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WHY WORRY ABOUT BLACK HELICOPTERS: GPS AND THE
REASONABLE EXPECTATION OF PRIVACY

I. INTRODUCTION

If you met a man who told you his every move was being tracked by the government, would you believe him? What if he then told you that you were also being tracked? Many would likely dismiss the man, thinking he suffered from paranoid delusions. The notion of “big brother,” black helicopters, and federal agents hiding in the bushes may all come to mind.¹ But with today’s technology, the government need not waste its resources scrambling the helicopters or dispatching the agents. If you own a car or a cell phone,² the government can track you 24 hours a day, 7 days a week- without much effort, without your knowledge or consent, and, according to some courts, without a warrant.³

¹ MICHAEL BARKUN, A CULTURE OF CONSPIRACY: APOCALYPTIC VISIONS IN CONTEMPORARY AMERICA, 65 (2003).

² Martin A. Dolan, Noreen C. Lennon, Karen Muñoz, *Use Of Cell Phone Records And Gps Tracking*, 24-JAN CBA REC. 38, 39 (2010).

³ See *Foltz v. Virginia*, 698 S.E.2d 281 (Va. Ct. App. 2010); *United States v. Pineda-Moreno*, 617 F.3d 1120 (9th Cir. 2010); *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007)

The rise of the Global Positioning System (GPS) has been nothing short of revolutionary. A little over a decade ago, the technology was still largely unknown, limited to military applications and high-end consumer products.⁴ The first commercially available GPS devices were only accurate to approximately 100 meters and were often large, bulky devices with crude, monochrome screens.⁵ Today's GPS technology is much more accurate, compact, and affordable.⁶ This newfound accessibility and concealability has made the technology naturally attractive to law enforcement.⁷ However, the increasing use of GPS technology by law enforcement brings with it new questions that, if answered without deliberate reflection, threaten to reshape the role and salience of the Fourth Amendment. While there can be no doubt that GPS technology can be immensely helpful in modern day law enforcement, the very roots of the Fourth Amendment require an abundance of caution in allowing its use.⁸

⁴ *The Global Positioning System: The Role of Atomic Clocks*, BEYOND DISCOVERY, <http://www.beyonddiscovery.org/content/view.page.asp?I=1275> (Last visited Feb. 17, 2011)

⁵ *Id.*; See http://static.garmincdn.com/pumac/GPS100STD_OwnersManual.pdf

⁶ Ramya Shah, *From Beepers To Gps: Can The Fourth Amendment Keep Up With Electronic Tracking Technology?*, 2009 U. ILL. J.L. TECH. & POL'Y 281, 283-84 (2009).

⁷ *Id.* at 284-285

⁸ See Shah, *Supra* note 6; April A. Otterberg, *Gps Tracking Technology: The Case For Revisiting Knotts And Shifting The Supreme Court's Theory Of The Public Space Under The Fourth Amendment*, 46 B.C. L. REV. 661 (2005); Renée McDonald Hutchins, *Tied Up In Knotts? Gps Technology And The Fourth Amendment*, 55 UCLA L. REV. 409 (2007).

A number of courts have recently confronted the question of how GPS technology should fit into contemporary Fourth Amendment jurisprudence.⁹ A majority of federal circuits that have addressed the issue of GPS monitoring have held that the use of a GPS device is not a search cognizable under the Fourth Amendment.¹⁰ However, numerous state courts have questioned the use of GPS technology by police, and held that such surveillance is a violation of their own state constitutions.¹¹ Likewise, the D.C. Circuit Court has recently broken ranks with other federal

⁹ See *State of Delaware v Holden*, Case No. 1002012520 (DE Superior Ct., Dec. 14, 2010); *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010); *Foltz v. Virginia*, 698 S.E.2d 281 (Va. Ct. App. 2010); *United States v. Pineda-Moreno*, 617 F.3d 1120 (9th Cir. 2010); *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *Wisconsin v. Sveum*, 787 N.W.2d 317 (Wis. 2010); *New York v. Weaver*, 12 N.Y.3d 433 (2009); *Massachusetts v. Connolly*, 913 N.E.2d 356 (Mass. 2009); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007)

¹⁰ *Foltz v. Virginia*, 698 S.E.2d 281 (Va. Ct. App. 2010) (Police use of a GPS device to track defendants work van did not violate the Fourth Amendment because defendant did nothing to minimize the visibility of the van while it travelled down public streets); *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010) (finding that the use of GPS technology to track a suspect does not violate the fourth amendment when "there [is] nothing random or arbitrary about the installation and use of the device"); *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010) (police did not conduct an impermissible search of defendants car by monitoring its location with mobile tracking devices because it was merely an enhancement to police officer's natural senses); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007) (GPS tracking not a search when done on a limited basis)

¹¹ See *State of Delaware v Holden*, IN 10-03-0545, 2010 WL 5140744 (Del. Super. Ct. Dec. 14, 2010) (Defendants reasonable expectation of privacy violated when police surreptitiously placed a GPS device on his vehicle and tracked his location 24 hours a day for a period of several weeks); *New York v. Weaver*, 12 N.Y.3d 433 (2009) ("placement by police of a global positioning system (GPS) tracking device inside the bumper of defendant's street-parked van and constant monitoring of the position of the van for 65 days, all without a warrant or justification under any exception to the warrant requirement, constituted an illegal search under New York Constitution"); *Massachusetts v. Connolly*, 913 N.E.2d 356 (Mass. 2009) (When a GPS device is installed in a motor vehicle, the government's control and use of the defendant's vehicle to track its movements interferes with the defendant's interest in the vehicle notwithstanding that he maintains possession of it); *Washington v. Jackson*, 76 P.3d 217 (Wash. 2003) (en banc) ("a substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a search")

courts, finding that prolonged GPS monitoring is a search under the Fourth Amendment, requiring compliance with the warrant clause.¹²

This note focuses on *United States v. Pineda-Moreno*¹³ (*Pineda*). Like other federal courts that have approved of warrantless GPS monitoring, the *Pineda* Court found that the activity did not present a Fourth Amendment concern because it was no different than if police had physically followed Pineda.¹⁴ However, the *Pineda* decision is worthy of closer scrutiny. *Pineda* is distinguishable from other GPS cases in two important ways: First, the *Pineda* Court found that warrantless GPS monitoring was categorically permissible, without imposing limits on the activity such as reasonableness or time.¹⁵ Second, the *Pineda* Court found that because Pineda had not taken steps to “outline his expectations” of privacy in his driveway, police had not violated the Fourth Amendment when they twice installed GPS devices on his vehicle while it was parked there.¹⁶

¹² *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) (Finding that while the initial act of installing and monitoring a GPS device on someone’s vehicle is not a search, it becomes one over time, as it invades the reasonable expectation of privacy one possesses in the *totality* of their movements over a period of time.)

¹³ 591 F.3d 1212 (9th Cir. Or. 2010)

¹⁴ *Id.* at 1216–17

¹⁵ *Id.*

¹⁶ *Id.* at 1214–15

This note takes issue with the court's analysis, and argues that it falls short in three crucial respects. First, by comingling GPS technology with radio beeper technology, the court failed to take into account the scope of data provided by GPS technology, and as a result, misapplied relevant case law. Second, the court ignored well-settled law regarding the protections afforded to the curtilage of one's home by the Fourth Amendment, adding to the traditional analysis an unsupported qualification with potentially classist implications.¹⁷ Finally, in reaching its decision, the court analyzed the Fourth Amendment claims made by Pineda-Moreno in a near vacuum, myopically focusing in on the facts of the case while ignoring the larger policy problems with its finding.¹⁸

Part II of this note details the technology behind GPS, and provides the contextual and historical background of modern day Fourth Amendment jurisprudence while exploring the current circuit split arising over the question of whether GPS monitoring constitutes a search under the Fourth Amendment. Part III will cover the facts of *Pineda*, the court's opinion, and the dissenting opinion in the court's decision to deny an en banc rehearing. Part IV will analyze the

¹⁷ *Id.*

¹⁸ *Id.*

Pineda decision, and its implications. It will argue that the court inappropriately concluded the GPS question as already foreclosed, without giving the issue the considered analysis current Fourth Amendment jurisprudence requires. The section will distinguish *Pineda* from other GPS cases, which at least drew minimal limits on GPS monitoring. The section will also criticize the ease with which the court dismissed police intrusions into Pineda's curtilage, and argues that by creating an affirmative action requirement to preserve ones right's under the Fourth Amendment, the court created a standard of protection that tends to favor the wealthy. Part V concludes that when the practice of GPS monitoring is subjected to the proper legal analysis, it becomes clear that it is a search. The implication of this finding requires that, absent an emergency, government agents always obtain a warrant before affixing a GPS device to someone's vehicle.

II. BACKGROUND

1. GPS TECHNOLOGY

The Global Positioning System (GPS) is a network that allows one to track the exact location, speed, and direction of various GPS receivers at any given time, anywhere on Earth.¹⁹

The GPS network consists of a constellation of 29 orbiting satellites, a ground control system, and GPS receivers.²⁰ GPS satellites provide data to receivers on the ground about their location in orbit. By triangulating the location of the four nearest satellites, a GPS receiver can determine its own location.²¹ Any object, vehicle, or person can be accurately tracked within two to three meters of their actual location when a GPS receiver is attached.²²

GPS technology has come a long way since the first “NAVSTAR” satellite was launched in 1978.²³ Initially developed strictly for military applications, GPS receivers now can be found

¹⁹ Hutchins, *Supra* note 8, at 409

²⁰ *U.S. global positioning satellites*, SPACE TODAY ONLINE, <http://www.spacetoday.org/Satellites/GPS.html> (Last visited Feb. 4, 2011)

²¹ Hutchins, *Supra* note 8, at 414

²² *Id.*

²³ *The Origins of GPS*, Part 1, GPS WORLD MAGAZINE, (May. 01, 2010) <http://www.gpsworld.com/gnss-system/gps-modernization/the-origins-gps-part-1-9890> (Last visited Feb. 17, 2011)

just about anywhere; they are an option on a wide range of new automobiles,²⁴ are built into most cell phones,²⁵ and might even be found in your shoes.²⁶ Stand-alone units are now available for less than \$100.²⁷ Where early receivers were crude and unwieldy,²⁸ the newest receivers are small enough to fit into a wristwatch.²⁹ Some governments have found the potential of the technology so attractive that they have proposed making the technology mandatory on all new vehicles by 2013.³⁰

GPS receivers are passive; they only provide the end user with information about their location.³¹ However, a wireless transmitter can make this information available to a third party,

²⁴ *The Fastest Way From Here to There — GPS Navigation Systems*, EDMUNDS.COM, <http://www.edmunds.com/car-technology/the-fastest-way-from-here-to-there-gps-navigation-systems.html> (Last visited Feb. 17, 2011)

²⁵ Michael Isikoff, *The Snitch in Your Pocket*, NEWSWEEK, (Mar. 1, 2010), <http://www.newsweek.com/id/233916>

²⁶ *GPS shoes for Alzheimer's patients* PHYSORG.COM, <http://www.physorg.com/news163474344.html> (Last visited Feb. 23, 2011). (GPS shoes have been developed for various applications, such as keeping track of children, Alzheimer's patients, and even miners. While the technology is still in its infancy, GPS shoes are now available commercially.)

²⁷ *12 Things That Will Cost Less in 2011*, COMCAST.NET FINANCE, <http://www.comcast.net/slideshow/finance-12thingscostless2011/portable-gps/> (Last Visited Mar 2, 2011)

²⁸ *GPS 100 Personal Navigator OwnerManual*, http://static.garmincdn.com/pumac/GPS100STD_OwnersManual.pdf (Last visited Feb 23, 2011). (GPS receivers were first publicly marketed in the early 1990's for use in marine and aviation applications. The devices were roughly 4 " tall and 9" wide, and consisted of a small monochrome screen that displayed ones latitude and longitude at any given point, typically within 30 meters.

²⁹ *Garmin Forerunner 305 and 205 GPS Fitness Training Aids*, GPS TECHNOLOGY REVIEWS <http://gpstekreviews.com/2007/10/31/garmin-forerunner-305-and-205-gps-fitness-training-aids/> (Last visited Feb. 17, 2011)

³⁰ *Mandatory As Of 2013: A Snitch In Every Car*, THETRUTHABOUTCARS.COM, <http://www.thetruthaboutcars.com/2010/11/mandatory-as-of-2013-a-snitch-in-every-car/> (While the United States has yet to make such a proposal, the EU has recently mandated that by 2013, all new cars sold in Europe incorporate a system called Ecall. Ecall will wirelessly send airbag deployment and impact sensor information, as well as GPS coordinates to local emergency agencies if the system determines the vehicle has been involved in an accident)

³¹ Hutchins, *Supra* note 8, at 410

located anywhere in the world, by sending the information to a cellular tower, much like sending a file on a cell phone.³² This feature has made the technology very attractive to law enforcement.³³ Police can utilize GPS to track a suspect, either through the suspects cell phone,³⁴ or by attaching a battery powered GPS device to a suspect's vehicle.³⁵

Prior to the advent of GPS, police had to rely on primitive radio beepers and visual observation to track and monitor suspects.³⁶ Radio beepers were typically battery-operated, and emitted an intermittent signal which police could pick up with a radio receiver.³⁷ The devices were not actually aware of their own location, and accordingly could not record any data. Instead, the beepers merely did what their title suggest: they gave off radio "beeps" that could only be picked up by police in the immediate vicinity.³⁸ Otherwise, no data could be received.³⁹

³² *Id.*

³³ *Id.*

³⁴ *Sprint fed customer GPS data to cops over 8 million times*, ARS TECHNICA <http://arstechnica.com/telecom/news/2009/12/sprint-fed-customer-gps-data-to-leos-over-8-million-times.ars> (Last visited Feb. 17, 2011) ("law enforcement offers could log into a special Sprint Web portal and, without ever having to demonstrate probable cause to a judge, gain access to geolocation logs detailing where they've been and where they are.... Law enforcement doesn't need to show probable cause to obtain your physical location via the cell phone grid. All of the aforementioned metadata can be accessed with an easy-to-obtain pen register/trap & trace order. But given the volume of requests, it's hard to imagine that the courts are involved in all of these.")

³⁵ *GPS web device*, LAW ENFORCEMENT TECHNOLOGY (Oct. 2002) <http://appliedinnovativesolutions.net/spycompany.com/let/let%20pg%20168.htm> (Last visited Feb. 17, 2011)

³⁶ *United States v. Knotts*, 460 U.S. 276, 277 (1983)

³⁷ Otterberg, *Supra* note 8

³⁸ *Id.* at 665

³⁹ *Id.*

2. THE GPS DEBATE

The issue of GPS tracking by law enforcement has been gaining attention; in 2010 alone four of the seven existing GPS cases at the federal level were decided.⁴⁰ At issue is the question of whether police may utilize GPS tracking without a warrant without violating the Fourth Amendment. Key to the analysis is the question of whether GPS monitoring is a search, something numerous courts have taken different positions on.

A key component of the debate is the similarity- or differences- of GPS technology compared to older tracking devices, such as radio beepers. Proponents of GPS tracking argue that GPS devices provide the essentially the same information as radio beepers do.⁴¹ According to this group, this similarity means the warrantless use of GPS devices requires no greater legal scrutiny than radio beepers do.⁴² Opponents argue that GPS is in fact a very different technology,

⁴⁰ See *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010); *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *Foltz v. Virginia*, 698 S.E.2d 281 (Va. Ct. App. 2010) ; *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010)

⁴¹ See Tarik N. Jallad, *Old Answers To New Questions: Gps Surveillance And The Unwarranted Need For Warrants*, 11 N.C. J. L. & TECH. 351 (2010) (“The fact is that the information a traveler reveals on public roads, is just that: public. Whether that information is surreptitiously gathered by direct observation, semi-distant following, or interpreting location data points, the Constitution, as delineated by the Supreme Court, has laid a foundation that is upheld today.”)

⁴² *Id.* at 354-59

namely in the scope of information it provides, scalability, and the incentives it creates for police officers engaged in an investigation.⁴³ These differences, they contend, require a more nuanced analysis under the Fourth Amendment, rather than strict reliance on arguably applicable radio beeper precedent.

3. CONTEMPORARY FOURTH AMENDMENT ANALYSIS

Today, the touchstone of modern Fourth Amendment analysis is defined by the reasonable expectation of privacy.⁴⁴ This standard, which replaced the property-based view that had defined the reach of the Fourth Amendment for much of the nation's early history, was a result of the Court's frustration with the inability of the old standard to protect against nontangible threats to privacy.⁴⁵ The revolution was quick: in one term, the Court discarded the old rules, and replaced them with the new. This paradigm shift began with *Warden, Md. Penitentiary v. Hayden*,⁴⁶ where the Court excised the "mere evidence rule", which had held that

⁴³ Bennett L. Gershman, *Privacy Revisited: GPS Tracking As Search and Seizure*, 30 Pace L. Rev. 927, 928, 956-58 (2010) ("GPS can...reveal and record "with breathtaking quality and quantity . . . a highly detailed profile, not simply of where we go, but by easy inference, of our associations--political, religious, amicable and amorous, to name only a few--and of the pattern of our professional and avocational pursuits." (Quoting *New York v. Weaver*, 909 N.E.2d 1195, 1199-200 (2009)) GPS has the "profound effect ofincreas[ing] the ability of law enforcement to scrutinize any given individual, or many of them."

⁴⁴ *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 967-71 (1977)[hereinafter *Formalism*]

⁴⁵ *Id.* at 969

⁴⁶ 387 U.S. 294 (1967)

nothing could be searched or seized for its mere evidentiary value.⁴⁷ Finding that “Nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband....Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to [a categorical item].”⁴⁸ Finding that the link between property and the Fourth Amendment was “discredited”, the Court announced that the Fourth Amendment should be seen as protecting privacy interest rather than property interest.⁴⁹

Building off the logic asserted in *Hayden*, the Court utilized the property-privacy distinction and announced a new Fourth Amendment standard in *Katz v. United States*.⁵⁰ In *Katz*, the defendant had been charged with eight counts of transmitting illegal gambling wagers across the country using public pay phones.⁵¹ The FBI, who had been investigating Katz, intercepted the communications by placing eavesdropping devices on the exterior of the phone

⁴⁷ *Id.* at 308

⁴⁸ *Id.* at 301-302

⁴⁹ *Id.* at 304

⁵⁰ 389 U.S. 347 (1967)

⁵¹ *Id.* at 348

booths he had been using.⁵² Katz was later convicted after the recordings were introduced at trial against him.⁵³ The Supreme Court reversed, finding that the police had violated Katz's Fourth Amendment rights when they placed the eavesdropping devices on the phone booth without a warrant.⁵⁴ The Court found that because the Fourth Amendment protects the expectation of privacy, rather than just tangible items and areas, electronic communications fell into the amendment's purview.⁵⁵ The Court declared that the old property rights view of the Fourth Amendment had seriously "eroded", and announced that the amendment "...protects people, not places."⁵⁶

The *Katz* decision effectively overturned *Olmstead v. United States*,⁵⁷ which had for much of the preceding century strictly tied up the rights enjoyed under the Fourth Amendment with tangible property. In *Olmstead*, the Court had held that wiretapping was not a search or seizure because "The amendment itself shows that the search is to be of *material things*-the person, the house, his papers, or his effects....The amendment does not forbid what was done

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 358

⁵⁵ *Id.* at 353

⁵⁶ *Id.*

⁵⁷ 277 U.S. 438 (1928)

here. There was no searching....The evidence was secured by the use of the sense of hearing and that only.”⁵⁸ Thus, according to the *Olmstead* Court, the Fourth amendment only protected tangible items, one’s “...person, the house, his papers or his effects”.⁵⁹

In overturning *Olmstead*, the *Katz* Court recognized many of the principles contained in Justice Brandeis’s dissent. Justice Brandeis had openly worried about the power of technology to enable law enforcement to bypass the protections of the Fourth Amendment:

[T]he progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences.... Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. ‘That places the liberty of every man in the hands of every petty officer’ was said by James Otis of much lesser intrusions than these.⁶⁰

Justice Brandeis recommended the law look towards “not only what has been, but what may be.”⁶¹ Justice Brandeis argued that Fourth Amendment analysis must contemplate its purpose and application in a modern context, for otherwise the Amendment’s meaning

⁵⁸ *Id.* at 439-440

⁵⁹ *Id.*

⁶⁰ *Id.* at 474

⁶¹ *Id.* at 473

“...would have little value and be converted by precedent into impotent and lifeless formulas.

Rights declared in words might be lost in reality.”⁶²

The *Katz* Court addressed these concerns by establishing that the Fourth Amendment provides a constitutionally protected expectation of privacy, which is not bound by tangible categories of property.⁶³ Instead of focusing on “solid” objects and corporeal acts as the lonely providences of the amendment, it was instead applicable to the metaphysical “reasonable expectation of privacy.”

The reasonable expectation of privacy is defined by a two-part test that incorporates both a subjective prong and an objective prong.⁶⁴ The first prong requires that the target of a search or seizure subjectively possess an expectation of privacy.⁶⁵ This question is typically answered by looking to the actions of the target, and whether they support such an inference.⁶⁶ Once a subjective expectation of privacy is established, the second prong then asks whether that

⁶² *Id.*

⁶³ *Katz* 389 U.S. at 353

⁶⁴ *Id.* at 361

⁶⁵ *Id.*

⁶⁶ See *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010); *Maisano v. Welcher*, 940 F.2d 499, 502–503 (9th Cir. 1991); *United States v. Humphries*, 636 F.2d 1172, 1179 (9th Cir. 1980); *United States v. Magana*, 512 F.2d 1169, 1170–71 (9th Cir. 1975); *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968); *Care v. United States*, 231 F.2d 22, 25 (10th Cir. 1956).

expectation is one “that society is prepared to recognize as reasonable.”⁶⁷ If both prongs are satisfied, a reasonable expectation of privacy is said to exist, and that expectation is protected by the Fourth Amendment.⁶⁸

The second prong of the *Katz* test played a significant role in *United States v. Knotts*,⁶⁹ where the warrantless use of radio beepers was first challenged. In *Knotts*, the defendants were arrested and charged with conspiracy to manufacture methamphetamine after law enforcement agents tracked and followed one of the defendants by utilizing a radio beeper affixed to a five-gallon container of chloroform he had purchased.⁷⁰ The public nature of the defendant’s conduct dominated the Court’s analysis.⁷¹ The Court reasoned that even if the defendants had possessed a subjective expectation of privacy, it was not one society was prepared to recognize as reasonable.⁷² The Court found that the monitoring of beeper signals by police did not invade the defendants’ expectations of privacy because it was tantamount to simply following the

⁶⁷ *Katz* 389 U.S. at 361

⁶⁸ *Id.*

⁶⁹ 460 U.S. 276 (1983)

⁷⁰ *Id.* at 277

⁷¹ Otterberg, *Supra* note 8, at 682-86

⁷² *Knotts*, 460 U.S. at 281–82

defendant's vehicle.⁷³ Writing for the majority, Justice Rehnquist argued that "[N]othing 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."⁷⁴

To Justice Rehnquist, one who drove their vehicle in public was essentially engaged in the act of voluntarily disseminating information about their movements to passersby. Thus, reasoned Justice Rehnquist, radio beepers were no more intrusive than police visually monitoring the vehicle as it passed by.⁷⁵ However, the *Knotts* Court was careful to limit the scope of its holding, finding that would not apply in cases where police engaged in "dragnet-type" activities, such as "twenty-four hour surveillance of any citizen of this country....without judicial knowledge or supervision." The question of whether twenty-four hour electronic monitoring would violate the Fourth Amendment was left for another day.⁷⁶

The Court again visited the question of the Fourth Amendment's application to radio beepers in *United States v. Karo*.⁷⁷ The facts of *Karo* were essentially analogous to those in

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 283-284.

⁷⁷ 468 U.S. 705.

Katz, with the main difference being that the beeper used in *Karo* travelled into the defendant's home.⁷⁸ This distinction, however, was significant enough for the Court to render its use a search, and thus unreasonable without the utilization of a warrant. In deciding *Karo*, the Court explicitly found that when electronic devices reveal information that could not be obtained by visual observation alone, such information "fall[s] within the ambit" of the Fourth Amendment.⁷⁹ Noting that "warrantless searches are presumptively unreasonable...." the Court rejected the government's argument that warrantless beeper monitoring was reasonable, and found that the expectation that the government could not enter one's home without a warrant was one that society was prepared to recognize as reasonable.⁸⁰

4. THE GPS CASES

Courts that have held that GPS monitoring is not a search under the Fourth Amendment have done so by directly relying on the proposition raised by *Knotts*: there is no reasonable expectation of privacy where the information gathered is of the kind which could be obtained by

⁷⁸ *Id.* at 714–15.

⁷⁹ *Id.* at 707.

⁸⁰ *Id.* at 719

visual observation.⁸¹ These courts maintain that even if the target of such an investigation subjectively maintains such an expectation, it is not one society is prepared to accept as reasonable.⁸² Thus far, three out of four federal circuit courts have responded to the GPS question with this answer.⁸³

*United States v. Garcia*⁸⁴ was amongst the first of a series of cases that have attempted to answer the question of whether GPS monitoring is search. There, law enforcement officers had placed a GPS device on a vehicle borrowed by the defendant, which led them to a tract of land he had been using to manufacture methamphetamines.⁸⁵ At trial, Garcia argued, *inter alia*, that police officers violated his Fourth Amendment rights when they placed GPS devices on his

⁸¹ *Foltz v. Virginia*, 698 S.E.2d 281 (Va. Ct. App. 2010) (“...[s]ociety does not recognize such an expectation [of privacy] for vehicles on public streets...”); *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010) (“...[A] person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another. ”); *United States v. Burton*, 698 F. Supp. 2d 1303 (N.D. Fla. 2010) (“[T]here is no Fourth Amendment violation for using a tracking device as a substitute for visual surveillance.”); *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010) (“[T]he only information the agents obtained from the tracking devices was a log of the locations where [the defendant’s] car traveled, information the agents could have obtained by following the car.”); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007) (“[t]he substitute ... is for an activity, namely following a car on a public street, that is unequivocally not a search within the meaning of the amendment.”); *Morton v. Nassau County Police Dep’t*, No. 05-CV-4000 (SJF)(AKT), 2007 WL 4264569, at *3–4 (E.D.N.Y. Nov. 27, 2007) (“[T]he use of the GPS Device did not permit the discovery of any information that could not have obtained by following an automobile traveling on public roads, either physically or through visual surveillance.”)

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 474 F.3d 994 (7th Cir. 2007)

⁸⁵ *Id.* at 995

vehicle without a warrant.⁸⁶ The government countered that no warrant was needed, because the placement of the device was not a search.⁸⁷

In analyzing Garcia's claim, the *Garcia* Court held that *Knotts* was directly applicable.⁸⁸ Judge Posner, writing for the court, argued that the use of GPS devices was no different than the utilization of stationary cameras, *Google Earth* satellite imagery, or following a suspect around in a car.⁸⁹ Acknowledging the limits of *Knotts*, the *Garcia* court found that its holding was not dispositive of the constitutionality of "mass surveillance."⁹⁰ However, the court found that this limitation was inapplicable in Garcia's case, because police only tracked Garcia while they "had [him] in their sights." Therefore, according to the court, Garcia could not claim to have possessed a reasonable expectation of privacy, and a search had not occurred.⁹¹

The *Garcia* court's interpretation of *Knotts* applicability to GPS technology and the case's limits was influential in later GPS cases. In *United States v. Marquez*,⁹² the court narrowly focused in on *Knotts*' "no reasonable expectation of privacy in an automobile" holding,

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 474 F.3d at 996

⁸⁹ *Id.* at 997

⁹⁰ *Id.* at 998

⁹¹ *Id.*

⁹² 605 F.3d 604 (8th Cir. 2010)

without acknowledging the express limits of the decision's scope.⁹³ Calling the use of GPS tracking in the instant case "non-invasive", the court found that warrantless GPS tracking was constitutional when the device in question is used for "a reasonable period of time."⁹⁴ However, the *Marquez* court echoed the concerns of the *Garcia* court about the specter of "mass surveillance," suggesting that "random and arbitrary" monitoring of citizens-at-large was a different issue than the one presented there.⁹⁵

In *Foltz v. Virginia*,⁹⁶ the reading of the *Knotts* limitation as merely barring "mass surveillance" of citizens-at-large limited the court's analysis of the defendant's Fourth Amendment claim.⁹⁷ Like the defendants in *Garcia*, *Marquez*, and *Pineda*, Foltz claimed that police had violated his reasonable expectation of privacy when they placed GPS devices on his vehicle.⁹⁸ Much like the courts in previous GPS cases, the *Foltz* court was quick to point out that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of

⁹³ *Id.*

⁹⁴ *Id.* at 610

⁹⁵ *Id.*

⁹⁶ 698 S.E.2d 281

⁹⁷ *Id.* at 289

⁹⁸ *Id.*

privacy.”⁹⁹ Following the logic asserted in *Garcia, Marquez, and Pineda*, the *Foltz* court dismissed the *Knotts* limitation: “This case does not involve dragnets and mass surveillance, so these warnings are not as relevant here.”¹⁰⁰ Like the previous GPS cases, the *Foltz* court saw no distinction between utilizing GPS to track someone on public roads and physically following them.¹⁰¹

The most recent federal court to decide a GPS case has struck a different tone. Much like other GPS cases, the facts of *United States v. Maynard*¹⁰² are strikingly familiar: the police suspected the defendant was involved in trafficking drugs, and as part of their investigation attached a GPS device to his vehicle without a warrant.¹⁰³ Similarly, the defendant in *Maynard* argued that police violated his Fourth Amendment rights.¹⁰⁴ Unlike the other courts that had encountered the GPS problem, however, the *Maynard* Court held that *Knotts* was not controlling.¹⁰⁵ Distinguishing between the “limited information” provided by the radio beepers at the center of *Knotts* and the “more comprehensive or sustained monitoring of the sort at issue

⁹⁹ *Id.* at 290

¹⁰⁰ *Id.* at 289

¹⁰¹ 698 S.E.2d at 290

¹⁰² 615 F.3d 544 (D.C. Cir. 2010)

¹⁰³ *Id.* at 549.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 556.

[with GPS]”, the *Maynard* Court found that the *Knotts* limitation barred its holding from becoming dispositive of the GPS question.¹⁰⁶ The *Maynard* Court pointed out that the scope of *Knotts* was limited by the facts of that case, and that while the term “dragnet” is used within the limitation, so is the phrase “twenty-four hour surveillance of any citizen.”¹⁰⁷ Thus, according to *Maynard*, the limitation on privacy imposed by *Knotts* is limited to one’s movements from one place to another, not “...[ones] movements whatsoever, world without end.”¹⁰⁸ Noting that “Whether an expectation of privacy is reasonable depends in large part upon whether that expectation relates to information that has been “expose[d] to the public...”,¹⁰⁹ the *Maynard* Court distinguished between the types of information “exposed to the public” and that received via GPS monitoring:

[F]irst, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more-sometimes a great deal more-than does the sum of its parts.¹¹⁰

¹⁰⁶ *Id.*

¹⁰⁷ 615 F.3d 544

¹⁰⁸ *Id.* at 557 (The *Maynard* court’s holding is not an entirely new take on the limits of the *Knotts* holding. As the court points out, the Fifth Circuit Court of Appeals has also interpreted the holding of *Knotts* as not applying to situations that involve “persistent, extended, or unlimited” monitoring of citizens by police. See *United States v. Butts*, 729 F.2d 1514, 1530 (5th Cir. 1984)

¹⁰⁹ 615 F.3d at 558.

¹¹⁰ *Id.*

According to the *Maynard* Court, it was precisely this misunderstanding of *Knotts* that caused other courts faced with similar GPS questions to mistakenly broaden its scope, while at the same time narrowly construing its limits to hypothetical cases of “mass surveillance” of the citizenry-at-large.¹¹¹

Thus, under *Maynard*, GPS monitoring is not initially a search, but can become one over time.¹¹² The Fourth Amendment is not violated because of the actual placement of the device, or even because the device was used to track someone from one place to another, but because it was used over the course of time to effect prolonged and invasive “twenty-four hour surveillance....without judicial knowledge or supervision.”¹¹³

Thus far, the courts that have found *Knotts* controlling of the GPS issue dismiss its express analytical limitations as only being concerned with “mass surveillance”, drawing a sharp distinction between sustained monitoring of an individual on one hand, and of the “random and arbitrary” monitoring of citizens at large on the other.¹¹⁴ None of the “pro-GPS” courts has

¹¹¹ *Id.*

¹¹² *Id.* at 560

¹¹³ *United States v. Knotts*, 460 U.S. 276, 283–84 (1983)

¹¹⁴ *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010)

submitted the practice of warrantless GPS monitoring to the complete “reasonable expectation of privacy analysis.”¹¹⁵ The only court to have done so, *Maynard*, found that while the act of warrantless GPS monitoring is not in itself a search, but can quickly become one.¹¹⁶ However, this aspect of the *Maynard* holding is nonetheless consistent with *Garcia*, *Marquez*, and *Foltz*, as a factor in each of those courts decisions was that the monitoring that took place was “limited” or occurred only for a “reasonable time”¹¹⁷ Only *Pineda* goes as far as to suggest that the government may engage in “twenty-four hour surveillance of any citizen....without judicial knowledge or supervision.”¹¹⁸

III. STATEMENT OF THE CASE

Juan Pineda-Moreno was arrested by Drug Enforcement Administration (DEA) agents shortly after he was seen leaving a suspected marijuana grow site on September 12th, 2007.¹¹⁹ A

¹¹⁵ See *Foltz v. Virginia*, 698 S.E.2d 281 (Va. Ct. App. 2010); *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010); *United States v. Burton*, 698 F. Supp. 2d 1303 (N.D. Fla. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007); *Morton v. Nassau County Police Dep't*, No. 05-CV-4000 (SJF)(AKT), 2007 WL 4264569, at *3–4 (E.D.N.Y. Nov. 27, 2007)

¹¹⁶ *United States v. Maynard*, 615 F.3d 544, 560 (D.C. Cir. 2010)

¹¹⁷ See *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010) (“In this case, there was nothing random or arbitrary about the installation and use of the device. The installation was non-invasive and occurred when the vehicle was parked in public. The police reasonably suspected that the vehicle was involved in interstate transport of drugs.”); *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007) (“So far as appears, the police of Polk County, where the events of this case unfolded, are not engaged in mass surveillance. *They do GPS tracking only when they have a suspect in their sights.*”) (*Emphasis added*)

¹¹⁸ *United States v. Knotts*, 460 U.S. 276, 283–84 (1983)

¹¹⁹ *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. Or. 2010)

subsequent search of Pineda's vehicle and home yielded two large garbage bags of marijuana, and he was charged with the manufacturing of marijuana and conspiracy to manufacture marijuana.¹²⁰ Pineda's arrest was more than just a lucky break for the DEA, however. The only reason agents knew Pineda was near the suspected grow site was because they had been secretly monitoring him over a period of four months using GPS technology.¹²¹ The DEA had begun investigating Pineda after a special agent observed him and some other men purchasing a large amount of fertilizer from a Home Depot Store in late May of 2007.¹²² Agents later observed Pineda and the men purchasing large amounts of groceries, irrigation equipment, and deer repellent at other area stores, and followed the group to Pineda's mobile home.¹²³ Suspecting that Pineda was growing marijuana, agents snuck onto Pineda's property in the middle of the night and attached a GPS device to the underside of his Jeep, which was parked a only few feet from Pineda's mobile home.¹²⁴ By the time Pineda was apprehended, DEA agents had placed GPS devices on the underside of Pineda's Jeep on seven different occasions: four times while it was

¹²⁰ *Id.* at 1213. Pineda was charged under 21 U.S.C. § 846(a)(1) , and (b)(1)(A)(vii), and 21 U.S.C. § 841(a)(1) and (b)(1)(A)(vii)

¹²¹ *Id.* at 1212.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 591 F.3d at 1213.

parked on public streets, once in a parking lot, and twice while it was parked in Pineda's driveway.¹²⁵ Agents never procured a warrant before placing the GPS units on Pineda's Jeep, or at any other time during the investigation.¹²⁶

At trial, Pineda attempted to have the evidence gathered against him through GPS monitoring suppressed, but was unsuccessful. Unconvinced by Pineda's argument that the government had violated his Fourth Amendment rights by placing a GPS device on his vehicle without a warrant, the District Court denied his motion to suppress the GPS evidence, and Pineda entered a conditional guilty plea, reserving the right to appeal the ruling.¹²⁷

On appeal, Pineda argued that (1) The placement of GPS devices on the undercarriage of his Jeep invaded an area in which he possessed a reasonable expectation of privacy, constituting a search under the Fourth Amendment, and (2) that the continuous monitoring of his Jeep's location through GPS devices amounted to a search, in violation of the Fourth Amendment.¹²⁸ In its analysis of Pineda's "placement" argument, the *Pineda* Court relied heavily up its decision in

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1213-1214.

United States v. McIver,¹²⁹ in which the Court found that attaching electronic devices to the underside of a vehicle did not constitute a “search” under the Fourth Amendment, because the undercarriage of a car is open and exposed to the public.¹³⁰ Citing *McIver*, the *Pineda* Court concluded that Pineda could not have had a reasonable expectation of privacy while his vehicle was parked on public streets and in public parking lots.¹³¹ In analyzing the legality of placing GPS devices on Pineda’s vehicle while it was parked in his driveway, the court found that Pineda had no reasonable expectation of privacy, even in the curtilage of his own driveway, because he did not “support that expectation by detailing the special features of the driveway itself” through the use of a gate or barrier.¹³²

Arguing that the monitoring of his vehicle with a GPS device violated the Fourth Amendment, Pineda suggested that *Knotts* was not controlling.¹³³ This was so, he argued, because the Supreme Court had “heavily modified” the analysis called for with regards to

¹²⁹ 186 F.3d 1119 (9th Cir. Mont. 1999)

¹³⁰ *Id.* at 1126.

¹³¹ *Pineda-Moreno*, 591 F.3d at 1213.

¹³² *Id.* at 1214.

¹³³ UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Juan PINEDA-MORENO, Defendant-Appellant., 2009 WL 4611260 (C.A.9)(2009) (Brief for appellant)

technology that provides “more than naked-eye surveillance”, such as GPS, in *Kyllo v. United States*.¹³⁴

The *Pineda* Court rejected this argument, finding that *Kyllo* involved “...technology [which] provided a substitute for a search unequivocally within the meaning of the Fourth Amendment...”¹³⁵ According to the court, GPS monitoring was different, because the technology is “ [a] substitute.... [for] following a car on a public street, [which] is unequivocally not a search.”¹³⁶ Comparing the use of GPS devices to the use of radio beepers, the court concluded that GPS technology only served as a substitute to the act of agents physically following *Pineda*.¹³⁷ Applying the Supreme Court’s analysis in *Knotts*, the court reasoned that no constitutionally protected rights were violated when agents utilized GPS technology to merely be “more effective in detecting crime” because the law does not “equate...police efficiency with

¹³⁴ 533 U.S. 27 (2001) (In *Kyllo*, police used a thermal imaging device to scan the heat signature emanating from the home of a suspected marijuana grower. After the images showed that the heat signatures were consistent with someone using heat lamps to grow marijuana, they secured a warrant and searched Kyllo’s home, uncovering an indoor growing operation involving more than 100 plants. At trial, Kyllo unsuccessfully moved to suppress the evidence gained from the search, arguing that the warrantless use of thermal scanning equipment violated his Fourth Amendment rights. On appeal, the Ninth Circuit Court of Appeals found that Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home. Reversing, the Supreme Court found that any use of technology to gather information that could not otherwise be obtained without physical intrusion into a constitutionally protected area is a search under the Fourth Amendment. Because ““At the very core” of the Fourth Amendment “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,” police could not use technology to invade the home.

¹³⁵ *Pineda-Moreno*, 591 F.3d at 1216

¹³⁶ *Id.*

¹³⁷ *Id.*

unconstitutionality.”¹³⁸ Finding that Pineda’s arguments were circumvented by *McIver* and *Knotts*, the court affirmed the decision of the district court.¹³⁹

Pineda petitioned for a rehearing of the matter en banc, which was denied.¹⁴⁰ In his dissenting opinion, Chief Judge Alex Kozinski argued that the court’s decision was dangerous, warning that “1984 may have come a bit later than predicted, but it’s here at last.”¹⁴¹ Judge Kozinski questioned two crucial aspects of the opinion. First, Judge Kozinski criticized the court’s treatment of the fact that officers had affixed a GPS device to Pineda’s vehicle while it was parked within the curtilage of his home.¹⁴² Writing that the curtilage “rounds out the constitutional protections accorded an individual when he is at home,” Judge Kozinski argued that the curtilage should be afforded the same protections “as the home itself.”¹⁴³ Judge Kozinski also took issue with the *Pineda* Court’s reliance on the public nature of the driveway to determine that Pineda could not have possessed a reasonable expectation of privacy in it. Judge

¹³⁸ *Id.* (quoting *United States v. Knotts*, 460 U.S. 276 (1983))

¹³⁹ *Id.* at 1212-1214, 1216

¹⁴⁰ 617 F.3d 1120 (9th Cir. 2010)(Kozinski, A., Dissenting)

¹⁴¹ *Id.* (Referencing George Orwell’s dystopian classic 1984, which followed the plight of Winston Smith and his life in the tyrannical big-brother state, *Oceania*. Winston is consistently monitored and oppressed by the government. He ultimately attempts to escape with his lover, Julia, but fails, and is forced by the government to choose between her life and his own.

¹⁴² *Id.* at 1121-1123

¹⁴³ *Id.* at 1121 (Quoting *Oliver v. United States*, 466 U.S. 170, 225 (1984))

Kozinski argued that while one's driveway may be open to the general public, it is only open "for limited purposes....[various people] may come onto...[one's]...property to deliver their wares, perform maintenance or make repairs. This doesn't mean that we invite neighbors to use the pool, strangers to camp out on the lawn or police to snoop in the garage."¹⁴⁴ Of particular concern to Judge Kozinski was how this requirement would play out in the real world. Judge Kozinski feared that such a requirement would afford the wealthy a greater amount of protection under the Fourth Amendment than others:

[T]he very rich will still be able to protect their privacy with the aid of electric gates, tall fences, security booths, remote cameras, motion sensors and roving patrols, but the vast majority of...people will see their privacy materially diminished....open driveways, unenclosed porches, basement doors left unlocked, back doors left ajar, yard gates left unlatched, garage doors that don't quite close....will all be considered invitations for police to sneak in.¹⁴⁵

Second, Judge Kozinski criticized the court's reliance on *Knotts* in determining that no search occurred when officers monitored the GPS devices they had attached to Pineda's vehicle.¹⁴⁶ Taking issue with the ease at which the court found that GPS technology was akin to beeper technology from the 1980's, in that it "amounted principally to the following of an

¹⁴⁴ 617 F.3d 1120

¹⁴⁵ *Id.*

¹⁴⁶ *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010)

automobile on public streets and highways....”¹⁴⁷ Judge Kozinski distinguished beeper

technology from GPS technology:

[T]he modern devices used in [this] case can record the car's movements without human intervention—quietly, invisibly, with uncanny precision...the devices create a permanent electronic record that can be compared, contrasted and coordinated to deduce all manner[s] of private information about individuals.¹⁴⁸

Of critical importance to Judge Kozinski were the subtle, yet significant differences between radio beeper technology and GPS technology. GPS devices have greater differences with radio beepers than just the scope of their intrusiveness; key to Judge Kozinski was the ability of GPS to monitor a suspect autonomously, without the aid of an officer. While Judge Kozinski acknowledged that the law affords little privacy against police engaged in visual surveillance, he pointed out that this is limited to actual visual observation, or to those tools that “augment the sensory faculties bestowed upon [police officers] at birth.”¹⁴⁹ Thus, according to Judge Kozinski, radio beepers, which allowed police officers to follow a suspect from a distance, were acceptable because they merely augmented the vision of officers.¹⁵⁰ However, GPS

¹⁴⁷ *Id.* at 1123

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

technology is hardly natural. “[T]here's no hiding from the all-seeing network of GPS satellites that hover overhead, which never sleep, never blink, never get confused and never lose attention.”¹⁵¹

Throughout his dissent, Judge Kozinski expressed his concerns about the repercussions of the *Pineda* Court’s decision. Openly worrying that the decision “...Hands the government the power to track the movements of every one of us, every day of our lives...”,¹⁵² Judge Kozinski reminded the court that it must not forget the original meaning of the Fourth Amendment when applying it in modern context.

IV. ANALYSIS

1. TRYING TO TEACH OLD DOGMA NEW TRICKS

Nearly half a century ago, the Supreme Court recognized that the Fourth Amendment “protects people, not places.”¹⁵³ This finding was the result of growing discontent with the inability of the prevailing doctrine to ensure the amendments continued saliency in the face of

¹⁵¹ *Id.* at 1126

¹⁵² 591 F.3d 1212

¹⁵³ *Katz v. United States*, 389 U.S. 347 (1967)

advancing technology.¹⁵⁴ Rather than defining the scope of the amendment in purely categorical, tangible terms, the Court broadened the protections afforded under its reach to encompass non-tangible privacy interest, and defined its outer limits as the bounds of “reasonableness.”

The inherently subjective nature of this balancing test requires that courts faced with the question of whether something enjoys protection under the Fourth Amendment exercise exceptional cautiousness, and deliberate reflection. This is especially true of novel technologies, such as GPS.

No court faced with the question of GPS’s role in law enforcement has gone as far in diminishing the protections of the Fourth Amendment than the *Pineda* Court. The power that was challenged by the defendant in *Pineda* is a limitless one, which affords “every petty officer”¹⁵⁵ the ability to secretly monitor the movements of any citizen, months on end, world without end, without any judicial supervision or accountability. This power differs fundamentally from how radio beepers help police. Unlike GPS, radio beepers cannot be used without direct human

¹⁵⁴ *Formalism*, *Supra* note 45 at 967-71

¹⁵⁵ See THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY (1971) (The Writs of Assistance were general warrants issued by the English government which allowed government officials to search any suspected property for goods that had been smuggled to avoid taxes. The warrants were issued with no time limit and were extremely broad in their scope, allowing a search anywhere at any time, with little to no justification required. The writs were challenged by the colonist, and in a legal action against the practice, lawyer James Otis gave an impassioned and powerful speech decrying the writs as “being general, [and thus] illegal. It is a power that places the liberty of every man in the hands of every petty officer.” James Madison, who was in the courtroom, described the scene: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born")

involvement, and are more like a simple tool, not unlike binoculars, which serves only to “augment the natural senses of police.”¹⁵⁶

Many of the analytical problems with the *Pineda* Court’s ruling are largely the result of its heavy and at times awkward reliance on its previous decision in *United States v. McIver*,¹⁵⁷ which was itself heavily reliant on *Knotts*. While the facts of *McIver* were similar to those in *Pineda*, there are glaring problems with the ease at which the Court rested its decision upon *McIver*’s precedential value. In *McIver*, police officers suspected that the defendant was involved in a marijuana production and distribution scheme.¹⁵⁸ Police attached a GPS device and a “birddog 300” electronic tracking device to McIver’s Toyota SUV without a warrant.¹⁵⁹ However, the GPS device malfunctioned after three days, and police resorted to relying on the radio beeper to continue monitoring McIver.¹⁶⁰ After his eventual arrest and trial, McIver challenged the constitutionality of the officers’ actions, contending that the attachment of these

¹⁵⁶ *United States v. Knotts*, 460 U.S. 276, 276 (1983)

¹⁵⁷ 186 F.3d 1119 (9th Cir. 1999)

¹⁵⁸ *Id.* at 1122-1124

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

devices violated his Fourth Amendment rights.¹⁶¹ However, *McIver* did not challenge the monitoring of the devices.¹⁶²

While the similarity of these facts made *McIver* a logical place for the *Pineda* Court to root its analysis, *McIver* cannot be squarely relied upon as a pure GPS precedent. Unlike *Pineda*, *McIver* did not challenge the actual practice of monitoring his vehicles position; instead, he merely challenged the attachment of said devices to his vehicle. Likewise, the GPS unit there malfunctioned only three days after it was installed, and much of the dispute instead came from evidence obtained through the use of the “birddog 300”- a radio beeper device.¹⁶³ To the *Pineda* Court, this distinction was of little consequence; in its view, the two technologies were essentially the same.¹⁶⁴

This comingling of technology, which parsed and interfused the reach and scope of two very different technologies, led the *Pineda* Court to conclude that *Pineda* lacked a reasonable expectation of privacy against GPS monitoring: “The substitute [for GPS monitoring]... is an activity, namely following a car on a public street.... [which] is unequivocally not a search

¹⁶¹ *Id.* at 1126

¹⁶² *Id.*

¹⁶³ *Id.* at 1123

¹⁶⁴ *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (D.C. Cir. 2010)

within the meaning of the amendment.”¹⁶⁵ As a result, the *Pineda* Court never truly submitted the issue of GPS monitoring to the complete analysis the Fourth Amendment calls for. Instead, the court bound its analysis strictly in arguably applicable precedent alone, and in the process expounded a legal fiction that was first aired in *Garcia*: that GPS monitoring is no different than so many other technologies.¹⁶⁶

This view of GPS devices lead the *Pineda* Court to cite *Garcia* as the leading proposition for what the *Knotts* limitation was meant to apply to: “mass surveillance.”¹⁶⁷ However, it was incorrect to construe the limits of the *Knotts* holding in this way, as nothing in the language of the *Knotts* decision suggest that it merely prohibits tracking citizens-at-large, while simultaneously blessing the sustained “twenty-four hour monitoring of any citizen.” Rather, this construction is born out of dictum contained within the *Garcia* opinion, where Judge Posner left open the question of whether mass surveillance of numerous citizens at once could survive constitutional scrutiny.¹⁶⁸ While there can be no doubt that the question of whether “mass

¹⁶⁵ *Id.*

¹⁶⁶ *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007)

¹⁶⁷ *Pineda-Moreno*, 591 F.3d at 1217 Fn. 2

¹⁶⁸ *Garcia*, 474 F.3d 994, 998 (“One can imagine the police affixing GPS tracking devices to thousands of cars at random, recovering the devices, and using digital search techniques to identify suspicious driving patterns. One can even imagine a law requiring all new cars to come equipped with the device so that the government can keep track

surveillance” would be constitutional has yet to be resolved, this does not mean the analytical limits of *Knotts* lends lend themselves only to the interpretation afforded to them by the *Garcia* court.¹⁶⁹ Such a narrow reading of the express limits of *Knotts* merely broadens its holding inversely.

By misapplying *McIver* and *Knotts*, The Pineda Court treated a question of first impression about the warrantless use of novel technology as though it had already been decided long ago. This use of old dogma to justify the use of new and entirely different technology by police goes beyond merely applying stare decisis; it instead serves to “convert by precedent [the protections of the Fourth Amendment] into impotent and lifeless formulas.”¹⁷⁰

2. STILL DELUSIONAL? THE SUBJECTIVE EXPECTATION OF PRIVACY AND GPS.

Courts which have found the use of GPS monitoring to not be violative of the Fourth Amendment have uniquely qualified their findings based on the facts the case. In *Garcia*, Judge Posner opined that warrantless GPS monitoring was acceptable in that case because police only

of all vehicular movement in the United States. It would be premature to rule that such a program of mass surveillance could not possibly raise a question under the Fourth Amendment—that it could not be a search because it would merely be an efficient alternative to hiring another 10 million police officers to tail every vehicle on the nation's roads.”)

¹⁶⁹ *United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010)

¹⁷⁰ *Olmstead v. United States*, 277 U.S. 438, 473 (1928)

“do GPS tracking only when they have a suspect in their sights.”¹⁷¹ In *Marquez*, the court found warrantless GPS monitoring to be acceptable when police only monitor it “for a reasonable period of time” and when said monitoring does not involve tracking a vehicle “on private land.”¹⁷² In *Foltz*, the court found that the defendants behavior, namely “...[driving] slowly through the same areas, repeating a pattern...actually made it easier rather than harder for someone to observe the van's movements,” thus defeating his expectation of privacy.¹⁷³

Like other pro-GPS courts, the *Pineda* Court relied heavily upon *Knotts*. However, the court made no qualifications to the right of police to warrantlessly monitor suspects with GPS receivers. Instead, the *Pineda* Court afforded the GPS issue the scantest amount of analysis, conclusorily deciding that the use of GPS receivers by police was no different that the use of radio beepers.¹⁷⁴ The GPS question deserves greater scrutiny than this.

Quoting *Knotts*, the *Pineda* Court found that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place

¹⁷¹ *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007)

¹⁷² *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010)

¹⁷³ *Foltz v. Virginia*, 698 S.E.2d 281, 290 (Va. Ct. App. 2010).

¹⁷⁴ *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (9th Cir. 2010).

to another.”¹⁷⁵ Thus, according to the *Pineda* Court, this text foreclosed the argument that the utilization of GPS tracking is a search.¹⁷⁶ However, the court read too much into this line. As recently as 2009, the Supreme Court directly challenged this proposition when it found that police could not search an arrestee's vehicle without a warrant or the arrestee's consent: "a motorist's privacy interest in his vehicle is less substantial than in his home.... [however], the....interest is nevertheless important and deserving of constitutional protection."¹⁷⁷

The question of whether one lacks an expectation of privacy, in totality, twenty four hours a day, seven days a week is a different question, one that was deliberately and expressly left open by the *Knotts* Court.¹⁷⁸ Through its own language, the application of *Knotts* is expressly limited to temporary viewing and observation by both bystanders and following police.¹⁷⁹ One cannot fairly equate the temporary loss of privacy that inevitably occurs when one

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Arizona v. Gant*, 129 S. Ct. 1710 (2009)

¹⁷⁸ *Id.*

¹⁷⁹ *United States v. Maynard*, 615 F.3d 544, 556 (D.C. Cir. 2010) (“In reserving the "dragnet" question, the [Knotts] Court was not only addressing but in part actually quoting the defendant's argument that, if a warrant is not required, then prolonged "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.”); *United States v. Butts*, 729 F.2d 1514, 1518 n. 4 (1984) (“As did the Supreme Court in *Knotts*, we pretermitted any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms”); *Knotts*, 460 U.S. 276, 283 (1983) (“Respondent [worries that] the result of the holding sought by the government would be that "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision."if such dragnet type law enforcement practices as

enters the public sphere with the total and complete loss of privacy that the *Pineda* Court suggests. Taken to its logical extreme, the *Pineda* decision suggest a brave new world in which a million law enforcement agents could follow someone everywhere they go, twenty four hours a day, seven days a week, for months or even years on end, without a warrant.

But, argue advocates of warrantless GPS monitoring, can't police do just that?¹⁸⁰ It is one thing to say that the police may follow you, it is another to suggest they could actually do so as completely, continuously and perfectly as GPS allows, over a period of several months or years. One can imagine: Over the span of several years, the police watch you. In the morning, on the way to work, during your lunch break, to the bar after work, there they are. They never fail to be there, and they never miss a thing. To your parent-in-laws house, the grocery store, daycare

respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable”

¹⁸⁰ *Foltz v. Virginia*, 698 S.E.2d 281 (Va. Ct. App. 2010) (“...society does not recognize such an expectation [of privacy] for vehicles on public streets....”); *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010) (“...A person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another. ”); *United States v. Burton*, 698 F. Supp. 2d 1303 (N.D. Fla. 2010) (“There is no Fourth Amendment violation for using a tracking device as a substitute for visual surveillance.”); *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010) (“The only information the agents obtained from the tracking devices was a log of the locations where [the defendant’s] car traveled, information the agents could have obtained by following the car.”); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007) (“the substitute ... is for an activity, namely following a car on a public street, that is unequivocally not a search within the meaning of the amendment.”); *Morton v. Nassau County Police Dep’t*, No. 05-CV-4000 (SJF)(AKT), 2007 WL 4264569, at *3–4 (E.D.N.Y. Nov. 27, 2007) (“The use of the GPS Device did not permit the discovery of any information that could not have obtained by following an automobile traveling on public roads, either physically or through visual surveillance.”)

center, and the psychiatrist, they slowly follow. Such a scenario is hardly seems plausible; it is the stuff of government conspiracy fantasies, and why we call the delusional man delusional.

Even if one presupposes that police could somehow deploy enough officers to engage in physical observation that achieves the same level of completeness and accuracy as that made possible by GPS, the affordability, deployability, and scalability of the technology serves to impermissibly alter the incentives and disincentives police must weigh before deciding to expend resources on an investigation. The labor cost needed to sustain such complete observation over a period of four months, such as what occurred in *Pineda*, would be substantial. The expense of such an ambitious operation helps to ensure that police will not take on such investigations unless they have substantial reason to believe that their actions will be worthwhile. In this sense, the cost of prolonged visual observations serves as a guard against frivolous police harassment and prolonged “dragnets”. GPS removes this guard; the same results can be obtained at minimal cost. This has the effect of lowering the cost of performing investigations to nearly nothing; the cost-benefit ratio becomes such that “fishing expeditions” are not just possible, but a profitable tactic for police departments engaged in “the competitive enterprise of ferreting out crime.”¹⁸¹

¹⁸¹ *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

Finally, one must take into consideration the expectations of the individual that such invasive monitoring would even occur. Even if the police had the resources to carry out the kind of invasive, prolonged observation GPS monitoring allows, it is arguable that such activity is something people actually expect them to do. The “expectations” the law refers to when it defines “reasonable expectations” is not ascertained merely by what the police might do, but rather by what people reasonably expect them to do.¹⁸² In this context, it is not enough to say that people expect that police might merely conduct visual observation, because GPS monitoring is much more than this. Where the expectations that the police might follow someone or conduct visual observation makes the limited nature of radio beeper tracking permissible, it at the same time precludes the use of GPS monitoring, due to its entirely different qualities. While one might reasonably expect that the police might follow them from one place to another, one could not

¹⁸² *Bond v. United States*, 529 U.S. 334, 338–39 (2000) (“...a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.”); *United States v. Lord*, 230 F. App’x 511, 514 (6th Cir. 2007) (“ in ascertaining the scope of a consent to search, a reviewing court considers what “the typical reasonable person [would] have understood by the exchange between the officer and the suspect.”(Quoting *United States v. Garrido-Santana*, 360 F.3d 565, 576 (6th Cir.2004)); *Florida v. Riley*, 488 U.S. 445, 455 (1989) (If something is not known to normally occur, there is a subjective expectation of privacy against that kind of activity; “...If the public rarely, if ever, travels overhead at [400 feet], the observation [made by police at that altitude] cannot be said to be from a vantage point generally used by the public and [the defendant] cannot be said to have “knowingly expose[d]” his greenhouse to public view.”); *California v. Greenwood*, 486 U.S. 35, 40–41 (1988)(Because it is “common knowledge” that garbage left on the curb of ones whom is easily accessible to animals or scavengers, and other members of the public, one cannot say they have a subjective expectation of privacy in their garbage) See Otterberg, *Supra* note 8, at 689 (“If... knowing exposure to the public diminishes, but does not eliminate, an individual’s expectation of privacy, then that person may maintain some kind of expectation of privacy in the accumulation of detail about his activities and movements.”)

reasonably expect that police could have them under nearly complete observation, “week in and week out, dogging [their] prey until [they] have identified all the places, people, amusements, and chores that make up that person's hitherto private routine.”¹⁸³

In applying the reasonable expectation of privacy test to GPS monitoring, the *Maynard* court made clear that the reasonableness of one’s expectations of privacy does not turn on what is possible, but what a reasonable person might expect another to do.¹⁸⁴ This understanding of a “reasonable expectation” implicates the first prong of the expectation of privacy test: “A reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain "disconnected and anonymous.””¹⁸⁵

3. THE EFFECT OF TIME ON THE SUBJECTIVE EXPECTATION OF PRIVACY

The warning against twenty-four hour monitoring, as foretold in *Knotts*, seems especially salient in *Pineda*. Unlike the limited, radio-like monitoring that occurred in *Garcia*,¹⁸⁶ the one

¹⁸³ *United States v. Maynard*, 615 F.3d 544, 560 (D.C. Cir. 2010)

¹⁸⁴ *Id.* (“In considering whether something is “exposed” to the public as that term was used in *Katz* we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do.”)

¹⁸⁵ *Id.*

¹⁸⁶ *Garcia* 474 F.3d at 998

week of monitoring at issue in *Foltz*,¹⁸⁷ and the “reasonable period of time” limitation of *Marquez*,¹⁸⁸ police monitored Pineda over a period of over *four months*.¹⁸⁹ This length of monitoring made what may have initially been a non-search under *Knotts* into a search in *Pineda*. The issues of time and scope are key to this distinction.¹⁹⁰ *Knotts* found that the tracking of a suspect “from one place...to another” with a radio beeper was not a search, but instead merely the “augment[ing] [of] the sensory faculties.”¹⁹¹ While utilizing GPS for a short period of time may arguably survive constitutional scrutiny under this standard, prolonged monitoring falls into a different category. Where short term monitoring may merely “augment” the police officer’s vision, prolonged GPS monitoring gives him omniscient vision.

The difference between incidental monitoring and prolonged monitoring was the basis upon which the *Maynard* court found that GPS monitoring is uniquely capable of becoming a search, even it is not initially.¹⁹² However, some have pointed out that the *Maynard* opinion suffers from analytical defects of its own, arguing that police will have no guideline to indicate

¹⁸⁷ *Foltz v. Virginia*, 698 S.E.2d 281, 283-284 (Va. Ct. App. 2010)

¹⁸⁸ *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010)

¹⁸⁹ *United States v. Pineda-Moreno*, 591 F.3d 1212-1213 (9th Cir. 2010)

¹⁹⁰ *United States v. Maynard*, 615 F.3d 544, 560-561 (D.C. Cir. 2010)

¹⁹¹ *United States v. Knotts*, 460 U.S. 276, 282 (1983)

¹⁹² *Maynard*, 615 F.3d at 560–61

when the use of GPS crosses the line from a permissible non-search to an impermissible search.¹⁹³ The answer to this criticism is surprisingly simple, however intractable it seems at first: police should err on the side of caution. Unless a valid warrant exception applies, police should obtain a warrant before placing a GPS device on a suspect's vehicle.¹⁹⁴

This is not to say that all forms GPS monitoring are outside the holding of *Knotts*, however. Where GPS monitoring is limited to short-term tracking, utilized merely to track someone from one location to another- for the same limited purposes as radio beepers were utilized in *Knotts*, the constitutionality is less suspect.¹⁹⁵ Where, however, GPS monitoring is conducted over a greater span of time, the mere potential that “ the whole of a person's

¹⁹³*D.C. Circuit Introduces “Mosaic Theory” Of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search*, THE VOLOKH CONSPIRACY, <http://volokh.com/2010/08/06/d-c-circuit-introduces-mosaic-theory-of-fourth-amendment-holds-gps-monitoring-a-fourth-amendment-search/> (“how do the police know when a mosaic has been created such that the sum of law enforcement techniques, when aggregated, amount to a search? Are they supposed to carry around a [Judge] Ginsburg Aggregatormeter that tells them when it's time to get a warrant? Take the case of Maynard. One-month of surveillance is too long, the court says. But how about 2 weeks? 1 week? 1 day? 1 hour?)(Last accessed Feb. 17, 2011)

¹⁹⁴ One such exception would be “hot pursuit”. See *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 310 (1967) One benefit of GPS technology is that allows police to “chase” fleeing suspects without necessitating a dangerous vehicular pursuit. Some police departments have already begun experimenting with such technology. See *L.A. Cops Fight Car Chases With GPS Devices*, INFORMATION WEEK, (Feb. 03, 2006) <http://www.informationweek.com/news/global-cio/showArticle.jhtml?articleID=178601965> (Last visited Feb. 17, 2011)

¹⁹⁵ *Maynard*, 615 F.3d at 556; *Garcia*, 474 F.3d 994

movements” will become exposed requires that officers obtain a warrant in order to comply with the requirements of the Fourth Amendment.¹⁹⁶

The practical reality of this dichotomy makes it difficult, if not impossible, for an officer in the field to know precisely when her utilization of GPS will become a search. There is no hard and fast rule. Thus, outside of emergencies, the wise officer will always obtain a warrant, even if it is not initially needed, because she knows it may be needed before long. While it is often true that “there is a tradeoff between security and privacy,”¹⁹⁷ security should never be permitted to defeat privacy when not absolutely necessary. “The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.”¹⁹⁸ The requirement that police officers obtain a warrant before utilizing GPS provides “a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.”¹⁹⁹

¹⁹⁶ *Maynard*, 615 F.3d at 556

¹⁹⁷ *Garcia*, 474 F.3d at 998

¹⁹⁸ *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009)

¹⁹⁹ *Kyllo v. United States*, 533 U.S. 27, 38 (2001).

4. IS THE SUBJECTIVE EXPECTATION AGAINST GPS MONITORING ONE SOCIETY IS PREPARED TO ACCEPT?

Even if one can satisfy the requirement that they subjectively maintain a reasonable expectation of privacy, the Fourth Amendment will not protect that expectation unless it is one “that society is prepared to recognize” as reasonable.²⁰⁰ This requires that one look at “understandings that are recognized or permitted by society”²⁰¹ The privacy interest invaded, as held by Pineda, were not those of his automobile, or even any particular interest he had in a single trip, but that of his anonymity in day-to-day life, and the “intimate picture of [his] life that he expects no one to have, short perhaps of his spouse.”²⁰² Recognizing this, numerous states have explicitly declared that GPS monitoring violates privacy rights. California’s penal code states that “No person or entity... shall use an electronic tracking device to determine the location or movement of a person.” This provision of the law can be found under a chapter 1.5, entitled “invasion of privacy.”²⁰³ In Utah, the law specifically mentions the “reasonable expectation of privacy” in prohibiting police officers from placing GPS devices on a vehicle

²⁰⁰ *Katz v. United States*, 389 U.S. 347, 361 (1967)

²⁰¹ *Maynard*, 615 F.3d at 558

²⁰² *Id.* at 563

²⁰³ CAL. PENAL CODE § 637.7

without a warrant: “...placing a mobile tracking device, entry upon private property, the passenger compartment of a vehicle, or *any other area subject to a reasonable expectation of privacy* is prohibited unless the applicant first obtains consent or authority for such an entry.”²⁰⁴

Minnesota law states that “...no person may install [a] mobile tracking device without first obtaining a court order...” under Chapter 626A, entitled “Privacy of Communications or Wire, Electronic, and Oral Interception.”²⁰⁵ Numerous other states have similar laws, and others have recently proposed them.²⁰⁶

This recognition of the privacy interest invaded by GPS monitoring has also been reinforced in several state courts, which have held that warrantless GPS monitoring by police violates state law. In *Washington v. Jackson*,²⁰⁷ the Washington Supreme Court found that the installation of GPS devices on the defendant’s vehicle while it was impounded violated the state constitution because it violated those privacy interest “...which citizens of this state have held,

²⁰⁴ UTAH CODE ANN. §§ 77-23a-4, 77-23a-7, 77-23a-15.5

²⁰⁵ MINN. STAT. §§ 626A.37, 626A.35

²⁰⁶ See Florida(FLA. STAT. §§ 934.06, 934.42; S.C.CODE ANN. § 17-30-140);Oklahoma (OKLA. STAT., TIT. 13, §§ 176.6, 177.6);Hawaii (HAW. REV. STAT. §§ 803-42, 803-44.7); Pennsylvania(18 PA. CONS.STAT. § 5761.) Washington (House Bill 1180 “*Expanding the protections for victims of stalking and harassment in antiharassment protection orders*” pending; <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1180> (Last Visited Feb. 17, 2011))

²⁰⁷ 76 P.3d 217 (Wash. 2003)

and should be entitled to hold, safe from governmental trespass.”²⁰⁸ While the court did find the state constitution to be broader than the Fourth Amendment itself, it nonetheless made clear that the expectation to privacy is not reduced by “advances in technology”²⁰⁹ In *New York v. Weaver*,²¹⁰ the New York Court of Appeals found that police violated the defendant’s rights under New York’s Constitution when they placed a GPS device on his vehicle without a warrant, finding that “the massive invasion of privacy entailed by the prolonged use of [a] GPS device [is] inconsistent with even the slightest reasonable expectation of privacy.”²¹¹ In *Massachusetts v. Connolly*²¹² the Massachusetts Supreme Court found that because “...the owner of property has a right to exclude it from ‘all the world’.... the government’s....use of the defendant’s vehicle to track its movements interferes with the defendant’s interest in the vehicle notwithstanding that he maintains possession of it.”²¹³ Similarly, in *Delaware v Holden*²¹⁴ the Delaware Superior Court recently found that warrantless GPS monitoring violates the reasonable expectation of privacy

²⁰⁸ *Id.* at 220

²⁰⁹ *Id.*

²¹⁰ 12 N.Y.3d 433 (2009)

²¹¹ *Id.* at 444

²¹² 913 N.E.2d 356 (Mass. 2009)

²¹³ *Id.* at 369-370

²¹⁴ *Delaware v. Holden*, No. IN 10-03-0545, 10-03-0546, 10-03-0547, 10-03-0548, 2010 WL 5140744 (Del. Super. Ct. Dec. 14, 2010).

because “society reasonably expects to be free from constant police scrutiny.”²¹⁵ No state court thus far faced with the GPS question has found in the governments favor.

Through their respective legislatures and courts, numerous states have thus answered the question of whether the expectation of privacy against GPS monitoring is one society is prepared to recognize as reasonable in the affirmative.

By overly relying on past radio beeper cases, the *Pineda* Court misses this point. As a result, it did not even apply the “reasonable expectation of privacy” test to the problem of warrantless GPS monitoring. This analytical short shrift undermines the Fourth Amendment, and is inconsistent with the law of numerous states, including three within its own district. The *Pineda* Court has created a dangerous precedent, which will have a practical and real effect on the practices of law enforcement agents and the lives of citizens throughout the ninth district.

5. ENTERING THE CURTILAGE

By the time their investigation was complete, police had placed GPS devices on Pineda’s Jeep a total of seven times.²¹⁶ These devices were twice placed on his Jeep while it was parked

²¹⁵ *Id.* at 7

²¹⁶ *United States v. Pineda-Moreno*, 591 F.3d 1212-1213 (9th Cir. 2010)

in his driveway, near his front door.²¹⁷ Pineda argued that his Jeep was parked in the curtilage of his home on these two occasions, something the government did not dispute.²¹⁸ Despite this, the *Pineda* Court found that the installation of the GPS devices was not violative of the Fourth Amendment because Pineda did not “....support [his subjective expectation of privacy] by detailing the special features” of his driveway.²¹⁹ According to the court, Pineda could have supported such expectations by erecting a gate or barrier, or by obscuring his driveways visibility from the street.²²⁰

Relying on *United States v. Magana*,²²¹ the *Pineda* Court justified this conclusion by explaining that one’s driveway is only a semiprivate area.²²² In *Magana*, the court declared that the reasonable expectation of privacy test governed the right to privacy one has in their driveway. Because the driveway is open to public view, the *Magana* court reasoned that the privacy interest in it is not absolute, but rather a matter of degrees.²²³ There, police officers were

²¹⁷ *Id.*

²¹⁸ *Id.* at 1214-1215

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ 512 F.2d 1169 (9th Cir. 1975)

²²² *Pineda-Moreno*, 591 F.3d at 1215

²²³ *Magana*, 512 F.2d at 1171

engaged in a sting operation to buy drugs from a heroin dealer.²²⁴ Police officers entered the defendant's driveway to arrest him after he had arranged to sell drugs to an undercover officer.²²⁵ Police entered the defendant's driveway as he was opening his garage.²²⁶ The *Magana* Court found because the defendant was seen from the street engaging in illegal activity, he could not claim an expectation of privacy.²²⁷

Applying this logic, the *Pineda* Court argued that because a neighborhood child could have easily “walked up Pineda’s driveway and crawled under his Jeep to retrieve a lost ball or runaway cat”, Pineda could not claim he had an expectation of privacy in his driveway.²²⁸ However, this stretch of logic essentially converts a “semi-private area” into an area devoid of any privacy whatsoever. For many, if not most driveways are open to the public, if only for limited purposes. To hold that the public’s ability to enter one’s driveway, whether invited or not, as the litmus for whether there is an expectation of privacy in ones driveway essentially deprives a majority of driveways from any expectation of privacy at all. This flies in the face of

²²⁴ *Id.* at 1170

²²⁵ *Id.*

²²⁶ *Id.* at 1171

²²⁷ *Id.*

²²⁸ *Pineda-Moreno*, 591 F.3d at 1215

Magana itself, which cautioned “...it would be...unwise to hold, as a matter of law, that all driveways are protected by the Fourth Amendment from all penetrations by police officers.... as to hold that no driveway is ever protected from police incursions.”²²⁹

The *Pineda* Court’s narrow interpretation of the subjective prong of the privacy test as applied to the curtilage is likewise contrary to Supreme Court precedent. There are very few areas in modern life that are entitled to nearly *per se* protection under the Fourth Amendment; the home- and by extension the curtilage immediately surrounding it, is one of them. In *Oliver v. United States*,²³⁰ the Supreme Court made this clear when it declared that while a person may not legitimately demand privacy for activities conducted “outdoors in fields”, he may make such demands “in the area immediately surrounding the home.”²³¹ *Oliver* was reaffirmed four years later in *United States v. Dunn*,²³² when the Court referred to four factors to define the curtilage: (1) the proximity of the area to the home, (2) whether the area is included in an enclosure surrounding the home, (3) the nature of the area, and (4) the steps taken to protect the area from observation by passersby. An area need not possess all four factors to qualify as the curtilage,

²²⁹ *Magana*, 512 F.2d at 1171

²³⁰ 466 U.S. 170 (1984)

²³¹ *Id.* at 178

²³² 480 U.S. 294 (1987)

rather “...these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration-whether the area in question is so intimately tied to the home itself that it should be placed under the home's “umbrella” of Fourth Amendment protection.”²³³ While it may be arguable whether certain factors would have been applicable or not in Pineda’s case, the full analysis isn’t necessary, because there was no dispute- the government conceded that they had entered the Pineda’s curtilage.²³⁴

Despite this, the *Pineda* Court treated the distinction as though it was irrelevant, and applied a seemingly new affirmative action requirement derived from cases in which there was a question as to whether a given place was technically within the curtilage or not, to areas undisputed to be within the curtilage.²³⁵ The *Pineda* Court essentially applied the second and third factors laid out in *Dunn*- factors meant to be used as “tools” to measure the meaning of the curtilage, to negate the contentions of both Pineda and the government that police had entered Pineda’s curtilage, *sua sponte*.

²³³ *Id.* at 301

²³⁴ *Pineda-Moreno*, 591 F.3d at 1214-1215

²³⁵ *Id.*

The requirement that one take special actions to “outline the special features” of their driveway necessarily provides a lower level of Fourth Amendment protection for the curtilage at large than previously recognized by the law.²³⁶ As a result, those with more resources to erect a gate or other “special features” to conceal the curtilage of their home will enjoy a level of privacy typically not enjoyed by others.²³⁷ This, in turn, will often reflect the differences in socioeconomic class between the owner of the worthy curtilage and the owner of the non-worthy curtilage. Such an interpretation of the reasonable expectation of privacy lives so far outside the Fourth Amendment that it essentially undermines it: “the Fourth Amendment protects people, not places.”²³⁸ Regardless of where a search or seizure takes place, the Fourth Amendment protects people; it does not qualify itself based upon the landscaping choices of those people.

By intermingling the diminished expectations of privacy of the driveway with the absolute expectations of privacy of the curtilage, the *Pineda* Court has provided a way into what

²³⁶ *Id.* at 1122–23; *Dow Chem. Co. v. United States*, 476 U.S. 227, 252 fn.4 (1986). (Finding that the area immediately adjacent to a private home possesses a heightened expectation of privacy relative to the remainder of one’s property.)

²³⁷ *Pineda-Moreno*, 617 F.3d at 1123

²³⁸ *Katz v. United States*, 389 U.S. 347, 351 (1967)

is “nearly the home itself.”²³⁹ Now that police know of the path, it is certain to become well-traveled.

6. THE IMPLICATIONS OF THE PINEDA DECISION

Far too often, the Fourth Amendment is thought to only be the concern of the criminal. However, this couldn't be further from the truth. This is especially so with GPS. Every GPS case that has been before a court thus far has involved a defendant who was essentially caught red-handed committing a crime.²⁴⁰ This does not mean, however, that police only track criminals.²⁴¹

Only those who actually end up facing charges due to incriminating evidence obtained through GPS monitoring are likely to ever become aware that they have been monitored. Thus the

²³⁹ *Oliver v. United States*, 466 U.S. 170, 180 Fn. 11 (1984)

²⁴⁰ *United States v. Maynard*, 615 F.3d 544 (D.C. Circuit 2010)(Defendants implicated in a drug conspiracy) *Foltz v. Virginia*, 698 S.E.2d 281 (Va. Ct. App. 2010) (Police caught defendant in the midst of a sexual assault); *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010)(Police caught defendant making illegal drug deliveries); *United States v. Burton*, 698 F. Supp. 2d 1303 (N.D. Fla. 2010)(Defendant caught with drugs); *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010)(Defendant caught leaving a Marijuana field); *Morton v. Nassau County Police Dep't*, No. 05-CV-4000 (SJF)(AKT), 2007 WL 4264569, at *3–4 (E.D.N.Y. Nov. 27, 2007) *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007)(Defendant caught manufacturing Methamphetamine); (Defendant confessed to a series of burglaries); *State of Delaware v Holden*, IN 10-03-0545, 2010 WL 5140744 (Del. Super. Ct. Dec. 14, 2010)(Defendant caught transporting drugs); *New York v. Weaver*, 12 N.Y.3d 433 (2009)(Defendant caught committing a burglary); *Massachusetts v. Connolly*, 913 N.E.2d 356 (Mass. 2009)(Defendant convicted of selling drugs); *Washington v. Jackson*, 76 P.3d 217 (Wash. 2003) (en banc) (Murder suspect tracked dumping the bodies of his victims)

²⁴¹ *Student Files Lawsuit Over FBI's GPS Tracking*, NPR.COM, <http://www.npr.org/templates/story/story.php?storyId=134207567> (Yasir Afifi was surprised last fall when during a routine visit to the mechanic, his mechanic discovered an electronic device attached to his vehicle between his right rear wheel and exhaust. At first Afifi was unsure of what the device was, so he took photos and posted them on the internet. It was soon revealed that the device was a GPS receiver. Soon afterwards, FBI agents visited him to retrieve their device. They revealed to him that the FBI knew private details about his life, such as which restaurants he dined at, the new job he had just obtained and his plans to travel abroad. Agents demanded the he returned the device, and refused to let him speak with a lawyer. Afifi is now suing the government for violating his rights. (Last visited Mar. 3, 2011)

innocent may unwittingly and unknowingly become ensnared by the all seeing eye of government. “ If police are not required to obtain a warrant...before attaching a GPS device to a citizen's vehicle, then there is no limitation on the [government’s] use of these devices on any person's vehicle, whether criminal activity is suspected or not.”²⁴²

The implications of the *Pineda* Court’s decision are startling. Using *Pineda* as legal authority, police may now enter any curtilage that is arguably open, and track someone with a GPS device for an unlimited amount of time. The *Pineda* holding is not just limited to a GPS tracker clandestinely affixed to someone’s vehicle. The logic essentially allows any form of warrantless GPS tracking, including the secret co-opting of GPS enabled cell phones. In this light, the *Pineda* decision is exceptionally feckless, even when compared to other courts that have found GPS monitoring to fall outside the protections of the Fourth Amendment. Unlike other courts that have faced the issue, the *Pineda* Court placed no limits on the ability of police to engage in warrantless GPS monitoring. Under *Pineda*, police may engage in such monitoring unilaterally, without cause, with no time limit, and no boundaries. They may enter any curtilage

²⁴² *Washington v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) (en banc).

that isn't gated or otherwise "outlined" in order to execute these powers.²⁴³ Such irreverence to the purposes of the Fourth Amendment essentially takes the broadened interpretation afforded the amendment under *Katz* and fashions it into a weapon that serves to emasculate civil liberty in the name of civil security. This blessing of unfettered power to law enforcement recalls the Writs of Assistance, which like the *Pineda* decision, granted unchecked, blanket authority to petty officers to intrude upon the privacy of citizens.²⁴⁴

V. CONCLUSION

After Pineda, is the delusional man still delusional, or is his judge merely naive?

There may no longer be a reason to fear black helicopters, but the idea that one is secretly being followed by the government is no longer just the stuff of crackpot conspiracy theories. *Pineda* enlarges the power of police to new heights. They may enter anywhere on your property, at any time, limited only by your front door. Police may engage in clandestine electronic surveillance at their own discretion, without judicial oversight or accountability, for as long as they want. This

²⁴³ *Id.*

²⁴⁴ See HUTCHINSON, *Supra* note 155

may be great for security, but it is disastrous for the very freedom the Fourth Amendment was designed to protect: the right to be left alone.²⁴⁵

The sort of prolonged GPS monitoring that occurred in *Pineda* was a search. This is clear because most people do not reasonably expect to become the subjects of sustained, highly invasive, and uninterrupted police monitoring for months on end, and such expectations are ones that our society has long recognized as being objectively reasonable, even if a handful of circuit courts happen to disagree. These expectations of society, pronounced by several state legislatures and every state court to encounter the GPS question thus far, deserve respect. What is ultimately needed is a refusal by the courts to reward police work that takes unjustifiable shortcuts.

²⁴⁵ See Samuel D. Warren, Louis D. Brandeis, Boston, December, 1890, *The Right To Privacy*, 4 HARV. L. REV. 193, Dec. 15, 1890 (1890)