IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEN SMITH,

Defendant.

REPORT AND RECOMMENDATION

11-cr-104-wmc

REPORT

On September 7, 2011, the federal grand jury charged defendant Allen Smith with delivering crack cocaine three times in July 2011. On September 15, 2011, state agents located Smith by "pinging" his cell phone pursuant to a state court warrant. Smith, by his second appointed attorney (he's now on his third) has moved to suppress all evidence derived from his arrest, including his post-arrest statements. *See* dkt. 26. On January 25, 2012, the grand jury returned a five-count superseding indictment against Smith (dkt. 47), which prompted him to file motions to dismiss Counts 1 and 3 and for a bill of particulars. *See* dkts. 63 and 64. *See* Briefs in Opposition, dkts. 42 and 66. For the reasons stated below, I recommending that this court deny all three of Smith's motions.

Dkt. 26: Motion To Suppress Evidence

The parties agree that the written reports in the court's file provide the facts relevant to resolving Smith's suppression motion.[1] These documents speak for themselves, but I synopsize them here in order to provide a smoother narrative:

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[1] *See* September 14, 2011 warrant affidavit and application (dkt. 31-1), September 14, 2011 search warrant (dkt. 31-2), September 15, 2011 Investigative Report (dkt. 31-3), and September 15, 2011 "Initial Report" (dkt. 31-4), Sprint Nextel "Ping" summary (dkt. 42-1), Smith's September 15, 2011 *Miranda* rights waiver form, (dkt. 42-2) and Reportin Officer Narrative (dkt. 42-3).

Facts

On September 7, 2011, a federal grand jury in this district indicted defendant Allen Smith on three counts of distributing cocaine base (crack cocaine). This court issued an arrest warrant for Smith that same day. Attempts to locate Smith were unsuccessful, so on September 14, 2011, Investigator Scott Bjerkos of the Vernon County Sheriff's Department filed in Vernon County Circuit Court a "Motion for the Authorization To Monitor, Maintain and Retrieve Cell Tower Locations from the Cell Phone of Allen Smith." Investigator Bjerkos stated that the specified target telephone was under the control of suspect Allen Smith within the State of Wisconsin, "such that the cell phone operation would document Allen Smith's whereabouts and assist in his apprehension as there is currently a federal warrant issued for his arrest."

In his warrant application, Investigator Bjerkos reported that there was an outstanding federal warrant to arrest Smith. Investigator Bjerkos further reported that a confidential informant had made a controlled purchase of 14 grams of crack cocaine from Smith on July 8, 2011 and a controlled purchase of 7 grams of crack cocaine from Smith on July 12, 2012. Law enforcement officers had surreptitiously recorded both controlled buys. The target telephone had been used in both of these controlled buys, and investigation had revealed that the target telephone belonged to Smith. Investigator Bjerkos stated that information obtained through the GPS tracking/cell tower locator would assist in Smith's apprehension on the federal warrant. Therefore, Investigator Bjerkos requested a court order that allowed investigators to monitor and retrieve GPS tracking/cell phone tower locator information from the carrier (Sprint/Nextel) providing service to the target telephone. The application also included irrelevant boilerplate about placing and removing a GPS tracking device for the purpose of determining where controlled substances were stored and redistributed.

That same day, the state court granted the request and signed a document titled "Search Warrant for: Authorization To Monitor, Maintain and Retrieve Cell Tower Locations from the Cell Phone of Allen Smith." The order authorized law enforcement officers to search "the cell phone tower location of the said cell phone when it is in use which will generally give the location of the cell phone and its use."–"for information, including . . . the cell phone tower location of the said cell phone when it is in use which will generally give the location of the cell phone and its user." The court's order stated as grounds for its order that

> there is a federal arrest warrant in place and said information will assist in the apprehension of Allen Smith and there is probable cause to believe that Allen Smith has committed the crime of Conspiracy to Deliver Controlled Substances pursuant to Chapter 961 of the Wisconsin Statutes.

The next day, September 15, 2011, in response to this court order, Sprint/Nextel's Subpoena Compliance Office caused its servers "ping" the target telephone four times between noon and 2:14 p.m. Each ping caused the servers to locate and identify the cell phone tower geographically closest to the target telephone at that time, and to estimate the target telephone's distance and direction from that tower. Direction and distance information from three of the pings (one ping returned no data) estimated the phone's location to be at virtually the same latitude and longitude. A Google Map inquiry of these coordinates showed that the closest address was 1102 10th Avenue North in Onalaska, Wisconsin, an apartment complex. The cell tower pings were not precise enough to determine whether the target telephone was inside an apartment at the complex or which apartment it might be in.

Law enforcement officers visited the scene to investigate further, ran some license plates and determined that Katie Klein, a known associate of Smith's, was living in Apartment #9 at 1104 10th Avenue North. The investigators went to this apartment and knocked on the door.

Smith answered and was immediately arrested. Investigators recovered physical evidence from Smith and took him to the La Crosse County Jail. There, Smith was advised of his *Miranda* rights; he waived his rights and made self-incriminatory statements. Smith was transferred to the Vernon County Jail, where he was questioned again the next day (September 16, 2011).

Analysis

In his motion, Smith seeks to quash the cell tower search that located his telephone and to suppress all evidence obtained and derived from his arrest. In support of his motion, Smith claims that: (1) the state court search warrant "improperly supports a wide-ranging, exploratory 'fishing expedition' type warrant"; (2) The warrant was anticipatory, but it was not supported by conditions necessary in an anticipatory search warrant; (3) Smith had a cognizable privacy interest in his own physical location in public and private places, even if he was carrying a cell phone. Motion To Suppress, dkt. 26, at 1-2. Smith also argues that the "good faith" exception to the warrant requirement is inapplicable because the warrant was so plainly deficient. The government disputes all four of these points.

Smith's arguments for suppression swing widely and wildly. Perhaps this is due in part to the state agents' Procrustean approach to their situation: they knew what information they wished to obtain and the mechanism by which they intended to obtain it, but they had no close-fitting state statute or procedural mechanism to implement their plan, so they cut and stretched their search warrant boilerplate to make it fit. Although the federal mechanisms for locating a cell phone aren't much less cumbersome, they provide useful guidance in addressing Smith's various Fourth Amendment challenges.

Cell tower locational searches of the sort implemented here are not per se unreasonable, and they might be permissible on a showing lower than probable cause. Here, it is undisputed that Smith had been indicted on felony drug charges, there was a warrant for his arrest, and his whereabouts were unknown; the state court then found probable cause to believe that pinging Smith's cell phone would help the officers find him and arrest him. The judge's probable cause determination on this point is unimpeachable, so the "ping search" was constitutionally reasonable.

Before looking at the nuts and bolts of the search, I have to ask: exactly what evidence is Smith seeking to suppress? It's unclear, but it seems that Smith might be contending that not only should the court suppress the targeted cell phone, it also should suppress his arrest and should definitely suppress his post arrest statements. *See, e.g.,* Brief in Support, dkt. 38 at 8; *but compare* brief in reply, dkt. 51 at 4 (court should suppress the pings and the fruit of the pings, but the trial still could proceed). At the risk of recommending a ruling on a suppression request Smith hasn't made, I note that it is hornbook law under the *Ker-Frisbie* doctrine[2] that Smith cannot seek suppression of his physical person. *See Matta-Ballesteros v. Henman*, 896 F.2d 255, 262 (7th 1990), *quoting United States v. Crews*, 455 U.S. 463, 474 (1980) and *Lopez-Mendoza*, 468 U.S. 1032, 1039-40(1984). The application of this legal doctrine, coupled with the officers providing Smith with *Miranda* warnings before questioning him, would seem to attenuate

[2] *See Frisbie v. Collins*, 342 U.S. 519 (1952) and *Ker v. Illinois*, 119 U.S. 436 (1886).

any link between Smith's post-arrest statements and any alleged Fourth Amendment violation. *See United State v. Conrad*, 673 F.3d 728, 733-34 (7th Cir. 2012).[3]

That could be the end of the analysis, but the parties' competing arguments on the reasonableness of this search merit discussion. First, the applicability of the law on GPS monitoring devices to this situation is debatable because it is arguable that there was no government use of a "monitoring device." As one district court has held:

> A cell phone is not a tracking device as that term is commonly understood. Tracking devices are devices that are "installed" at the request of the Government. 18 U.S.C. § 3117(a). Cell phones are not "installed." They are carried (usually in a person's pocket or purse) and used voluntarily. Any cell phone user who has ever had a call dropped due to a lack of service knows that their cell phone communicates with the nearest tower. Some towers are miles apart. When the nearest tower is outside of the user's network, roaming and other charges may apply to the call. Therefore, users know that third party service providers are aware of their general location vis-a-vis the nearest tower, at the beginning of, during and at the end of each call. If the owner of a cell phone does not wish to convey that information to the third party service providers, he can simply not make a call or he can turn his cell phone off. The existence of a true "tracking device" is unknown to, and cannot be disabled or turned off by, the person being tracked.
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> *In the Matter of Application of United States for an Order*, 411 F.Supp.2d 678, 681 (W.D. La. 2006) *Id.* at 681[4]

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[3] Two other factors in the attenuation analysis are the time elapsed between the alleged illegal conduct and the acquisition of the evidence and the purpose and flagrancy of the official misconduct. *Id.* at 733. Smith gave his first statement after being transported and booked into jail, he gave his second the next day at a different jail. For the purpose of the attenuation argument, if we assume *arguendo* that there was an unreasonable search, the investigators did not act purposefully or flagrantly. They pinged Smith's phone under the imprimatur of a court-approved search warrant and with the intent simply to locate and arrest an indicted defendant.

[4] *Cf. United States v. Jones*, ___ U.S. ____, 132 S.Ct. 945, 953 (Jan. 23 2012) ("Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." [*Katz v. United States*, 389 U.S. 347 (1967),] emphasis in original).

The court then noted in dicta that in a situation where the government employs cell tower location information to pinpoint the cell user's location, then a Rule 41 warrant would suffice. *Id.* at 682.

That's the majority view; the *minority* view is that neither probable cause nor a search warrant is needed to locate a suspect via cell tower information. *See, e.g., In re: Application of the United State for an Order for Prospective Cell Site Location Information on a Certain Cellular Telephone*, 460 F.Supp.2d 448, 454-462 (S.D.N.Y. 2006) (court surveys the case law as part of its analysis of the statues applicable to the government's request). The court held that, pursuant to the statutory schemes of 18 U.S.C. §§ 2701 *et seq.* & 3121 *et seq.*, courts may permit law enforcement agents to track the precise movements of particular cell phones on a real time basis without a prior showing of probable cause. All the government has to show is "specific and articulable grounds to believe that the . . . information sought [was] relevant and material to an ongoing criminal investigation." *Id.* at 463, quoting 18 U.S.C. § 3123.

Contrariwise, one could argue that if the government enlists a telecom service provider to pinpoint the geographic location of a cell phone, then it has surreptitiously transformed a common and seemingly innocuous personal electronic device into an undetectable law enforcement tracking device.[5] If we accept this characterization, then the Court's admonition in *United States v. Karo*, 468 U.S. 705 (1984) applies:

> We cannot accept the Government's contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article–or a person for that matter–is in an individual's home at a particular time.

[5] *See e.g.*, the Decepticon "Frenzy" in "Transformers" (2007).

> Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.
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> *Id.* at 716.

This court need not take sides in this debate because in Smith's case, the state investigators held themselves to the higher standard: they made a probable cause showing to a court and obtained an actual search warrant. This is all that the Fourth Amendment required of them. As the Court noted in *Karo*,

> The primary reason for the warrant requirement is to interpose a neutral and detached magistrate between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime. Those suspected of drug offenses are no less entitled to that protection than those suspected of nondrug offenses. Requiring a warrant will have the salutary effect of ensuring that use of beepers is not abused by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search.
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> *Id.* at 717.

The Court also addressed and dispensed with Smith's claim in the instant case that the state court's warrant was too broad because it was geographically limitless, and that it was "anticipatory" because it sought unknown locational data prospectively:

> The government contends that it would be impossible to describe the "place" to be searched, because the location of the place is precisely what is sought to be discovered through the search. However true that may be, it will still be possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance.
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> *Id.* at 718.

Here, the targeted cell phone was the "place" to be searched by pinging it from a cell tower, which could be viewed conservatively as the equivalent of placing a virtual beeper in Smith's cell phone in order to determine where the phone was located. The only thing "anticipatory" about this process was that the investigators anticipated that locating the phone would lead them to Smith.

As for Smith's claim that the Vernon County Circuit Court had no authority to issue a cell tower search warrant that theoretically could have located his cell phone in Minnesota, he provides no support for the proposition that hypothetical outcomes that never actually occurred provide a basis to suppress a warrant that was executed within the bounds of the applicable state statute. In any event, state law is irrelevant to a determination of reasonableness under the Fourth Amendment. *United States v. Brack*, 188 F.3d 748, 759 (7th Cir. 1999), and federal law does not view the interstate tracking of a beeper to be unreasonable: almost 30 years ago in *United States v. Knotts*, 460 U.S. 276 (1983), the Court found no Fourth Amendment violation when agents tracked a beeper in a 5-gallon can of chloroform from Minneapolis to Shell Lake, Wisconsin. In short, this argument is a nonstarter.

Smith also argues that the search warrant is invalid because the application failed adequately to redact boilerplate statements that related to placing a tracking device on a car to ascertain where controlled substances were stored and redistributed. This surplusage demonstrates sloppy editing, but it is not be a basis to quash the warrant or suppress evidence. By analogy, when a defendant challenges a search warrant affidavit for containing untrue information, one way for a court to address the challenge is to redact the challenged information to determine if what remains still supplies probable cause for the search. *See, e.g., United states v. Lowe*, 516 F.3d 580, 584 (7th Cir. 2008). If we did that here, then the application would be

better, not worse, because we would have excised the clutter that didn't belong in the application in the first place.

In sum, every strand of Smith's spaghetti-against-the-wall attack on the state court's search warrant fails: none of his arguments stick. Although the warrant application was rough around the edges, it was a prudent, by-the-book investigative approach to locating Smith and arresting him on the federal charges. As a result, there is no analytical need to address the government's fallback good faith argument. For what it's worth, even if this warrant application were closer to the line, it was the result of objectively reasonable law enforcement activity and the officers acted in good faith reliance on the warrant issued by the court. Therefore the good faith exception to the exclusionary rule would allow admission of the challenged evidence. *See United States v. Clark,* 668 F.3d 934, 941-42 (7th Cir. 2012), *citing United States v. Leon*, 468 U.S. 897, 922-23 (1984) and *Herring v. United States*, 555 US. 125 (2009). There is no basis to suppress any evidence.

Dkt. 63: Motion To Dismiss Counts 1 and 3
Dkt. 64: Motion for a Bill of Particulars

Smith has moved to dismiss Counts 1 and 3 of the superseding indictment, claiming that "the two new counts fail to provide fair notice to the defendant and to assure that any conviction would arise out of the theory of guilt presented to the grand jury." *See* dkt. 63 at 1. In the alternative, he wants more particulars "describing the manner in which the Government believes that the defendant committed the crimes of possession of cocaine with intent to distribute it on July 8, 2011 and July 12, 2011." *See* dkt. 64 at 1.

Count 1 charges Smith with possession with intent to distribute an unspecified amount of cocaine base (crack cocaine) on July 8, 2011; Count 2 charges him with distributing crack cocaine on that same date. Count 3 charges Smith with possession with intent to distribute an unspecified amount of cocaine base (crack cocaine) on July 12, 2011; Count 4 charges him with distributing crack cocaine on that same date. Smith claims that although he has watched the videos of the alleged transactions underlying these charges, he still does not have notice as to what quantity of crack cocaine he possessed on either day, the length of time he allegedly possessed it, to whom he allegedly intended to deliver the drugs or whether he is alleged to have exercised exclusive control over these quantities of drugs. *See* Brief in support, dkt. 65 at 3. Almost as an afterthought, Smith observes that he "cannot be validly convicted on the basis of facts not found by, and perhaps not even presented to the grand jury;" Smith does not proffer any reason that would suggest that this is what happened here.

The government responds by first observing that Smith concedes the indictment is facially valid; the government then reports that it has provided him with the testimony of the grand jury witness as to these counts along with the videos of the alleged transactions:

> The defendant is on video on July 8, 2011, acquiring about a one-half ounce of crack cocaine from his source, then possessing the cocaine base while weight it on a scale, and subsequently distributing that cocaine base to another person in exchange for money. This evidence, in addition to witness testimony, forms the basis for the first two counts of the superseding indictment.
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> A few days later, on July 12, 2011, the defendant was captured on video weighing cocaine base on a scale and then distributing *some* of that cocaine base to another person. Along with witness testimony, this evidence forms the basis for Count Four of the superseding indictment.
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> The defendant was captured on video that same day a very short time later taking the remainder of the cocaine base, re-packaging

> it, holding it in his hand (i.e., possessing it), and then distributing a portion of that remaining cocaine base to another person along with a crack pipe while telling that person to "test" (i.e., smoke) the cocaine base. Along with witness testimony, this evidence forms the basis for Count Three of the superseding indictment.
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> Gov't Brief in Opposition, dkt. 66, at 2-3.

The government also has provided Smith with about 990 pages of discovery and additional audiovisual disks pertaining to the five counts in the superseding indictment. *Id.* at 6.

In light of this proffer, I share the government's puzzlement as to why Smith filed either of these motions. An indictment must state the elements of the charges, provide the defendant with adequate notice of the nature of the charges to allow preparation of a defense, and allow the defendant to plead the judgment as a bar to future prosecutions for the same offense. *United States v. Dooley*, 578 F.3d 582, 589 (7th Cir. 2009); *see also United States v. White*, 610 F.3d 956, 958-59 (7th Cir. 2010) (indictment that tracks the words of statute to state elements of the crime generally is acceptable as long as there are enough particulars so that defendant is aware of the specific conduct at issue). These requirements have been met here. There is no basis to grant Smith's motion to dismiss.

Next, a bill of particulars under Rule 7(f) is not designed to provide a defendant with a detailed disclosure of the government's witnesses, legal theories or evidentiary detail. *See Wong Tai v. United States*, 273 U.S. 77, 82 (1927).[6] The Court of Appeals for the Seventh Circuit

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[6] "The test for whether a bill of particulars is necessary is 'whether the indictment sets forth the elements of the *offense charged* and sufficiently apprises the defendant of the *charges* to enable him to prepare for trial." *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982), *quoting United States v. Roya*, 574 F.2d 386, 391 (7th Cir. 1978)(emphasis in original). The defendant has no right, under the guise of a bill of particulars, to force the government to reveal the details of how it plans to prove its case. *United States v. Glecier*, 923 F.2d 496, 502 (7th Cir. 1991), *citing Kendall*, 665 F.2d at 135. "It is established that a defendant is not entitled to know all the *evidence* the government intends to produce, but only the *theory* of the government's case." 665 F.2d at 135, It is appropriate for the court to look at post-indictment discovery to determine whether a bill of particulars is required. *Id.; United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991).

disfavors bills of particulars, deeming them unnecessary whenever the indictment sets forth the elements of the offense charged, the time and place of the accused's conduct which constituted a violation, and a citation to the statutes violated. *United States v. Fassnacht*, 332 F.3d 440, 446-47 (7th Cir. 2003). Because every valid indictment contains this information, it is difficult to envisage a circumstance in which a defendant in this circuit would be entitled to a bill.

In short, a bill of particulars is a blunt tool that neither this court nor the Seventh Circuit favors. Quite apart from this, the government has provided to Smith what it accurately characterizes as "full robust discovery." This more than adequately remedies Smith's claimed inability to discern the bases for the possession counts charged against him. Notwithstanding Smith's protestations, in this case, no bill of particulars are necessary.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that the court deny defendant Allen Smith's motion to suppress evidence, motion to dismiss Counts 1 and 3, and motion for a bill of particulars.

Entered this 12th day of October, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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October, 2012

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Re: United States v. Allen Smith
Case No. 11-cr-104-wmc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before October 22, 2012, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by October 22, 2012, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable William M. Conley, District Judge

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**