No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

ANTOINE JONES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the warrantless use of a tracking device on petitioner's vehicle to monitor its movements on public streets violated the Fourth Amendment.

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The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 615 F.3d 544. The order of the court of appeals denying rehearing (App., *infra*, 43a), and the opinions concurring in and dissenting from the denial of rehearing en banc (App., *infra*, 44a-52a) are reported at 625 F.3d 766. The opinion of the district court granting in part and denying in part respondent's motion to suppress (App., *infra*, 53a-88a) is published at 451 F. Supp. 2d 71.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2010. A petition for rehearing was denied on November 19, 2010 (App., *infra*, 43a). On February 3, 2011, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including March 18, 2011. On March 8, Chief Justice Roberts further extended the time within which to file a petition for a writ of certiorari to and including April 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted of conspiracy to distribute five kilograms or more of cocaine and 50 or more grams of cocaine base, in violation of 21 U.S.C. 841 and 846. The district court sentenced respondent to life imprisonment. Resp. C.A. App. 123-127. The court of appeals reversed respondent's conviction. App., *infra*, 1a-42a.

1. In 2004, a joint Safe Streets Task Force of the Federal Bureau of Investigation and the Metropolitan

Police Department began investigating respondent, who owned and operated a nightclub in the District of Columbia, for narcotics violations. App., *infra*, 2a. The agents used a variety of investigative techniques designed to link respondent to his co-conspirators and to suspected stash locations for illegal drugs. The agents conducted visual surveillance and installed a fixed camera near respondent's nightclub, obtained pen register data showing the phone numbers of people with whom respondent communicated by cellular phone, and secured a Title III wire intercept for respondent's cellular phone. *Id.* at 54a-55a; Gov't C.A. App. 73-74; Resp. C.A. App. 218-222, 227-289.

In addition to those techniques, the agents obtained a warrant from a federal judge in the District of Columbia authorizing them to covertly install and monitor a global positioning system (GPS) tracking device on respondent's Jeep Grand Cherokee. App., *infra*, 15a-16a, 38a-39a; Resp. C.A. App. 827.[1] The warrant authorized the agents to install the device on the Jeep within ten days of the issuance of the warrant and only within the District of Columbia, but the agents did not install the device until 11 days after the warrant was issued, and they installed it while the Jeep was parked in a public parking lot in Maryland. App., *infra*, 38a-39a. Agents also later replaced the device's battery while the Jeep was located in a different public parking lot in Maryland. Resp. C.A. App. 828, 832.

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[1] The Jeep was registered in the name of respondent's wife, but it was used exclusively by respondent. App., *infra*, 16a n.*; Resp. C.A. App. 826. Nevertheless, vehicle tracking devices provide information only about the vehicle's location; they do not reveal who is driving the car, what the driver and occupants are doing, and with whom they may meet at their destinations.

The GPS device communicated with orbital satellites to establish the device's location. Gov't C.A. App. 66. It was battery powered and accurate within 50 to 100 feet, *Id.* at 67, and it generated data only when the Jeep was moving. When the vehicle was not moving, the device was in "sleeping mode" in order to conserve its battery. *Id.* at 68-70. Using the device, agents were able to track respondent's Jeep in the vicinity of a suspected stash house in Fort Washington, Maryland, which confirmed other evidence of respondent driving his Jeep to and from that location. For example, respondent's presence at the Fort Washington stash house was also established by visual surveillance, including videotape and photographs of respondent driving his Jeep to and from that location. *Id.* at 75-76, 145-147; Resp. C.A. App. 844.

Based on intercepted calls between respondent and his suspected suppliers, investigators believed that respondent was expecting a sizeable shipment of cocaine during late October 2005. Gov't C.A. App. 215-218. On October 24, 2005, agents executed search warrants at various locations. They recovered nearly $70,000 from respondent's Jeep, and they recovered wholesale quantities of cocaine, thousands of dollars in cash, firearms, digital scales, and other drug-packaging paraphernalia from respondent's suspected customers. *Id.* at 137A, 222, 230A-F, 248B-N. Agents also recovered from the stash house in Fort Washington, Maryland, approximately 97 kilograms of powder cocaine, almost one kilogram of crack cocaine, approximately $850,000 in cash, and various items used to process and package narcotics. *Id.* at 83-93, 95; App., *infra*, 40a.

2. A federal grand jury sitting in the District of Columbia charged respondent with conspiring to distribute five kilograms or more of cocaine and 50 grams or more

of cocaine base, in violation of 21 U.S.C. 841 and 846; and 29 counts of using a communications facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). App, *infra*, 54a.

Before trial, respondent moved to suppress the data obtained from the GPS tracking device. Resp. C.A. App. 413, 560-567. Relying on *United States* v. *Knotts*, 460 U.S. 276 (1983), and *United States* v. *Karo*, 468 U.S. 705 (1984), the district court granted the motion in part and denied it in part, explaining that data obtained from the GPS device while the Jeep was on public roads was admissible, but that any data obtained while the Jeep was parked inside the garage adjoining respondent's residence must be suppressed. App., *infra*, 83a-85a. As a result, the GPS data introduced at trial related only to the movements of the Jeep on public roads. The jury acquitted respondent on a number of the charges and the district court declared a mistrial after the jury was unable to reach a verdict on the conspiracy charge. Gov't C.A. Br. 2-3.

A grand jury charged respondent in a superseding indictment with a single count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841 and 846. Gov't C.A. App. 321. After a second trial, at which the GPS evidence again related only to the movements of the Jeep on public roads, a jury convicted respondent of the sole count in the indictment. App., *infra*, 3a. The district court sentenced respondent to life imprisonment and ordered him to forfeit $1,000,000 in proceeds from drug trafficking. Resp. C.A. App. 122-127.

3. The court of appeals reversed respondent's conviction. App., *infra*, 1a-42a.

a. The court acknowledged this Court's holding in *Knotts* that monitoring the public movements of a vehicle with the assistance of a beeper placed inside a container of chemicals was not a search within the meaning of the Fourth Amendment because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." App., *infra*, 17a (quoting *Knotts*, 460 U.S. at 281). The court concluded, however, that *Knotts* was not controlling because the officers in that case monitored a "discrete journey" of about 100 miles, rather than conducting prolonged monitoring of a vehicle over the course of several weeks. *Id.* at 17a-19a. The court noted that *Knotts* reserved whether a warrant would be required before police could use electronic devices as part of a "dragnet-type law enforcement practice[]," such as "twenty-four hour surveillance." *Id.* at 17a-18a (quoting *Knotts*, 460 U.S. at 283-284).

The court acknowledged that two other courts of appeals have held that prolonged GPS monitoring of a vehicle is not a Fourth Amendment search. App., *infra*, 20a-21a (citing *United States* v. *Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515); *United States* v. *Garcia*, 474 F.3d 994 (7th Cir.), cert. denied, 552 U.S. 883 (2007)); see also *United States* v. *Marquez*, 605 F.3d 604 (8th Cir. 2010). The court found those cases inapplicable, stating that those defendants had not challenged the application of the holding in *Knotts* to prolonged surveillance. App., *infra*, 21a-22a.

b. After determining that it was not bound by *Knotts*, the court of appeals concluded that respondent had a reasonable expectation of privacy in the public movements of his vehicle over the course of a month be-

cause he had not exposed the totality of those movements to the public. App., *infra*, 22a-31a. The government's use of a GPS device to monitor those movements, the court held, was therefore a search within the meaning of the Fourth Amendment. *Id.* at 22a-35a; see *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

First, the court concluded that respondent's movements while he drove on public roads in his Jeep were not "actually exposed" to the public. App., *infra*, 23a-27a. The court stated that "[i]n 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." *Id.* at 23a. Applying that standard, the court concluded that "the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements * * * is essentially nil." *Id.* at 26a.

Second, the court rejected the argument that because each of respondent's individual movements was in public view, respondent's movements were "constructively exposed" to the public. App., *infra*, 27a-31a. The court explained that "[w]hen it comes to privacy, * * * the whole may be more revealing than the parts." *Id.* at 27a. Applying a "mosaic" theory, the court reasoned that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble," which can "reveal more about a person than does any individual trip viewed in isolation." *Id.* at 29a. The court concluded that a reasonable person "does not expect anyone to monitor and retain a record of every time he drives his car * * * rather, he

expects each of those movements to remain disconnected and anonymous." *Id.* at 31a.

Noting that seven States have enacted legislation requiring the government to obtain a warrant before it may use GPS tracking technology, App., *infra*, 33a-34a, the court of appeals further concluded that respondent's expectation of privacy in the month-long public movements of his Jeep was one that society was prepared to recognize as reasonable, *id.* at 31a-35a.

c. The court of appeals rejected the government's argument that the court's decision could invalidate the use of prolonged visual surveillance of persons or vehicles located in public places and exposed to public view. App., *infra*, 35a-38a. As a practical matter, the court suggested that police departments could not afford to collect the information generated by a GPS device through visual surveillance, but GPS monitoring, according to the court, "is not similarly constrained." *Id.* at 35a-36a. The court also explained that the constitutionality of prolonged visual surveillance was not necessarily called into question by its decision, because "when it comes to the Fourth Amendment, means do matter." *Id.* at 37a. For example, the court explained, police do not need a warrant to obtain information through an undercover officer, but they need a warrant to wiretap a phone. *Ibid.* The court ultimately decided to "reserve the lawfulness of prolonged visual surveillance" for another day. *Id.* at 37a-38a.

The court of appeals also rejected the government's argument that the search was nonetheless reasonable because, under the "automobile exception" to the Fourth Amendment's warrant requirement, see *Maryland* v. *Dyson*, 527 U.S. 465, 466-467 (1999) (per curiam); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974), the agents could

have repeatedly searched respondent's vehicle based on probable cause without obtaining a warrant. App., *infra*, 38a-39a. The court observed that the government had not raised this argument in the district court, but nevertheless rejected the argument on the merits, stating that "the automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate." *Id.* at 39a.

d. Finally, the court concluded that the district court's error in admitting evidence obtained by use of the GPS device was not harmless. App., *infra*, 39a-42a. The court rejected the government's contention that the other evidence linking respondent to the conspiracy was overwhelming and instead found that "the GPS data were essential to the Government's case." *Id.* at 41a. The court therefore reversed respondent's conviction. *Id.* at 1a-2a.

4. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 43a. Chief Judge Sentelle, joined by Judges Henderson, Brown, and Kavanaugh, dissented. *Id.* at 45a-49a. Chief Judge Sentelle explained that the panel's decision was inconsistent not only with the decisions of every other court of appeals to have considered the issue, but also with this Court's decision in *Knotts*. *Id.* at 45a. Chief Judge Sentelle observed that the Court's statement in *Knotts*, that nothing in the Fourth Amendment "prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," was "[c]entral to [its] reasoning." *Id.* at 46a (quoting *Knotts*, 460 U.S. at 282). He therefore concluded that "[e]verything

the Supreme Court stated in *Knotts* is equally applicable to the facts of the present controversy," because "[t]here is no material difference between tracking the movements of the *Knotts* defendant with a beeper and tracking [respondent] with a GPS." *Ibid.*

Chief Judge Sentelle found "unconvincing[]" the panel's attempt to distinguish *Knotts* "not on the basis that what the police did in that case is any different than this, but that the volume of information obtained is greater in the present case," noting that "[t]he fact that no particular individual sees * * * all [of a person's public movements over the course of a month] does not make the movements any less public." App., *infra*, 46a-47a. Chief Judge Sentelle also criticized the panel opinion for giving law enforcement officers no guidance about "at what point the likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private." *Id.* at 47a. He noted that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem." *Id.* at 48a.

With regard to the panel's holding that respondent acquired a reasonable expectation of privacy in the totality of his movements over the course of a month because "that whole reveals more . . . than does the sum of its parts," Chief Judge Sentelle stated that the panel had failed to explain how the whole/part distinction affects respondent's reasonable expectation of privacy. App., *infra*, 47a-48a. He explained that "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "[t]he sum

of an infinite number of zero-value parts is also zero." *Ibid.* Whatever the whole revealed, Chief Judge Sentelle explained, the test of the reasonable expectation is not "in any way related to the intent of the user of the data obtained by the surveillance or other alleged search." *Id.* at 48a.

Finally, Chief Judge Sentelle noted, "[l]est the importance of this opinion be underestimated," that because the panel found that the privacy invasion was not in the agents' using a GPS device, "but in the aggregation of the information obtained," App., *infra*, 48a, the panel's opinion calls into question "any other police surveillance of sufficient length to support consolidation of data into the sort of pattern or mosaic contemplated by the panel," *ibid.* Chief Judge Sentelle could not "discern any distinction between the supposed invasion by aggregation of data between the GPS-augmented surveillance and a purely visual surveillance of substantial length." *Id.* at 48a-49a.

Judge Kavanaugh also dissented. App., *infra*, 49a-52a. In addition to the reasons set forth by Chief Judge Sentelle, Judge Kavanaugh would have granted rehearing to resolve respondent's alternative claim on appeal that the initial warrantless installation of the GPS device on his car violated the Fourth Amendment because it was "an unauthorized physical encroachment within a constitutionally protected area," which the panel did not address. *Ibid*. (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with this Court's longstanding precedent that a person traveling on public thoroughfares has no reasonable expectation of privacy in his movements from one place to an-

other, even if "scientific enhancements" allow police to observe this public information more efficiently. See *United States* v. *Knotts*, 460 U.S. 276, 282-284 (1983). The decision also creates a square conflict among the courts of appeals. The Seventh and Ninth Circuits have correctly concluded that prolonged GPS monitoring of a vehicle's movements on public roads is not a "search" within the meaning of the Fourth Amendment. The Eighth Circuit, in rejecting a challenge to GPS tracking, stated that a person has no reasonable expectation of privacy in his public movements, and it upheld tracking for a reasonable period based on reasonable suspicion. At a minimum, if GPS tracking were (incorrectly) deemed a search, the tracking in this case was likewise reasonable.

Prompt resolution of this conflict is critically important to law enforcement efforts throughout the United States. The court of appeals' decision seriously impedes the government's use of GPS devices at the beginning stages of an investigation when officers are gathering evidence to establish probable cause and provides no guidance on the circumstances under which officers must obtain a warrant before placing a GPS device on a vehicle. Given the potential application of the court of appeals' "aggregation" theory to other, non-GPS forms of surveillance, this Court's intervention is also necessary to preserve the government's ability to collect public information during criminal investigations without fear that the evidence will later be suppressed because the investigation revealed "too much" about a person's private life. Because the question presented in this case is important, and because the court of appeals' decision is wrong, this Court should intervene to resolve the conflict.

A. The Court Of Appeals' Decision Conflicts With Prior Decisions Of This Court

1. This Court has held that a "search" within the meaning of the Fourth Amendment occurs only where a "legitimate expectation of privacy * * * has been invaded by government action." *Knotts*, 460 U.S. at 280 (internal quotation marks omitted). As a result, "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Applying those principles in *Knotts*, the Court held that a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281.

In *Knotts*, police officers, without obtaining a warrant, installed an electronic beeper in a container of chemicals that was subsequently transported in a vehicle. 460 U.S. at 277. The police officers used the beeper to supplement their visual surveillance of the vehicle, and the Court stated 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." *Id.* at 282.

The court of appeals' decision is in significant tension, if not outright conflict, with *Knotts*. As in *Knotts*, respondent had "no reasonable expectation of privacy in his movements from one place to another" as he traveled on public roads, 460 U.S. at 281, because those movements were all in public view. The enhanced accuracy of GPS technology, compared to the beeper used in *Knotts*, does not change the analysis. See *id.* at 284 ("Insofar as respondent's complaint appears to be * * * that scientific devices such as the beeper enabled the police to be

more effective in detecting crime, it simply has no constitutional foundation."); *Smith* v. *Maryland*, 442 U.S. 735, 744-745 (1979) (noting that petitioner had conceded that he would have no reasonable expectation of privacy in the phone numbers he dialed if he had placed the calls through an operator, and stating that "[w]e are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate"). Electronic tracking of a vehicle as it moves on public roads offends no reasonable expectation of privacy because it reveals only information that any member of the public could have seen, and it is therefore not a search within the meaning of the Fourth Amendment. See *Katz*, 369 U.S. at 351.

2. The court of appeals concluded that it was not bound by *Knotts* because that case involved a "discrete journey" of 100 miles, while this case involves "prolonged" GPS tracking over the course of roughly a month. App., *infra*, 17a-20a. That distinction makes no difference. The Court's decision in *Knotts* was based on the premise that the driver had no reasonable expectation of privacy in movements that were exposed to public view, not on the length of time the beeper was in place. 460 U.S. at 284-285.

Furthermore, even if the holding of *Knotts* was limited to police monitoring of short journeys on public roads with the assistance of electronic surveillance, the Court applied the same Fourth Amendment principles to prolonged electronic tracking in *United States* v. *Karo*, 468 U.S. 705, 715 (1984). In *Karo*, agents placed a tracking device in a can of ether and left the device in place for five months as the can was transported between different locations. *Id.* at 709-710. The Court held that certain transmissions from the beeper during

that prolonged period—*i.e.*, those that revealed information about private spaces—could not be used to establish probable cause in an application for a warrant to search a residence, but the Court's holding on that point did not depend upon the duration of the electronic monitoring. *Id*. at 714-718. Although the court of appeals had distinguished *Knotts* on the ground that "[t]he *Knotts* case involved surveillance over only a few days; monitoring in [this] case took place over five months," *United States* v. *Karo*, 710 F.2d 1433, 1439 (10th Cir. 1983), rev'd, 468 U.S. 705 (1984), the Court concluded that the remaining evidence, including "months-long tracking" of the ether can through "visual and beeper surveillance," established probable cause supporting issuance of the warrant. *Karo*, 468 U.S. at 719-720. The Court expressed no concern about the prolonged monitoring.

The GPS monitoring in this case was not "dragnet" surveillance, which the Court in *Knotts* stated it would leave for another day. 460 U.S. at 284. The Court generally has used the term "dragnet" to refer to high-volume searches that are often conducted without any articulable suspicion. See, *e.g.*, *Florida* v. *Bostick*, 501 U.S. 429, 441 (1991); *Cupp* v. *Murphy*, 412 U.S. 291, 294 (1973) (discussing police "dragnet" procedures without probable cause in *Davis* v. *Mississippi*, 394 U.S. 721 (1969)); *Berger* v. *New York*, 388 U.S. 41, 65 (1967). That scenario is not presented here. The agents in this case tracked the movements of a single vehicle driven by an individual reasonably suspected of cocaine trafficking. Even if this were (incorrectly) deemed a Fourth Amendment search, it would be a reasonable one. This record raises no concerns about mass, suspicionless GPS monitoring; "the fact is that the 'reality hardly suggests abuse.'" *Knotts*, 460 U.S. at 283-284 (quoting *Zurcher*

v. *Stanford Daily*, 436 U.S. 547, 566 (1978)). Any constitutional questions about hypothetical programs of mass surveillance can await resolution if they ever occur.

3. Even assuming this case is not squarely controlled by *Knotts*, the court of appeals misapplied this Court's Fourth Amendment cases to hold that respondent had a reasonable expectation of privacy in the totality of his public movements, even if every individual movement was exposed to the public. The court of appeals stated that to determine whether something is "exposed to the public," "we ask not what another person can physically and may lawfully do[,] but rather what a reasonable person expects another might actually do." App., *infra*, 23a. This Court's cases lend no support to the court of appeals' view that public movements can acquire Fourth Amendment protection based on the lack of "likelihood" that anyone will observe them. *Id.* at 26a.

In support of its approach (App., *infra*, 23a, 24a-25a), the court of appeals cited *California* v. *Greenwood*, 486 U.S. 35 (1988), and *Bond* v. *United States*, 529 U.S. 334 (2000), both of which involve tactile observation of items that were not visually exposed to the public. In *Greenwood*, the Court held that the defendant lacked a reasonable expectation of privacy in the contents of trash bags that he placed on the curb in front of his house. 486 U.S. at 41. The Court acknowledged that the defendants may have had a "subjective" expectation of privacy based on the unlikelihood that anyone would inspect their trash after they placed it on the curb "in opaque plastic bags" to be picked up by the garbage collector after a short period of time. *Id.* at 39. But that expectation, the Court held, was not "objectively reasonable." *Id.* at 40. Instead, the Court held that once the

defendants placed the bags on the curb where they were readily accessible to anyone who wanted to look inside, "the police [could not] reasonably be expected to avert their eyes from evidence of criminal activity that *could have been* observed by any member of the public." *Id.* at 41 (emphasis added).

In *Bond*, the Court held that, unlike the opaque trash bags left on the curb in *Greenwood*, a bus passenger who places his opaque duffle bag in an overhead compartment does not "expose" his bag to the public for the type of "physical manipulation" that a border patrol agent engaged in to investigate the bag's contents. *Bond*, 529 U.S. at 338-339. The Court in *Bond* explicitly distinguished "visual, as opposed to tactile, observation" of an item in a public place, noting that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." *Id.* at 337.

The law enforcement investigations in *Greenwood* and *Bond* went beyond conducting visual surveillance of an item that was placed in public view, but even in *Greenwood*, the Court attached no importance to the subjective expectation that "there was little likelihood" that anyone would inspect the defendants' trash. 486 U.S. at 39. And the Court has never engaged in a "likelihood" analysis for cases involving visual surveillance of public movements like those at issue in this case. In *Knotts*, for example, the Court did not analyze the likelihood that someone would follow a vehicle during a 100-mile trip from Minnesota to Wisconsin. Instead, the Court stated that the use of a beeper to track the vehicle "raise[d] no constitutional issues which visual surveillance would not also raise" because "[a] police car following [the vehicle] at a distance throughout [the] journey *could have* observed [the defendant] leaving the

public highway and arriving at the cabin," *Knotts*, 460 U.S. at 285 (emphasis added), just as respondent's Jeep could have been observed through extensive visual and physical surveillance.

The court of appeals' reliance (App., *infra*, 23a-24a) on this Court's "flyover" cases, see *California* v. *Ciraolo*, 476 U.S. 207 (1986); *Florida* v. *Riley*, 488 U.S. 445 (1989), is similarly misplaced. *Ciraolo* and *Riley* involved visual inspections of private areas (the curtilage of homes), not public movements. In both cases, the Court acknowledged that although the defendants had exhibited actual expectations of privacy in their backyards, those expectations were not reasonable "[i]n an age where private and commercial flight in the public airways is routine." *Ciraolo*, 476 U.S. at 215.[2] The Court's likelihood analysis in those cases determined whether something ordinarily private was sufficiently "exposed" to the public to make an expectation of privacy in that area unreasonable. In the case of movements of a vehicle on public highways, that information has clearly already been exposed to the public. See *Knotts*, 460 U.S. at 285.

Finally, this Court has not "implicitly recognized" (App., *infra*, 28a) a distinction between a whole and the sum of its parts in analyzing whether something has been "exposed" to the public for purposes of the Fourth Amendment. In support of this proposition (*id.* at 27a-29a), the court of appeals cited *United States Department of Justice* v. *Reporters Committee for Freedom of*

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[2] As the court of appeals noted (App., *infra*, 24a), Justice O'Connor's concurrence in *Riley* clarifies that she believed that the defendant's backyard had been "exposed" to the public not because it was possible or legal for commercial planes to fly over the area, but because overflight was common. 488 U.S. at 453.

the Press, 489 U.S. 749 (1989), and *Smith*, *supra*, neither of which offers any support for the court of appeals' decision. *Reporters Committee for Freedom of the Press* is a Freedom of Information Act case addressing whether an individual has a privacy interest in his "rap sheet," which compiled "scattered bits" of public information, not "'freely available' * * * either to the officials who have access to the underlying files or to the general public." 489 U.S. at 764, 769. Its analysis does not inform, let alone resolve, the question of whether an individual who exposes his or her movements to the public retains a reasonable expectation of privacy in the sum of those movements.

And in *Smith*, the Court did not consider, as the court of appeals stated (App., *infra*, 28a), "whether [a person] expects all the numbers he dials to be compiled in a list" in determining whether a person has an *objectively* reasonable expectation of privacy in the phone numbers he dials. The Court, instead, noted that a person "see[s] a list of their * * * calls on their monthly bills" in supporting the Court's prior conclusion that individuals would not "in general entertain any actual expectation of privacy in the numbers they dial," and thus would lack a *subjective* expectation of privacy. *Smith*, 442 U.S. at 742. The Court's ultimate conclusion was that any subjective expectation of privacy a person has in the phone numbers he dials is objectively unreasonable, because when a person uses his phone, he "voluntarily convey[s] numerical information to the telephone company," thereby "'expos[ing]' th[e] information" to a third party. *Id.* at 744.

As Chief Judge Sentelle stated in his dissent from the denial of rehearing en banc, "[t]he reasonable expectation of privacy as to a person's movements on the high-

way is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." App., *infra*, 47a-48a. Nothing in this Court's Fourth Amendment cases supports the court of appeals' "aggregation" theory that a person can maintain a reasonable expectation of privacy in the totality of his public movements, each of which is "conveyed to anyone who want[s] to look." *Knotts*, 460 U.S. at 281.

B. The Court of Appeals' Decision Creates A Conflict Among The Circuits

The court of appeals' decision also creates a conflict among the circuits. The Seventh and Ninth Circuits have held that prolonged GPS monitoring of a vehicle's public movements is not a search within the meaning of the Fourth Amendment. See *United States* v. *Garcia*, 474 F.3d 994, 996-998 (7th Cir.), cert. denied, 552 U.S. 883 (2007); *United States* v. *Pineda-Moreno*, 591 F.3d 1212, 1216-1217 (9th Cir. 2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515). In addition, the Eighth Circuit in rejecting a challenge to GPS tracking, has stated that "[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. *Marquez*, 605 F.3d 604, 609 (2010). That conflict provides a compelling reason for the Court to intervene.

In *Pineda-Moreno*, after obtaining information that the defendant might be involved in drug trafficking, agents from the Drug Enforcement Administration (DEA) "repeatedly monitored [his] Jeep using various types of mobile tracking devices" "[o]ver a four-month period." 591 F.3d at 1213. After a tracking device alerted the agents that Pineda-Moreno was leaving a sus-

pected marijuana grow site, agents stopped the vehicle and smelled marijuana emanating from the backseat, and they found two large garbage bags of marijuana during a search of Pineda-Moreno's residence. *Id.* at 1214. Although Pineda-Moreno had not raised the argument in the district court, the Ninth Circuit rejected the argument that "the agents' use of mobile tracking devices continuously to monitor the location of his Jeep violated his Fourth Amendment rights." *Id.* at 1216. The court held that the use of a GPS device to track Pineda-Moreno's vehicle was not a Fourth Amendment search because "[t]he only information the agents obtained from the tracking devices was a log of the locations where Pineda-Moreno's car traveled, information the agents could have obtained by following the car." *Ibid.*[3]

In *Garcia*, police officers received information that Garcia was manufacturing methamphetamine, and they placed a GPS device on his car without applying for a warrant. 474 F.3d at 995. When they later retrieved the

[3] Chief Judge Kozinski, joined by Judges Reinhardt, Wardlaw, Paez, and Berzon, dissented from the Ninth Circuit's denial of rehearing en banc. *United States* v. *Pineda-Moreno*, 617 F.3d 1120 (2010), petition for cert. filed (U.S. Nov. 10, 2010) (No. 10-7515). Chief Judge Kozinski believed that the expectation of privacy in one's driveway (as "curtilage") is the same as in the home itself and that the agents' installation of the device while the vehicle was parked in the defendant's driveway was therefore problematic. *Id.* at 1121-1123. He also believed that rehearing en banc was warranted to address whether prolonged warrantless surveillance using a GPS device is permissible under the Fourth Amendment, given this Court's decision in *Kyllo* v. *United States*, 533 U.S. 27, 40 (2001), to "take the long view" from the original meaning of the Fourth Amendment in order to guard against advances in technology that can erode Fourth Amendment privacy interests. *Pineda-Moreno*, 617 F.3d at 1124.

device, they could see the car's travel history. *Ibid.* The Seventh Circuit held that no warrant was required to conduct continuous electronic tracking using a GPS device because the device was a "substitute * * * for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment." *Id.* at 997.

The Eighth Circuit similarly concluded that a warrant was not required in *Marquez*. In that case, DEA agents placed a GPS device on a truck that the agents believed was involved in drug trafficking. 605 F.3d at 607. The agents changed the battery on the device seven times over the course of a prolonged investigation, and the device "allowed police to determine" that the truck was traveling back and forth between Des Moines, Iowa, and Denver, Colorado. *Ibid.* The Eighth Circuit held that the defendant did not have "standing" to challenge the warrantless use of the GPS device because he was only an occasional passenger in the vehicle. *Id.* at 609. But the court further concluded that "[e]ven if [the defendant] had standing, we would find no error." *Ibid.* The court stated that "[a] person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another," *ibid.*, and concluded that "when police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time," *id.* at 610.[4]

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[4] In addition, appellate courts in Virginia, Wisconsin, and Maryland have concluded that police officers do not need to obtain a warrant before using a GPS device to track the movements of a vehicle on public roads. See *Foltz* v. *Commonwealth*, 698 S.E.2d 281, 285-292 (Va. Ct.

The D.C. Circuit's contrary opinion in this case creates a division of authority in the federal courts of appeals.[5] The conflict became intractable when the D.C. Circuit denied the government's petition for rehearing en banc in this case. App., *infra*, 49a (Sentelle, C.J., dissenting from denial of rehearing en banc) (noting conflict with Seventh, Eighth, and Ninth Circuits). This Court's intervention is therefore necessary to resolve the conflict.

C. The Question Presented Is Of Substantial And Recurring Importance

This Court's resolution of the question presented is critically important to law enforcement efforts through-

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App. 2010) (use of GPS monitoring device not a Fourth Amendment search where police officer "could have followed and personally recorded the movements" of defendant's vehicle without violating any recognized right of privacy), aff'd on other grounds, No. 0521-09-4, 2011 WL 1233563 (Va. Ct. App. Apr. 5, 2011) (en banc); *State* v. *Sveum*, 769 N.W.2d 53, 57-61 (Wis. Ct. App. 2009) (holding that no Fourth Amendment search or seizure occurs "when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view"); *Stone* v. *State*, 941 A.2d 1238, 1249-1250 (Md. Ct. Spec. App. 2008) (holding trial court did not abuse its discretion in cutting short defendant's cross-examination about a GPS tracking device because defendant had no reasonable expectation of privacy in his location while he traveled on public thoroughfares).

[5] Several state courts have also held that police use of GPS devices to monitor the public movements of vehicles is unlawful, but have done so only under their respective state constitutions, and not under the Fourth Amendment. See *People* v. *Weaver*, 909 N.E.2d 1195, 1202 (N.Y. 2009); *Commonwealth* v. *Connolly*, 913 N.E.2d 356, 366-372 (Mass. 2009); *State* v. *Jackson*, 76 P.3d 217, 224 (Wash. 2003); *State* v. *Campbell*, 759 P.2d 1040, 1049 (Or. 1988); but see *Osburn* v. *State*, 44 P.3d 523, 524-526 (Nev. 2002) (upholding attachment of electronic monitoring device under state constitution).

out the United States. The court of appeals' decision, if allowed to stand, would stifle the ability of law enforcement agents to follow leads at the beginning stages of an investigation, provide no guidance to law enforcement officers about when a warrant is required before placing a GPS device on a vehicle, and call into question the legality of various investigative techniques used to gather public information. GPS tracking is an important law enforcement tool, and the issue will therefore continue to arise frequently. This Court should intervene to clarify the governing legal principles that apply to an array of investigative techniques, and to establish when GPS tracking may lawfully be undertaken.

1. The court of appeals' decision, which will require law enforcement officers to obtain a warrant before placing a GPS device on a vehicle if the device will be used for a "prolonged" time period, has created uncertainty surrounding the use of an important law enforcement tool. Although in some investigations the government could establish probable cause and obtain a warrant before using a GPS device, federal law enforcement agencies frequently use tracking devices early in investigations, before suspicions have ripened into probable cause. The court of appeals' decision prevents law enforcement officers from using GPS devices in an effort to gather information *to establish* probable cause, which will seriously impede the government's ability to investigate leads and tips on drug trafficking, terrorism, and other crimes.

2. Additionally, the court of appeals' opinion gives no guidance to law enforcement officers about when a warrant is required. Use of a GPS device for a few hours (or perhaps a few days) is presumably still acceptable under *Knotts*. But the court's opinion offers no

workable standard for law enforcement officers to determine how long a GPS device must remain in place before their investigation reveals enough information to offend a reasonable expectation of privacy (and therefore become a Fourth Amendment search). See App., *infra*, 48a (Sentelle, C.J., dissenting from denial of rehearing en banc) (noting that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem").

3. Significantly, the court of appeals' legal theory that the aggregation of public information produces a Fourth Amendment search, even when short periods of surveillance would not, has the potential to destabilize Fourth Amendment law and to raise questions about a variety of common law enforcement practices. Protracted use of pen registers, repeated trash pulls, aggregation of financial data, and prolonged visual surveillance can all produce an immense amount of information about a person's private life. Each of these practices has been held not to be a Fourth Amendment search. See *Smith*, 442 U.S. at 745-746; *Greenwood*, 486 U.S. at 44-45; *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Karo*, 468 U.S. at 721. But under the court of appeals' theory, these non-search techniques could be transformed into a search when used over some undefined period of time or in combination. Just as "[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," App., *infra*, 31a, a person does not expect anyone to pull his trash every day for six weeks, or monitor the phone numbers he dials for months, or

review every credit card statement he receives and every check he writes for years. The court of appeals "aggregation" theory thus has limitless potential to require courts to draw impossible lines between the moderate degree of review or observation permitted under the court's approach, and the excessive or prolonged degree that becomes a search.

4. Finally, the use of GPS tracking devices is a common law enforcement investigative technique, and the question presented is therefore of recurring importance. In the wake of the decision in this case, suppression motions based on the use of prolonged GPS tracking have proliferated. Two motions have recently been decided in the government's favor. See *United States* v. *Walker*, No. 2:10-cr-00032, 2011 WL 651414, at 2-3 (W.D. Mich. Feb. 11, 2011) (noting that issue of warrantless GPS tracking "is a contentious issue regarding which there have been great differences of opinion among the federal courts" and holding that warrantless GPS tracking of vehicle did not constitute Fourth Amendment search under the "steadfastly cardinal rule in a universe of varying expectations," that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection") (brackets in original) (internal quotation marks omitted); *United States* v. *Sparks*, No. 10-10067-WGY (D. Mass. Nov. 10, 2010) (noting that "[t]he proper inquiry * * * is not what a random stranger would actually do or likely do, but rather what he feasibly could," and holding that warrantless GPS tracking of a vehicle for 11 days was not a Fourth Amendment search). Additional motions filed or supplemented after the court of appeals' opinion in this case remain pending in the district courts. See, *e.g.*, Docket entry No. 47, *United States* v. *Oladosu*,

No. 1:10-cr-00056-S-DLM (D.R.I. Jan. 21, 2011) (motion to suppress evidence obtained through warrantless use of GPS device); Docket entry No. 48, *United States* v. *Lopez*, No. 1:10-cr-00067-GMS (D. Del. Feb. 8, 2011) (expanding previous suppression motion to request suppression of evidence obtained from GPS devices attached to various vehicles driven by defendant), and Docket entry No. 54, *Lopez*, *supra* (Mar. 4, 2011) (continuing trial date and reopening hearing on defendant's suppression motion); Docket entry No. 99, *United States* v. *Santana*, No. 1:09-cr-10315-NG (D. Mass. Nov. 19, 2010) (supplemental memorandum in support of suppression motion; expanding original suppression motion to include request for suppression of evidence obtained through warrantless use of GPS device). This litigation will continue unabated in the absence of a definitive resolution of the conflict by this Court. And confusing or inconsistent case law with respect to GPS tracking or other means of acquiring or aggregating data not normally thought of as a search will hamper important law enforcement interests. This Court's intervention to forestall those consequences is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3030, Consolidated with No. 08-3034

UNITED STATES OF AMERICA, APPELLEE

v.

LAWRENCE MAYNARD, APPELLANT

Argued: Nov. 17, 2009
Decided and Filed: Aug. 6, 2010

OPINION

Before: GINSBURG, TATEL and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: The appellants, Antoine Jones and Lawrence Maynard, appeal their convictions after a joint trial for conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841 and 846. Maynard also challenges the sentence imposed by the district court. Because the appellants' convictions arise from the same underlying facts and they make several overlapping arguments, we consolidated their appeals. For the reasons that fol-

low, we reverse Jones's and affirm Maynard's convictions.

I. Background

Jones owned and Maynard managed the "Levels" nightclub in the District of Columbia. In 2004 an FBI Metropolitan Police Department Safe Streets Task Force began investigating the two for narcotics violations. The investigation culminated in searches and arrests on October 24, 2005. We discuss that investigation and the drug distribution operation it uncovered in greater detail where relevant to the appellants' arguments on appeal.

On October 25 Jones and several alleged co-conspirators were charged with, among other things, conspiracy to distribute and to possess with intent to distribute cocaine and cocaine base. Maynard, who was added as a defendant in superseding indictments filed in March and June 2006, pled guilty in June 2006.

In October 2006 Jones and a number of his co-defendants went to trial. The jury acquitted the co-defendants on all counts but one; it could not reach a verdict on the remaining count, which was eventually dismissed. The jury acquitted Jones on a number of counts but could not reach a verdict on the conspiracy charge, as to which the court declared a mistrial. Soon thereafter the district court allowed Maynard to withdraw his guilty plea.

In March 2007 the Government filed another superseding indictment charging Jones, Maynard, and a few co-defendants with a single count of conspiracy to distribute and to possess with intent to distribute five or more kilograms of cocaine and 50 or more grams of co-

caine base. A joint trial of Jones and Maynard began in November 2007 and ended in January 2008, when the jury found them both guilty.

II. Analysis: Joint Issues

Jones and Maynard jointly argue the district court erred in (1) admitting evidence gleaned from wiretaps of their phones, (2) admitting evidence arising from a search incident to a traffic stop, (3) denying their motion to dismiss the indictment as invalid because it was handed down by a grand jury that had expired, (4) declining to instruct the jury on their theory that the evidence at trial suggested multiple conspiracies, and (5) declining to grant immunity to several defense witnesses who invoked the Fifth Amendment to the Constitution of the United States and refused to testify. Jones also argues the court erred in admitting evidence acquired by the warrantless use of a Global Positioning System (GPS) device to track his movements continuously for a month.[*] After concluding none of the joint issues warrants reversal, we turn to Jones's individual argument.

A. Wiretaps

Before their first trial Jones and his co-defendants moved to suppress evidence taken from wiretaps on

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[*] Maynard waves at one individual argument, to wit, that "the district court erred in using acquitted conduct to calculate his guideline range" but, in the same sentence, concedes his argument "is foreclosed by" precedent, *e.g., United States v. Dorcely,* 454 F.3d 366 D.C. Cir. 2006) (district court's consideration of prior acquitted conduct did not violate the Fifth or Sixth Amendments to the Constitution of the United States). He nonetheless "raises this issue to preserve his argument in anticipation of future changes in the law and/or *en banc* review." So be it.

Jones's and Maynard's phones. The police had warrants for the wiretaps, but the defendants argued the issuing court abused its discretion in approving the warrants because the applications for the warrants did not satisfy the so-called "necessity requirement," *see* 18 U.S.C. § 2518(3)(c) ("normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tied or to be too dangerous"); *see also, e.g., United States v. Becton,* 601 F.3d 588, 596 (D.C. Cir. 2010). They also moved for a hearing, pursuant to *Franks v. Delaware,* 438 U.S. 154 (1978), into the credibility of one of the affidavits offered in support of the warrant. The district court denied both motions. 451 F. Supp. 2d 71, 78-79, 81-83 (2006). Before his second trial Jones moved the court to reconsider both motions; Maynard adopted Jones's motions and made an additional argument for a *Franks* hearing. The district court held Jones's motion for reconsideration added nothing new and denied it for the reasons the court had given before the first trial. 511 F. Supp. 2d 74, 77 (2007). The court then denied Maynard's separate motion for a *Franks* hearing. *Id.* at 78. The appellants appeal the district court's denial of their motions to suppress and for a *Franks* hearing.

As for their motions to suppress, the district court held the applications for the warrants "amply satisfie[d]" the necessity requirement because they recounted the ordinary investigative procedures that had been tied and explained why wiretapping was necessary in order to "ascertain the extent and structure of the conspiracy." 451 F. Supp. 2d at 83. We review the court's "necessity determination" for abuse of discretion. *United States v. Sobamowo,* 892 F.2d 90, 93 (D.C. Cir. 1989).

The appellants do not directly challenge the reasoning of the district court; rather they suggest sources of information to which the police hypothetically might have turned in lieu of the wiretaps, to wit, cooperating informants, controlled buys, and further video surveillance. At best, the appellants suggest investigative techniques that might have provided some of the evidence needed, but they give us no reason to doubt the district court's conclusion that "[h]aving engaged in an adequate range of investigative endeavors, the government properly sought wiretap permission and was not required to enumerate every technique or opportunity missed or overlooked." 451 F. Supp. 2d at 82 (quoting *Sobamowo,* 892 F.2d at 93).

The appellants also requested a hearing into the credibility of the affidavit submitted by Special Agent Yanta in support of the wiretap warrants. An affidavit offered in support of a search warrant enjoys a '"presumption of validity," *Franks,* 438 U.S. at 171, but

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56. The substantial showing required under *Franks* must be "more than conclusory" and "accompanied by an offer of proof." *United States v. Gatson,* 357 F.3d 77, 80 (D.C. Cir. 2004) (quoting *Franks).*

The appellants argued Yanta intentionally or at least recklessly both mischaracterized certain evidence and omitted any mention in her affidavit of Holden, an informant whom the appellants think might have assisted the investigation. The district court denied the motion, holding the appellants had satisfied neither the substantial showing nor the materiality requirement for a *Franks* hearing. 451 F. Supp. 2d at 78-79; 511 F. Supp. 2d at 77-78.

As we recently noted, "[t]he circuits are split on the question whether a district court's decision not to hold a *Franks* hearing is reviewed under the clearly erroneous or *de novo* standard of review," and "[w]e have not definitively resolved the issue in this circuit." *United States v. Becton,* 601 F.3d 588, 594 (2010) (internal quotation marks deleted). We need not resolve the issue today because even proceeding *de novo* we would agree with the district court: The appellants did not make the requisite substantial preliminary showing that Yanta, in her affidavit, intentionally or recklessly either described the evidence in a misleading way or failed to mention Holden. Lacking any probative evidence of Yanta's *scienter,* the appellants argue the district court should have inferred Yanta knew about Holden and intentionally failed to mention him because his name must have "flashed across the Task Force's team computer screens." This is speculation, not a substantial showing, and no basis upon which to question the ruling of the district court. *See United States v. Richardson,* 861 F.2d 291, 293 D.C. Cir. 1988) (affidavit in support of warrant not suspect under *Franks* where "there has been absolutely no showing [the affiant] made the statements with scienter").

B. Traffic Stop

In 2005 Officer Frederick Whitehead, of the Durham, North Carolina Police Department, pulled over Jones's minivan for speeding. Because we consider the "evidence in the light most favorable to the Government," *Evans v. United States,* 504 U.S. 255, 257 (1992), what follows is the Officer's account of the incident.

Maynard was driving and one Gordon was asleep in the passenger seat; Jones was not present. At the officer's request Maynard walked to the rear of the vehicle. There, in response to Whitehead's questioning, Maynard said he worked for a nightclub in D.C. and was driving to South Carolina to pick up a disc jockey and to bring him back for an event. When asked about his passenger, Maynard claimed not to know Gordon's last name or age. Whitehead then addressed Gordon, who had awakened and whom he thought seemed nervous, and asked him where he was going. Gordon told a different story: He and Maynard were headed to Georgia in order to meet relatives and some girls.

Whitehead then went to speak with his partner, who had arrived in a separate car. After relating the suspicious conflict in the stories he had been told, Whitehead called for a canine unit and ran the usual checks on Maynard's license and registration. He then returned to the rear of the van, where Maynard was still standing, gave Maynard back his identification, along with a warning citation, and told him he was free to leave. By that time, the canine unit had arrived on scene but remained in their vehicle. Maynard moved toward the front of the van and, as he reached to open the driver's side door, Whitehead called out "do you mind if I ask you a few

additional questions?" Maynard turned around and walked back toward Whitehead, who then asked him if he was transporting any large sums of money, illegal weapons, or explosives. Maynard "looked scared," said nothing, closed his eyes, and held his breath. He then looked at the rear of the van, told Whitehead he had a cooler he had meant to put some ice in, and reached toward the rear latch. Whitehead said not to open the door and asked Maynard if he would consent to a search; when Maynard said "yes," Whitehead frisked Maynard for weapons, asked Gordon to step out of the vehicle, frisked him for weapons, and then gave the canine unit the go-ahead. The dog alerted while sniffing around the car, and the ensuing search of the van turned up $69,000 in cash.

Before trial the appellants moved unsuccessfully to suppress evidence from the traffic stop, arguing, as they do now, that by extending the traffic stop after giving Maynard his written warning the police (1) unreasonably seized Maynard, *see Ilinois v. Caballes,* 543 U.S. 405, 407-08 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"), and (2) unreasonably searched the van, all in violation of the Fourth Amendment to the Constitution of the United States. The district court held the extended stop was not a seizure because Maynard was free to leave and, if it was a seizure, then it was lawful because it was supported by reasonable suspicion. As for the search of the van, the district court held the canine sniff was not a search and, once the canine alerted, the police had probable cause to search the vehicle. "We consider a district court's legal rulings on a suppression motion *de novo*

and review its factual findings for clear error giving due weight to inferences drawn from those facts and its determination of witness credibility." *United States v. Holmes,* 505 F.3d 1288, 1292 (D.C. Cir. 2007) (internal quotation marks deleted).

In determining whether a person has been seized within the meaning of the Fourth Amendment, "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick,* 501 U.S. 429, 436 (1991). This inquiry "tak[es] into account all of the circumstances surrounding the encounter," *id.,* in the light of which we ask "not whether the citizen [in this case] perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that [message] to a reasonable person," *California v. Hodari D.,* 499 U.S. 621, 628 (1991). So it is that "[a] stop or seizure takes place only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *United States v. Jones,* 584 F.3d 1083, 1086 (D.C. Cir. 2009) (internal quotation marks omitted); *see also* David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard,* 99 J. Crim. L. & Criminology 51, 60 (2009) ("The Court has declined to find seizures based on mere interaction with law enforcement without a showing of some degree of outward coercion"). Whether a seizure has taken place "is a legal conclusion that this court reviews *de novo.*" *United States v. Jordan,* 958 F.2d 1085, 1086 (D.C. Cir. 1992).

The appellants argue Maynard was seized because, when Officer Whitehead told Maynard he was free to go,

he "had already decided that he was going to search the van. . . . Whitehead had no intention of letting him go until after he [had searched it]." This assertion, even if true, has no bearing upon whether a reasonable person would have felt free to decline Whitehead's request. That Maynard seemed nervous when Whitehead asked him whether he was carrying any contraband or large sums of money, which Maynard offers as further evidence he was "under duress," is irrelevant for the same reason.

We agree with the district court that, considering all the circumstances surrounding the stop, a reasonable person in Maynard's position would have felt free to decline Whitehead's request that he answer "a few additional questions." *See United States v. Wylie,* 569 F.2d 62, 67 (D.C. Cir. 1977) ("police-citizen communications which take place under circumstances in which the citizen's 'freedom to walk away' is not limited by anything other than his desire to cooperate do not amount to 'seizures' of the person"). Whitehead had already returned Maynard's license and registration and told him he was free to go. Although there were by that time three police cars (two of which were unmarked) on the scene, Whitehead's words and actions unambiguously conveyed to Maynard his detention was at an end. After that, Maynard returned to the front of the van—a clear sign he thought he was free to go. By remaining behind the vehicle as Maynard left, Whitehead further assured Maynard he would not impede his leaving. Finally, Maynard turned around and came back only when Whitehead reinitiated the stop by asking him if he would answer a few more questions. That Whitehead shouted the question might in some circumstances turn it into a show of authority, but not here; the two were standing

some distance apart on the side of a noisy interstate highway. In sum, the police did not seize Maynard by asking him whether he would answer a few more questions.

The appellants' brief might be read to argue the extension of the stop, from the time Whitehead frisked Maynard until the dog alerted, was a separate seizure. *See United States v. Alexander,* 448 F.3d 1014, 1016 (8th Cir. 2006) (dog sniff "may be the product of an unconstitutional seizure [] if the traffic stop is unreasonably prolonged before the dog is employed"). If Maynard's and Gordon's inconsistent statements, Maynard's claimed lack of knowledge about Gordon, and Gordon's nervousness had not already created "reasonable suspicion to believe that criminal activity [was] afoot," *United States v. Awizu,* 534 U.S. 266, 273 (2002) (internal quotation marks deleted), however, then surely the addition of Maynard's agitated reaction to Whitehead's renewed questioning did, *see Illinois v. Wardlow,* 528 U.S. 119, 123 (2000) ("nervous, evasive behavior is a pertinent factor in determining reasonable suspicion").

The parties also dispute whether Maynard's consent to the search of the van was voluntary and whether Jones has standing to challenge that search. Those issues are mooted by our holding the extension of the stop to ask Maynard a few additional questions was not a seizure and any subsequent extension of the stop leading up to the canine sniff was supported by reasonable suspicion. The appellants do not dispute the district court's determination that the police had probable cause to search the van once the dog alerted. Accordingly, we hold the district court properly admitted evidence the police discovered by searching the van.

C. Superseding Indictment

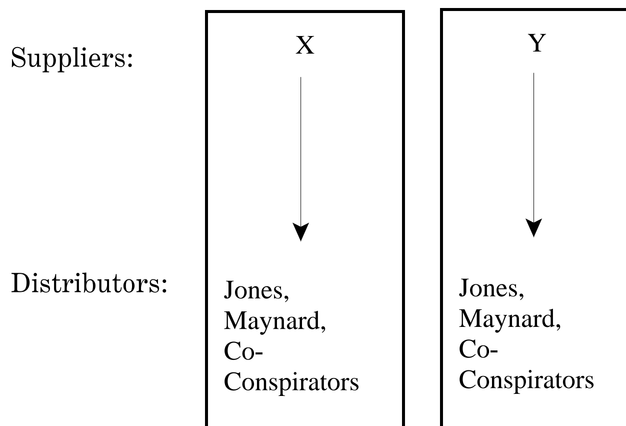
The appellants argue the indictment returned June 27, 2006 was invalid because it was returned by a grand jury whose term had expired. As the Government points out, the validity of that indictment is irrelevant here because the appellants were charged and tried pursuant to the superseding indictment returned by a different grand jury on March 21, 2007. The appellants point to no infirmity in the relevant indictment.

D. Multiple Conspiracies

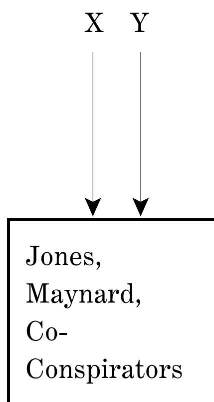
At trial the appellants asked the court to instruct the jury that proof of multiple separate conspiracies is not proof of one larger conspiracy. The district court denied that request, which the appellants argue was reversible error under *United States v. Graham,* 83 F.3d 1466, 1472 (D.C. Cir. 1996): "To convict, the jury must find appellants guilty of the conspiracy charged in the indictment, not some other, separate conspiracy"; therefore, "if record evidence supports the existence of multiple conspiracies, the district court should . . . so instruct[] the jury."

The appellants argue the evidence at trial supports the existence of "[t]wo independent supply-side conspiracies." The two purportedly separate conspiracies they instance, however, each comprises the core conspiracy charged—that of Maynard, Jones, and the same co-conspirators, to possess and to distribute cocaine and cocaine base—differing only as to the supplier of the drugs, as reflected in the following illustration:

Appellants' view:
Two conspiracies



Government's view:
One conspiracy



Even if the evidence showed the charged conspiracy to distribute drugs relied upon two different suppliers, and the Government does not concede it did, that does not

cleave in two the single conspiracy to distribute the appellants were charged with operating. As the appellants offer no other reason to doubt the district court's conclusion, in rejecting the proposed instruction, that "[t]he defendants here and their coconspirators [were] involved in a single overarching conspiracy," there was no error in the district court's refusal to instruct the jury about multiple conspiracies.

E. Immunity

At trial, the appellants called a number of their coconspirators as witnesses, but the co- conspirators refused to testify, asserting their right, under the Fifth Amendment, not to be compelled to incriminate themselves. The appellants then asked the district court, "in its discretion, [to] adopt [the] rationale and . . . procedure" set forth in *Carter v. United States,* 684 A.2d 331 (1996), where the District of Columbia Court of Appeals addressed a situation in which

> a defense witness possessing material, exculpatory and non-cumulative evidence which is unobtainable from any other source will invoke the Fifth Amendment privilege against self-incrimination unless granted executive "use" immunity.

Id. at 342. In *Carter* the court held that if the Government did not "submit to the court a reasonable basis for not affording use immunity," then the court would dismiss the indictment. *Id.* at 343. The district court refused to follow *Carter.*

The appellants do not argue the district court's refusal to follow *Carter* violated any right they had under any source of law. The closest they come is to say "a

strong case can be made that [use immunity] is compelled . . . by due process considerations," but they do not make any effort to show this case presents the sort of "extraordinary circumstances" in which some courts have suggested the Government's failure to grant use immunity might violate the Due Process Clause of the Fifth Amendment, see, *e.g., United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988) (discussing three-part test used to determine whether failure of Government to grant immunity violates due process, including "prosecutorial overreaching"); *cf. United States v. Lugg,* 892 F.2d 101, 104 (D.C. Cir. 1989) (reserving due process issue: "[w]hatever it takes to constitute a deprivation of a fair trial by the prosecution's failure to exercise its broad discretion on immunity grants, the present case does not present it").

Instead, their counsel told the district court:

> I'll be straight. I'll be honest with the Court. I don't believe that there's any case law in this jurisdiction or another federal jurisdiction that would allow the Court to do this. . . . I think that the Court should, in its discretion, adopt [the rule in *Carter*].

The appellants mistake our role in asking us "to fashion[]" a rule of the sort the district court declined to adopt. Absent a well-founded claim they were deprived of due process, the only question they may properly raise is whether the district court abused its discretion, to which the answer is obviously no.

III. Analysis: Evidence Obtained from GPS Device

Jones argues his conviction should be overturned because the police violated the Fourth Amendment prohibi-

tion of "unreasonable searches" by tracking his movements 24 hours a day for four weeks with a GPS device they had installed on his Jeep without a valid warrant.[*] We consider first whether that use of the device was a search and then, having concluded it was, consider whether it was reasonable and whether any error was harmless.

A. Was Use of GPS a Search?

For his part, Jones argues the use of the GPS device violated his "reasonable expectation of privacy," *United States v. Katz*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring), and was therefore a search subject to the reasonableness requirement of the Fourth Amendment. Of course, the Government agrees the *Katz* test applies here, but it argues we need not consider whether Jones's expectation of privacy was reasonable because that question was answered in *United States v. Knotts,* 460 U.S. 276 (1983), in which the Supreme Court held the use of a beeper device to aid in tracking a suspect to his drug lab was not a search. As explained below, we hold *Knotts* does not govern this case and the police action was a search because it defeated Jones's reasonable expectation of privacy. We then turn to the Government's claim

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[*] Although the Jeep was registered in the name of Jones's wife, the Government notes "Jones was the exclusive driver of the Jeep," and does not argue his non-ownership of the Jeep defeats Jones's standing to object. We see no reason it should. *See Rakas v. Illinois,* 439 U.S. 128, 148-49 & n.17 (1978) (whether defendant may challenge police action as search depends upon his legitimate expectation of privacy, not upon his legal relationship to the property searched). We therefore join the district court and the parties in referring to the Jeep as being Jones's. 451 F. Supp. 2d 71, 87 (2006).

our holding necessarily implicates prolonged visual surveillance.

1. *Knotts* is not controlling

The Government argues this case falls squarely within the holding in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281. In that case the police had planted a beeper in a five-gallon container of chemicals before it was purchased by one of Knotts's co-conspirators; monitoring the progress of the car carrying the beeper, the police followed the container as it was driven from the "place of purchase, in Minneapolis, Minnesota, to [Knotts's] secluded cabin near Shell Lake, Wisconsin," 460 U.S. at 277, a trip of about 100 miles. Because the co-conspirator, by driving on public roads, "voluntarily conveyed to anyone who wanted to look" his progress and route, he could not reasonably expect privacy in "the fact of his final destination." *Id.* at 281.

The Court explicitly distinguished between the limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case. *Id.* at 283 (noting "limited use which the government made of the signals from this particular beeper"); *see also id.* at 284-85 ("nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the [container] had ended its automotive journey at rest on respondent's premises in rural Wisconsin"). Most important for the present case, the Court specifically reserved the question whether a war-

rant would be required in a case involving "twenty-four hour surveillance," stating

> if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.

Id. at 283-84.

Although the Government, focusing upon the term "dragnet," suggests *Knotts* reserved the Fourth Amendment question that would be raised by mass surveillance, not the question raised. by prolonged surveillance of a single individual, that is not what happened. In reserving the "dragnet" question, the 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." *Id.* at 283.* The Court avoided the question

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* Indeed, the quoted section of the respondent's brief envisions a case remarkably similar to the one before us:

> We respectfully submit that the Court should remain mindful that should it adopt the result maintained by the government, twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision. Without the limitations imposed by the warrant requirement itself, and the terms of any warrant which is issued, any person or residence could be monitored at any time and for any length of time. Should a beeper be installed in a container of property which is not contraband, as here, it would enable authorities to determine a citizen's location at any time without knowing whether his travels are for legitimate or illegitimate purposes, should the container be moved. A beeper thus would turn a person into a broadcaster of his own affairs and travels, without his knowledge or consent, for as long as the government may wish to use him where no warrant places a limit on surveillance. To allow war-

whether prolonged "twenty-four hour surveillance" was a search by limiting its holding to the facts of the case before it, as to which it stated "the reality hardly suggests abuse." *Id.* at 283 (internal quotation marks deleted).

In short, *Knotts* held only that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," *id.* at 281, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it. The Fifth Circuit likewise has recognized the limited scope of the holding in *Knotts, see United States v. Butts,* 729 F.2d 1514, 1518 n.4 (1984) ("'As did the Supreme Court in *Knotts,* we pretermit any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms"), as has the New York Court of Appeals, *see People v. Weaver,* 12 N.Y. 3d 433, 440-44 (2009) *(Knotts* involved a "single trip" and Court "pointedly acknowledged and reserved for another day the question of whether a Fourth Amendment issue would be posed if 'twenty-four hour surveillance of any citizen of this country [were] possible'"). *See also* Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment,* 419 UCLA L. Rev. 409, 457 (2007) ("According to the [Supreme] Court, its decision [in *Knotts*] should not be read to sanction 'twenty-four hour surveillance of any

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> rantless beeper monitoring, particularly under the standard urged by the government here ("reasonable suspicion"), would allow virtually limitless intrusion into the affairs of private citizens.

Br. of Resp. at 9-10 (No. 81-1802).

citizen of this country.'" (quoting *Knotts*, 460 U.S. at 284)).

Two circuits, relying upon *Knotts*, have held the use of a GPS tracking device to monitor an individual's movements in his vehicle over a prolonged period is not a search, *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), but in neither case did the appellant argue that *Knotts* by its terms does not control whether prolonged surveillance is a search, as Jones argues here. Indeed, in *Garcia* the appellant explicitly conceded the point. Br. of Appellant at 22 (No. 06- 2741) ("Garcia does not contend that he has a reasonable expectation of privacy in the movements of his vehicle while equipped with the GPS tracking device as it made its way through public thoroughfares. *Knotts*. His challenge rests solely with whether the warrantless installation of the GPS device, in and of itself, violates the Fourth Amendment."). Thus prompted, the Seventh Circuit read *Knotts* as blessing all "tracking of a vehicle on public streets" and addressed only "whether installing the device in the vehicle converted the subsequent tracking into a search." *Garcia*, 474 F.3d at 996. The court viewed use of a GPS device as being more akin to hypothetical practices it assumed are not searches, such as tracking a car "by means of cameras mounted on lampposts or satellite imaging," than it is to practices the Supreme Court has held are searches, such as attaching a listening device to a person's phone. *Id*. at 997. For that reason it held installation of the GPS device was not a search. Similarly, the Ninth Circuit perceived no distinction between short- and long-term surveillance; it noted the appellant had "acknowledged" *Knotts* controlled the case and addressed only whether *Kyllo v. United States*,

533 U.S. 27 (2001), in which the Court held the use of a thermal imaging device to detect the temperature inside a home defeats the occupant's reasonable expectation of privacy, had "heavily modified the Fourth Amendment analysis." *Pineda-Moreno,* 591 F.3d at 1216.

In a third related case the Eighth Circuit held the use of a GPS device to track a truck used by a drug trafficking operation was not a search. *United States v. Marquez,* 605 F.3d 604 (2010). After holding the appellant had no standing to challenge the use of the GPS device, the court went on to state in the alternative:

> Even if Acosta had standing, we would find no error. . . . [W]hen police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time.

Id. at 609-10.

In each of these three cases the court expressly reserved the issue it seems to have thought the Supreme Court had reserved in *Knotts,* to wit, whether "wholesale" or "mass" electronic surveillance of many individuals requires a warrant. *Marquez,* 605 F.3d at 610; *Pineda-Moreno,* 591 F.3d at 1216 n.2; *Garcia,* 474 F.3d at 996. As we have explained, in *Knotts* the Court actually reserved the issue of prolonged surveillance. That issue is squarely presented in this case. Here the police used the GPS device not to track Jones's "movements from one place to another," *Knotts,* 460 U.S. at 281, but rather to track Jones's movements 24 hours a day for 28 days as he moved among scores of places, thereby discov-

ering the totality and pattern of his movements from place to place to place.

2. Were Jones's locations exposed to the public?

As the Supreme Court observed in *Kyllo,* the "*Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable." 533 U.S. at 34. Indeed, the Court has invoked various and varying considerations in applying the test. *See O'Connor v. Ortega,* 480 U.S. 709, 715 (1987) ("We have no talisman that determines in all cases those privacy expectation that society is prepared to accept as reasonable") (O'Connor, J., plurality opinion); *Rakas v. Illinois,* 439 U.S. 128, 143 n.2 (1978) ("legitimation of expectations of privacy must have a source outside the Fourth Amendment," such as "understandings that are recognized or permitted by society"). This much is clear, however: 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," *Katz,* 389 U.S. at 351.

Two considerations persuade us the information the police discovered in this case—the totality of Jones's movements over the course of a month—was not exposed to the public: First, 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.

a. Actually exposed?

The holding in *Knotts* flowed naturally from the reasoning in *Katz:* "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," 389 U.S. at 351. *See Knotts,* 460 U.S. at 281-82 (movements observed by police were "voluntarily conveyed to anyone who wanted to look"). The Government argues the same reasoning applies here as well. We first consider the precedent governing our analysis of whether the subject of a purported search has been exposed to the public, then hold the information the police discovered using the GPS device was not so exposed.

(i). Precedent

The Government argues Jones's movements over the course of a month were actually exposed to the public because the police lawfully could have followed Jones everywhere he went on public roads over the course of a month. The Government implicitly poses the wrong question, however.

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. *See California v. Greenwood,* 486 U.S. 35, 40 (1988) ("It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public"); *California v. Ciraolo*, 476 U.S. 207, 213, 214 (1986) ("in an age where private and

commercial flight in the public airways is routine," defendant did not have a reasonable expectation of privacy in location that "[a]ny member of the public flying in this airspace who glanced down could have seen"); *Florida v. Riley*, 488 U.S. 445, 450 (1989) ("Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, 'private and commercial flight [by helicopter] in the public airways is routine' in this country, and there is no indication that such flights are unheard of in Pasco County, Florida" (quoting *Ciraolo*)). Indeed, in *Riley*, Justice O'Connor, whose concurrence was necessary to the judgment, pointed out:

> Ciraolo's expectation of privacy was unreasonable not because the airplane was operating where it had a "right to be," but because public air travel at 1,000 feet is a sufficiently routine part, of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude.
>
> . . . .
>
> If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view.

488 U.S. at 453, 455; *see also id*. at 467 (Blackmun, J., dissenting) (explaining five justices agreed "the reasonableness of Riley's expectation depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet").

The Supreme Court re-affirmed this approach in *Bond v. United States,* 529 U.S. 334 (2000). There a pas-

senger on a bus traveling to Arkansas from California had placed his soft luggage in the overhead storage area above his seat. During a routine stop at an off-border immigration checkpoint in Sierra Blanca, Texas, a Border Patrol agent squeezed the luggage in order to determine whether it contained drugs and thus detected a brick of what turned out to be methamphetamine. The defendant argued the agent had defeated his reasonable expectation of privacy, and the Government argued his expectation his bag would not be squeezed was unreasonable because he had exposed it to the public. The Court responded:

> [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. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment.

Id. at 338-39. The Court focused not upon what other passengers could have done or what a bus company employee might have done, but rather upon what a reasonable bus passenger expects others he may encounter, i.e., fellow passengers or bus company employees, might actually do. A similar focus can be seen in *Kyllo,* in which the Court held use of a thermal imaging device defeats the subject's reasonable expectation of privacy, "at least where . . . the technology in question is not in general public use." 533 U.S. at 34.

The Government cites as authority to the contrary our statement in *United States v. Gbemisola,* 225 F.3d 753, 759 (2000), that "[t]he decisive issue . . . is not

what the officers saw but what they could have seen." When read in context, however, this snippet too supports the view that whether something is "expose[d] to the public," *Katz,* 389 U.S. at 351, depends not upon the theoretical possibility, but upon the actual likelihood, of discovery by a stranger:

> The decisive issue . . . is not what the officers saw but what they could have seen. At any time, the surveillance vehicle could have pulled alongside of the taxi and the officers could have watched Gbemisola through its window. Indeed, the taxi driver himself could have seen the event simply by looking in his rear-view mirror or turning around. As one cannot have a reasonable expectation of privacy concerning an act performed within the visual range of a complete stranger, the Fourth Amendment's warrant requirement was not implicated.

225 F.3d at 759. In short, it was not at all unlikely Gbemisola would be observed opening a package while seated in the rear of a taxi, in plain view of the driver and perhaps of others.

(ii). Application

Applying the foregoing analysis to the present facts, we hold the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the

next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

b. Constructively exposed?

The Government does not separately raise, but we would be remiss if we did not address, the possibility that although the whole of Jones's movements during the month for which the police monitored him was not actually exposed to the public, it was constructively exposed because each of his individual movements during that time was itself in public view. When it comes to privacy, however, precedent suggests that the whole may be more revealing than the parts. Applying that precedent to the circumstances of this case, we hold the information the police discovered using the GPS device was not constructively exposed.

(i). Precedent

The Supreme Court addressed the distinction between a whole and the sum of its parts in *United States Department of Justice v. National Reporters Committee,* 489 U.S. 749 (1989), which arose not under the Fourth Amendment but under the Freedom of Information Act, 5 U.S.C. *§* 552. There the respondents had requested, pursuant to the FOIA, that the FBI disclose rap sheets compiling the criminal records of certain named persons. Although the "individual events in those summaries [were] matters of public record," the Court upheld the FBI's invocation of the privacy exception to the FOIA, holding the subjects had a privacy interest in the aggregated "whole" distinct fiom their interest in the "bits of

information" of which it was composed. *Id.* at 764.[*] Most relevant to the Fourth Amendment, the Court said disclosure of a person's rap sheet "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.*

The Court implicitly recognized the distinction between the whole and the sum of the parts in the Fourth Amendment case of *Smith v. Maryland,* 442 U.S. 735 (1979). There, in holding the use of a pen register to record all the numbers dialed from a person's phone was not a search, the Court considered not just whether a reasonable person expects any given number he dials to be exposed to the phone company but also whether he expects all the numbers he dials to be compiled in a list. *Id.* at 742-43 ("subscribers realize . . . the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills"; they "typically know that . . . the phone company has facilities for recording" the numbers they dial). The Court explained that Smith could not reasonably expect privacy in the list of numbers because that list was composed of information that he had "voluntarily conveyed to [the company]" and that "it had facilities for recording and . . . was free to record." *Id.* at 745.

If, for the purposes of the Fourth Amendment, the privacy interest in a whole could be no greater (or no

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[*] The colloquialism that "the whole is greater than the sum of its parts" is not quite correct. "It is more correct to say that the whole is something different than the sum of its parts." Kurt Koffka, Principles of Gestalt Psychology 176 (1935). That is what the Court was saying in *Reporters Committee* and what we mean to convey throughout this opinion.

different) than the privacy interest in its constituent parts, then the Supreme Court would have had no reason to consider at length whether Smith could have a reasonable expectation of privacy in the list of numbers he had called. Indeed, Justice Stewart dissented specifically because he thought the difference was significant on the facts of that case. *See id.* at 747 ("such a list [of all the telephone numbers one called] easily could reveal . . . the most intimate details of a person's life").

(ii). Application

The whole of one's movements over the course of a month is not constructively exposed to the public because, like a rap sheet, that whole reveals far more than the individual movements it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine that, like the dog that did not bark in the Sherlock Holmes story, may reveal even more.

As with the "mosaic theory" often invoked by the Government in cases involving national security information, "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene." *CIA v. Sims,* 471 U.S. 159, 178 (1985) (internal quotation marks deleted); *see J. Roderick MacArthur Found. v. F.B.I.,* 102 F.3d 600, 604 (D.C. Cir. 1996). Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or

a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story.[*] A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.

Other courts have recognized prolonged surveillance of a person's movements may reveal an intimate picture of his life. *See Galella v. Onassis,* 353 E Supp. 196, 227-28 (S.D.N.Y. 1972) ("Plaintiff's endless snooping constitutes tortious invasion of privacy. . . . [he] has insinu-

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[*] This case itself illustrates how the sequence of a person's movements may reveal more than the individual movements of which it is composed. Having tracked Jones's movements for a month, the Government used the resulting pattern—not just the location of a particular "stash house" or Jones's movements on any one trip or even day—as evidence of Jones's involvement in the cocaine trafficking business. The pattern the Government would document with the GPS data was central to its presentation of the case, as the prosecutor made clear in his opening statement:

> [T]he agents and investigators obtained an additional order and that was to install a GPS. . . . They had to figure out where is he going? When he says ten minutes, where is he going? Again, the pattern developed. . . . And I want to . . . just show you an example of how the pattern worked. . . . The meetings are short. But you will again notice the pattern you will see in the coming weeks over and over again.

Tr. 11/15/07.

ated himself into the very fabric of Mrs. Onassis' life") *(aff'd in relevant part* 487 F.2d 986, 994 & n.12 (2nd Cir. 1973) (if required to reach privacy issue "would be inclined to agree with" district court's treatment)). Indeed, they have reached that conclusion in cases involving prolonged GPS monitoring. *See People v. Weaver,* 909 N.E. 2d 1194, 1199 (N.Y. 2009) (Prolonged GPS monitoring "yields . . . 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"); *State v. Jackson,* 76 P.3d 217, 224 (Wash. 2003) (en banc) ("In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life.").

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," *Nader v. Gen. Motors Corp.,* 25 N.Y.2d 560, 572 (1970) (Breitel, J., concurring). In this way the extended recordation of a person's movements is, like the "manipulation of a bus passenger's carry-on" canvas bag in *Bond,* not what we expect anyone to do, and it reveals more than we expect anyone to know. 529 U.S. at 339.

3. Was Jones's expectation of privacy reasonable?

It does not apodictically follow that, because the aggregation of Jones's movements over the course of a

month was not exposed to the public, his expectation of privacy in those movements was reasonable; "legitimation of expectations of privacy must have a source outside the Fourth Amendment," such as "understandings that are recognized or permitted by society," *United States v. Jacobsen,* 466 U.S. 109, 123 n.22 (1984) (quoting *Rakas,* 439 U.S. at 143 n.12). So it is that, because the "Congress has decided . . . to treat the interest in 'privately' possessing cocaine as illegitimate," "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* at 123.

The Government suggests Jones's expectation of privacy in his movements was unreasonable because those movements took place in his vehicle, on a public way, rather than inside his home. That the police tracked Jones's movements in his Jeep rather than in his home is certainly relevant to the reasonableness of his expectation of privacy; "in the sanctity of the home," the Court has observed, "*all* details are intimate details," *Kyllo,* 533 U.S. at 37. A person does not leave his privacy behind when he walks out his front door, however. On the contrary, in *Katz* the Court clearly stated "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351. Or, as this court has said, outside the home, the "Fourth Amendment . . . secur[es] for each individual a private enclave, a 'zone' bounded by the individual's own reasonable expectations of privacy." *Reporters Comm. for Freedom of Press v. AT&T,* 593 F.2d 1030, 1042-43 (1978).

Application of the test in *Katz* and its sequellae to the facts of this case can lead to only one conclusion: Society

recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse. The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts;* indeed it exceeds the intrusions occasioned by every police practice the Supreme Court has deemed a search under *Katz,* such as a urine test, *see Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602 (1989) (urine test could "reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic"); use of an electronic listening device to tap a payphone, *Katz,* 389 U.S. at 352 (user of telephone booth "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world"); inspection of a traveler's luggage, *Bond,* 529 U.S. at 338 ("travelers are particularly concerned about their carry-on luggage"); or use of a thermal imaging device to discover the temperature inside a home, *Kyllo*, 533 U.S. at 37 ("In the home, *all* details are intimate details").

We note without surprise, therefore, that the Legislature of California, in making it unlawful for anyone but a law enforcement agency to "use an electronic tracking device to determine the location or movement of a person," specifically declared "electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy," and implicitly but necessarily thereby required a warrant for police use of a GPS, California Penal Code section 637.7,

Stats. 1998 c. 449 (S.B. 1667) § 2. Several other states have enacted legislation imposing civil and criminal penalties for the use of electronic tracking devices and expressly requiring exclusion of evidence produced by such a device unless obtained by the police acting pursuant to a warrant. *See, e.g.*, Utah Code Ann. §§ 77-23a-4, 77-23a-7, 77-23a- 15.5; Minn Stat §§ 626A.37, 626A.35; Fla Stat §§ 934.06, 934.42; S.C. Code Ann § 17-30- 140; Okla. Stat, tit 13, §§ 176.6, 177.6; Haw. Rev. Stat §§ 803-42, 803-44.7; 18 Pa. Cons. Stat § 5761.

Although perhaps not conclusive evidence of nationwide "societal understandings," *Jacobsen*, 466 U.S. at 123 n.22, these state laws are indicative that prolonged GPS monitoring defeats an expectation of privacy that our society recognizes as reasonable. So, too, are the considered judgments of every court to which the issue has been squarely presented. *See Weaver*, 12 N.Y.3d at 447 ("the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause"); *Jackson*, 76 P.3d at 223-24 (under art. I, § 7 of Washington State Constitution, which "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass," "use of a GPS device on a private vehicle involves a search and seizure"); *cf. Commonwealth v. Connolly,* 913 N.E.2d 356, 369-70 (Ma. 2009) (installation held a seizure). The federal circuits that have held use of a GPS device is not a search were not alert to the distinction drawn in *Knotts* between short-term and prolonged surveillance,[*] but we have al-

[*] One federal district court and two state courts have also held use of a GPS device is not *per se* a search, but none was presented with the argument that prolonged use of a GPS device to back an individual's

ready explained our disagreement on that collateral point.

4. Visual surveillance distinguished

The Government would have us abjure this conclusion on the ground that "[Jones's] argument logically would prohibit even visual surveillance of persons or vehicles located in public places and exposed to public view, which clearly is not the law." We have already explained why Jones's argument does not "logically . . . prohibit" much visual surveillance: Surveillance that reveals only what is already exposed to the public—such as a person's movements during a single journey—is not a search. *See Knotts,* 460 U.S. at 285.

Regarding visual surveillance so prolonged it reveals information not exposed to the public, we note preliminarily that the Government points to not a single actual example of visual surveillance that will be affected by our holding the use of the GPS in this case was a search. No doubt the reason is that practical considerations prevent

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movements is meaningfully different from short-term surveillance. *See United States v. Moran,* 349 F. Supp. 2d 425, 467-68 (N.D.N.Y. 2005) (police used GPS device to track defendant during one-day drive from Arizona to New York); *State v. Sveum,* 269 N.W.2d 53, 59 (Wis. Ct. App. 2009) ("Sveum implicitly concedes that . . . using [a GPS device] to monitor *public* travel does not implicate the Fourth Amendment. He contends, however, that because the GPS device permitted the police to monitor the location of his car while it was in his garage . . . all of the information obtained from the GPS device should have been suppressed."); *Stone v. State,* 941 A.2d 1238 (Md. 2008) (holding, in light of *Knotts,* that lower court "did not abuse its discretion in cutting short testimony" about use of GPS device; appellant did not cite *Knotts* in is briefs or affirmatively argue use of device was a search).

visual surveillance from lasting very long.* Continuous human surveillance for a week would require all the time and expense of several police officers, while comparable photographic surveillance would require a net of video cameras so dense and so widespread as to catch a person's every movement, plus the manpower to piece the photographs together. Of course, as this case and some of the GPS cases in other courts illustrate, *e.g., Weaver,* 12 N.Y.3d at 447, 459 (holding use of GPS device to track suspect for 65 days was search); *Jackson,* 76 P.3d 261-62 (holding use of GPS device to track suspect for two and one half weeks was search), prolonged GPS monitoring is not similarly constrained. On the contrary, the marginal cost of an additional day—or week, or month—of GPS monitoring is effectively zero. Nor, apparently, is the fixed cost of installing a GPS device significant; the Los Angeles Police Department can now affix a GPS device to a passing car simply by launching a GPS-enabled dart.* For these practical reasons, and not by virtue of

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* According to the former Chief of the LAPD, keeping a suspect under "constant and close surveillance" is "not only more costly than any police department can afford, but in the vast majority of cases it is impossible." W.H. Parker, *Surveillance by Wiretap or Dictograph: Threat or Protection?*, 42 Cal. L. Rev. 727, 734 (1954). Or as one of the Special Agents involved in the investigation of Jones testified at trial: "Physical surveillance is actually hard, you know. There's always chances of getting spotted, you know, the same vehicle always around, so we decided to use GPS technology." Tr. 11/21/07 at 114.

* "The darts consist of a miniaturized GPS receiver, radio transmitter, and battery embedded in a sticky compound material. When fired at a vehicle, the compound adheres to the target, and thereafter permits remote real- time tracking of the target from police headquarters." Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment,* 55 UCLA L. Rev. 409, 419 (2007); *see also* Richard Witon, *LAPD Pursues High-Tech End to High-Speed Chases,*

its sophistication or novelty, the advent of GPS technology has occasioned a heretofore unknown type of intrusion into an ordinarily and hitherto private enclave.

The Government's argument—that our holding the use of the GPS device was a search necessarily implicates prolonged visual surveillance—fails even on its own terms. That argument relies implicitly upon an assumption rejected explicitly in *Kyllo,* to wit, that the means used to uncover private information play no role in determining whether a police action frustrates a person's reasonable expectation of privacy; when it comes to the Fourth Amendment, means do matter. *See* 533 U.S. at 35 n.2 ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment"). For example, the police may without a warrant record one's conversations by planting an undercover agent in one's midst, *Lopez v. United States,* 373 U.S. 427, 429 (1963), but may not do the same by wiretapping one's phone, even "without any trespass," *Katz,* 389 U.S. 347, 353 (1967). Quite simply, in the former case one's reasonable expectation of control over one's personal information would not be defeated; in the latter it would be. See *Reporters Committee,* 489 U.S. at 763 ("both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person").

This case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the war-

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L.A. Times, Feb. 3, 2006, at B1. GPS darts are used in exigent circumstances and for only as long as it takes to interdict the subject driver without having to engage in a high-speed chase on a public way.

rant requirement of the Fourth Amendment. As the Supreme Court said in *Dow Chemical Co. v. United States,* "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. 'We have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.'" 476 U.S. 227, 238 n.5 (1986) (quoting *United States v. Karo,* 468 U.S. 705, 712 (1984)); *see also City of Ontario v. Quon,* 130 S. Ct. 2619, 2629 (2010) ("Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations"). By the same token, we refuse to hold this "search is not a search," *Kyllo,* 533 U.S. at 32, merely because a contrary holding might at first blush seem to implicate a different but intuitively permissible practice. *See Nat'l Fed'n of Fed. Employees v. Weinberger,* 818 F.2d 935, 942 (D.C. Cir. 1987) ("Few legal issues in the Fourth Amendment domain are so pure that they do not turn on *any* facts or circumstances peculiar to the case"). Instead, just as the Supreme Court in *Knotts* reserved the lawfulness of prolonged beeper surveillance, we reserve the lawfulness of prolonged visual surveillance.

B. Was the Search Reasonable Nonetheless?

A search conducted without a warrant is "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz,* 389 U.S. at 357. Here, because the police installed the GPS device on Jones's vehicle without a valid warrant,* the Government argues the resulting

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* The police had obtained a warrant to install the GPS device in D.C. only, but it had expired before they installed it—which they did in

search can be upheld as a reasonable application of the automobile exception to the warrant requirement. Under that exception, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Pennsylvania v. Labron,* 518 U.S. 938, 940 (1996).

As Jones points out, this arguinent is doubly off the mark. First, the Government did not raise it below. *See Bryant v. Gates,* 532 F.3d 888, 898 (D.C. Cir. 2008) (argument not made in district court is forfeited). Second, the automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate. *See Delaware v. Prouse,* 440 U.S. 648, 662-63 (1979) ("Were the individual subject to unfettered governmental intrusion every time he entered his automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed").

C. Was the Error Harmless?

Finally, the Government argues in a terse and conclusory few lines that the district court's error in admitting evidence obtained by use of the GPS device was harmless. "The beneficiary of a constitutional error [must prove] beyond a reasonable doubt that the error

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Maryland. When challenged in the district court, the Government "conceded . . . the violations" of the court's order, "confine[d] its arguments to the issue of whether or not a court order was required[,] and assert[ed] that it was not." Government's Omnibus Response to Defendant's Legal Motions.

complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24 (1967).

According to the Government, "Overwhelming evidence implicated [Jones] in the drug-distribution conspiracy." Overwhelming evidence certainly showed there was a conspiracy to distribute and to possess with intent to distribute drugs based out of 9508 Potomac Drive, Ft. Washington, Maryland, where police found $850,000 in cash, 97 kilograms of cocaine, and one kilogram of cocaine base. The evidence linking Jones to that conspiracy, however, was not strong, let alone overwhelming.

The Government points to no evidence of a drug transaction in which Jones was involved, nor any evidence that Jones ever possessed any drugs. Instead it relies upon (1) the testimony of admitted participants in the conspiracy, one of whom (Bermea) was at the Potomac Drive house when the police arrived—to the effect that Jones was the ringleader of the operation and frequented the Potomac Drive house, (2) data showing Jones used his cell-phone frequently and often called some of the conspirators, including one whose phone was found at the Potomac Drive house, (3) leases in Jones's name for other properties the Government alleged were used in furtherance of the conspiracy, (4) currency seized from Jones's Jeep and mini-van, and (5) physical and photographic surveillance showing Jones visited the Potomac Drive house a few times. Jones's defense responded to each type of evidence as follows: (1) the cooperating witnesses had cut deals with the Government and were not credible, (2) the cell-phone records and (5) visits to Potomac Drive showed only that Jones knew the participants in the conspiracy, (3) Jones leased the other

properties for legitimate purposes and no drugs were found there, (4) and his nightclub was a cash business.

The GPS data were essential to the Government's case. By combining them with Jones's cell-phone records the Government was able to paint a picture of Jones's movements that made credible the allegation that he was involved in drug trafficking. In his closing statement the Government attorney summarized this way the inference he was asking the jury to draw:

> [W]hen there is a conversation with Bermea and [Jones] says, I'm coming to see you, or I'll be there in ten minutes, and within a while . . . the GPS shows that that vehicle is in Potomac Drive, how does that all fit together? Well it fits together exactly as you know. That the defendant is going to 9508 Potomac Drive, and there's no reason anyone goes there other than drug activity.
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> . . . .
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> Then, that follows these series of conversations, day after day, GPS reading after GPS reading, with the defendant speaking with [Bermea] and then the vehicle coming to Potomac Drive. . . . You'll have the timeline. You've got the conversations. I won't go through them all."

Tr. 1/3/08 at 114-18. As mentioned earlier, the Government had also stressed in its opening remarks, which would color the jury's understanding of the whole case, that the GPS data would demonstrate Jones's involvement in the conspiracy.

To be sure, absent the GPS data a jury reasonably might have inferred Jones was involved in the conspiracy. "We are not concerned here," however, "with whether there was sufficient evidence on which [Jones] could have been convicted without the evidence complained of"; rather our concern is with "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963). Without the GPS data the evidence that Jones was actually involved in the conspiracy is so far from "overwhelming" that we are constrained to hold the Government has not carried its burden of showing the error was harmless beyond a reasonable doubt.

IV. Conclusion

Maynard's conviction and sentence are affirmed because neither any of the appellants' joint arguments nor Maynard's individual argument warrants reversal. Jones's conviction is reversed because it was obtained with evidence procured in violation of the Fourth Amendment.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3034, Consolidated with No. 08-3030

UNITED STATES OF AMERICA, APPELLEE

v.

ANTOINE JONES, APPELLANT

Filed: Nov. 19, 2010

ORDER

Before: SENTELLE, Chief Judge, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges

Appellee's petition for rehearing en banc in No. 08-3034, and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MICHAEL C. MCGRAIL
Deputy Clerk

GINSBURG, TATEL and GRIFFITH, *Circuit Judges*, concurring in the denial of rehearing en banc: In response to the Government's petition, we underline two matters. First, because the Government did not argue the points, the court did not decide whether, absent a warrant, either reasonable suspicion or probable cause would have been sufficient to render the use of the GPS lawful; to the extent the Government invoked the automobile exception to the warrant requirement, as we pointed out, that exception applies only when "a car is readily mobile and probable cause exists to believe it contains contraband," neither of which elements the Government satisfied. Slip op. at 38 (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996)). Second, the Government's petition complains that the court's opinion "implicitly calls into question common and important practices such as sustained visual surveillance and photographic surveillance of public places," Pet. at 2, but that is not correct. The court explicitly noted: "This case does not require us to, and therefore we do not decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment." Slip op. at 37.

SENTELLE, *Chief Judge*, joined by HENDERSON, BROWN, and KAVANAUGH, *Circuit Judges*, dissenting from the denial of rehearing en banc: The panel opinion in this case held that the government's warrantless use of a global positioning system ("GPS") device to track the public movements of appellant Antoine Jones's vehicle for approximately four weeks was an unreasonable search in violation of Jones's Fourth Amendment rights. In my view, this question should be reviewed by the court en banc because the panel's decision is inconsistent not only with every other federal circuit which has considered the case, but more importantly, with controlling Supreme Court precedent set forth in *United States v. Knotts*, 460 U.S. 276 (1983).

In *Knotts*, the Supreme Court reviewed a case in which law enforcement officers had placed a radio transmitter ("beeper") inside a chloroform container which was in turn placed inside a motor vehicle. Through the use of the electronic signals from the beeper, the police tracked the chloroform container from one automobile to another across the length of an interstate journey from Minneapolis, Minnesota, to Shell Lake, Wisconsin. The information obtained from the electronic monitoring was augmented by intermittent physical surveillance and by monitoring from a helicopter. In upholding the constitutionality of the surveillance by electronic monitoring, the Supreme Court reviewed the establishment of the privacy interest as the principal right protected by the Fourth Amendment's guarantee. To briefly summarize the Court's jurisprudence from *Knotts* and its predecessors: if there is no invasion of a reasonable expectation of privacy, there is no violation of the Fourth Amendment protection "against unreasonable searches and seizures." U.S. CONST. AMENDMENT IV.

Applying that jurisprudence to the electronically enhanced surveillance in *Knotts*, the Court declared that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281. The Court went on to note that "[w]hen [the suspect] traveled over the public streets, he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property." *Id.* at 281-82. The Court further reasoned that since visual surveillance from public places along the route or adjacent to the destination would have revealed all of the same information to the police, "[t]he fact that the officers . . . relied not only on visual surveillance, but also on the use of the beeper to signal the presence of [the suspect's] automobile to the police receiver, does not alter the situation." *Id.* at 282. Central to the *Knotts* Court's reasoning, and, I think, controlling in this case is the observation 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." *Id.*

Everything the Supreme Court stated in *Knotts* is equally applicable to the facts of the present controversy. There is no material difference between tracking the movements of the *Knotts* defendant with a beeper and tracking the *Jones* appellant with a GPS. The panel opinion distinguishes *Knotts*—I think unconvincingly—not on the basis that what the police did in that case is any different than this, but that the volume of information obtained is greater in the present case than in

Knotts. The panel asserts that "the totality of Jones's movements over the course of a month . . . was not exposed to the public." The panel reasoned that "first, 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 these movements is effectively nil." Slip op. at 22. I suggest that this assertion in no way demonstrates that Jones's movements were not exposed to the public. The fact that no particular individual sees them all does not make the movements any less public. Nor is it evident at what point the likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private. As the *Knotts* Court recalled, it is well established that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. Unifed States*, 389 U.S. 347, 351 (1967). In applying that principle in *Knotts*, the Supreme Court declared that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281.

The panel opinion seems to recognize that Jones had no reasonable expectation of privacy in any particular datum revealed by the GPS-augmented surveillance, but somehow acquired one through "the totality of Jones's movements over the course of a month." Slip op. at 22. In the view of the panel, this is true "because that whole reveals more . . . than does the sum of its parts." While this may be true, it is not evident how it affects the reasonable expectation of privacy by Jones. The reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero. The sum

of an infinite number of zero-value parts is also zero. Nowhere in *Knotts* or any other Supreme Court Fourth Amendment decision since the adoption of the expectation of privacy rationale in *Katz* has the Court ever suggested that the test of the reasonable expectation is in any way related to the intent of the user of the data obtained by the surveillance or other alleged search. The words "reasonable expectation of privacy" themselves suggest no such element. The expectation of privacy is on the part of the observed, not the observer. Granted, the degree of invasion of that expectation may be measured by the invader's intent, but an invasion does not occur unless there is such a reasonable expectation.

Lest the importance of this opinion be underestimated, I would note that the invasion the panel found was not in the use of the GPS device, but in the aggregation of the information obtained. Presumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem. Therefore, it would appear, as appellee argues, that this novel aggregation approach to the reasonable expectation of privacy would prohibit not only GPS- augmented surveillance, but any other police surveillance of sufficient length to support consolidation of data into the sort of pattern or mosaic contemplated by the panel. True, the panel declares that "this case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment." Even in the face of this declaration, I cannot discern any distinction between the supposed invasion by aggregation of data between the GPS-augmented

surveillance and a purely visual surveillance of substantial length.

I would further note that the Seventh Circuit in *United States v. Garcia*, 474 F.3d 994 (7th Cir.), *cert. denied*, 128 S. Ct. 291 (2007), concluded that "GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking." *Id.* at 997; *see also United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

In light of its inconsistency with Supreme Court jurisprudence and with the application of the Fourth Amendment to similar circumstances by other circuits, this decision warrants en banc consideration. I respectfully dissent from the denial.

KAVANAUGH, *Circuit Judge*, dissenting from the denial of rehearing en banc: I agree with Chief Judge Sentelle that the panel opinion conflicts with the Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276 (1983). I also share Chief Judge Sentelle's concern about the panel opinion's novel aggregation approach to Fourth Amendment analysis.

That is not to say, however, that I think the Government necessarily would prevail in this case. The defendant contended that the Fourth Amendment was violated not only by the police surveillance without a warrant (the issue addressed in the panel opinion) but also by the police's initial installation of the GPS device on his car without a warrant. The panel opinion did not address the defendant's alternative and narrower property-based

Fourth Amendment argument concerning the installation. In my judgment, the defendant's alternative submission also poses an important question and deserves careful consideration by the en banc Court.

The Supreme Court has stated that the Fourth Amendment "protects property as well as privacy." *Soldal v. Cook Cnty., Ill.,* 506 U.S. 56, 62 (1992). As the defendant here rightly points out, the police not only engaged in surveillance by GPS but also intruded (albeit briefly and slightly) on the defendant's personal property, namely his car, to install the GPS device on the vehicle.

Because of the police's physical intrusion to install the GPS device, this case raises an issue that was not presented in *Knotts*. The defendant in *Knotts* did not own the property in which the beeper was installed and thus did not have standing to raise any Fourth Amendment challenge to the installation of the beeper. But Justice Brennan's concurring opinion in *Knotts* foresaw the Fourth Amendment issue posed by the police's installing such a device: "when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." 460 U.S. at 286.

As Justice Brennan noted in *Knotts*, the Supreme Court precedent that is perhaps most relevant to this property-based argument is the Court's unanimous 1961 decision in *Silverman v. United States*, 365 U.S. 505. In Silverman, the Court concluded that installation of a listening device on the defendants' property (by accessing a heating duct in a shared wall of the defendants' row

house) was subject to the Fourth Amendment. The Court reasoned that the Fourth Amendment applied because of the police's physical contact with the defendants' property, which the Court variously characterized as: "unauthorized physical penetration into the premises," "unauthorized physical encroachment within a constitutionally protected area," "usurping part of the petitioners' house or office," "actual intrusion into a constitutionally protected area," and "physically entrench[ing] into a man's office or home." *Id.* at 509-12. The Court further determined that a physical encroachment on such an area triggered Fourth Amendment protection regardless of the precise details of state or local trespass law. *Id.* at 511.

To be sure, since *Silverman* the Supreme Court has held that the Fourth Amendment protects more than just property interests. *See Katz v. United States*, 389 U.S. 347, 352-53 (1967). But as thoroughly explained in *Soldal*, the Court has not retreated from the principle that the Fourth Amendment also protects property interests. 506 U.S. at 64. "'[P]rotection for property under the Fourth Amendment' remains a major theme of the post-*Katz* era: If a person owns property or has a close relationship to the owner, access to that property usually violates his reasonable expectation of privacy." Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516 (2007) (quoting *Soldal*, 506 U.S. at 64); *see also Bond v. United States*, 529 U.S. 334 (2000) (squeezing outer surface of a bag subject to Fourth Amendment).

If *Silverman* is still good law, and I see no indication that it is not, then *Silverman* may be relevant to the defendant's alternative argument concerning the police's

installation of the GPS device. Cars are "effects" under the text of the Fourth Amendment, *see United States v. Chadwick*, 433 U.S. 1, 12 (1977), and are thus "constitutionally protected areas" for purposes of *Silverman*.

The key *Silverman*-based question, therefore, is whether the police's installation of a GPS device on one's car is an "unauthorized physical encroachment within a constitutionally protected area" in the same way as installation of a listening device on a heating duct in a shared wall of a row house. *Silverman*, 365 U.S. at 510. One circuit judge has concluded that the Fourth Amendment does apply to installation of a GPS device: Absent the police's compliance with Fourth Amendment requirements, "people are entitled to keep police officers' hands and tools off their vehicles." *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir. 1999) (Kleinfeld, J., concurring). Without full briefing and argument, I do not yet know whether I agree with that conclusion. Whether the police's mere touching or manipulating of the outside of one's car is a "physical encroachment within a constitutionally protected area" requires fuller deliberation.[*] In any event, it is an important and close question, one that the en banc Court should consider along with the separate issue raised by Chief Judge Sentelle.

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[*] To be clear, even if the Fourth Amendment applies to the installation, the police may still attach GPS devices to suspects' cars. The police simply must first obtain a warrant or otherwise demonstrate that their actions are reasonable under the Fourth Amendment. Indeed, in this case, the police obtained a warrant but then failed to comply with the warrant's temporal and geographic limits.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 05-0386 (ESH)

UNITED STATES OF AMERICA

v.

ANTOINE JONES, ET AL., DEFENDANT

Aug. 10, 2006

MEMORANDUM OPINION

HUVELLE, District Judge.

Before the Court are a series of motions, filed by Defendant Jones, to suppress evidence found in vehicles and at Levels nightclub, evidence obtained from a mobile tracking device, from the seizure of electronic communications, and from the interception of wire communications. Defendant also seeks discovery regarding co-conspirator statements, a preliminary determination of the conspiracy and a pretrial ruling on the admissibility of co-conspirator statements.[1]

[1] Also pending before the Court is the government's Rule 404(b) motion and Defendant Jones' motions for a bill of particulars and for disclosure of confidential informants. The Court will address these motions at the hearing on Monday, August 14, 2006.

BACKGROUND

Defendants Antoine Jones, Adrian Jackson, Michael Huggins, Kevin Holland and Kirk Carter are charged in a 34-count Superseding Indictment (the "Indictment"). All defendants are charged with Conspiracy to Distribute and Possess with Intent to Distribute 5 Kilograms or more of Cocaine and 50 Grams or More of Cocaine Base, in violation of 21 U.S.C. § 846 (Count One), and with various individual counts of Use of a Communication Facility to Facilitate a Drug Trafficking Offense, in violation of 21 U.S.C. § 843(b) (Counts Five through Thirty-Four). In addition, Jones is charged with two counts of Unlawful Possession with Intent to Distribute Cocaine or Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii) (Count Two), and 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count Three), and Jackson is charged with Using, Carrying, Brandishing, and Possessing a Firearm During a Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Four).

As alleged in the Indictment, from at least sometime in 2003 through October 24, 2004, defendants and their co-conspirators acquired, repackaged, stored, processed, sold, and redistributed large quantities of cocaine and cocaine base, in the District of Columbia, the States of Maryland and Texas, the Republic of Mexico and elsewhere. It is further alleged that Jones was the primary supplier of cocaine and cocaine base to members of the organization in the District of Columbia and in the State of Maryland.

As part of their investigation into the alleged conspiracy, law enforcement agents utilized a number of investigative techniques, including surveillance, informants, installation of an electronic tracking device on Jones' vehi-

cle, search warrants issued to electronic communication service providers for text messages to or from cellular telephones used by Jones and an alleged co-conspirator, and a Title III wire intercept. The covert portion of the investigation ended on October 24, 2005, with searches pursuant to warrants and arrests. At that time, drugs, drug paraphernalia, firearms, and significant quantities of cash were seized from the homes of a number of the defendants, as well as from an alleged "stash house" in Fort Washington, Maryland where 97 kilograms of cocaine, 3 kilograms of crack cocaine, and in excess of $800,000 was found. (Government's Omnibus Response to Defendant's Legal Motions ["Gov't's Omnibus Opp'n"] at 5.) The evidence the government intends to introduce at trial includes, *inter alia,* items seized on October 24, 2005, a number of conversations intercepted pursuant to Title III wiretap orders, and the testimony of individuals who were allegedly part of Jones' drug organization.[2] (*See id.*)

I. Motion to Suppress Evidence Obtained From Interception of Wire Communications and Seizure of Electronic Communications

Jones first moves to suppress evidence obtained from the interception of wire communications (telephone conversations) to or from his cellular telephone and the seizure of electronic communications (text messages) to or from both his cellular telephone and the cellular telephone of an alleged co-conspirator Lawrence Maynard. (*See* Defendant's Motion to Suppress Evidence Obtained From Interception of Wire Communications and Seizure

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[2] On June 5, 2006, the government filed a 21-page itemization of evidence, divided into nine categories, that it intends to rely on at trial.

of Electronic Communications ["Def.'s Mot. to Suppress Evid."].) The text messages were held in storage by two electronic communication service providers at the time of their acquisition by the government. In support of his motion, Jones argues that (1) the affidavits submitted by FBI Special Agent Stephanie Yanta in support of the text message search warrants and the wire intercept violated both the probable cause and necessity requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Wiretap Act"), 18 U.S.C. § 2510 *et seq.*; (2) Special Agent Yanta intentionally misled the authorizing court and demonstrated a reckless disregard for the truth in setting forth the factual allegations in her supporting affidavits; and (3) the government impermissibly failed to minimize the intercepted wire communications. In connection with his claim that the affidavits contained deliberate, material misstatements, Jones also seeks a hearing under *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed.2d 667 (1978).[3] For the reasons explained herein, all of Jones' arguments are without merit.

A. The Text Message Affidavits

On August 10, 2005, and again on August 18, 2005, Magistrate Judge Alan Kay issued search warrants to two electronic communication service providers for stored text messages that had been transmitted over cellular telephones used by Jones and Maynard. In support of the search warrants, the government submitted

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[3] Jones also requests a *Franks* hearing in connection with his motions to suppress tangible evidence obtained from his Jeep Cherokee, evidence obtained from a mobile tracking device, and evidence seized at the Levels nightclub. These claims are addressed herein *infra.*

affidavits sworn to by Special Agent Yanta (the "August 10th Affidavit" and the "August 18th Affidavit"). In response to the search warrants, the companies provided a significant number of text messages to the government, which, in turn, referenced several of the messages in the affidavit in support of the first wiretap. (*See* Gov't's Omnibus Opp'n at 7.)

1. *Governing Law*

Jones' argument that the affidavits submitted in support of the text message search warrants violated certain requirements of the Wiretap Act fails as a matter of law because the Wiretap Act does not apply to the government's acquisition of text messages held in storage at electronic communication service providers. First, as amended by Title I of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, Title I, 100 Stat. 1848 (Oct. 21, 1986), the Wiretap Act applies only to the "interception" of wire, oral or electronic communications. An "intercept" is defined in the Wiretap Act as "the aural or other acquisition of the contents of any wire, electronic, or oral communication *though the use of any electronic, mechanical or other device.*" *Id.* § 2510(4) (emphasis added). The text messages here were supplied to the government by electronic communication providers in response to search warrants issued to companies. The messages, therefore, were not acquired by the government "through the use of any electronic, mechanical or other device." As a result, the government's acquisition of the text messages did not involve an "intercept" within the meaning of the Wiretap Act.

Moreover, while Jones accurately asserts that text messages constitute "electronic communications" within

the meaning of the Wiretap Act (*see* Def.'s Mot. to Suppress Evid. at 5), this assertion gets him nowhere. Courts consistently have held that the Wiretap Act governs only the acquisition of the contents of electronic communications that occur contemporaneous with their transmission, and not—as is the case here—the subsequent acquisition of such communications while they are held in electronic storage by third parties. *See, e.g., United States v. Steiger,* 318 F.3d 1039, 1048-49 (11th Cir. 2003) (holding that "a contemporaneous interception—*i.e.,* an acquisition during 'flight'—is required to implicate the Wiretap Act with respect to electronic communications"); *Konop v. Hawaiian Airlines, Inc.,* 302 F.3d 868 (holding that "for [an electronic communication] to be 'intercepted' in violation of the Wiretap Act, it must be acquired during transmission, not while it is in electronic storage"); *Steve Jackson Games, Inc. v. U.S. Secret Serv.,* 36 F.3d 457, 462 (5th Cir. 1994) (analyzing statutory text and legislative history and concluding that "Congress did not intend for 'intercept' to apply to 'electronic communications' when those communications are in 'electronic storage' "); *see also See* Clifford S. Fishman & Anne T. McKenna, *Wiretapping and Eavesdropping* § 2:5 (West, 2d ed. 1995) ("An interception [of an electronic communication] occurs . . . only if the contents are acquired as the communication takes place, not if they are acquired while the communications are in storage.").

Instead, the relevant statutory provision governing searches and seizures of stored electronic communications, such as the text messages at issue here, appears in Title II of the Electronic Communications Privacy Act of 1986 (the "Stored Communications Act"), 18 U.S.C. § 2701 *et seq.* *See* Fishman & McKenna, *supra,* § 26:1

(the Stored Communications Act "spells out the circumstances in which the government may obtain access" to the contents of stored wire or electronic communications.) In pertinent part, it provides that:

> A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation. . . .

Id. § 2703(a).[4] And as courts have recognized, the procedures the government must follow to access the contents of stored electronic communications "are considerably less burdensome and less restrictive than those required to obtain a wiretap order under the Wiretap Act." *Konop,* 302 F.3d at 879. For example, unlike the Wiretap Act, the Stored Communications Act contains no express requirement that the government demonstrate necessity. In light of the substantial differences between the statutory procedures and requirements between the Wiretap Act and the Stored Communications Act, courts consis-

[4] As used in the Stored Communications Act, which expressly adopts the definitions provided in § 2510 of the Wiretap Act, 18 U.S.C. 2711(1), the term "electronic storage" means "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof" and "any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17). "Electronic communication service," in turn, is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id.* § 2510(15).

tently have concluded that "Congress could not have intended" to require the government "to comply with the more burdensome, more restrictive procedures of the Wiretap Act to do exactly what Congress apparently authorized it to do under the less burdensome procedures of the [Stored Communications Act]." *Konop,* 302 at 879; *see also Steve Jackson Games, Inc.,* 36 F.3d at 463 ("to satisfy the more stringent requirements for an intercept in order to gain access to the contents of stored electronic communications").

2. *Probable Cause*

Jones' argument that the text message affidavits lacked probable cause also misses the mark. The task of an issuing magistrate, when assessing probable cause for search warrants

> is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L. Ed.2d 527 (1983). And the duty of a reviewing court, in turn, "is simply to ensure that the [issuing court] had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Id.* at 238-39, 103 S. Ct. 2317 (quoting *Jones v. United States,* 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed.2d 697 (1960)). The issuing court's determination that probable cause exists "should be paid great deference by reviewing courts." *Gates,* 462 U.S. at 236, 103 S. Ct. 2317 (internal quotation marks omitted). More-

over, in reviewing a warrant application, courts must treat the affidavit "in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." *United States v. Ventresca,* 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed.2d 684 (1965).

Applying these standards, the Court easily concludes that the information contained in Special Agent Yanta's supporting affidavits was sufficient to establish probable cause for the text message warrants. The 29-page August 10th Affidavit, which served as the foundation upon which subsequent affidavits submitted in support of wiretap and search warrant applications were based, references information provided by three confidential sources who had first-hand knowledge of Jones' illicit activity.[5] For example, the affidavit states that Confidential Source Number One ("CS-1") reported having made multi-kilogram purchases of cocaine directly from Jones in the recent past, including at Jones' Levels nightclub. (Def.'s Mot. to Suppress Evid. Ex. 1 at 9, 13.) CS-1 also provided specific pricing, packaging, distribution, and operating information, and detailed vehicles, individuals, and locations that Jones used for transporting and distributing the narcotics. (*Id.* at 12-14.) CS-2

[5] The affidavit establishes the informants' credibility for providing accurate information. (Def.'s Mot. to Suppress Evid. Ex. 1 at 9, 14, 17.) *See United States v. Bruner,* 657 F.2d 1278, 1297 (D.C. Cir.1981) (issuing court may rely on recital that informant previously provided reliable information without requiring further factual elaboration). Furthermore, none of the three informants had any business or personal relationships with each other and likely did not even know of each other. (*See* Def.'s Mot. to Suppress Evid. Ex. 1 at 14, 17.)

also described having purchased kilogram quantities of cocaine from Jones (*id.* at 14), and independently confirmed details provided to investigators by CS-1 concerning pricing, packaging, vehicles used to transport the drugs, and procedures used to distribute drugs. (*Id.* at 13-16.) The August 10th Affidavit further indicates that CS-3 was in communication with, and made privy to the activities of, a suspected cocaine customer of Jones. (*Id* at 17.)

In addition to the testimony of each of the confidential informants, the August 10th Affidavit also describes at length the results of surveillance, searches, debriefings, review of electronic data, and other investigative techniques. For instance, the affidavit states that alleged co-conspirator Maynard, the manager of the Levels nightclub, was stopped for speeding in North Carolina, while driving a minivan registered to Jones. (Def.'s Mot. to Suppress Evid. Ex. 1 at 11, 18-20.) After an interdiction canine alerted on the right rear area of the minivan, officers searched the vehicle and recovered from a hidden compartment $67,115.00 in U.S. currency, bundled together and contained in plastic bags. (*Id.* at 19.) The affidavit further provides the basis for investigators' belief that Jones and Maynard were using text messaging in an attempt to conceal their alleged narcotics trafficking activities. First, analysis of pen register data indicated that several weeks prior to August 10, 2005, the target cellular telephones showed an increase in text messaging from 50% of all activations to 90%. (*Id.* at 26-27.) And second, the technology to capture the contents of text messages had "only become available to law enforcement within recent weeks." (*Id.* at 27.)

In summary, the Court finds that the affidavit clearly establishes probable cause to believe that Jones operated a conspiracy to distribute narcotics, and that Jones and Maynard were using text messages on their phones to further that conspiracy. Because the August 18th Affidavit contained all of the foregoing information,[6] the Court likewise finds that it is sufficient.

3. *Request for a Franks Hearing*

Although there is a "presumption of validity" with respect to affidavits in support of search warrants, *Franks,* 438 U.S. at 171, 98 S. Ct. 2674, a court is required to hold an evidentiary hearing "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155-56, 98 S. Ct. 2674; *see also United States v. Dale,* 991 F.2d 819, 843 (D.C. Cir. 1993); *United States v. Sobamowo,* 892 F.2d 90, 94 (D.C. Cir.1989); *United States v. Richardson,* 861

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[6] In addition to the information provided in the August 10th Affidavit, the August 18th Affidavit also states that some of the 180 text messages, submitted to investigators pursuant to the August 10th search warrant issued by Magistrate Judge Kay, were suspicious. (Def.'s Mot. to Suppress Evid. Ex. 2 at 28.) According to the August 18th Affidavit, in light of the context provided by the confidential informants and the increased activity observed by surveillance at the Levels nightclub, investigators believed that certain of the text messages referred to narcotics activity. (*See id.*). Because the Court concludes that other information contained in the affidavit is sufficient to establish probable cause to believe that Jones operated a conspiracy to distribute narcotics, and that Jones and Maynard were using text messages on their phones to further that conspiracy, the Court need not address the reasonableness of the investigators' belief regarding the text messages.

F.2d 291, 293-94 (D.C. Cir.1988). The rule set forth in *Franks,* however, "has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded." *Id.* at 167, 98 S. Ct. 2674. As the D.C. Circuit has instructed, "a defendant is entitled to an evidentiary hearing *only* if his attack on the accuracy of the affidavit is 'more than conclusory' and is accompanied by 'allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.' " *United States v. Gaston,* 357 F.3d 77, 80 (D.C. Cir. 2004) (quoting *Franks,* 438 U.S. at 171, 98 S. Ct. 2674) (emphasis added). Furthermore, even if the defendant makes the requisite preliminary showing, a hearing is not required unless the alleged misstatement was material to the finding of probable cause. *See Richardson,* 861 F.2d at 294.

In requesting a *Franks* hearing in connection with the August 10th and the August 18th Affidavits, Jones argues that Special Agent Yanta "omitted certain unhelpful facts while touting other facts for the sole purpose misleading" the issuing court. (Def.'s Mot. to Suppress Evid. at 3.) More specifically, he contends that Special Agent Yanta omitted pertinent details concerning (1) the context of the Levels nightclub; (2) the legitimate relationships between Jones and his associates; (3) phone activation figures; and (4) the context of several text messages. (*Id.* at 8-15.) Jones arguments are both factually incorrect and legally without merit.

First, his contentions that Special Agent Yanta omitted details regarding the context of his "legitimate" business activities and associations are false. To the contrary, based on information provided by confidential

sources and obtained through surveillance, the affidavits set forth the fact that Jones was using his "legitimate" nightclub business for the purposes of conducting drug trafficking activities and laundering proceeds, and that Jones employed Maynard both as his nightclub manager and as an assistant in his narcotics business. (*See, e.g.*, Def.'s Mot. to Suppress Evid. Ex. 1 at 7.) Moreover, this latter disclosure regarding Maynard's dual roles belies Jones' assertion that the affidavit omitted information tending to indicate that the number of activations between Maynard's and Jones' cellular telephones is related to their operation of a nightclub and not the facilitation of narcotics trafficking.

Furthermore, even if Jones could prove that the affidavits contain material false statements, which he cannot, he has offered no proof that Special Agent Yanta made such misstatements or omissions with the requisite scienter-namely, that she intentionally tried to deceive the issuing court or manifested a reckless disregard for the truth. And perhaps most significantly, the alleged omissions were immaterial to the magistrate judge's probable cause determination. That is to say, even without the contested portions (or rather, even with the additional details that Jones argues should have been included), the affidavit more than establishes probable cause.[7] The fact that legitimate nightclub activities may have taken place at Levels; that Jones may have had personal or legitimate business relationships with some or

[7] In this regard, with respect to Jones' assertion that Special Agent Yanta, in her August 18th Affidavit, misleadingly referenced portions of text messages out of context, the Court already has concluded that the referenced text messages are immaterial to a finding of probable cause. *See supra* note 8.

all of his associates referenced in the affidavit; or that the contested text messages were sexual in nature rather than indicative of illegal activity simply does not undermine the wealth of facts in the affidavit establishing probable cause to believe that Jones was operating a large-scale cocaine business.

Accordingly, because Jones has offered little more than conclusory assertions, some of which are factually incorrect, that Special Agent Yanta omitted information that is material to a court's probable cause determination, he is *not* entitled to a *Franks* hearing.[8]

B. The Wire Tap Affidavits

On September 2, 2005, the government applied, pursuant to 18 U.S.C. § 2518, for an Order from the Honorable Paul L. Friedman, authorizing the interception of communications occurring to and from the cellular telephone used by Jones. In support of the application, the government again submitted an affidavit sworn to by Special Agent Yanta (the "September 2nd Affidavit"). That same day, Judge Friedman issued an Order authorizing electronic surveillance for a period of thirty days, and on September 30, 2005, at the government's request, supported by yet another affidavit by Special Agent

[8] Having concluded that the affidavits in support of the text message search warrants satisfied the standard for probable cause and that a *Franks* hearing is not warranted, the Court need not address the government's arguments that (1) the Stored Communications Act does not create a statutory suppression remedy (Gov't's Omnibus Mot. at 10); (2) the Wiretap Act, while providing such a remedy for improperly intercepted oral and wire communications, does not provide such a remedy for electronic communications (*id.* at 9 n. 3); and (3) regardless, Jones has no protected Fourth Amendment interest in text messages in the hands of third parties. (*Id.* at 10-11.)

Yanta (the "September 30th Affidavit"), Judge Friedman authorized an extension of the interception period for an additional thirty days. On October 24, 2005, the government terminated the intercept.

As noted, Jones claims that the affidavits submitted in support of the government's wiretap application violated both the probable cause and necessity requirements of the Wiretap Act; that the affidavits contained deliberate, material misstatements; and that the government impermissibly failed to minimize the intercepted wire communications.[9]

1. *The Wiretap Act*

Jones certainly is correct that the government's interception of his telephone calls is governed by the Wiretap Act. It requires that an application for the interception of certain oral, wire or electronic communications shall be in writing, under oath, and shall contain certain information including "a full and complete statement of the facts and circumstances relied upon by the applicant[ ] to justify his belief that an order should be issued." *Id.* § 2518(1). On the basis of the facts submitted by the applicant, a district court may authorize a wiretap upon finding that (1) probable cause exists to believe that an individual has committed or is about to commit one of certain enumerated offenses; (2) probable cause exists to believe that "particular communications concerning that offense will be obtained" through an interception; (3) "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to

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[9] Although Jones purportedly challenges both affidavits submitted in support of the government's wiretap application, he only addresses the September 2nd Affidavit in his argument.

succeed if tried"; and (4) probable cause exists to believe that the communication facility sought to be wiretapped "[is] being used, or [is] about to be used, in connection with the commission of [the] offense." *Id.* § 2518(3)(a)-(d); *see also United States v. Donovan,* 429 U.S. 413, 435, 97 S. Ct. 658, 50 L. Ed. 2d 652 (1977). The determination that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. § 2518(3)(c), is referred to as the "necessity requirement," which is the "keystone of congressional regulation of electronic eavesdropping." *United States v. Williams,* 580 F.2d 578, 587-88 (D.C. Cir. 1978).

The statute also requires that "[e]very [wiretap] order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable [and] shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. . . . " 18 U.S.C. § 2518(5). This is referred to as the "minimization requirement." Although "[t]he statute does not forbid the interception of all nonrelevant conversations," the government must make reasonable efforts to "minimize" the interception of such conversations. *Scott v. United States,* 436 U.S. 128, 139-40, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978). The statute also provides that an order authorizing an interception cannot extend "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." 18 U.S.C. § 2518(5). Furthermore, the statute provides that "no part of the contents of [intercepted] communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . if the disclosure of that information

would be in violation of this chapter." *Id.* § 2515. Any "aggrieved person" may move to suppress the introduction of wiretap evidence or its fruits if "the communication was unlawfully intercepted," the "order of authorization or approval under which it was intercepted is insufficient on its face," or if "the interception was not made in conformity with the order of authorization or approval." *Id.* § 2518(10)(a)(i)-(iii); *see also Donovan,* 429 U.S. at 433-34, 97 S. Ct. 658.

2. *Probable Cause*

Having found that the August 10th Affidavit submitted in support of the first text message search warrant establishes probable cause to believe that Jones operated a conspiracy to distribute narcotics, it follows that the September 2nd Affidavit is sufficient because, as even Jones concedes, the September 2nd Affidavit relies in significant part on the information contained in the August 10th Affidavit. (*See* Def.'s Mot. to Suppress Evid. at 11-15.) Furthermore, the September 2nd Affidavit also states that surveillance of Jones and the Levels nightclub revealed that a number of the individuals whom the confidential informants linked to narcotics activity were in frequent contact with Jones. (Def.'s Mot. to Suppress Evid. Ex. 3 ¶¶ 75, 79, 80.) Pen register data included in the affidavit, in turn, verified that the target cellular telephone was in contact with phones used by these individuals as well as a number of other persons with drug convictions or histories of drug activity. (*Id.* ¶¶ 84-91.) The Court accordingly finds that the affidavit satisfies the applicable probable cause requirements.

3. *Necessity*

Jones contends that the government violated the Wiretap Act's necessity requirement because it failed to conduct all other methods of investigation before resorting to wire intercepts. Specifically, he alleges that, based upon the information contained in Special Agent Yanta's affidavits, the government never attempted (1) to perform surveillance at the Levels nightclub, (2) to perform surveillance at Jones' home or at the homes or employment sites of his alleged co-conspirators, or (3) to make undercover drug purchases. (*See* Def.'s Mot. to Suppress Evid. at 11, 15, 21-24.)

Congress created the necessity requirement to ensure that "wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn,* 415 U.S. 143, 153 n. 12, 94 S. Ct. 977, 39 L. Ed.2d 225 (1974). Thus, a court should "give close scrutiny" to a contested wiretap application and "reject generalized and conclusory statements that other investigative procedures would prove unsuccessful." *Williams,* 580 F.2d at 588. Because, however, the "statutory command was not designed to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, the government will meet its burden of demonstrating necessity if it shows that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation." *United States v. Carter,* 449 F.3d 1287, 1293 (D.C. Cir. 2006) (internal quotation marks and citation omitted). Moreover, while this requirement compels the government to demonstrate that it has made a good faith effort to utilize a range of con-

ventional law enforcement techniques before it resorts to the more intrusive means of electronic eavesdropping, the statute does not require the literal exhaustion of all other possible investigative approaches. *See United States v. Lopez,* 300 F.3d 46, 52-53 (1st Cir. 2002) ([T]he necessity requirement is not tantamount to an exhaustion requirement.); *United States v. Thompson,* 210 F.3d 855, 858-59 (8th Cir. 2000). Instead, in a case involving a wide-ranging conspiracy, the government must simply provide an adequate basis for the court to make a practical, common-sense determination that other methods would likely prove inadequate to reveal the operation's "full nature and scope." *United States v. Brown,* 823 F.2d 591, 598 (D.C. Cir. 1987); *see also United States v. Nelson-Rodriguez,* 319 F.3d 12, 33 (2003). This determination is reviewed only for abuse of discretion. *See United States v. Sobamowo,* 892 F.2d 90, 93 (D.C. Cir. 1989).

In this case, the September 2nd Affidavit amply satisfies the necessity requirement.[10] The affidavit details the normal investigative procedures that already had been tried, including the use of physical and video surveillance, confidential informants, pen registers, interviews, public records, and search warrants, and noted that while these techniques had been probative "in proving that an ongoing illegal narcotics business is operating," they had not "yielded sufficient evidence or ascertained the identities of, and proven beyond a reasonable doubt, the guilt of all those participants in this illegal conspiracy." (Def.'s Mot. to Suppress Evid. Ex. 3 ¶ 93.) Fur-

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[10] Nor has Jones demonstrated that there are any material misstatements or omissions in the September 2nd Affidavit.

ther information is then provided as to the specific failings of each of these and other approaches and the role that wiretap evidence would likely provide in filling these gaps.[11] "Having engaged in an adequate range of investigative endeavors, the government properly sought wire-

[11] For example, physical surveillance had yielded little valuable information to further the investigation, other than confirming that some of the identified members of the alleged conspiracy associated with one another. Efforts to observe the members of the alleged conspiracy had been frustrated by the FBI's limited ability to obtain advanced information concerning planned activities. (Def.'s Mot. to Suppress Evid. Ex. 3 ¶ 93(a).) Undercover operations also had their limitations; Jones was believed to deal only with known associates, and the FBI knew of no known source who was in a position to purchase narcotics from Jones or to introduce an undercover officer for that purpose. These circumstances limited the ability of investigators to amass sufficient evidence as to the manner in which Jones allegedly redistributed large quantities of narcotics in the Washington, D.C. area, the identities of all other members of the alleged conspiracy, or the manner in which Jones and others disposed of the proceeds of the operation. (*Id*. ¶ 93(b).) The confidential sources who has provided much of the probable cause for the affidavit had information that was principally "historical in nature," and although a number of individuals who were believed to be customers of Jones had been arrested, none was willing to cooperate with the government. (*Id*. ¶ 93(d).) Similar representations have led courts to find the use of wiretaps necessary under § 2518(1)(c). *See, e.g., United States v. Williams,* 124 F.3d 411, 418 (3d Cir. 1997) (necessity requirement satisfied where use of informants was thought too dangerous and conspirators regularly used evasive techniques to avoid other kinds of law enforcement infiltration); *United States v. Carrazana,* 921 F.2d 1557, 1564-65 (11th Cir. 1991) (necessity existed where drug ring used counter-surveillance to frustrate investigation); *United States v. Macklin,* 902 F.2d 1320, 1327 (8th Cir. 1990) (necessity found where affidavit disclosed that normal methods, including physical surveillance, pen registers, and confidential information had been tried and failed to "disclose the scope of the conspiracy and all the persons involved," and other tactics, including grand jury investigation and undercover operations had been rejected as too dangerous).

tap permission and was not required to enumerate every technique or opportunity missed or overlooked." *Sobamowo,* 892 F.2d at 93.

Indeed, the September 2nd Affidavit indicates that the government sought the wiretap in order to uncover the full extent of the alleged conspiracy, including how Jones laundered the proceeds of his criminal enterprise. From the government's perspective, wiretaps represented "the only reasonable method of developing evidence of the full scope of the suspected violations being committed by the target subjects and others as yet unknown or not yet fully identified" (Def.'s Mot. to Suppress Evid. Ex. 3 ¶ 95.) The use of wiretaps for such purposes in comparable investigations has been repeatedly upheld. *See, e.g., Lopez,* 300 F.3d at 53-54 (identities of some conspirators); *United States v. Diaz,* 176 F.3d 52, 111 (2d Cir. 1999) (sources of drug supply and location of drug proceeds); *United States v. Cooper,* 868 F.2d 1505, 1510 (6th Cir. 1989) (customers and agents of drug ring). Thus, even where the government has other evidence linking a defendant to a crime, § 2518 does not prevent it from obtaining wiretaps in order to "ascertain the extent and structure of the conspiracy." *United States v. Plescia,* 48 F.3d 1452, 1463 (7th Cir. 1995); *see also United States v. McGuire,* 307 F.3d 1192, 1198-99 (9th Cir. 2002) ("The government's possession of evidence sufficient to indict some conspirators does not bar it from seeking evidence against others. . . . [T]here was a powerful government interest in identifying all conspirators and the full scope of the conspiracy."). The necessity requirement is not meant to work as an impediment to making a good case better, or a strong case airtight.

Moreover, as detailed above, the government's affidavits regarding the necessity for wiretaps were not based merely on conclusory statements about the difficulties of investigating large-scale narcotics distribution conspiracies in general, but instead provided specific information about the *Jones operation* that limited the effectiveness of conventional investigative methods, and made the request for wiretaps not merely useful but indispensable. *See United States v. Johnson,* 696 F.2d 115, 123-24 (D.C. Cir. 1982) (rejecting defendant's challenge to wiretap orders where the government's supporting affidavit "revealed that the wiretap was sought only after more than six months of extensive investigation, discussed a number of techniques that had been tried or considered, and amply demonstrated the need for electronic surveillance *in this particular investigation").* Therefore, in light of the considerable documentation presented by the government concerning the progress of its investigation and the difficulties of gathering the evidence needed to present a complete picture of the extensive criminal activity that was being uncovered, the Court concludes that Judge Friedman did not abuse his discretion in initially authorizing the wiretap on September 2, 2005, and in authorizing an extension of the wiretap on September 30, 2005.

4. *Minimization*

While Jones also challenges the degree to which intercepted conversations were appropriately minimized (Def.'s Mot. to Suppress Evid. at 25-26), he points to no specific conversations that he claims should have been minimized. Instead, he baldly asserts that the government should have minimized all conversations between the targets "pertaining to their joint business ventures

as well as social or other matters unrelated to a drug distribution conspiracy." (*Id.* at 25.) Allegations of this type are insufficient, as recently affirmed by the D.C. Circuit in *Carter.* The defendant in *Carter* challenged a wire intercept by presenting evidence that only 27% of the non-pertinent calls in the intercept had been minimized. He also alleged that non-pertinent calls had been monitored, particularly conversations concerning golf, but pointed to no specific conversations. On that record the district court rejected the contention without any evidentiary hearing. The D.C. Circuit agreed because:

> What the wiretapping statute forbids is failure by the government to make reasonable efforts to minimize interceptions of non-pertinent communications; consequently, a defendant must identify particular conversations so that the government can explain their non-minimization. Having failed to identify 'specific conversations that should not have been intercepted, or even . . . a pattern of such conversations,' . . . *the issue of reasonable minimization was simply not in play.*

Carter, 449 F.3d at 1295 (internal citation omitted) (emphasis added). Here too, because Jones has failed to identify even a single conversation that should have been minimized, he has not properly raised the issue of reasonable minimization.

II. Motion to Adopt and Conform to Co-defendant's Motions

Because the deadline for filing has expired and none of Jones' co-defendants has filed a substantive motion, this motion by Jones is denied as moot.

III. Motion for a Preliminary Determination of Conspiracy and Pretrial Ruling on the Admissibility of Co-conspirators' Statements

Jones also has moved for a pretrial hearing on the admissibility of co-conspirator statements. The admission of co-conspirator statements is governed by Fed. R. Evid. 801(d)(2)(E), which requires proof of the following: (1) a conspiracy, (2) between the declarant and the co-defendant, and (3) statements made in furtherance of the conspiracy. Here, the government persuasively argues that no pretrial hearing is necessary and that the Court instead should admit the statements during trial subject to the contingent relevancy rule of Fed. R. Evid. 104(b).

It is accepted in this jurisdiction that district courts have discretion to admit co-conspirator statements conditionally, "subject to connection" at the close of the government's case to the three requirements of Rule 801(d)(2)(E) (co-conspirators making statements in furtherance of the conspiracy). *See United States v. Jackson,* 627 F.2d 1198, 1218 (D.C. Cir. 1980) (holding that a district court has "no obligation" to conduct a "mini-trial" before trial to determine the existence of the conspiracy and noting that a district court is "vested with considerable discretion to admit particular items of evidence 'subject to connection'"); *United States v. Gantt,* 617 F.2d 831, 845 (D.C. Cir. 1980) ("As a practical matter, to avoid what otherwise would become a separate trial on the issue of admissibility, the court may admit declarations of co-conspirators 'subject to connection.' ").[12]

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[12] This approach has been used in recent cases similar in scope and nature to this one. *See, e.g., United States v. Edelin,* 128 F. Supp. 2d 23, 45-46 (D.D.C. 2001) (finding it unnecessary to conduct an advance

Here, given that the indictment includes a total of 94 overt acts in furtherance of the alleged narcotics conspiracy and considering the large number of witnesses expected to testify, the Court finds that such a preliminary hearing would be immensely time-consuming and would unnecessarily delay the trial. Therefore, in accordance with the governing practice in this jurisdiction, the Court denies defendant's motion and will allow the admission of co-conspirator statements at trial subject to proof of connection. Of course, if the requisite connection is not demonstrated at trial, the Court will strike the testimony and provide a cautionary instruction to the jury.

IV. Motion For an Order Directing the Government to Specify All Evidence Which May Be Subject to Suppression

Because the Court already has ordered the government to specify all the evidence it intends to introduce at trial, and the government has complied,[13] this motion is denied as moot.

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determination of conspiracy, which would amount to a time-consuming "mini-trail prior to trial in this case" and place an unreasonable burden on the government); *United States v. Cooper,* 91 F. Supp. 2d 60, 78 (D.D.C. 2000) (noting, in a RICO conspiracy case, that it is common practice in the D.C. Circuit to admit declarations of co-conspirators subject to connection).

[13] The government has acknowledged that the 21-page itemization of evidence that it intends to rely on at trial, filed on June 5, 2006, is over-inclusive. Accordingly, the government has represented that, "[a]s the case pares down," it will alert counsel for the defendants to those items of evidence that it no longer anticipates relying on at trial. (Gov't's Omnibus Opp'n at 42.) It is noted that by Order dated June 27, 2006, the government must file a list of all exhibits it intends to use at trial.

V. Motion For Discovery of Co-Defendant And Co-Conspirator Statements

Jones seeks an order directing the government to provide discovery of "any statements made by co-defendants or alleged co-conspirators that the government intends to offer against him pursuant to Fed. R. Crim. P. 801(d)(2)(E)." (Def.s' Omnibus Mot. at 13.) To the extent that such statements are those of testifying witnesses, they are covered by the Jencks Act and must be produced by the government in accordance therewith. To the extent that Jones seeks discovery of statements made by co-defendants or co-conspirators whom the government does not intend to call at trial, his motion must be denied. The D.C. Circuit has ruled on this precise question, finding itself "without authority to order such discovery" because "[n]othing in the Federal Rules of Evidence or in the Jencks Act requires such disclosure." *United States v. Tarantino,* 846 F.2d 1384, 1418 (D.C. Cir. 1988). The court, therefore "decline [d] to extend the defendant's right to discovery beyond that required by statute or the Constitution." *Id.* This approach concords with the majority of other circuits. *See, e.g., United States v. Orr,* 825 F.2d 1537 (11th Cir. 1987); *United States v. Roberts,* 811 F.2d 257 (4th Cir. 1987) *(en banc); United States v. Percevault,* 490 F.2d 126 (2d Cir. 1974.) Thus, to the extent that co-defendant or co-conspirator statements are not otherwise discoverable, defendant's motion is denied.

VI. Motion to Suppress Tangible Evidence Seized From Jones' Waldorf, Maryland Home[14]

On October 22, 2005, law enforcement agents obtained a search warrant for several locations, including Jones' home at 10870 Moore Street in Waldorf, Maryland. The warrant application was supported by a 47-page affidavit sworn to by Special Agent Yanta. (Def.'s Omnibus Mot., Ex. 2.) During the course of the search of the Moore Street residence on October 24, 2005, agents located a Jeep Cherokee parked inside the garage attached to the house. Jones was provided with and signed a consent form authorizing the agents to search the vehicle. (*Id.*, Ex. 3.)

Jones asserts three claims in support of his motion to suppress the evidence seized from the Moore Street address. First, he argues that the search warrant for the home was invalid because it was tainted by evidence obtained through illegal wiretapping and because it was based on false affidavit. (*Id.* at 14.) As already decided, there was no violation of law in connection with the government's interception of telephone conversations from Jones' cellular telephone. Nor was Special Agent Yanta's affidavit faulty, for it exhaustively details why investigators believed they had uncovered a massive international cocaine smuggling and distribution conspiracy with Antoine Jones as the conspiracy's ringleader in the Washington, D.C. area. The affidavit supplies the agent's ba-

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[14] Though Jones styled this motion as one to "Suppress Tangible Evidence Obtained From Jeep Cherokee" in his Omnibus Motion, he actually seeks suppression of "all evidence obtained as a result of the search of 10870 Moore Street, Waldorf, Maryland." (Def.'s Omnibus Mot. at 16.)

sis of knowledge for the information contained therein, which includes confidential source information, police surveillance, and interceptions of wireless communications between Jones and his alleged co-conspirators. (Def.'s Omnibus Mot. Ex. 2.) Specifically with respect to the Moore Street location, the affidavit notes that "a Jeep Cherokee (registered in the name of Deniece Jones)" had "been observed parked at the Moore Street Address," and that "[s]urveillance frequently showed Antoine Jones driving the Jeep." (*Id.* at 34-35.)

The Court therefore concludes that the affidavit clearly establishes probable cause to search Jones' Moore Street residence, and moreover, for the reasons previously explained, Jones is not entitled *Franks* hearing to determine the validity of the warrant because he has alleged no facts to support his claim that the affidavit contained "intentional misstatements and a reckless disregard for the truth." (*Id.* at 14.)

Jones next argues that the investigating officers violated Fed. R. Crim. P. 41(f) by failing to "present either Jones, his wife or son a copy of the warrant with attachment to inform them of the scope of the warrant, nor did they leave a copy on the premises." (Def.'s Omnibus Mot. at 16.) Under Rule 41(f), the "officer executing the warrant must . . . give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or . . . leave a copy of the warrant and receipt at the place where the officer took the property." Fed. R. Crim. P. 41(f)(3). In support, Jones cites *United States v. Gantt,* 194 F.3d 987 (9th Cir. 1999), for the proposition that all evidence seized during a search conducted in violation of Rule 41(f) should be suppressed. The D.C. Circuit has

not resolved the question of whether a violation of Rule 41 merits the suppression of the disputed evidence. *See United States v. Weaks,* 388 F.3d 913, 915 (D.C. Cir. 2004) (referring to question as "undecided"). The Ninth Circuit in *Gantt* held, however, that "[v]iolations of [Rule 41(f)] do not usually demand suppression." 194 F.3d at 1005. Rather, "only if there was a deliberate disregard of the rule or if the defendant was prejudiced," is suppression necessary. *Id.* (internal quotation marks omitted). Jones' claim is belied, however, by the unrebutted fact that the returned copy of the warrant notes that a "copy of warrant and receipt for items" was left with Deniece Jones, defendant's wife. (Def.'s Omnibus Mot. Ex. 2 at 53.) Deniece Jones' signature is affixed to each page of a five-page receipt for goods taken during the search. (*Id.* at 54-58.) Therefore, at the very least, Jones was provided with a copy of the warrant and a receipt at the conclusion of the search.[15]

[15] Neither the government nor defendants allege or present any evidence to demonstrate whether the warrant was served at the outset of the search. As the Supreme Court has noted, "neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search." *Groh v. Ramirez,* 540 U.S. 551, 563 n.5, 124 S.Ct. 1284, 157 L. Ed. 2d 1068 (2004). The Court declined, however, to express an opinion on "[w]hether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when . . . an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission." *Id.* Therefore, in the absence of any allegation that Jones requested that officers provide him a copy of the warrant at the outset of the search, the Court has no reason to suspect that the officers actions were "unreasonable" within the meaning of the Fourth Amendment or that there was any prejudice to defendant even if he did not receive the warrant until after the search was completed. "Prejudice in this context means the search would otherwise not have occurred or would have been less intrusive absent

Third, Jones asserts that the search of the Jeep Cherokee parked in the attached garage at the Moore Street residence was illegal because he signed the consent form authorizing the search involuntarily. Jones alleges that he "felt [he had] no choice but to sign the paper" because he was "guarded by several heavily armed agents after having been rudely awakened." (Def.'s Omnibus Mot. at 15.) Jones' argument fails, however, because the officers did not need to rely on his consent to search the Jeep; the search of the vehicle was authorized by the original search warrant. Courts have consistently held that a search of "the premises" of a home includes vehicles located within its curtilage. *See, e.g., United States v. Duque,* 62 F.3d 1146, 1151 (9th Cir. 1995); *United States v. Singer,* 970 F.2d 1414, 1418 (5th Cir. 1992); *United States v. Gottschalk,* 915 F.2d 1459, 1461 (10th Cir.1990); *United States v. Percival,* 756 F.2d 600, 612 (7th Cir. 1985). Moreover, the affidavit in support of the warrant application specifically noted the Jeep Cherokee as having "been observed parked at the Moore Street Address," and that "[s]urveillance frequently showed Antoine Jones driving the Jeep." (Def.'s Omnibus Mot. Ex. 2 at 34-35.) Therefore, the warrant authorizing a search of the premises of 10870 Moore Street also authorized the search of the Jeep Cherokee parked in the garage attached to the house, rendering the consent form superfluous.[16]

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the error." *United States v. Negrete-Gonzales,* 966 F.2d 1277, 1283 (9th Cir. 1992). Here, the Court has already upheld the validity of the warrant. There is no likelihood that the scope of the search would have been altered by defendant's receipt of the warrant at the beginning of the search.

[16] Nor does Jones' argument, based on *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed.2d 564 (1971), that agents should

VII. Motion to Suppress Evidence Obtained From Mobile Tracking Device

Jones also has moved to suppress the data obtained from an electronic tracking device—a Global Positioning System ("GPS")—which law enforcement agents placed on his Jeep Cherokee pursuant to an Order issued by the Honorable Paul L. Friedman on September 16, 2005. In support of the motion, Jones advances two arguments. First, he contends that Special Agent Yanta's affidavit in support of the application for GPS authorization lacked probable cause to believe that his vehicle "was in any manner being used for criminal activity." (Def.'s Omnibus Mot. at 18.) Second, Jones asserts that the government placed the GPS device on his vehicle both after the Order authorizing its placement had expired and while the vehicle was located outside of the issuing court's jurisdiction. (*See* Defendant Jones' Supplemental Omnibus Pre-Trial Motion at 3-6.) In response, while conceding the "technical" violations of the September 10, 2005 Order (Gov't's Omnibus Opp'n at 52 n. 12), the government contends that the placement of the GPS device was proper—"even in the complete absence of a court order"—because Jones lacked a reasonable expectation of privacy in the whereabouts of his vehicle. (*Id.* at 51.)

The government is correct, but only to a point. As a number of courts have held, the government is not required to obtain a court order or search warrant to in-

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not have been able to seize the car without having a warrant specific to the vehicle, have any validity. *Coolidge* involved a warrantless search incident to arrest at the suspect's home. *Id.* at 457, 91 S. Ct. 2022. This case, by contrast, involves a search of a residence pursuant to a valid warrant that, by law, authorized the search of vehicles within the curtilage of the home. *Coolidge* is therefore inapposite.

stall a GPS or similar tracking device on a vehicle. *See United States v. McIver,* 186 F.3d 1119, 1127 (9th Cir. 1999) (placement of tracking device is neither search nor seizure under the Fourth Amendment); *United States v. Moran,* 349 F. Supp. 2d 425, 467 (N.D.N.Y. 2005) (no Fourth Amendment violation through installation of GPS device without a warrant because "law enforcement personnel could have conducted a visual surveillance of the vehicle as it traveled on the public highways"). These courts have relied upon the Supreme Court's statement in *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L. Ed. 2d 55 (1983), a case involving a "beeper" device installed in a container that was secreted in a vehicle, that:

> A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [the suspect] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Id. at 281-82, 103 S. Ct. 1081. The very next year, however, in *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L. Ed. 2d 530 (1984), a case that also involved a "beeper" device secreted in a vehicle, the Court distinguished between monitoring in public spaces versus private locations. In doing so, it held that, while the data in question that was obtained from the device while on the public roads was admissible, information that was obtained from the tracker while it was inside the private residence was not, because the residents had a justifiable

interest in privacy in their home. *Karo,* 468 U.S. at 715, 104 S.Ct. 3296. Accordingly, as the government here essentially concedes (Gov't's Omnibus Opp'n at 55 n. 14), the data obtained from the GPS device when the Jeep Cherokee was parked in the garage adjoining the Moore Street property must be suppressed. All other data obtained from the device is admissible.

VIII. Motion to Suppress Tangible Evidence Seized From Green Honda Odyssey Minivan

Jones also has moved to suppress the approximately $67,115 in cash discovered in a secret compartment in his 1997 Honda Odyssey minivan during a traffic stop in Durham, North Carolina. (Def.'s Omnibus Mot. at 19.) Though owned by Jones, the vehicle was being driven at the time by his co-conspirator, Lawrence Maynard. Maynard was accompanied by Derrick Gordon. (*Id.*) When a Durham police officer stopped the vehicle for speeding, Maynard gave him his license and a registration card indicating that the owner of the vehicle was Antoine Jones. (*Id.*) The officer, having become suspicious after Maynard and Gordon gave conflicting stories regarding the purpose of their trip when questioned separately, asked Maynard for permission to search the minivan. Maynard consented to the search. (*Id.*)

Jones claims that it was not reasonable for the officer to believe that Maynard had authority to consent to the search because the officer was on notice that he was not the owner of the vehicle. (*Id.* at 19-20.) That is simply not the case. The officer acted reasonably in searching the vehicle based on Maynard's consent because Jones gave up any reasonable expectation of privacy he had in the contents of the vehicle when he entrusted complete con-

trol over it to Maynard. *See United States v. Powell,* 929 F.2d 1190, 1196 (7th Cir. 1991) (owner of pickup truck lacked legitimate expectation of privacy where vehicle was driven by another more than 1,000 miles away); *see also United States v. Fuller,* 374 F.3d 617, 622 (8th Cir. 2004). The Supreme Court has held that consent "obtained from a third party who possessed common authority over . . . the . . . effects sought to be inspected" is valid. *United States v. Matlock,* 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed.2d 242 (1974). "Common authority" is defined as "joint access or control for most purposes," such that the owner has "assumed the risk" that another might consent to a search of the shared item. *Id.* at 171 n. 7, 94 S. Ct. 988. The D.C. Circuit has held that an owner's "Fourth Amendment rights were not violated when the police, with . . . justification . . . made a warrantless search of those portions of the car which the owner had delivered access and control to others." *United States v. Free,* 437 F.2d 631, 635 (D.C. Cir. 1970). There is no contention here that Jones' transfer of authority over the vehicle to Maynard was anything but complete and unequivocal. Rather, the allegation is merely that the officer failed to act reasonably in acting on Maynard's consent. (Def.'s Omnibus Mot. at 19.) On the contrary, however, the Court finds that the officer did act reasonably because Jones ceded complete control to Maynard, thereby assuming the risk that he might consent to a search of his vehicle, while he was driving it out-of-state in North Carolina.

IX. Motion to Suppress Evidence Seized at Levels Nightclub

Jones alleges that the warrant issued for the search of Levels nightclub was invalid because the affidavit on which it was based "presented intentional misstatements and a reckless disregard for the truth" and because it was tainted by evidence obtained through illegal wiretapping. (Def.'s Omnibus Mot. at 21.) As noted above, "to mandate an evidentiary hearing" under *Franks,* "the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood and those allegations must be accompanied by an offer of proof." 438 U.S. at 171, 98 S. Ct. 2674. Jones alleges no facts to support his claim that the affidavit contained "intentional misstatements and a reckless disregard for the truth." (*Id.* at 21.) The Court therefore upholds the validity of the warrant and the use of the evidence obtained through electronic interceptions in the affidavit.

CONCLUSION

For the foregoing reasons, defendant's motions are denied with the exception that the government cannot use GPS tracking data obtained when the Jeep Cherokee was parked in the garage adjoining Jones' Moore Street property. The Court will consider the parties' arguments regarding the government's Rule 404(b) motion and defendant's motions for a bill of particulars and for disclosure of confidential informants at the hearing on Monday, August 14, 2006.

ORDER

For the reasons given in the attached Memorandum Opinion, it is hereby

ORDERED that defendant's motions [# s 142, 144, 150, 154, 156, 157, 158, 159, 160, 161] are **DENIED** with the exception that the government cannot use data obtained from the GPS device while Defendant Jones' Jeep Cherokee was parked in the garage adjoining his Moore Street property; and it is

FURTHER ORDERED that the Court will consider the parties' arguments regarding the government's Rule 404(b) motion and defendant's motions for a bill of particulars and for disclosure of confidential informants at the hearing on Monday, August 14, 2006.