10-1982

United States v. Knotts

Lewis F. Powell Jr.

Curve-lined with 81-6089 Petschen v. U.S.

C.F.C. 5/14/82 both cases

Recessed to Grant this & #81-6089, & consolidate. Same facts 6/15

A "beeper" was attached w/o warrant to a can of chaloform bought by petr. & then enabled agents to locate an illicit drug operation. CA8 held no 4th Amend violation

6/15/82 Response Received - see over.

PRELIMINARY MEMORANDUM

May 20, 1982 Conference
List 1, Sheet 3

No. 81-1802

UNITED STATES

v.

KNOTTS

Cert to CA8 (Heaney, Peck; Henley, dissenting in part)

Federal/Criminal

Timely

Only negative is this beeper was installed with owner's permission & typical case may be different

NOTE: This case is "curve-lined" with No. 81-6089, Petschen v. United States, in which a Preliminary Memorandum has already circulated. The two petitions arise from the same CA8 decision, and the operative facts are the same.

SUMMARY: The issue is whether the warrantless use of an electronic "beeper" to locate a can of chloroform transported to resp's property violated the Fourth Amendment.

CFR. Important 4th Amendment question.

RF

FACTS: Petr and his co-defendant, Petschen, were part of an enterprise engaged in the manufacture of amphetamine. Police suspicion focused on the group's "chemist," Armstrong, due to his pilferage of "drug-precursor chemicals" from the 3M Co., his former employer. Further investigation indicated that Armstrong was involved in illicit drug manufacturing, and had been placing numerous orders for chemicals with the Hawkins Chemical Co. in Minneapolis.

On Feb. 28, 1980, with the consent of Hawkins Chemical Co., police agents attached an electronic beeper to a can of chloroform which Armstrong was scheduled to pick up from the company later that day. Armstrong picked up the chloroform and other chemicals as expected, and later transferred the chemicals to Petschen's car. Agents followed Petschen as he drove into Wisconsin, but lost sight of the car when Petschen began driving evasively. The agents also lost the beeper signal for about half an hour, but the signal was later picked up by a helicopter and the can of chloroform was determined to be on property surrounding a remote cabin owned by resp. The next day, resp and Knotts were observed leaving the property.

Based on this information, Minn. and federal agents obtained a warrant to search the cabin and surrounding property. They discovered a clandestine drug laboratory in the cabin, and seized chemicals and equipment. The can of chloroform, on which the beeper had been placed, was found hidden under a wooden barrel outside the cabin.

The DC (D. Minn., J. Alsop) denied a motion to suppress the evidence seized from the cabin. Resp and Petschen were both

convicted of conspiring to manufacture controlled substances in violation of 21 U.S.C. §§ 841(a)(1) & 846.

HOLDING BELOW: The CA8 reversed resp's conviction, although it affirmed the conviction of his codefendant, Petschen. Noting that other CAs had reached varying results regarding Fourth Amendment restrictions on the use of beepers to trace personalty other than motor vehicles, the CA8 held that law enforcement officers must obtain a warrant before using a beeper to determine the location of noncontraband materials that have been placed in a private area or withdrawn from public view. See United States v. Bailey, 628 F.2d 938, 944 (CA6 1980); United States v. Moore, 562 F.2d 106, 113 (CA1 1977), cert denied, 435 U.S. 926 (1978). Resp's cabin was a secluded and private area, and the chloroform drum was placed out of sight. As the owner and resident of the property, resp had "a reasonable, legitimate expectation of privacy in the ... location of objects out of public view on his land," and the warrantless use of the tracing beeper thus violated his Fourth Amendment rights. However, because Petschen could have no reasonable expectation of privacy in the equipment of a clandestine drug laboratory on his coconspirator's property, the seized evidence was admissible against him.

Judge Henley dissented in part. He maintained that the use of a beeper to monitor the location of a precursor chemical--which, although not itself contraband, is clearly intended for use in the illegal manufacture of controlled substances--does not violate the Fourth Amendment. See United States v. Perez, 526 F.2d 859, 863 (CA5), cert denied, 429 U.S. 846 (1976).

CONTENTIONS: The SG contends that this case presents an important question of Fourth Amendment law and that there is a

direct conflict with decisions of the CAs 9 & 10. E.g., United States v. Dubrofsky, 581 F.2d 208 (CA9 1978); United States v. Clayborne, 584 F.2d 346, 350-351 (CA10 1978). These decisions hold that, because beeper monitoring is merely an aid to visual surveillance and the intrusion occasioned by such monitoring is slight, beeper surveillance may be undertaken without a warrant. Cf. Moore and Bailey, supra, which reached a contrary conclusion. The decision below goes beyond Moore and Bailey, which involved the warrantless use of a beeper over an extended period to ascertain the continued presence of chemicals inside private premises. The CA8 in this case held that the beeper could not be employed even to determine the arrival of the chloroform on resp's property; this conflicts with other CA decisions holding that the warrantless monitoring of a beeper to follow the movements of a vehicle does not violate the Fourth Amendment. E.g., United States v. Bruneau, 594 F.2d 1190 (CA8 1979); United States v. Michael, 645 F.2d 252 (CA5 1981) (en banc), cert denied sub nom. Michael v. United States, No. 81-112 (Oct. 19, 1981)(Justice White, with Justices Brennan and Powell, dissenting). The decision below is also inconsistent with Smith v. Maryland, 442 U.S. 735 (1979), which upheld the warrantless use of a "pen register" to record the numbers dialed from a defendant's telephone.

DISCUSSION: As the SG points out, there is a CA conflict concerning the validity of warrantless beeper surveillance. Although the Court recently denied cert in a similar case--Michael v. United States, supra--this is an issue that the Court will probably have to take eventually. The legality of the installation of the beeper--at issue in some of the other CA

cases--is not in dispute here, since the CA8 held that attachment with the consent of the Hawkins Chemical Co. was proper. However, the Court may nevertheless want to grant, to consider the constitutionality of warrantless beeper monitoring.

I recommend calling for a response with a view toward granting.

The right to respond has been waived.

May 12, 1982 Rosenblum Opns in petn

[RE MAY 20, 1982]

The response does little to change the posture of the case as revealed by the petitions. There is a conflict over the main issue presented: whether the Fourth Amendment forbids warrantless "beeper" surveillance. Because of the importance of this issue, I would Grant and Consolidate these two curve-lined cases arising from the same set of facts, Nos. 81-1802 and 81-6089.

The one disadvantage of these cases is that there is here no 4th Amendment issue about the "installation" of the beeper. It was installed into a can, with the permission of the can's owner. The Fourth Amendment question thus arose only when the can was moved onto the defendants' property. As the more typical beeper case may involve direct installation of the beeper into property of the defendant himself, it arguably would be worth waiting for such a case. You certainly should consider this possibility.

Because of the importance of the issue, however, it would be my inclination to GRANT these cases now and CONSOLIDATE them for argument.

Dick

June 17, 1982

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 81-1802

Submitted ....., *19*... *Announced* ....., *19*...

UNITED STATES

vs.

KNOTTS

Also motion for leave to proceed ifp.

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓	& Rev										
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

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Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

Received ~~12/3~~ 12/4 - Helpful

Beeper case - see my memo to file.

men 12/03/82

BENCH MEMORANDUM

No. 81-1802:

United States v. Knotts

From: Mark December 3, 1982

Question Presented

Whether warrantless monitoring of a beeper placed in noncontraband violates the Fourth Amendment.

I. Background

A. Facts

On June 14, 1979, a state narcotics agent was informed by the 3M Company that Tristan Armstrong, one of resp's codefendants, had been stealing phenylacetone and other chemicals that are "precursors" (starter materials) in the manufacture of amphetamine and methamphetamine. Through visual surveillance, agents saw codefendant Darryl Petschen and others moving laboratory equipment and furniture from a residence in St. Paul, Minn., into a truck. A search of the vacated residence, conducted with the landlord's permission, revealed laboratory equipment and traces of a white powder that contained a byproduct of the amphetamine synthesis.

The agents later learned that Armstrong had been ordering chemicals from the Hawkins Chemical Co. in Minneapolis. They conducted visual surveillance as Armstrong picked up boxes of chemicals from the company and took them to Petschen's house in Minneapolis. There the chemicals were transferred to Petschen's car, which Petschen then drove to a farmhouse in Scandia, Minn.

On February 28, 1980, Armstrong was scheduled to pick up another order of chemicals, including a quantity of chloroform, from Hawkins Chemical Co. The company permitted the state agents to place the chloroform in a special five-gallon drum containing an electronic signal transmitter -- a "beeper" -- hidden in the bottom. On the delivery date, the agents used the beeper and visual surveillance to follow the progress of the drum.

Armstrong took the packages of chemicals to Petschen's resi-

dence in the city, where they were put in Petschen's car. An hour and a half later Petschen left, drove to his farmhouse in Scandia, then twenty minutes later resumed driving and headed into Wisconsin. During this time, the agents kept intermittent visual surveillance of the car, relying on the beeper to stay in continuous contact. At some point Petschen began making evasive maneuvers. The agents terminated their visual surveillance, then lost the signal. One hour later -- two hours after Petschen left the farmhouse -- a heliocopter located the beeper signal in the vicinity of a cabin occupied by resp Leroy Knotts near Shell Lake, Wisconsin. The agents established intermittent visual surveillance of the property until the following day, when they saw resp and Petschen leave in Petschen's vehicle.

Three days later federal and state agents executed warrants authorizing them to search Petschen's farmhouse and Knotts' cabin and surrounding property. They discovered a fully operable drug laboratory behind wall paneling in Knotts' cabin. In the laboratory were forumlae for amphetamine and methamphetamine, $10,000 worth of equipment, and chemicals sufficient to produce 14 pounds of pure amphetamine. The agents found the five-gallon drum hidden under a barrel outside the cabin.

B. Decisions Below

Armstrong, Petschen, and resp were indicted on various drug charges. Armstrong pleaded guilty and testified against the other two.

Prior to trial resp moved to suppress the evidence found

during the search of his cabin on the ground that the warrant was invalid because based on information derived from the warrantless use of the beeper. The DC (D. Minn; Alsop, J.) denied the motion. Pet. App. at 12a. It held that the company's consent validated the installation of the beeper, and that resp "could not reasonably have expected to keep private the fact that the can had arrived at his residence." Pet. App. at 15a-16a (emphasis in original). Resp and Petschen were convicted. Resp was sentenced to five years.

A divided CA8 panel reversed resp's conviction. Pet. App. at 1a. Judge Peck [CA6], joined by Judge Heaney, agreed with the DC that the beeper's installation was valid, stating "Caveat emptor." Id. at n.2. He then distinguished cases involving beepers on cars or in contraband, finding that "it would be a limitless expansion of police power to allow warrantless tracking of lawful goods wherever an illicit use was suspected." Id. at 5a. The crucial point was that the beeper had passed from the public sphere to the private sphere:

> When police agents track bugged personal property without first obtaining a warrant, they must do so at the risk that this enhanced surveillance, intrusive at best, might push fortuitously and unreasonably into the private sphere protected by the Fourth Amendment. It did so in this case, where the beeper's signal was lost and found again only after the beeper-laden drum was on private property out of public view. (Pet. App. at 6a-7a.)

Although resp's conviction was reversed, Petschen's conviction was upheld because Petschen had no standing to object to the search of Knotts' cabin.

Judge Henley dissented from the reversal of resp's convic-

tion. He objected primarily to the majority's inflexible distinction between contraband and noncontraband, arguing that the rationale underlying the contraband exception applies as well to these precursor chemicals: "[W]hen chemicals are purchased for such intended illegal use, the familiar warning cited by the majority in note 2, caveat emptor, might be well-taken." Pet. App. at 10a. In addition, he noted that these precursor chemicals were subject to forfeiture under the Controlled Substances Act, 21 U.S.C. §881, a further indication that resp lacked a reasonable expectation of privacy in them.

The Court granted cert to resolve a clear conflict in the CAs. The Court denied Petschen's petition for cert in No. 81-6089. There are no amicus briefs.

II. Discussion

This is a vexing case. I have spent what probably is an inordinate amount of time on it, yet have been unable to satisfy myself that I have reached the proper conclusion. I hope this memo at least sets forth a useful analytical framework. My view is that the Government should be required, absent exigent circumstances, to obtain a warrant prior to using a beeper. My reading of this Court's cases, however, suggests that use of a beeper does not constitute a search under the Fourth Amendment.

A. Installing the Beeper

A threshold issue that sometimes arises in this type of case is whether the installation of the beeper was valid. The issue

"Consent" by a 3rd party to the installation of beeper doesn't affect its validity as to the party under surveillance (E.g. Avis could consent, but this would not affect my rights

is not raised here because the chemical company consented to placement of the beeper in the drum. Such third-party consent normally is obtained when the Government places a beeper in a particular object. The other usual mode of installing a beeper is to place it on a moving vehicle. Most CAs have held that installation of a beeper in these circumstances does not contravene the Fourth Amendment. See Brief for US at 13 n.6 (citing cases). There are no decisions on the validity of placement of a beeper on a person, nor any decisions dealing with illegal entry to install a beeper.

For present purposes, the only important point is that the third-party consent does not affect the remainder of the analysis. Even if the Government obtained consent from the owner of a pay telephone to install a recording device, the decision in Katz v. United States, 389 U.S. 347 (1968), still would protect the phone user's expectation of privacy. Similarly, the central issue here is the reasonableness of resp's expectation that the Government will not use beepers to follow him and his property around. The chemical company could not consent to the continuing "search" that allegedly occurred once the property containing the beeper was transferred to the purchaser.

Katz good point

Central issue

U-Drive it, for example

B. Does the Fourth Amendment Apply? { Two major issues

There are two major issues: (1) whether use of a beeper is a "search" at all under the Fourth Amendment, and, if so, (2) whether a warrant must be obtained to use the beeper. I discuss the first issue here, and the second issue in part C.

Judge Henley's dissent correctly observed that CAs have adopted two types of analysis in these cases: "One analysis focuses on the location of the item containing the beeper. Under this analysis, items may generally be monitored in public places, but monitoring may be prohibited after the items are withdrawn from public view. Another analysis focuses on the nature of the item containing the beeper. Under this analysis, contraband items may be monitored regardless of location, whereas most non-contraband items may be monitored under the former analysis only if they are in a public location." Pet. App. at 8a-9a. I will use these analyses for purposes of discussion, though I will argue that both are dubious.

1. The NATURE of the Item Containing the Beeper

Several CAs have placed significance on the "type of object" to which a beeper may be attached: (1) contraband, (2) moving vehicles, and (3) lawfully-possessed property. For present purposes, the important distinction is between contraband and other property. No CA has held that monitoring a beeper placed in contraband violates the Fourth Amendment. See, e.g., United States v. Bishop, 530 F.2d 1156 (CA5 1976) (beeper in money stolen from bank); United States v. Dubrofsky, 581 F.2d 208 (CA9 1978) (beeper in heroin). The basic rationale is that no one may have a reasonable expectation of privacy in contraband.

There is no dispute that the chloroform contained in the five-gallon drum was not technically contraband. Its possession was not per se unlawful. But Judge Henley argued that the rationales underlying the contraband exception apply as well to "chem-

icals intended for use in the manufacture of illegal drugs." Pet. App. at 10a. He noted that the chloroform was an essential precursor to the manufacture of amphetamine and methamphetamine. Moreover, the Controlled Substances Act, 21 U.S.C. §881(a)(2), provides for forfeiture of any "raw material . . . intended for use" in manufacturing controlled substances. In Judge Henley's view, these considerations clearly diminished resp's expectation of privacy with respect to the chloroform. The Government had probable cause to believe that the chloroform was "intended for use" in illegal drug manufacturing, and under the statute could have seized the chloroform without a warrant.

This argument is somewhat attractive, but I believe it should be rejected. First, difficult line-drawing problems will develop if the test is the likelihood that certain property will be used in a criminal endeavor. For example, where a doctor or chemist might have a legitimate reason to purchase certain chemicals, it may be difficult to say whether the chemicals were intended for illegal use. Furthermore, the very focus on the existence of probable cause to believe criminal activity is occuring suggests that without probable cause the police cannot act, which in turn means there is a search taking place. Thus, the probable criminal purpose for the chemicals relates not to the existence of a protected Fourth Amendment privacy interest, but the sufficiency of the Government's reasons for overriding that interest.

Second, there are difficult analytical problems with the statement that "no one has a legitimate expectation of privacy in contraband." An individual's expectation of privacy is not sim-

ply in a particular piece of property. If the police without probable cause break into someone's home and discover heroin, the heroin will be suppressed even though it is contraband. The same holds for contraband discovered during an unlawful search of a person or car or suitcase or any other location in which the person has a reasonable expectation of privacy. It is not the "contraband" in which the person has a privacy interest, but rather "the places" in which he might keep the contraband or any object.

Thus, in this case the expectation of privacy relates to the person's movements and to the location of items at his residence. This expectation seems the same regardless whether the beeper is placed on his person, car, or lawful property or whether it is placed in contraband. Even if the chloroform was subject to forfeiture, therefore, that fact would not affect the question whether the police may use a beeper without regard to the Fourth Amendment.

I recognize that there is historical support for the contraband distinction, but I always have had difficulty with it. One as easily could say that resp had no reasonable or legitimate expectation of privacy in a cabin that presumably served primarily or exclusively as a clandestine laboratory for manufacturing illegal drugs. Cf. Pet. App. at 9a (Henley, J., dissenting). Yet the Court consistently has rejected the view that the conduct of illegal activity on searched premises defeats the occupant's expectations of privacy in those premises.

2. The LOCATION of the Item Containing the Beeper

The second type of analysis, used by the court below and the

parties here, suggests that the critical question is where the beeper is located while being monitored. In particular, the question is whether the beeper is in "public" or "private."

This analysis begins with the undisputed assertion that the Fourth Amendment does not apply to visual surveillance of a person, a vehicle, or other object. When a person moves about in public, in a car or otherwise, he has no reasonable expectation that this movements will be unobserved. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351. This principle generally applies even where the Government makes use of "sense-enhancing" devices such as radar, binoculars, and tracking dogs.

From this the SG argues that use of a beeper to follow the movements of a vehicle does not constitute a search because no expectation of privacy is at stake. Resp does not contend otherwise: "We . . . agree that the warrantless use of a beeper to assist visual surveillance of another person does not violate a defendant's Fourth Amendment rights." Brief for Resp at 18. Resp does contend, however, that monitoring a beeper that is on private premises implicate the Fourth Amendment. The CA8 majority emphasized that here "the beeper's signal was lost and found again only after the beeper-laden drum was on private property out of public view." Pet. App. at 7a. Resp also draws this distinction between the valid use of beepers for "surveillance assistance" and their invalid use for "location monitoring," i.e., using a beeper "to determine the (continued) presence of property

which it is lawful to possess." Brief for Resp at 25.

I do not think this distinction easily can be maintained. To be sure, it always is plausible under the Fourth Amendment to suggest a distinction between intrusions of public and private locations. The prevailing analysis focuses on "reasonable expectations of privacy," and such expectations generally are greater in a private place such as a home than in a more public place such as a car. Few would suggest that the police violate the Fourth Amendment by using binoculars to identify persons or activities in an automobile in public, yet a violation may occur if binoculars are used to peer into a private home. Cf. United States v. Taborda, 635 F.2d 131 (CA2 1980) (warrantless use of telescope to identify objects in suspect's apartment violates the Fourth Amendment, where the objects otherwise would not have been identifiable to the public).

Resp raises an analogous argument here. Where the police conduct surveillance through a beeper, they simply are using an electronic means of doing what they could do visually. But when the police monitor the location of property (or presumably a person) on private premises, they are using the beeper to do what they otherwise could not do without a search warrant: "enter" the premises to see if certain items are inside. One can conceive of cases in which this might be true. For example, the police might place beepers in every drum of chemicals sold, not to follow a particular purchaser to a destination, but to allow the police to scan a large number of buildings to see if any of the drums ended up there.

The problem is that this "visual surveillance"/"location monitoring" distinction breaks down in practice. A beeper's fundamental use is for tracking particular persons or items to a final resting point. Usually this resting point will be on private property. Whether one calls this "surveillance" or a determination of "location," the SG is correct that "ascertaining the destination" of the vehicle or package "is the whole point of the exercise." Brief for US at 35.

In this case, for example, the Government's purpose was to locate the clandestine laboratory. It would seem to matter little as a practical matter whether the state agents were monitoring the beeper at the precise moment the car arrived at the cabin, or whether they temporarily lost the signal and rediscovered it only after the drum containing the beeper had come to rest out of public view. It would be a fine distinction indeed to say that the intrusion on resp's privacy was greater in the latter situation. Yet this is precise basis on which this case was decided. Resp and the CA8 appear to concede that had the agents been tracking the beeper when it turned onto resp's property, the discovery of the destination would have been valid for use in obtaining a search warrant.

I do not believe that the fortuity of whether the police happened to lose the beeper signal shortly before Petschen's car arrived at the cabin has any reasonable relationship to the existence of an intrusion on resp's Fourth Amendment expectations. I Mark therefore would not adopt a rule distinguishing between monitoring of "public" and "private" places for purposes of deciding

whether the monitoring constituted a search. In either case the purpose of the beeper monitoring is to discover where certain persons or items have gone. If the use of the beeper is not a search for purposes of "surveillance assistance," then it is not a search for the related purpose of "location monitoring."

3. Beepers and "Expectations of Privacy" in the Movement and Location of Persons or Property

In my view, the case turns on the validity of the SG's proposition that use of a beeper to follow someone's public movements does not constitute a search. If this proposition is true, then beepers do not fall within the ambit of the Fourth Amendment.

As noted above, the SG's argument is quite simple -- and persuasive. When a beeper is used to track a person's public location, it simply provides a more efficient means of doing what the Government might do through visual surveillance or other "enhancement" devices such as bloodhounds or binoculars. Since a person's location generally is "knowingly expose[d] to the public," Katz, 389 U.S. at 351, the beeper does not impinge on any privacy interests that visual surveillance does not.

This argument has powerful support in the type of analysis employed in Smith v. Maryland, 442 U.S 735 (1979) (you did not participate). Justice Blackmun held for the Court that use of a pen register -- a device that records the numbers dialed on a telephone, but does not monitor the contents of the communication -- was not a search under the Fourth Amendment. The arguments adopted by the Court are relevant here.

First, the Court noted that the intrusion was minimal, since

the communications of the contents were not disclosed. A similar argument is made here that all the beeper says is "here I am." The beeper tells nothing else about what private activity is going on. (Note, however, that there is a type of beeper -- not at issue here -- that signals when a package has been opened.) Second, the Court found that the phone user knowingly exposed the numbers dialed either to an operator or to the telephone company's capacity for routine monitoring. He therefore assumed the risk of disclosure to the police. A similar argument is made here that when a person moves about in public, he assumes the risk that his whereabouts will be observed by the police. Finally, the Smith Court rejected the argument that since the phone company did not in fact routinely record the numbers of the type of local call that Smith had made, he had a legitimate expectation of privacy. It sufficed that the phone company could have recorded the information. Similarly, the SG argues that it does not matter, as the CA8 thought it did, that the police did not actually see Petschen's car arrive at resp's cabin. Since the police could have watched the car arrive, resp "could not reasonably have expected to keep private the fact that the can had arrived at his residence." Pet. App. at 15a-16a (DC opinion) (emphasis in original).

In short, the SG has persuasive arguments that under existing precedent, monitoring a beeper simply enhances lawful methods of surveillance and thus does not constitute a search. Nonetheless, a strong counterargument is possible. Quite candidly, this counterargument is premised primarily on the very efficiency of a

beeper and the chilling prospects of its widespread use by the Government. A Court holding that monitoring a beeper does not implicate the Fourth Amendment would mean that the Government may use beepers on anyone for any reason. Any individual unsuspectingly might carry around a beeper placed, say, in his shoe. Evidence of involvement in criminal activity would not be required prior to use of the beeper. This unrestrained power may implicate the privacy concerns that arise from the Fourth Amendment.

The broadest possible argument against the unrestrained use of beepers is stated in Judge Keith's concurring opinion in United States v. Bailey, 628 F.2d 938 (CA6 1980):

> I would hold that privacy of movement itself is deserving of Fourth Amendment protections. A meaningful definition of privacy should include the control of the intimacies of personal identity. Obviously this control begins with one's body and at the very least extends to those elements which constitute one's existence as a sentient being. In this regard, I think an individual may legitimately expect to live in this society without fear that the government may be silently following his every movement. Sometimes we do not care if others know where we go or what we do. If someone follows us to work or to the grocery store, we may not be concerned. But each of us goes places and does things that we would prefer to keep private. Ordinarily we can protect our privacy by insuring that we are not being followed, and that others do not know where we are going. The beeper destroys our ability to protect the privacy of our movement. (628 F.2d at 949 (emphasis in original).)

This position is too broad. It would call into question even the use of ordinary visual surveillance by the police, at least where the person exhibited some sign that he did not wish to be followed. Cf. Note, Tracking Katz: Beepers, Privacy, and

the Fourth Amendment, 86 Yale L.J. 1461, 1494 n.145 (1977) (argues for a right of privacy in movement, then states that this "suggests that even long-term visual surveillance may result in a search subject to Fourth Amendment warrant requirements.") It would be fairly disastrous for the Court to adopt a theory of privacy that might raise in every case the question whether the person's public activities were protected under the Fourth Amendment.

It is possible, however, to articulate a different theory that emphasizes the very efficiency with which a beeper enables the Government to keep track of someone, and thus would not extend to ordinary means of surveillance. The courts that have adopted this view generally have argued that although a person in public has no reasonable expectation of going unobserved, he may well expect that there is no special means of tailing him. Cf. United States v. Moore, 562 F.2d 106, 112 (CA1 1977) ("While a driver has no claim to be free from observation while driving in public, he properly can expect not to be carrying around an uninvited device that continuously signals his presence.")

This emphasis on subjective expectations, of course, somewhat begs the question whether his expectation is reasonable. If the law determines that the use of beepers is unobjectionable, then the expectation can be ignored. Because of this problem of circularity, the issue ultimately must be determined through a "normative inquiry," Smith v. Maryland, 442 U.S. at 740 n.5., into the legitimacy of these privacy expectations -- what society is prepared to say should be expected. The argument here is that

society is not prepared to expect that personal public movements may be subjected to pervasive monitoring through electronic surveillance devices.

Concedely, there is not much authority for such a proposition. The most analogous argument was presented in Justice Harlan's dissent in United States v. White, 401 U.S. 745 (1971). In that case the Court upheld a conviction based on testimony by government agents who, without a warrant, listened to statements made by the defendant to an informer wearing a microphone. (The informer could not be located, necessitating testimony by the agents.) In a dissent based largely on concerns about the rise of the "Orwellian Big Brother," id. at 770, Justice Harlan expressed concern that warrantless third-party bugging might "undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens of a free society." Id. at 787. He believed that there were crucial differences between testimony by the informant and third-party monitoring.

My analysis is similar, though I do not suggest that Justice Harlan necessarily was correct in White. Justice White's plurality opinion in White reasonably argued that it was unlikely that a person engaged in criminal activities "would distinguish between probable informers on the one hand and probable informers with transmitters on the other." Id. at 752. In other words, the danger of permitting warrantless recording by an informer was quite limited; the informer still had to get the person to talk directly to him. The same would be true if a person's traveling

companion wore a beeper. Since the person "consents" to his companion's continuous knowledge of his location, warrantless use of the beeper, like use of the transmitting device in White, would be permissible. The potential for harassment through such a use of beepers is limited because the informant has to obtain this "consent" to travel with the person.

Beepers normally are not used, however, by an informant traveling with the suspect. In the usual case, where there is no "consent" to continuous knowledge of one's whereabouts, I think Justice Harlan's analysis has merit. I certainly do not wish to recognize that electronic tracking devices may be anywhere and therefore that it is unreasonable to expect that my public movements will not be monitored. Yet under the SG's view, there is no limitation on the use of beepers. The police may use beepers on any person or property for any reason and for any length of time. The potential for harassment is substantial. It is this basic reaction, I believe, that explains why most CAs have been reluctant to hold that use of a beeper is entirely free from Fourth Amendment constraints.

In response the SG notes that this position "reflects the view that our governmental institutions are incapable of controlling abuses of police activities if those activities are not held to be subject to judicial scrutiny under the Fourth Amendment. [This] exceedingly pessimistic vision . . . is far removed from the realities of contemporary American society." Reply Brief for US at 5. This is a fair statement, but I am of the view that the Fourth Amendment exists to protect privacy interests that other-

wise might go unprotected in the legislative process.

A more telling response, however, is that in prior Fourth Amendment decisions this Court has refused to use hypothetical police abuses as a reason for invalidating a warrantless surveillance practice. The SG is correct that the "danger of abuse" type of argument sketched out above was made by Justice Marshall in dissent in Smith v. Maryland and by Justice Brennan in dissent in United States v. Miller, 425 U.S. 435 (1976) (Powell, J.) (holding that there is no Fourth Amendment privacy interest in bank records).

A related response is that the proper remedy for this kind of invasion of privacy, which realistically differs from a traditional "search," is an action for damages and an injunction. This was the view of Chief Judge Clark, joined by other judges, concurring in United States v. Michael, 645 F.2d 252 (CA5 1981) (en banc):

> Calling the attachment of a beeper to an automobile a search creates confusion at the outset -- it is neither a search nor a seizure. As importantly, extending the illogic of the exclusionary rule (which punishes society for the transgressions of errant police) to non-search situations puts undue pressure on the courts to infringe the core right at issue -- the right to privacy. Where no search or seizure is involved, police abridgement of the right to privacy should be rectified as other similar constitutional infringements are -- through a private action against the errant officer. (645 F.2d at 259-60.)

Charles Clark's view -

This is a reasonable argument, though I would note that it rests predominantly on the view that all Fourth Amendment violations properly are remedied through a lawsuit rather than through the exclusionary rule.

The only analogous example of which I am aware is a case used in first-year criminal law, Giancana v. Johnson, 335 F.2d 366 (CA7 1964). The FBI conducted 24-hour surveillance on Giancana, a reputed mobster. For example, two to five cars always were outside his home to maintain surveillance or follow him around. He brought suit under the Fourth and Fifth Amendments for infringement of his rights to privacy and liberty. The DC granted a preliminary injunction (which required inter alia that "at least one foursome intervene between plaintiff and FBI agents when plaintiff plays golf" (!)). The CA7 dismissed the action for lack of $10,000 in controversy under 28 U.S.C. §1331. But the point is that this presumably is the type of remedy that might serve as a bulwark against the systematic and continuous use of beepers for purposes of harassment. And it also preserves the position that visual surveillance is not a search and thus does not require a warrant.

After weighing all of these arguments and counterarguments, the decision seems to come down to a choice between two very different ways of looking at this situation. The first is that since a person has no expectation of privacy in his or his property's movements, use of a beeper cannot be called a search. The second is that whatever the general lack of expectation of privacy in public movements, people should not have to live with the risk that an electronic beeper may be used by the police as a means of pervasive and silent surveillance. Therefore, use of a beeper should be deemed a search.

Writing on a clean slate, I would opt for the latter view.

I share Justice Harlan's concerns about the "Orwellian Big Brother." The efficiency and secrecy with which electronic devices may be used are, in my view, powerful reasons for limiting their use to cases where the Government has a justifiable basis for believing that crimes are being committed. Reasonable arguments may be made that this problem should be dealt with by legislation or by private lawsuit brought under other constitutional amendments, but I think the Fourth Amendment's traditional protection of personal privacy would make its application proper here.

Under this Court's cases, however, I think the SG should prevail. The Government's ability to discover the identity of the persons to whom one has made phone calls is at least as intrusive on privacy as the Government's ability to follow a person or his property from one location to another. Yet the Court in Smith v. Maryland accepted the Government's arguments about the limited nature of the intrusion and the lack of any precisely defined expectation of privacy, while rejecting the individual's arguments about the danger of governmental abuse of means of electronic surveillance. A similar balancing was made in favor of the Government in your opinion in United States v. Miller. And the Court in United States v. White rejected Justice Harlan's view that electronic surveillance, because of its unique character, should be treated as invading privacy even where normal means of surveillance would not invade that same privacy. Under these decisions, the SG seems correct that a beeper merely enhances the Government's ability to conduct visual surveillance, which invades no reasonable expectation of privacy and which

therefore is not a search.

C. Need for a Warrant

If monitoring a beeper is a search, there remains the question whether a warrant is required. Some CAs have held that since the intrusion on privacy is limited, the Fourth Amendment is satisfied without regard to a warrant so long as there is some cause for using the beeper. An en banc CA5 plurality has held that beeper monitoring is acceptable so long as the police have a "reasonable suspicion" of criminal activity. United States v. Michael, 645 F.2d 252 (CA5 1981) (en banc) (11-3-10 decision). The CA1 has held that monitoring of a beeper on private property requires a warrant, but that warrantless monitoring of a beeper located in public is valid if the police have probable cause. United States v. Moore, 562 F.2d 106 (CA1 1978).

The motivation underlying these decisions is not hard to fathom. The CAs recognize that beepers are not very intrusive, but they are unwilling to authorize unlimited beeper use by declaring the Fourth Amendment entirely inapplicable. In my view, however, if use of the beeper is to be governed by the Fourth Amendment, the standard presumption in favor a warrant should be applied.

The SG argues that requiring a warrant prior to use of a beeper would not serve any purpose. He contends that time and place restrictions on monitoring a beeper are impractical, and that since the intrusion is slight, any abuse can be controlled adequately through post-search judicial review. He also argues

that requiring a warrant will increase the cost and therefore reduce the effectiveness of using beepers. Finally, the "principal cost would be a dilution of the effectiveness of the warrant procedure itself," because requiring warrants for minor intrusions on Fourth Amendment interests will trivialize the warrant procedure. Brief for US at 39.

I am not convinced by these arguments. The exceptions to the warrant requirement have been "'jealously and carefully drawn.'" Arkansas v. Sanders, 442 U.S. 753, 759 (1980) (Powell, J.) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)). The Court has not held that the limited nature of the intrusion alone suffices to excuse the police from obtaining a warrant. Terry v. Ohio, 392 U.S. 1 (1968), for example, was based on both the limited intrusion on privacy and the obvious impracticality of obtaining a warrant prior to a stop and frisk.

With respect to beepers, there is no decent argument that the warrant requirement is impractical. Police use of beepers almost always will be part of a planned operation. Securing a warrant therefore does not detract from the efficacy of the beeper. In this case, for example, the police had to obtain the company's consent to substitute the drum containing the beeper for the normal container that would have been used. The only thing saved by not obtaining a warrant was the officer's time. Time, of course, sometimes may be of the essence, but in those circumstances the exigent circumstances doctrine can sustain the warrantless use of a beeper. If the use of a beeper impinges on Fourth Amendment interests, as I assume in this section, then the

warrant requirement should apply.

D. Result in this Case

If the Court determines that the warrantless use of the beeper violated resp's Fourth Amendment rights, it might consider whether his conviction necessarily should be reversed. Put simply, is this a proper case in which to consider recognizing a good faith exception to the exclusionary rule? good faith exception?

The first thing to note is that the situation is only somewhat analogous to Illinois v. Gates. In both cases the police obtained and executed a search warrant, and the issue is whether there was probable cause to support the warrant. But in Gates the issue is simply whether there was enough evidence to justify the warrant; there is no suggestion that the police committed any illegal activity. Here, in contrast, the warrant presumably hinged on the validity of the evidence uncovered through use of the beeper. Therefore, though the deterrent rationale of the exclusionary rule does not apply to the police in Gates, it still may apply here.

One still can make an argument for a good faith exception in this case. The argument works by analogy to this Court's decisions refusing to apply new Fourth Amendment decisions retroactively. See, e.g., Desist v. United States, 394 U.S. 244 (1969) (holding that Katz v. United States should be applied prospectively only). If the police in good faith believed that warrantless use of the beeper was constitutional, then the deterrent function of the exclusionary rule is sufficiently served by ap-

plying the warrant requirement to cases arising in the future.

At the time of the "beeper search" here it was an open question whether a warrant was needed. Several CAs had held that warrantless use of the beeper was valid in some circumstances. One can see a problem, however, in applying a good faith standard to a situation where the CAs were in conflict. Would warrantless use of a beeper be in good faith in one circuit but not in another, depending on the holding of the relevant CA? Certainly the police reasonably could have been aware of the controversy over beepers and thus perhaps should have erred on the side of caution by obtaining a warrant. Thus, I am not sure this would be a good case in which to recognize or apply a good faith exception, though I think the possibility remains for consideration.

possibility

III. Conclusion

Unless the Court is willing to alter its analysis of electronic surveillance devices generally, I recommend that the CA8 be reversed.

1. The critical question is whether use of a beeper constitutes a "search."

2. Two types of analysis have been used on this question: (1) what is the nature of the object to which the beeper was attached; (2) what was the location of the object when the police were monitoring the beeper.

3. On the nature of the object, the key distinction is between contraband and lawfully-possessed property.

a. One might analogize precursor chemicals to contra-

band.

b. It would be difficult, however, to draw a line between lawful property and property that was intended for use in a crime.

c. Moreover, the issue is not whether there is an expectation of privacy in a particular piece of property (i.e., the contraband itself), but whether there is a valid expectation of privacy in a private location, such as resp's residence.

4. On the location of the object, the usual distinction is between monitoring a beeper in public to assist surveillance and monitoring a beeper to determine the location of an item on private premises.

a. This distinction is plausible, given that generally one has a greater expectation of privacy in, say, a private residence than in a car on the public roads.

b. But the distinction does not work well with beepers. The point of monitoring a beeper is to determine the destination of a person or object. It should make little difference whether or not the monitoring happens to occur while the beeper moves onto private property, since the intrusion on privacy differs little as between the two situations.

5. The crucial issue therefore becomes whether use of a beeper for any purpose of surveillance constitutes a search.

a. The SG makes a strong argument that the beeper merely enhances visual surveillance, which does not violate the Fourth Amendment since a person does not have an expectation of privacy in his public travels. This is consistent with Smith v.

Maryland.

b. The countervailing argument arises from a belief that electronic devices are especially pernicious and therefore should be treated as intruding on expectations of privacy even where such expectations are not violated by other forms of surveillance.

c. I prefer the latter view, believing that the Fourth Amendment should apply to use of electronic devices that invade to even a small degree of personal privacy.

d. My preferred view, however, has been rejected in recent cases. Unless the Court is willing to reconsider those opinions in favor of an approach similar to Justice Harlan's in dissent in United States v. White, the proper result is that use of beepers does not constitute a search.

6. If use of beepers is a search, the remaining question is whether a warrant should be required.

a. Some CAs have held that a warrant is not required, reasoning that where the intrusion on privacy is minimal a warrant is not necessary.

b. The Court's opinions, however, suggest that a warrant should be required except where there are clear and strong reasons for making an exception.

c. The police have sufficient opportunity to obtain a warrant to use beepers, since beepers normally are part of a planned operation. The SG's argument essentially is that it is burdensome for the police to obtain a warrant and that this burden is too heavy given the minimal intrusions on privacy. This

is not sufficient under this Court's precedent.

7. If the warrantless use of the beeper was unconstitutional in this case, the Court might consider applying a good faith exception to the exclusionary rule in order to uphold this conviction.

Mark

81-1802 U.S. v. KNOTTS (Beeper case) Argued 12/6/82
(See my memo to Fels)

Troy (SG)

Container with beeper was followed visually to home of .

Two Qs

1. Was there a search or seizure?
2. If answer is "yes", what must law enforcement do

Beeper here was ultimately used to locate the container in the cabin. There then was probably cause for warrant.

The Q is whether the surveillance by beeper was invalid "search". If so, the warrant was a "fruit" & hence the search was illegal.

Smith v Md (pen register) is analogous

Use of beeper to follow on public highway is not challenged; including the turning on to a private drive-way. The challenge is to monitoring the cabin by beeper Thru was private prop.

Fry (cont).

Only alleged violation is the ~~presence~~ presence of beeper in a private residence.

Beeper was used here to make sure the container was in the cabin.

Warrants

Can't comply with particularity as to "place" to be searched – Govt doesn't know. Object is to find the place.

Also, as Hunt case illustrates, the movement may go beyond the power of orig. magistrate. Here state lines were crossed.

If a "search":

(i) in reasonable suspicion (this would be OK to U.S. as a practical matter); or

(ii) if can't rely on suspicion, is "probable cause" w/o warrant acceptable.

If The "installation" of beeper is not a "search" – as nothing is learned by Hunt. The resulting surveillance is arguably the search:

Peterson (Rent)

The cabin was Rent's residence.
The chemical itself was not a "contraband."

Petr. don't challenge legality of ~~beep~~ beeper use to follow a vehicle on a public highway. Here, it was used - after the public movement had ended - to locate the chemical in a private home.

81-1802 Knotts
Reverse

No search - on facts
of this case.

Resp. conceded "no search" to follow on highway.

Complaint is that Beeper monitored the "cabin" that was private prop.

But once drums was tracked to cabin, & only visual monitoring occurred.

Cases: Smith v Md
(pen register) HAB.
U.S. v White (BRW
Miller (bank
records)

Put in Book

lfp/ss 12/06/82

MEMO TO FILE

81-1802 United States v. Knotts

The central issue is whether use of a beeper for any purpose of surveillance constitutes a search.

The SG's Answer:

Use of a beeper merely enchances visual surveillance, e.g., "tailing" a suspect, using binoculars, staking out a dwelling. The SG argues that one has no expectation of privacy in his public travels.

The SG's position is strongly supported by HAB's opinion in Smith v. Maryland, sustaining the validity of placing a "pen register" on one's telephone to identify the origin of phone calls. Byron's opinion in United States v. White (government agents, without a warrant, may listen to statements made by a suspected person to an informer wearing a microphone) also supports the SG. My opinion in Miller, with respect to bank records, is somewhat supportive.

Warrant Should be Required:

Justice Harlan's dissent in White makes the best case for a warrant (his famous "Orwellian Big Brother" concern). Under the SG's view, there is no limitation on the use of beepers - at least w/r to public movements. Police could, at least arguably, use beepers on persons or property for any reason and for any length of time. Unlike other visual means of surveillance the very efficiency and secrecy of beepers would enable

} not quite what he says

government to monitor the movement of persons and their property far more extensively and secretly.

Possible Middle Grounds:

CA5, plurality en banc in U.S. v. Michael (1981) held that beeper monitoring is acceptable when police have a "reasonable suspicion" of criminal activity. CA1 would require warrantless monitoring by a beeper in public (as distinguished from a private dwelling) is valid if police have probable cause.

If, however, the use of beepers is a search (as Justice Harlan would have held), it is logically difficult to say that a warrant is not required. There always will be close questions of fact as to whether there is "reasonable suspicion" or "probable cause".

The SG argues that obtaining a warrant would be impractical because of the variations in time and place. Thus, there could not be the particularized type of warrant that is required to tap a telephone. It can be answered that beepers normally are part of a planned operation.* It may not be really burdensome, where police have enough grounds of suspicion to plan such an operation, to require a warrant. Of course, the usual exception with respect to exigent circumstances would obtain.

* But what about interstate movements as here?

This Case:

Arguably, we might try to apply some sort of "good faith" exception here as the police probably acted in perfectly good faith. In Illinois v. Gates, to be reargued, the issue is whether there was enough evidence to justify the warrant, and thus no illegal activity by police. Here, in contrast, if a beeper is a search within the meaning of the Fourth Amendment, the deterrent rationale of the Exclusionary Rule should apply.

In any event, if the Court held that a warrant is required, the decision should not be made retroactive.

L.F.P., Jr.

ss

Rev. 7-2

No. 81-1802 U.S. v. Knotts Conf. 12/8/82

The Chief Justice Rev.

Surveillance on road & to location of drum is not a search.

Installation was not a search, but even if it were – Respt has no standing

~~Stop~~

Continued monitoring to determine location is not search.

Continued monitoring after ~~de~~finding location would not be a search, but ~~that~~ Q is not before us.

Extension of visual surveillance. Different option to obtain warrant

Justice Brennan Aff'm

~~Doesn't present~~ the deft's Q re validity of installation.

There is standing to raise this issue

There is a reasonable expectation of privacy.

Standing arises when officers set the stage for the surveillance to trap Respt.

Justice White Rev.

A new 4th Amend claim.

No expectation of privacy as to movements in public. Gov't could have followed in various ways – even airplane.

Rev. on facts of this case.

Different case if surveillance continued for some time. But this would be OK on reasonable suspicion

No serious invasion of privacy.

Should it construe "trespass" with 4th Amend rights. Then, could trespass in installation of the beeper

Justice Marshall Aff in - tentative

Justice Blackmun Rev.

Installation of beeper with consent prevents this Q from being here.

Similar to Smith v. Md., U.S. v White

Justice Powell Rev

Agree with CJ, BRW & HAB

- especially BRW.

No search on facts of this case.

Justice Rehnquist Rev.

Agree with BRW.

Justice Stevens Rev

But must write narrowly.

Other 4th Amend cases don't fit.

There is need for legislation - just as ~~court type~~ wire-tap problem.

Electronic detection devices are only at initial stages of development.

Putting beeper on a commodity might be different - might even convey information other than location.

Justice O'Connor Rev.

No reasonable expectation of privacy.

A listening device as to what is said would ~~create~~ implicate a like expectation

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: JAN 11 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1802

UNITED STATES, PETITIONER *v.*
LEROY CARLTON KNOTTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January ——, 1983]

JUSTICE REHNQUIST delivered the Opinion of the Court

A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver. In this case, a beeper was placed in a five gallon drum containing chloroform purchased by one of respondent's codefendants. By monitoring the progress of a car carrying the chloroform Minnesota law enforcement agents were able to trace the can of chloroform from its place of purchase in Minneapolis, Minnesota to respondent's secluded cabin near Shell Lake, Wisconsin. The issue presented by the case is whether such use of a beeper violated respondent's rights secured by the Fourth Amendment to the United States Constitution.

I

Respondent and two codefendants were charged in the United States District Court for the District of Minnesota with conspiracy to manufacture controlled substances, including but not limited to methamphetamine, in violation of 21 U. S. C. § 846 (1976). One of the codefendants, Darryl Petschen, was tried jointly with respondent; the other codefendant, Tristan Armstrong, pleaded guilty and testified for the government at trial.

Suspicion attached to this trio when the 3M Company,

which manufactures chemicals in St. Paul, notified a narcotics investigator for the Minnesota Bureau of Criminal Apprehension that Armstrong, a former 3M employee, had been stealing chemicals which could be used in manufacturing illicit drugs. Visual surveillance of Armstrong revealed that after leaving the employ of 3M Company, he had been purchasing similar chemicals from the Hawkins Chemical Company in Minneapolis. The Minnesota narcotics officers observed that after Armstrong had made a purchase, he would deliver the chemicals to codefendant Petschen.

With the consent of the Hawkins Chemical Company, officers installed a beeper inside a five gallon container of chloroform, one of the so called "precursor" chemicals used to manufacture illicit drugs. Hawkins agreed that when Armstrong next purchased chloroform, the chloroform would be placed in this particular container. When Armstrong made the purchase, officers followed the car in which the chloroform had been placed, maintaining contact by using both visual surveillance and a monitor which received the signals sent from the beeper.

Armstrong proceeded to Petschen's house, where the container was transferred to Petschen's automobile. Officers then followed that vehicle eastward towards the state line, across the St. Croix River, and into Wisconsin. During the latter part of this journey, Petschen began making evasive maneuvers, and the pursuing agents ended their visual surveillance. At about the same time officers lost the signal from the beeper, but with the assistance of a monitoring device located in a helicopter the approximate location of the signal was picked up again about one hour later. The signal now was stationary and the location identified was a cabin occupied by respondent near Shell Lake, Wisconsin. The record before us does not reveal that the beeper was used after the location in the area of the cabin had been initially determined.

Relying on the location of the chloroform derived through the use of the beeper and additional information obtained during three days of visual surveillance of respondent's cabin, officers secured a search warrant. During execution of the warrant, officers discovered a fully operable, clandestine drug laboratory in the cabin. In the laboratory area officers found formulas for amphetamine and methamphetamine, over $10,000 worth of laboratory equipment, and chemicals in quantities sufficient to produce 14 pounds of pure amphetamine. Under a barrel outside the cabin, officers located the five gallon container of chloroform.

After his motion to suppress evidence based on the warrantless monitoring of the beeper was denied, respondent was convicted for conspiring to manufacture controlled substances in violation of 21 U. S. C. § 846 (1976). He was sentenced to five years imprisonment. A divided panel of the United States Court of Appeals for the Eighth Circuit reversed the conviction, finding that the monitoring of the beeper was prohibited by the Fourth Amendment because its use had violated respondent's reasonable expectation of privacy, and that all information derived after the location of the cabin was a fruit of the illegal beeper monitoring.* —— F.

*Respondent does not challenge the warrantless installation of the beeper in the chloroform container, suggesting in oral argument that he did not believe he had standing to make such a challenge. We note that while several Courts of Appeals have approved warrantless installations, see *United States* v. *Bernard*, 625 F. 2d 854 (CA9 1980); *United States* v. *Lewis*, 621 F. 2d 1382 (CA5 1980), cert. denied, 450 U. S. 935 (1981); *United States* v. *Bruneau*, 594 F. 2d 1190 (CA8), cert. denied, 444 U. S. 847 (1979); *United States* v. *Miroyan*, 577 F. 2d 489 (CA9), cert. denied, 439 U. S. 896 (1978); *United States* v. *Cheshire*, 569 F. 2d 887 (CA5), cert. denied, 437 U. S. 907 (1978); *United States* v. *Curtis*, 562 F. 2d 1153 (CA9 1977), cert. denied, 439 U. S. 910 (1978); *United States* v. *Abel*, 548 F. 2d 591 (CA5), cert. denied, 431 U. S. 956 (1977); *United States* v. *Hufford*, 539 F. 2d 32 (CA9), cert. denied, 429 U. S. 1002 (1976), we have not before and do not now pass on the issue. We also note that the government has not,

2d —— (1981). We granted certiorari, —— U. S. ——, (1982), and we now reverse the judgment of the Court of Appeals.

II

In *Olmstead* v. *United States*, 277 U. S. 438 (1928), this Court held that the wiretapping of a defendant's private telephone line did not violate the Fourth Amendment because the wiretapping had been effectuated without a physical trespass by the government. Justice Brandeis, joined by Justice Stone, dissented from that decision, believing that the actions of the government in that case constituted an "unjustifiable intrusion . . . upon the privacy of the individual," and therefore a violation of the Fourth Amendment. *Id.*, at 478 (Brandeis, J., dissenting). Nearly forty years later, in *Katz* v. *United States*, 389 U. S. 347 (1967), the Court overruled *Olmstead* saying that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U. S., at 353. The Court said:

> "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.*

In *Smith* v. *Maryland*, 442 U. S. 735 (1979), we elaborated on the principles stated in *Katz*:

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in this Court, challenged respondent's standing to maintain the Fourth Amendment claim which he has raised and, therefore, for purposes of this decision we assume standing.

"Consistently with Katz, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations omitted]. This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U. S., at 361—whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.' *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable,"' *id.*, at 361—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id.*, at 353. *See Rakas* v. *Illinois*, 439 U. S., at 143–144, n. 12; *id.*, at 151 (concurring opinion); *United States* v. *White*, 401 U. S., at 752 (plurality opinion)." 442 U. S., at 740–741 (footnote omitted).

The governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways. We have commented more than once on the diminished expectation of privacy in an automobile:

"One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality). See also

Rakas v. *Illinois*, 439 U. S. 128, 153–154, and n. 2 (1978) (POWELL, J., concurring); *South Dakota* v. *Opperman*, 428 U. S. 364, 368 (1976).

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling 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. Visual surveillance from public places along his route would have sufficed to reveal these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology may afford. In *United States* v. *Lee*, 274 U. S. 559 (1927), the Court said:

> "But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor boat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *Id.*, at 563.

We have recently had occasion to deal with another claim which was to some extent a factual counterpart of respondent's assertions here. In *Smith* v. *Maryland*, *supra*, we said:

> "This analysis dictates that [Smith] can claim no legitimate expectation of privacy here. When he used his phone, [Smith] voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, [Smith] assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. [Smith] concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. [Citation omitted]. We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate." 442 U. S., at 744–745.

Respondent does not actually quarrel with this analysis, though he expresses the generalized view that the result of the holding sought by the government would be that "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision." Br. for Resp., at 9 (footnote omitted). But the fact is that the "reality hardly suggests abuse," *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 566 (1978); respondent was not just "any citizen," and 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.* Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

Respondent specifically attacks the use of the beeper insofar as it was used to determine that the can of chloroform had

come to rest on his property at Shell Lake, Wisconsin. He repeatedly challenges the "use of the beeper to determine the location of the chemical drum at Respondent's premises," Br. for Resp., at 26; he states that "[t]he government thus overlooks the fact that this case involves the sanctity of Respondent's residence, which is accorded the greatest protection available under the Fourth Amendment." *Id.* The Court of Appeals appears to have rested its decision on this ground:

> "As noted above, a principal rationale for allowing warrantless tracking of beepers, particularly beepers in or on an auto, is that beepers are merely a more effective means of observing what is already public. But people pass daily from public to private spheres. When police agents track bugged personal property without first obtaining a warrant, they must do so at the risk that this enhanced surveillance, intrusive at best, might push fortuitously and unreasonably into the private sphere protected by the Fourth Amendment." Pet., at 6a.

We think that respondent's contentions, and the above quoted language from the opinion of the Court of Appeals, to some extent lose sight of the limited use which the government made of the signals from this particular beeper. As we have noted, nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automotive journey at rest on respondent's premises in rural Wisconsin. Admittedly, because of the failure of the visual surveillance, the beeper enabled the law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned

by respondent, with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin. Just as notions of physical trespass based on the law of real property were not dispositive in *Katz*, *supra*, neither were they dispositive in *Hester* v. *United States*, 265 U. S. 57 (1924).

We thus return to the question posed at the beginning of our inquiry in discussing *Katz*, *supra*; did monitoring the beeper signals complained of by respondent invade any legitimate expectation of privacy on his part? For the reasons previously stated, we hold they did not. Since they did not, there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. The judgment of the Court of Appeals is therefore

Reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 12, 1983

Re: 81-1802 - United States v. Knotts

Dear Bill,

Please join me.

Sincerely,

Justice Rehnquist

Copies to the Conference

cpm

January 13, 1983

81-1802 United States v. Knotts

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 13, 1983

Re: 81-1802 - United States v. Knotts

Dear Bill:

While I agree with your conclusion, I am inclined to think that some of the statements in your opinion are broader than necessary. Let me identify those that trouble me.

On page 6, you state that a person travelling in an automobile on public thoroughfares has "no" reasonable expectation of privacy in his movements from one place to another. It seems to me that that statement is somewhat exaggerated. When one of us takes his family on a vacation, leaving early in the morning for an unannounced destination, I think we do not expect the general public to know where we are going or why. The fact that a detective might successfully follow us without our knowledge does not, it seems to me, totally foreclose the expectation that a private vacation would normally be a private matter.

Later on page 6, you state that nothing in the Fourth Amendment prohibits the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology may afford. But if sophisticated listening devices would enable officers to overhear private conversations that take place within an automobile, it seems rather clear that the Fourth Amendment might be violated. Indeed, isn't that what Katz holds?

On page 7, you suggest that respondent was not just "any citizen," but I should have thought he was entitled to the protections of any other citizen until the police had probable cause to conduct a search.

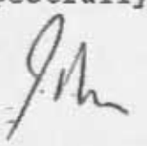
Toward the bottom of page 7, you make the statement, similar to the one on page 6, that the use

I generally agree with JPS that some of these generalizations in WHR's opinion could be narrowed. I strongly disagree, though, with JPS' final point. The consensus was to hold that this was →

of scientific devices to make the police more effective in detecting crime does not give rise to any constitutional problem. Again, as in the case of sophisticated listening devices, I do not believe I can agree. (There is a similar overstatement toward the bottom of page 8 about "scientific enhancement" raising no constitutional issues that visual surveillance would not also raise.)

Finally, in your concluding sentence you state that there was neither a "search" nor a "seizure." It would seem to me that the more correct analysis is that even if surveillance, whether visual or electronic, constitutes a search, the intrusion associated with following a car on the public roads is virtually always reasonable within the meaning of the Fourth Amendment. In this case I would say that even if there may have been a search--after all, the police did spend about an hour trying to locate the missing car--that it was perfectly reasonable, especially since there is no question about the legitimacy of the installation of the beeper itself.

Respectfully,



Justice Rehnquist

Copies to the Conference

not a search, not to hold that this was a "reasonable" search. The latter approach adopts (implicitly) a "reasonable suspicion" test — & as we've discussed, this is undesirable because it may lead to a breakdown in the Court's relatively clear categories of when a warrant is required. Future decisions might try to expand the use of such a test, creating confusion on when one needs (i) probable cause & (ii) a warrant.

Mark

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 13, 1983

Re: No. 81-1802 United States v. Knotts

Dear John:

I agree with some of your observations with respect to the circulating opinion in this case, and disagree with others.

Insofar as your example of a family leaving for a vacation in a car which is driven on a public thoroughfare, I stand by the statement in the circulating draft that there is no reasonable expectation of privacy in their movements along the highway.

I agree that any citizen, whether Knotts or anyone else, is entitled to the protections of the Fourth Amendment; but insofar as travel in a licensed vehicle along a public highway is concerned, I do not think that he or any citizen suffers any deprivation of Fourth Amendment rights when he is visually observed by the police.

I agree with your suggestion that the language which you refer to on page 6 might be taken to reach devices which would enable officers to overhear private conversations that take place within an automobile, though it is certainly not intended to pass judgment on such devices. Accordingly, I will change the sentence beginning "Nothing in the Fourth Amendment" on page 6 so as to read:

"Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties

John's letter is attached

bestowed upon them at birth with such enhancement as science and technology afforded them in this case."

Sincerely,

WHW

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 13, 1983

Re: No. 81-1802 United States v. Knotts

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"Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties

The suggested change is fine. No reason for you to enter this dispute.

mn

I agree

bestowed upon them at birth with such enhancement as science and technology afforded them in this case."

Sincerely,

WJB

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 17, 1983

Re: No. 81-1802, U.S. v. Knotts

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 17, 1983

Re: No. 81-1802 - United States v. Knotts

Dear Bill:

I would like very much to be able to join your opinion. I am certainly with you in the judgment. One thing, however, bothers me. On page 6, first full paragraph, next to the last line, could you see your way clear to end the sentence with the word "cabin" and eliminate the citation of the Hester case?

I do not regard the Knotts case as an open fields one. Further, we shall probably take an open fields case for argument, and I, for one, am a little reluctant to lay the ground work here for a decision in whatever case we take. Hester, of course, is also cited on page 9 of your opinion. I wish we could eliminate that citation, too.

Sincerely,

Harry

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 18, 1983

Re: No. 81-1802 United States v. Knotts

Dear Bill:

You have probably seen my letter to Harry, responding to a request similar to that contained in your letter of January 17th. The only reason I voted to grant certiorari in Florida v. Brady, which was an opinion of the Supreme Court of Florida expressing the view that United States v. Hester was no longer the law, was because I felt there was no warrant in this Court's cases for the conclusion reached by the Supreme Court of Florida. The present draft of my opinion in this case conforms to what I believe to be the state of the law on this subject.

Sincerely,

WHR

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 25, 1983

RE: No. 81-1802 United States v. Knotts

Dear Harry:

Please join me in your concurring in the judgment in the above.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 25, 1983

RE: No. 81-1802 United States v. Knotts

Dear John:

Please join me in your concurrence in the above.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 9, 1983

Re: No. 81-1802 - United States v. Knotts

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 18, 1983

Re: 81-1802 - United States v. Knotts

Dear Harry:

Please join me.

Respectfully,

Justice Blackmun

Copies to the Conference

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
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Join WHR 1/17/83	Join JPS 1/25/83	Join WHR 1/12/83	Join WJB 2/9/83	?	Join WHR 1/13/83	1st draft 1/11/83 2nd draft 1/14/83 3rd draft 2/4/83	1st draft concurring opinion 1/24/83 2nd draft 2/17/83	Join WHR 1/14/83
	Join HAB 1/25/83			2nd draft con opinion 2/7/83				
	1st draft con in judgment 1/25/83 2nd draft 2/15/83						Join HAB 2/18/83	
				81-1802 United States v. Knotts				