UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3034

UNITED STATES OF AMERICA, **Appellee,**

v.

ANTOINE JONES, **Appellant.**

APPELLEE'S PETITION FOR REHEARING EN BANC

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Crim. No. 05-CR-0386 (ESH)

CERTIFICATE OF PARTIES,
RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 28(a)(1) and 35(c), appellee, the United States of America, hereby states as follows:

A. Parties and Amici: The parties to this appeal are appellants Antoine Jones and Lawrence Maynard, and appellee the United States of America. The American Civil Liberties Union for the National Capital Area and the Electronic Frontier Foundation participated as amici curiae in support of appellants.

B. Rulings Under Review: This petition seeks rehearing *en banc* of the August 6, 2010, decision of a panel of this Court (Ginsburg, J., joined by Tatel, J., and Griffith, J.), reversing appellant Antoine Jones's convictions for conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine, and fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 841 and 846, finding that the government's month-long warrantless monitoring of a Global Positioning System ("GPS") tracking device on Jones's personal vehicle, while the vehicle was located on public streets, violated the Fourth Amendment. See United States v. Maynard, No. 08-3030, 2010 WL 3063788, slip op. at 16-41. A copy of the panel's decision is attached as an addendum to this petition.

C. Related Cases: There are no related cases on appeal.

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CONCISE STATEMENT OF THE ISSUE AND ITS IMPORTANCE

In the opinion of appellee, the following issue is presented: Whether the Fourth Amendment permitted the government's warrantless use of a Global Positioning System ("GPS") device to track the public movements of appellant Antoine Jones's vehicle for approximately four weeks.

On August 6, 2010, a panel of this Court held that the government's warrantless monitoring of a GPS tracking device in this case was "prolonged" and thus violated the Fourth Amendment. Maynard, slip op. at 32. The panel's decision is inconsistent with controlling Supreme Court precedent, see United States v. Knotts, 460 U.S. 276 (1983); United States v. Karo, 468 U.S. 705 (1984), and with decisions of every other federal appellate court to have addressed this issue. See infra page 12. Moreover, the panel's

decision is inconsistent with prior case law from this Court which allowed the electronic monitoring of a package located within a vehicle and exposed to public view. United States v. Gbemisola, 225 F.3d 753, 758-59 (D.C. Cir. 2000). Finally, the panel's decision raises enormous practical problems for law enforcement.[1/] The decision leaves unresolved precisely when the monitoring of a GPS device becomes a "search" under the Fourth Amendment, and implicitly calls into question common and important practices such as sustained visual surveillance and photographic surveillance of public places. Thus, rehearing *en banc* is "necessary to secure and maintain uniformity" of this Court's decisions, Fed. R. App. P. 35(b)(1)(A), and because the panel's decision presents an issue of "exceptional importance." Fed. R. App. P. 35(b)(1)(B).

STATEMENT OF FACTS

During 2004, law-enforcement agents began investigating Antoine Jones, who owned and operated a nightclub located in Washington, D.C., for possible cocaine trafficking. Those agents used various investigative techniques, including visual surveillance (R.M. 74), a fixed camera (id.), and a wire intercept (App. 289), to link Jones with his coconspirators and with

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[1/] **GPS tracking is an important law-enforcement tool. Investigative agents of the United States Department of Justice employ this method of surveillance with great frequency.**

suspected "stash" locations for illegal drugs (App. 220).[2/] On September 16, 2005, the government obtained a warrant from a federal judge in the District of Columbia authorizing it, in the District of Columbia and within ten days, to covertly install and monitor a GPS tracking device on a Jeep Grand Cherokee owned by Jones's wife and primarily used by Jones.[3/] Agents subsequently obtained search warrants for various locations, which they executed on October 24, 2005 (R.M. 83-84, 133-36, 221-24). Agents recovered a large quantity of drugs and cash, and various items used to process and package narcotics (R.M. 83-93, 95, 222). Jones and others were indicted for offenses including conspiracy to distribute narcotics.

Before trial, Jones moved to suppress the data obtained from the GPS tracking device. Relying on Knotts, 460 U.S. at 281-82, and Karo, 468 U.S. at 719, the district court suppressed only "the data obtained from the GPS device when the Jeep Cherokee was parked in the garage adjoining" Jones's residence, ruling that the

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[2/] The government's trial evidence also included the testimony of one of Jones's suppliers and two of his customers (R.M. 96-99). That testimony was corroborated by visual surveillance, including videotape and photographs of Jones driving to and from a suspected stash house (R.M. 76, 145-47; App. 844).

[3/] However, the government did not comply with the warrant's geographic and temporal limits; agents installed the GPS device eleven days after the issuance of the warrant, when Jones's Jeep was located in a public parking lot in Maryland.

monitoring of the Jeep while it was located on public streets was not a "search" under the Fourth Amendment. See United States v. Jones, 511 F. Supp. 2d 74 (D.D.C. 2007). Subsequently, Jones and his co-defendant, Lawrence Maynard, were found guilty at trial of the conspiracy charge.

Jones appealed, and a panel of this Court (Ginsburg, J., joined by Tatel, J., and Griffith, J.) reversed, holding that the "prolonged" monitoring of the public movements of Jones's Jeep through GPS tracking violated the Fourth Amendment. Maynard, slip. op. at 16, 21. The panel disagreed with the government's argument that Knotts controls the outcome in this case. Id. at 17-21. See Knotts, 460 U.S. at 281 (monitoring public movements of vehicle through beeper device placed in container in vehicle was not search under Fourth Amendment).

The panel distinguished Knotts as involving only the monitoring of a "discrete journey." Slip op. at 17. The panel concluded that the month-long GPS surveillance of Jones's movements on public streets constituted a "dragnet-type law enforcement practice[,]" the legality of which the Supreme Court had reserved in Knotts. Slip op. at 18 (quoting Knotts, 460 U.S. at 283-284). The panel also distinguished federal appellate decisions that have held or suggested that GPS monitoring is not a search, because

those decisions did not specifically address the duration of the GPS surveillance.

The panel introduced a novel theory of what constitutes a search for purposes of the Fourth Amendment, which it derived from the "'mosiac theory' often invoked by the Government in cases involving national security information." Id. at 29. The panel explained that, considered in the aggregate, Jones's movements were not "actually" exposed to public view because there was little "likelihood that a stranger would observe" all of the movements of Jones's Jeep during the month-long period. Id. at 26. The panel also found that Jones had not "constructively" exposed to the public the aggregate of his Jeep's movements during the month-long period, reasoning that "[p]rolonged surveillance" is qualitatively different from a single instance of surveillance, because "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." Id. at 29. Thus, the panel concluded that, notwithstanding the fact that no particular instance of surveillance could be said to have violated the Fourth Amendment, Jones had a reasonable expectation of privacy in the public movements of his Jeep during the month-long period of the GPS surveillance in this case. The panel recognized that its ruling might call into question the use of prolonged visual

surveillance, but expressly noted that the issue was not presented in this case. Id. at 34-37.

ARGUMENT

I. The Panel's Decision Conflicts with the Precedent of the United States Supreme Court and this Court, as Well as the Decisions of Every Other Federal Circuit to Have Addressed this Issue.

A. The panel's decision is inconsistent with controlling Supreme Court precedent. Under the Fourth Amendment, a "search" occurs only when government action invades a "legitimate expectation of privacy." Knotts, 460 U.S. at 280. In Knotts, the Supreme Court held that a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Id. at 281. The panel erred in concluding that Knotts is not relevant to the "prolonged" tracking of a vehicle's public movements. Although Knotts reserved the question of "whether different constitutional principles may be applicable" to "dragnet type law enforcement practices," id. at 284,[4/] that does not mean that its holding was limited only to "movements during a discrete journey." Slip op. at 17. On the

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[4/] The Supreme Court generally has used the term "dragnet" to refer to high-volume searches that are often conducted without any articulable suspicion. See, e.g., Florida v. Bostick, 501 U.S. 429, 441 (1991); Cupp v. Murphy, 412 U.S. 291, 294 (1973) (discussing police "dragnet" procedures without probable cause in Davis v. Mississippi, 394 U.S. 721 (1969)); Berger v. New York, 388 U.S. 41, 65 (1967).

contrary, the Court's ruling was based on the fact that the defendant's movements were exposed to public view. See Knotts, 460 U.S. at 284-285. Accord Karo, 468 U.S. at 712, 715 (no search under Fourth Amendment where police monitored beeper device located in areas exposed to public view); Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

Furthermore, the monitoring at issue here did not constitute the type of "dragnet" surveillance referenced in Knotts. Here, the monitoring was limited to tracking the movements of a single individual suspected of cocaine trafficking, the tracking was supported by a judicial finding of probable cause, and, as in Knotts, Jones was "traveling in an automobile on public thoroughfares." Knotts, 460 U.S. at 281. See Garcia, 474 F.3d at 998 (suggesting that "mass surveillance" through indiscriminate tracking of vehicles might violate Fourth Amendment, but concluding that GPS tracking of particular suspect does not).

In addition, the panel's theory that (otherwise permissible) GPS monitoring can violate the Fourth Amendment when aggregated, conflicts with the Supreme Court's analysis in Karo, 468 U.S. at 719-721. In Karo, the warrantless monitoring of a tracking device in a can of ether lasted for over four months. Id. at 709-10. The Supreme Court found that certain individual monitoring events

during that period, i.e., those that revealed information about private spaces, were impermissible, but the Court's holding in no way depended upon the duration of the monitoring. Id. at 714-18. Indeed, the Court went on to analyze whether the warrant affidavit at issue, which was based in part upon the impermissible portions of the monitoring, nonetheless cited sufficient untainted evidence so as to establish probable cause under Franks v. Delaware, 438 U.S. 154 (1978). Id. at 719. The Court carved out the permissible portions of the monitoring (i.e, those that did not invade private space), and found that those portions, in combination with other evidence (e.g., visual surveillance), established probable cause for the warrant, and the Court expressed no concern about the four-month duration of the monitoring. Id. at 719-20.[5/] Thus, instead of suppressing the totality of the government's months-long monitoring, the Supreme Court explicitly rejected such an approach.

[5/] The panel's opinion both exaggerates the intrusiveness of GPS vehicle tracking and underestimates the degree to which other types of surveillance can reveal an "intimate picture of [a person's] life." Slip op. at 30. Vehicle tracking yields only a vehicle's location at a particular time (here, accurate to within 100 feet) (R.M. 67, 69) but does not reveal who is driving the vehicle, with whom the driver meets, and what the driver and any occupants are doing. On the other hand, a person's habits or patterns can be revealed by visual surveillance, by interviewing a person's co-workers, friends, or neighbors, or by looking through the person's trash, practices that clearly do not violate the Fourth Amendment. See, e.g., California v. Greenwood, 486 U.S. 35, 40-41 (1988).

The cases relied upon by the panel are inapposite. United States Department of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749 (1989), is a Freedom of Information Act case addressing whether an individual has a privacy interest in his "rap sheet," which compiled "scattered bits" of public information, "not freely available . . . either to the officials who have access to the underlying files or to the general public." Id. at 764, 769. Its analysis does not inform, let alone resolve, the question of whether an individual who exposes his or her movements to the public retains a reasonable expectation of privacy in the sum of those movements. California v. Greenwood held that the defendant lacked a reasonable expectation of privacy in the contents of his trash cans because the contents were readily accessible to others, and "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." 486 U.S. at 41. Bond v. United States, 529 U.S. 334 (2000), held that the defendant did not "expose" his bag to the public for the type of "physical manipulation" that an agent performed on it, and explicitly distinguished the "visual" inspection of an item in a public place (which was unquestionably lawful) from the physical manipulation of the item in order to learn about its contents. Id. at 338-339.

California v. Ciraolo, 476 U.S. 207 (1986), and Florida v. Riley, 488 U.S. 445 (1989), involved visual inspections of private areas (the curtilage of homes) rather than of public movements. In both cases, the Court acknowledged that although the defendants had exhibited actual expectations of privacy in their yards, their expectations were not reasonable because they should have known that those areas could be observed from public airspace. None of these cases support the panel's holding in this case.

B. The panel's decision also contravenes this Court's decision in Gbemisola, 225 F.3d at 758-59. Citing Knotts and Karo, this Court held in Gbemisola that it was not a search for the police to monitor a GPS precursor device on a package in the defendant's possession while the package was exposed to public view. Id. Because such monitoring was not a search, this Court held that "no warrant was required for either the installation or [the] use of the mobile tracking device." Id. The Court recognized that the "decisive issue" in determining whether surveillance constitutes a search under the Fourth Amendment "is not what the officers [actually] saw, but what they could have seen." Id. at 759 (citing Karo, 468 U.S. at 713-714, and Knotts, 460 U.S. at 282, 285). Although the panel interpreted this language as supporting its view that "whether something is exposed to the public . . . depends not upon the theoretical possibility,

but upon the actual likelihood, of discovery by a stranger," slip op. at 25, the decision plainly relied on the public nature of the information revealed rather than the likelihood that it would, in fact, be revealed.

The latter principle directly follows from both Knotts and Karo, which did not turn on the "likelihood" that anyone could have observed a vehicle's movements in public space. Knotts considered whether, by using visual surveillance, the police "could have" observed the public location of the vehicle, even when they were unable to see the vehicle. See Knotts, 460 U.S. at 285 ("Admittedly, because of the failure of the visual surveillance, the beeper enabled the law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise."). See also Karo, 468 U.S. at 713-714 (describing Knotts as holding that "since the movements of the automobile and the arrival of the can containing the beeper in the area of the cabin could have been observed by the naked eye, no Fourth Amendment violation was committed by monitoring the beeper during the trip to the cabin.").

C. The panel's decision is contrary to that of every other federal appellate court to have addressed this issue. In United States v. Garcia, 474 F.3d 994, 997 (7th Cir.), cert. denied, 128 S. Ct. 291 (2007), the Seventh Circuit concluded that "GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking." See United States v. Marquez, 605 F.3d 604 (8th Cir. 2010); United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010). See also United States v. McIver, 186 F.3d 1119, 1126-1127 (9th Cir. 1999), cert. denied, 528 U.S. 1177 (2000). The panel discounted these cases because those defendants did not specifically argue that Knotts was inapplicable to "prolonged" GPS monitoring. Slip op. at 21. However, both the Seventh and Eighth Circuits considered the possibility that warrantless GPS monitoring could result in indiscriminate or mass surveillance, but concluded, as did Knotts, that such dragnet-type practices were not at issue in those cases. See Marquez, 605 F.3d at 610 (distinguishing tracking of suspect from "wholesale surveillance" of many persons); Garcia, 474 F.3d at 998.[6/]

[6/] **Although the Ninth Circuit did not address the duration issue in Pineda-Moreno, the defendant argued that point in his petition for rehearing *en banc* and the court, over a strongly worded dissent, denied the petition nonetheless. United States v.**

(continued...)

The panel's conclusion that Jones had a reasonable expectation of privacy in the public movements of his Jeep rested on the premise that an individual has a reasonable expectation of privacy in the totality of his or her movements in public places. Although "prolonged monitoring" may capture more information than discrete instances of surveillance, the type of information collected is the same regardless of the duration of the collection. The Supreme Court has repeatedly held that the Fourth Amendment is not implicated simply because "scientific enhancements" are more effective at collecting information than visual surveillance. See Knotts, 460 U.S. at 284-285; id. at 282 ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."). See also Smith v. Maryland, 442 U.S. 735, 744-745 (1979) (holding that petitioner lacked legitimate expectation of privacy in pen-register data, because the "switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. . . . We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.");

[6/] **(...continued)**
Pineda-Moreno, 2010 WL 3169573 (Aug. 12, 2010)(Kozinski, C.J., dissenting).

Garcia, 474 F.3d at 998 ("[T]he [Fourth] amendment cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth.").

II. The Panel's Decision Creates Enormous Practical Problems for Law Enforcement Investigations.

The panel's new rule that the "prolonged" monitoring of a vehicle's public movements constitutes a search for purposes of the Fourth Amendment is vague and unworkable. The panel's decision offers no guidance as to when monitoring becomes so efficient or "prolonged" as to constitute a search triggering the requirements of the Fourth Amendment. Investigators are left to speculate as to what is permissible. In addition, conduct that is initially permissible could later be deemed impermissible if it continues past some unspecified threshold. That is, if the police continue monitoring for too long, or perhaps too intensively, what is initially permissible would be rendered unconstitutional by virtue of the subsequent monitoring. This result underscores the unworkability of the panel's new rule.

Moreover, the panel's holding calls into question the use of many common and accepted forms of surveillance of public places, such as visual surveillance and fixed cameras. Numerous federal appellate courts, for example, have held that the use of cameras capturing images of areas exposed to public view does not violate the Fourth Amendment. See, e.g., McIver, 186 F.3d at 1126-1127

(use of fixed camera capturing images of area exposed to public view was not a search). If the panel's opinion remains in force, well-accepted investigative techniques such as physical and photographic surveillance of persons, places, and objects exposed to public view could be called into question if the use of those techniques were sufficiently "sustained" or "prolonged." Thus, *en banc* review is warranted.

CONCLUSION

WHEREFORE, appellee respectfully requests that this case be reheard by the Court *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September, 2010, counsel were served with the forgoing Petition for Rehearing En Banc electronically, through the Court's ECF system. In addition, I have caused two copies of the forgoing Petition for Rehearing En Banc to be sent by United States mail, postage prepaid, to counsel as follows:

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