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--- F.3d ----, 2010 WL 3063788 (C.A.D.C.)

United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee
v.
Lawrence MAYNARD, Appellant.

Nos. 08-3030, 08-3034.
Argued Nov. 17, 2009.
Decided Aug. 6, 2010.

Appeals from the United States District Court for the District of Columbia (No. 1:05-cr-00386-ESH-10).
Sicilia C. Englert and Stephen C. Leckar, appointed by the court, argued the causes for appellants. With them on the briefs was Michael E. Lawlor.

David L. Sobel, Daniel I. Prywes, and Arthur B. Spitzer were on the brief for amici curiae American Civil Liberties Union of the National Capital Area and Electronic Frontier Foundation in support of appellant Jones.

Peter S. Smith, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were Roy W. McLeese III, John V. Geise, and Rachel C. Lieber, Assistant U.S. Attorneys.

Before GINSBURG, TATEL and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

*1 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 follow, 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 cocaine 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.[FN*] After concluding none of the joint issues warrants reversal, we turn to Jones's individual argument.

FN* 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.

A. Wiretaps

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

*3 *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 mini-van 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.

*4 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* Illinois 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).

*5 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 re-initiated 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. Arvizu, 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").

*6 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:

Image 1 (4.03" X 2.24") Available for Offline Print

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

*7 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 prohibition 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.[FN*] 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.

FN* 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).

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 our holding necessarily implicates prolonged visual surveillance.

1. *Knotts* is not controlling

*8 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 warrant 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.[FN*] The Court avoided the question 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).

FN* 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 warrantless 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).

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

*9 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