or law enforcement officer"--was a "salient circumstance" in the
12 Fourth Amendment analysis of the search conducted in the
13 defendant's apartment.

14 *Reyes*, 283 F.3d at 461 (quoting *Knights*, 534 U.S. at 114, 118 (*Reyes's* emphasis
15 omitted)). We also observed in *Reyes* that "[t]he [*Knights*] Court noted, in particular,
16 that the defendant had signed the probation order, which stated his awareness of the
17 terms and conditions of his probation and his agreement to those terms." *Reyes*, 283
18 F.3d at 461; *see Knights*, 534 U.S. at 114; *see also United States v. Thomas*, 729 F.2d 120,
19 123 (2d Cir. 1984) (a parolee who has "been alerted to the conditions of parole, . . .
20 would not have the expectation of privacy enjoyed by ordinary citizens").

1 New York law authorizes a parole officer to search a parolee's home or
2 person, without a search warrant, if the search is "rationally and reasonably related
3 to the performance of his duty as a parole officer." *People v. Huntley*, 43 N.Y.2d 175,
4 179, 401 N.Y.S.2d 31, 33 (1977) ("*Huntley*"). Noting that the Fourth Amendment
5 prohibits only searches and seizures that are "unreasonable," *id.* at 180, 401 N.Y.S.2d
6 at 34, the *Huntley* Court

7 observe[d] that *in any evaluation of the reasonableness* of a particular
8 search or seizure *the fact of defendant's status as a parolee is always*
9 *relevant and may be critical*; what may be unreasonable with respect
10 to an individual who is not on parole may be reasonable with
11 respect to one who is (*United States ex rel. Santos v New York State*
12 *Bd. of Parole*, . . . 441 F.2d 1216, 1218 [2d Cir. 1971]). . . .

13 Where . . . the search and seizure is undertaken by the
14 parolee's own parole officer, in our view *whether the action was*
15 *unreasonable and thus prohibited by constitutional proscription must*
16 *turn on whether the conduct of the parole officer was rationally and*
17 *reasonably related to the performance of the parole officer's duty*. It
18 would not be enough *necessarily* that there was some rational
19 connection; *the particular conduct must also have been substantially*
20 *related to the performance of duty in the particular circumstances*.

21 *Huntley*, 43 N.Y.2d at 181, 401 N.Y.S.2d at 34 (emphases added).

22 New York State has adopted standard conditions governing persons who
23 have been convicted of a crime and have been released from prison. Its regulations
24 require that "[a] copy of the conditions of release, with the addition of any special

1 conditions, . . . be given to each inmate upon his release to supervision." 9 NYCRR

2 8003.2. One standard condition is that

3 [a] releasee will permit his parole officer to visit him at his
4 residence and/or place of employment and will permit the search
5 and inspection of his person, residence and property.

6 9 NYCRR 8003.2(d); *see, e.g., Newton*, 369 F.3d at 663.

7 A New York State parolee, by signing the "standard authorization . . . for
8 searches of his person, residence or property," does not give "an unrestricted consent
9 to any and all searches whatsoever or . . . a blanket waiver of all constitutional rights
10 to be secure from *unreasonable* searches and seizures." *Huntley*, 43 N.Y.2d at 182, 401
11 N.Y.S.2d at 35 (emphasis added). Nonetheless, "persons on supervised release who
12 sign such documents manifest an awareness that supervision can include intrusions
13 into their residence [or property or person] and, thus, have 'a severely diminished
14 expectation of privacy.'" *Newton*, 369 F.3d at 665 (quoting *Reyes*, 283 F.3d at 461). As
15 interpreted by the *Huntley* Court, such a signed authorization "merely parallels, by
16 way of confirmation, the right of the parole officer which [that Court] uph[e]ld--
17 namely, the right to conduct searches rationally and substantially related to the
18 performance of his duty." 43 N.Y.2d at 182-83, 401 N.Y.S.2d at 35.

1 An additional standard condition of release under New York law is that
2 [a] releasee will not behave in such manner as to violate the
3 provisions of any law to which he is subject which provides for
4 penalty of imprisonment, nor will his behavior threaten the safety
5 or well-being of himself or others.

6 9 NYCRR 8003.2(h). One aspect of "the parole officer's duty" thus includes "an
7 obligation to detect and to prevent parole violations for the protection of the public
8 from the commission of further crimes." *Huntley*, 43 N.Y.2d at 181, 401 N.Y.S.2d at 34;
9 *see, e.g., United States v. Barner*, 666 F.3d at 85; *Newton*, 369 F.3d at 666 (parole officer
10 has a duty "'to investigate whether a parolee is violating the conditions of his parole"
11 by "'commit[ting] . . . further crimes"' (quoting *Reyes*, 283 F.3d at 459)); *see also Griffin*,
12 483 U.S. at 875 ("the restrictions" associated with probation are "meant to assure" not
13 only "that the probation serves as a period of genuine rehabilitation," but also "that
14 the community is not harmed by the probationer's being at large").

15 This Court also observed in *Reyes* and *Newton* that, given the parole
16 officer's duty to verify whether the supervisee is committing other crimes, some
17 coordination between parole officers and law enforcement officers is often necessary,
18 and the fact that a new prosecution may ensue is not a sign that the parole officer was
19 not pursuing his normal duties.

1 Law enforcement officers are yoked with similar responsibilities
2 to root out crime in the public at large. Accordingly, the
3 objectives and duties of probation officers and law enforcement
4 personnel are unavoidably parallel and are frequently
5 intertwined. Indeed, it is difficult to imagine a situation where a
6 probation officer conducting a home visit in conjunction with law
7 enforcement officers, based on a tip that the probation officer has
8 no reason to believe conveys intentionally false information about
9 a supervisee's illegal activities, would not be pursuing legitimate
10 supervised release objectives. See *United States v. Martin*, 25 F.3d
11 293, 296 (6th Cir. 1994) ("[P]olice officers and probation officers
12 can work together and share information to achieve their
13 objectives."); [*United States v.]McFarland*, 116 F.3d [316,] 318 [(8th
14 Cir. 1997)] (stating that "[p]arole and police officers may work
15 together . . . provided the parole officer is pursuing parole-related
16 objectives"); [*United States v.]Watts*, 67 F.3d [790,] 794 [(9th
17 Cir.1995)] (approving of probation officer's enlistment of police
18 officers to assist his own legitimate objectives).

19 *Reyes*, 283 F.3d at 463-64 (footnote omitted); see also *Newton*, 369 F.3d at 667, 666 (when
20 parole officers have received "information suggest[ing] criminal conduct in addition
21 to that for which [a parolee] ha[s] already been convicted," it is "a reasonable exercise
22 of their parole dut[ies]" to investigate further, and, as may reasonably be thought
23 necessary to carry out those duties, to seek assistance from law enforcement officers).

24 As noted in the district court's opinion in *Lambus I*, 221 F.Supp.3d at 342,
25 *Reyes* and *Newton* rejected the stalking-horse theory that such cooperation between
26 parole officers and law enforcement officers is impermissible in the absence of court-

1 ordered warrants. As stated in *Reyes*,

2 collaboration between a probation officer and police does not in
3 itself render a probation search unlawful. The appropriate
4 inquiry is whether the probation officer used the probation search
5 to help police evade the Fourth Amendment's usual warrant and
6 probable cause requirements or whether the probation officer
7 enlisted the police to assist his own legitimate objectives.

8 *Reyes*, 283 F.3d at 463 (internal quotation marks omitted).

9 *Reyes*'s rejection of challenges to coordinated efforts between
10 probation/parole officers and other law enforcement officials
11 turned not on the particular level of intrusion in that case, but on
12 the legitimacy of the supervision objectives being pursued by the
13 probation officers.

14 *Newton*, 369 F.3d at 667.

15 2. *The Evidence With Regard to the Monitoring of Lambus*

16 Given the above framework, we have several difficulties with the district
17 court's decision in *Lambus II*. Principally, the court found that the continuation of GPS
18 monitoring of Lambus was impermissible without judicial authorization, based on its
19 view that that continuation was directed by federal officials, a view not supported by
20 the evidence presented at the hearings. Further, in urging renewed or reconfigured
21 acceptance of the stalking-horse concept, the court overemphasized the State's interest

1 in enforcing curfews, giving little or no deference to its interest in protecting the
2 public from further criminal activity by parolees--an interest recognized generally, as
3 discussed in Part II.B.1. above, and detailed by Scanlon, whose testimony the court
4 found "credible," *Lambus I*, 221 F.Supp.3d at 337 (*see also* Mar. 15, 2017 Tr. at 88 ("very
5 credible"); *id.* at 16 ("highly credible")). In addition, the court accorded to Lambus a
6 privacy expectation that was not reasonable or legitimate in light of the legal
7 conditions of supervision to which he was subject or the documents he signed
8 acknowledging those conditions; and it imposed a temporal limitation on the
9 continuation of GPS monitoring that was not warranted by DOCCS regulations and
10 was contradicted by the testimony of the DOCCS witnesses and by Lambus's signed
11 Special Conditions/GPS Monitoring Form.

12 a. *The Finding of Federal Control of GPS Monitoring*

13 The district court found that "[a]t th[e] moment" the federal agents were
14 informed of Lambus's GPS tracker, they took control of the investigation, and
15 "Lambus's parole officers ceased being his parole officers for Fourth Amendment
16 purposes and became conduits for the collection of evidence for use by the federal
17 criminal investigating team." *Lambus II*, 251 F.Supp.3d at 496; *see id.* (referring to

1 "[t]he controlling 'hand' of the federal government in this continuing search of
2 defendant Lambus through a tracking device"); (*see also* Mar. 15, 2017 Tr. 92 ("the Feds
3 effectively in this case . . . took control")). The court found that "the federal
4 authorities, working closely with state authorities, directed use of the [GPS] device
5 to provide evidence for the prospective federal criminal case, and not for any state
6 parole supervision or violation charge," *Lambus II*, 251 F.Supp.3d at 475, and that
7 "[w]hile the tracking device was not installed on Lambus at the behest of BSS or
8 federal law enforcement, *they* ensured the device remained on him," *id.* at 486
9 (emphasis added). We do not see that the record supports the finding that the State
10 parole officials became mere conduits for federal law enforcement or that the GPS
11 monitoring of Lambus was continued at the behest of the federal agents.

12 As a general matter, the record showed that the investigation of Lambus
13 was a joint State and federal operation, instigated by the State. The investigation of
14 Lambus for possible new criminal activity after his release from prison in 2012 had
15 been initiated by NYSDOCCS following its interception of the June 2012 Lambus
16 Letter, which raised suspicions that Lambus, barely three months after his release
17 from prison, and with more than three years left to serve on supervised release, was
18 again engaging in drug-related activities. It was BSS's Scanlon, assigned to

1 investigate as a result of the Lambus Letter, who requested assistance from federal
2 authorities. Scanlon contacted ICE in June 2013, and the investigation was joined by
3 ICE's branch HSI; BSS and ICE were joined by the DEA in August of 2014. Both
4 Scanlon and DEA Special Agent Russell testified that the investigation was conducted
5 jointly. As described in greater detail in Part I.A.3. above, while Scanlon testified that
6 HSI was designated the lead agency because it was supplying manpower and money,
7 he testified that BSS shared control of the investigation. Both Scanlon and Russell
8 described Scanlon as one of the "lead[ers]," who not only relayed the GPS data to the
9 federal agents but also, *inter alia*, monitored wiretapped conversations, planned
10 strategy, and helped to "draw[] up the [operational] plan." (E.g., Mar. 17, 2017 Tr. 142,
11 165, 170; Apr. 11, 2017 Tr. 225, 198.)

12 There was no evidence that any federal agent had a role in the decision
13 to extend Lambus's GPS monitoring. Russell was a latecomer to the joint
14 investigation, not arriving until several months after NYSDOCCS Bureau Chief
15 Parker had decided to continue the monitoring; and Russell was under the mistaken
16 impression that the monitoring of Lambus had been court-ordered. HSI's Popolow,
17 who had joined BSS's investigation a month after Lambus was placed on GPS
18 monitoring, was fully aware that the tracker had been put on by DOCCS pursuant to

1 its parole supervision authority. But there is no evidence that he urged its
2 continuation.

3 Parker had the authority to end or continue Lambus's GPS monitoring.
4 He was asked whom he consulted before making his decision in the spring of 2014
5 to continue it, and he testified that he consulted and received recommendations from
6 BSS, DOCCS's regional director, and DOCCS's deputy director. There is no evidence
7 that Parker had any contact with the federal agents.

8 Scanlon, who was working with the federal agents on the investigation,
9 testified that they "[n]ever"--"[n]ot once"--asked him "not to violate" Lambus (2016
10 Tr. 120); and that there was "[n]ever any recommendation by federal law enforcement
11 agents to keep Mr. Lambus on GPS monitoring" (Mar. 15, 2017 Tr. 22). No contrary
12 evidence has been called to our attention; and our own review of the record before
13 us has turned up no such evidence.

14 b. *Conditions of Parole and Parole Officers' Duties*

15 The district court also found that "[i]n the instant case, the search was
16 initiated by NYSDOCCS to monitor Lambus's adherence to his parole conditions;
17 specifically, his curfew," *Lambus I*, 221 F.Supp.3d at 343 (emphasis added)--that the

1 initial purpose of the GPS tracker was "to monitor whether [Lambus] was abiding by
2 the curfew condition of his parole," *id.* at 344 (citing 2016 Tr. 98), and "not because he
3 was [sus]pected of any criminal wrongdoing," *Lambus I*, 221 F.Supp.3d at 344
4 (emphasis added). The court stated that "[t]his purpose shifted as federal law
5 enforcement began using the location data to build a narcotics trafficking case against
6 a dozen individuals," *id.*, and that "State parole authorities . . . kept [the GPS tracker]
7 on for over two years under the pretext that it was being used to ensure compliance
8 with a curfew," *Lambus II*, 251 F.Supp.3d at 474; *see also Lambus I*, 221 F.Supp.3d at 344
9 ("The shifting purpose of the search--from monitoring whether a parolee was
10 violating the conditions of his parole, to gathering evidence about a narcotics
11 trafficking ring--lessens the legitimacy of the government's interest in the particular
12 braceleting."). We have three main difficulties with these findings.

13 First, the record indicates that one of the reasons for subjecting Lambus
14 to GPS monitoring initially was indeed his suspected drug dealing. The portion of
15 the 2016 transcript cited by the district court for the proposition that Lambus's
16 placement on GPS monitoring was solely curfew-related was testimony of Scanlon.
17 And despite the district court's statement that Scanlon "swore that . . . Lambus's
18 violations of his curfew" were "what motivated the supervisory bureau to impose the

1 GPS monitoring," *id.* at 337, the transcript reveals that Scanlon--who had not known
2 of the decision to impose GPS monitoring on Lambus until after it was imposed--was
3 responding to a question about the monitoring explanation that he had received from
4 P.O. Kovics; and Kovics mentioned only the problem with curfew (*see* 2016 Tr. 98).
5 As testified to by S.P.O. Browne and Bureau Chief Parker, however, the monitoring
6 decision had been made by Parker after conferring with Browne (*see* Apr. 11, 2017
7 Tr. 139; Apr. 10, 2017 Tr. 89); and Browne testified that while the immediate impetus
8 for placing Lambus on GPS monitoring on May 8, 2013 was "primar[il]y" his
9 noncompliance with curfew on May 5 (Apr. 11, 2017 Tr. 133), there were at least three
10 reasons for the monitoring: "a curfew violation *and* a report of illegal activities in
11 [Lambus's] residence" (*id.* at 113 (emphasis added)), and "[i]n addition," "allegations
12 of drug dealings" (*id.* at 135). "All of those factors played into placing him on
13 electronic monitoring." (*Id.*)

14 Second, the court's view that the continuation of GPS monitoring on
15 Lambus constituted a "purpose shift[]" away from "monitor[ing] Lambus's adherence
16 to his parole conditions," *Lambus I*, 221 F.Supp.3d at 344, 343, disregarded the scope
17 of both Lambus's parole conditions and the parole officers' obligations to investigate
18 his compliance. As discussed above, a parolee's release conditions forbid him to

1 commit further crimes, and one of a parole officer's responsibilities is to detect
2 whether the parolee is violating that condition. Indeed, as Scanlon testified, BSS's
3 primary function in NYSDOCCS is investigating criminal activity that had a nexus
4 to a particular parolee. Throughout the period of Lambus's release in 2012-2015,
5 Scanlon's principal focus was on determining the extent of Lambus's criminal activity.
6 Thus, the shift in the GPS monitoring's purpose was a change in emphasis from one
7 aspect of Lambus's parole to another, not a shift away from concerns regarding his
8 parole.

9 Third, although the federal agents were interested in rounding up the
10 entire membership of the DTO, the record indicates that Scanlon's own interest in any
11 persons other than New York State parolees was purely peripheral. Scanlon testified
12 that the identification of members of the DTO other than Lambus was relevant to him
13 because if any of those members were State parolees, stopping them from engaging
14 in new criminal activity was part of his job. And plainly, Scanlon sought prosecution
15 of Lambus as part of his obligation to see that the public was safe from new crimes
16 by parolees; he stated that he viewed federal prosecution as the best vehicle to
17 accomplish that goal, given that the several prior State prosecutions and
18 incarcerations of Lambus plainly had not provided sufficient deterrence. Thus, when

1 Parker was considering ending Lambus's GPS monitoring, Scanlon recommended its
2 continuation in order to assist his Lambus-focused investigation, for which he had
3 enlisted federal assistance. And Parker received the same recommendation from his
4 regional director and the DOCCS deputy director.

5 The district court viewed the parole officials as merely acting as conduits
6 for the accomplishment of federal objectives rather than pursuing State parole
7 supervision goals principally because Lambus could have been, but was not, charged
8 with parole violations earlier (or when he was eventually arrested on federal charges),
9 *see, e.g., Lambus I*, 221 F.Supp.3d at 344 ("[h]is ostensible supervisors, NYSDOCCS,
10 took no actions against him despite, presumably, possessing evidence of criminal
11 wrongdoing"); *Lambus II*, 251 F.Supp.3d at 485 (his "supervising parole officers were
12 deprived of" the necessary "autonomy" to loosen or tighten the parolee's restrictions
13 as they saw fit). We do not see that this rationale finds support either in principle or
14 in the record. Law enforcement investigators, for example, are "under no
15 constitutional duty to . . . arrest [a defendant] the moment they receive[]
16 confirmation" of his criminal wrongdoing. *United States v. De Biasi*, 712 F.2d 785, 795
17 (2d Cir.), *cert. denied*, 464 U.S. 962 (1983); *see, e.g., Hoffa v. United States*, 385 U.S. 293,
18 310 (1966) ("[t]here is no constitutional right to be arrested," and "[l]aw enforcement

1 officers are under no constitutional duty to call a halt to a criminal investigation the
2 moment they have the minimum evidence to establish probable cause"). Surely there
3 is an even lesser requirement that parole officers seek to return a parolee to prison as
4 soon as he violates a condition of his release; part of their duty, after all, is to try to
5 help the parolee readjust to public life and avoid reincarceration. And indeed,
6 DOCCS has devised graduated sanctions in part to avoid, where appropriate, that
7 harshest penalty.

8 In addition, Scanlon testified that many of Lambus's observable early
9 miscues were minor, that charging him with them would not have gotten him
10 reincarcerated, and that leaving him at large would likely not result in the cessation
11 of the drug trafficking activity of which he was suspected--although it would likely
12 cause him to become more circumspect, making it more difficult to prove his criminal
13 activity. The decisions not to violate Lambus for minor infractions, not to alert him
14 to BSS's investigation, and not to remove his GPS tracker, which was providing
15 valuable information for the investigation of his drug-trafficking parole violation,
16 were made solely by NYSDOCCS (*see, e.g.,* 2016 Tr. 120 and Mar. 15, 2017 Tr. 22
17 (federal agents "[n]ever" asked that Lambus not be violated or not be removed from
18 GPS monitoring)). Those DOCCS decisions--and whether its supervisory bureaus

1 should have "autonomy" to make decisions overriding the views of BSS and the
2 DOCCS deputy director--were surely matters for the State parole officials' exercise
3 of their discretion rather than for second-guessing by the court.

4 Given all the circumstances, we cannot endorse the district court's view
5 that the continuation of the GPS monitoring on Lambus was not rationally and
6 reasonably related to, and instead marked a shift away from, parole officers' duties.

7 As this Court recognized in *Reyes* and *Newton*--see Part II.B.1. above--"the
8 duties and objectives of probation/parole officers and other law enforcement officials,
9 although distinct, may frequently be 'intertwined' and responsibly require
10 coordinated efforts." *Newton*, 369 F.3d at 667 (quoting *Reyes*, 283 F.3d at 463-64).
11 "Accordingly, the law permits cooperation between probation officers and other law
12 enforcement officials so that they may work together and share information to
13 achieve their objectives," *Reyes*, 283 F.3d at 471, and we have squarely rejected the
14 "argument that police assistance during an otherwise reasonable warrantless search
15 by parole officers thereby invalidates the search," *Newton*, 369 F.3d at 662. We adhere
16 to this view with regard to BSS's collaboration with federal law enforcement
17 authorities in this case.

1 The above conclusions, that subjecting Lambus to GPS monitoring for the
2 entire course of Scanlon's investigation to determine whether he was violating his
3 release conditions by engaging in drug trafficking activity did not violate Lambus's
4 rights under the Fourth Amendment, means that it is unnecessary to reach the
5 question of whether suppression should have been denied under the good faith
6 doctrine, *see Davis*, 564 U.S. at 232 ("searches conducted in objectively reasonable
7 reliance on binding appellate precedent are not subject to the exclusionary rule").
8 However, we are constrained to note that were we to conclude that the coordination
9 between parole officers and law enforcement officers in this case was impermissible--
10 adopting the view of the law as the district court stated it "should be" (Mar. 15, 2017
11 Tr. 91)--*Davis* would surely be applicable, and reversal of the district court's order
12 excluding GPS data would clearly be required.

13 *c. The Findings as to Lambus's Expectation of Privacy*

14 The district court observed in *Lambus I* that Lambus, in anticipation of
15 his release from prison in 2012, had signed a PRS Certificate (or "Certificate") in which
16 he acknowledged conditions of his release and, as set out in Part I.A.1. above, agreed,
17 *inter alia*, "I will permit . . . the search and inspection of my person" (PRS Certificate

1 ¶ 4). See *Lambus I*, 221 F.Supp.3d at 325, 339. The court found, however, that the
2 subjection of Lambus to GPS monitoring "for over two years . . . was not specifically
3 covered by Lambus's Certificate." *Id.* at 343. While the court found in *Lambus II* that
4 in May 2013 Lambus had signed the Special Conditions/GPS Monitoring Form, it
5 found that that form did not constitute consent to GPS monitoring on the ground that
6 it was coerced. *Lambus II*, 251 F.Supp.3d at 498. The court credited Lambus's
7 assertion that he had been "coerced into giving his consent because Bureau Chief . . .
8 Parker . . . told Lambus that 'he would violate [Lambus] and send [him] back upstate
9 to prison unless'" Lambus agreed to GPS monitoring. *Lambus II*, 251 F.Supp.3d at 476
10 (quoting *Lambus Aff.* ¶ 14 (other internal quotation marks omitted)).

11 We have little doubt that Parker told Lambus "in sum and substance" that
12 if he did not agree to wear the GPS tracker he would be charged with parole
13 violations that could lead to his reimprisonment (*Lambus Aff.* ¶ 14), and that Lambus
14 "only signed the consent form to put the GPS ankle monitor on [him] because [he]
15 feared being sent back to prison" (*id.* ¶ 25). Parker testified that he did not recall
16 saying "specifically" that he would "ship [Lambus] Upstate," but he testified,

17 I am sure I discussed with him the expectations of getting the
18 electronic monitor placed on him and going over with him the
19 consequences of not adhering to any special conditions

1 subsequent to that and the consequences could lead to a violation
2 and his incarceration. I'm sure that was discussed with him.

3 (Apr. 10, 2017 Tr. 94.) But the parole officers had sufficient grounds to charge
4 Lambus with parole violations; he had, *inter alia*, failed to comply with curfews and
5 had been seen in the company of known felons. And the district court itself opined
6 that "NYSDOCCS . . . presumably[] possess[ed] evidence of [Lambus's] criminal
7 wrongdoing." *Lambus I*, 221 F.Supp.3d at 344. Thus, the parole officers had multiple
8 justifiable options, including charging Lambus with parole violation in order to seek
9 his return to prison or using the less severe sanction of GPS monitoring. They offered
10 Lambus the choice between those two. The "fact that a [parolee] has to choose
11 between two lawful, albeit distasteful, options does not render that choice coerced."
12 *United States v. Polly*, 630 F.3d 991, 999 (10th Cir. 2011).

13 The issue here, however, is not so much whether Lambus gave consent
14 as it is whether he had a reasonable and legitimate expectation of privacy. Given a
15 parolee's diminished expectation of privacy, *Huntley* noted that where his parole
16 officer's search is rationally and reasonably related to the performance of his duty as
17 a parole officer, the parolee's consent is not necessary; it is concomitant with the
18 officer's performance of his duty. *See* 43 N.Y.2d at 182-83, 401 N.Y.S.2d at 35; *Newton*,

1 369 F.3d at 666 ("neither *Huntley* nor [Second Circuit law] holds that consent, whether
2 obtained pursuant to parole regulation § 8003.2 or otherwise, is required in addition
3 to a reasonable relationship to the parole officer's duty to justify a warrantless parole
4 search"). Lambus's signing of the PRS Certificate, acknowledging that parole officers
5 had the right (unless unreasonable, *see id.* at 181, 401 N.Y.S.2d at 34) to "search" his
6 "person," and his signing of the Special Conditions/GPS Monitoring Form in which
7 he "agree[d] to wear the transmitter on my person and to keep the monitor plugged
8 into and attached to my telephone, and to do both for twenty-four hours a day, seven
9 days a week, during the period of my participation in the program" is inconsistent
10 with either a legitimate or a reasonable expectation of privacy protecting him from
11 constant search via GPS. (*See* PRS Certificate ¶ 4; GPS/Electronic Monitoring Form
12 at 4, ¶ 3.) "[P]ersons on supervised release who sign such documents manifest an
13 awareness that supervision can include intrusions into their [persons] and, thus, have
14 'a severely diminished expectation of privacy.'" *Newton*, 369 F.3d at 665 (quoting
15 *Reyes*, 283 F.3d at 461).

16 Nor can we uphold the district court's finding that "[t]o the extent that
17 Lambus's consent [to GPS monitoring] was voluntary, it was limited in scope to a
18 search lasting only a few months," *Lambus II*, 251 F.Supp.3d at 477, which was based

1 principally on the court's finding that there was a "verbal understanding between
2 Lambus and his parole officers that the tracking device would only remain on his
3 person for a few months," *id.* Other than an assertion in Lambus's affidavit, the
4 evidence does not suggest the existence of such an agreement.

5 The district court inferred the existence of agreement between Lambus
6 and the parole officers for a shorter GPS monitoring period in part based on the fact
7 that the DOCCS May 8, 2013 service order to the GPS monitoring provider gave a
8 scheduled end date of November 8, 2013. However, we have seen no evidence that
9 Lambus was shown that form, nor any evidence that anyone at DOCCS told him the
10 monitoring would end on that date. S.P.O. Browne testified that GPS monitoring
11 would seldom end on the date originally scheduled. (*See* Apr. 11, 2017 Tr. 167.) And
12 Browne testified that his understanding was that Lambus would be on GPS
13 monitoring for a "minimum" of six months. (Apr. 11, 2017 Tr. 112, 153-54, 161.)

14 Bureau Chief Parker testified that he and Browne did not discuss an
15 expected duration for the GPS monitoring, despite Lambus's numerous requests for
16 the tracker's removal. (*See* Apr. 10, 2017 Tr. 96.) The district court apparently
17 credited Lambus's affidavit's assertion "that Chief Parker told [Lambus] he would
18 only have the GPS on him for three to six months," *Lambus II*, 251 F.Supp.3d at 476

1 (citing *Lambus Aff.* ¶ 16), finding that there was such a "verbal" agreement, *Lambus II*,
2 251 F.Supp.3d at 477. But there was no testimony from Parker that he agreed with
3 *Lambus* to end the GPS monitoring in six months. Asked at the hearing whether he
4 had made that agreement with *Lambus*, Parker testified that he typically tells parolees
5 that the need for GPS monitoring will be "evaluat[ed]" in three-to-six months. (Apr.
6 10, 2017 Tr. 94.) Parker testified that he "never discussed when it was going to come
7 off." (*Id.* at 96.)

8 Further, the DOCCS policy on GPS monitoring--which the court read as
9 stating that the duration of such monitoring would generally be from four to six
10 months as a "maximum," *Lambus II*, 251 F.Supp.3d at 477--in fact does not state a
11 maximum or use the word "maximum." That policy states that "[t]he duration of
12 electronic monitoring participation will *generally* range from a period of four to six
13 months," that the "duration" of GPS monitoring "will be determined by the Area
14 Supervisor," and that "[o]nce electronic monitoring enrollment occurs, the releasee
15 will be placed on Intensive Supervision for a *minimum* of six months from date of
16 enrollment." (Policy and Procedures Manual, Electronic Monitoring at 2 (emphases
17 added).)

1 Scanlon was not privy to the initial decision to place Lambus on GPS
2 monitoring; but he testified that while in most cases six months would be a sufficient
3 monitoring period, he viewed Lambus as a high risk parolee because of his "[g]ang
4 involvement, his past history, and his apparent level of narcotics trafficking" (Mar. 15,
5 2017 Tr. 15), and that "individuals that [BSS] deems as high risk in the community
6 would stay on [monitoring] indefinitely, until the maximum" expiration date of the
7 legal period of supervision (*id.*). And indeed, on May 8, 2013, Lambus--more than
8 two years before his period of release supervision was "scheduled to end on August
9 2, 2015" (Lambus Aff. ¶ 28)--signed a Special Conditions/GPS Monitoring Form
10 ("Lambus GPS Acknowledgement") stating that the monitoring would "remain in
11 effect *until the termination of my legal period of supervision*" (Lambus GPS
12 Acknowledgement at 2 (emphasis added)). Accordingly, Scanlon's understanding
13 was that the GPS monitoring of Lambus would continue "until *his maximum expiration*
14 *date of August 2nd, 2015*" (Mar. 15, 2017 Tr. 29 (emphasis added)).

15 Finally, the existence of any supposed oral agreement that the
16 monitoring of Lambus would instead last only a few months was foreclosed by the
17 written provision that the GPS monitoring conditions would remain in effect "[u]nless
18 otherwise amended[] in writing by the Division of Parole" (Lambus GPS

1 Acknowledgement at 2). As the written acknowledgement stated that GPS
2 monitoring was to last from May 8, 2013, to August 2, 2015--*i.e.*, more than two years--
3 no oral agreement could validly shorten the period to just months.

4 In sum, Lambus was a parolee who, shortly after his release from prison,
5 had sent a letter that was suggestive of ongoing participation in drug trafficking
6 activity. Investigation ensued by State parole investigator Scanlon, whose duties
7 included assessments of threat by parolees to the community, in part by determining
8 whether parolees were engaging in further criminal activity, including drug
9 trafficking. The suspicions sparked by the Lambus Letter were enhanced by
10 surveillance, as Lambus was observed with persons known to engage in drug
11 trafficking, was seen wearing gang colors, and was found to be in possession of large
12 sums of money not explainable by his claimed employment. Lambus also violated
13 conditions of his parole by missing certain curfews and being observed in the
14 presence of former felons. Parole officials gave Lambus the choice of being charged
15 with his parole violations, which could result in his return to prison, or being
16 subjected to GPS monitoring until the end of his release supervision. Lambus chose
17 the latter.

1 The State's parole investigative bureau having limited resources, Scanlon
2 sought and received assistance from federal agencies to conduct a joint investigation
3 of Lambus. The joint investigation, of which Scanlon was one of the leaders, resulted
4 in, *inter alia*, a judicially authorized search--prompted by information provided by a
5 federal source--which resulted in seizures of crack cocaine and drug paraphernalia
6 from a location at which Lambus was present. Data generated by the GPS tracker on
7 Lambus, which Scanlon shared with the federal agents, also facilitated identification
8 of other locations for surveillance of suspected drug trafficking activity.

9 In finding Lambus's GPS monitoring unreasonable on the ground that
10 it was prolonged, *see Lambus II*, 251 F.Supp.3d at 495 (citing *Jones*, 565 U.S. at 415, 430),
11 finding him to have been given an unfair choice between wearing the GPS tracker or
12 being formally charged with parole violations, *see Lambus II*, 251 F.Supp.3d at 498
13 (citing *United States v. Isiofia*, 370 F.3d 226, 232-33 (2d Cir. 2004)), and likening his
14 monitoring to a random search "to 'generate evidence for law enforcement purposes,'" *see Lambus II*, 251 F.Supp.3d at 495 (quoting *Ferguson v. City of Charleston*, 532 U.S. 67,
15 83 (2001)), the district court relied chiefly on these cases that did not involve parolees.
16 Yet, as New York has recognized, "in any evaluation of the reasonableness of a
17 particular search or seizure the fact of defendant's status as a parolee is always
18 relevant and may be critical." *Huntley*, 43 N.Y.2d at 181, 401 N.Y.S.2d at 34.

1 Considering the totality of the circumstances, beginning with Lambus's
2 status as a parolee who from the outset was informed of and acknowledged
3 conditions that limited his reasonable expectation of privacy, and who from nearly
4 the start of his more-than-three-year period of release supervision raised reasonable
5 suspicions that he was again involved in drug- trafficking activity, in violation of the
6 terms of his release conditions, we conclude that the GPS monitoring of Lambus
7 throughout the investigation jointly led by BSS had a reasonable and rational
8 relationship to Scanlon's performance of his responsibilities as a State parole officer;
9 and that Lambus, as a parolee who chose to be placed on GPS monitoring rather than
10 be charged with parole violations and possibly returned to prison, and who
11 acknowledged that the monitoring would occur 24 hours a day, seven days a week,
12 until the end of his period of supervision, had no reasonable or legitimate expectation
13 of privacy that was violated by such monitoring. We conclude that the GPS
14 generated data should not have been suppressed.

CONCLUSION

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We have considered all of defendants' arguments in support of the decisions challenged on this appeal and have found them to be without merit. For the reasons stated above, the orders of the district court suppressing wiretap evidence and GPS-generated evidence are reversed.