

No. \_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 2011**

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UNITED STATES

*PETITIONER,*

v.

RACHEL VARGO

*RESPONDENT.*

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**On Writ of Certiorari to the United States Supreme Court**

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**Brief for the Petitioner**

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T. Peter Choi

Nathan Jensen

*Counsel for Petitioner*

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September 18, 2011

### QUESTIONS PRESENTED

- (1) Whether *the use* of a GPS tracking device without a timely warrant constituted a “search” within the meaning of the Fourth Amendment?
- (2) Whether the government violated Respondent’s Fourth Amendment rights by *attaching* the GPS tracking device to her vehicle with neither her consent nor a valid warrant.

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### STATEMENT OF THE CASE

In 2004, the Federal Bureau of Investigation, acting under the direction and authority of Petitioner United States, began investigating Respondent Rachel Vargo, who owned and operated the “Valentine” nightclub in the state of Lexington, for narcotics violations. When traditional investigative techniques to link Respondent to her co-conspirators and to suspected stash locations for illegal drugs proved to be unsuccessful, FBI agents successfully petitioned United States District Court Judge William Larson for a warrant authorizing them to covertly install and monitor a global positioning system (“GPS”) tracking device on Respondent’s Jeep Grand Cherokee. The warrant authorized the agents to install the device on the Jeep within ten days of the issuance of the warrant; however, Agent Hannapel was unable to install the device until eleven days after the warrant was issued.

Nevertheless, FBI agents gathered information from the GPS tracking device over the next twenty-eight days. The GPS tracking device, which was battery powered, accurate within fifty to one hundred feet, and functional only when Respondent’s Jeep was in motion, wirelessly communicated with orbital satellites to establish the device’s location. The device provided information only about the vehicle’s location; it did not reveal who was driving the car, nor did it reveal what the driver and occupants were doing or who they were meeting at their destinations. Moreover, when the vehicle was not moving, the device automatically became inactive by entering “sleeping mode” in order to conserve its limited battery.

Using the device, FBI agents were able to track Respondent’s Jeep to a suspected stash house in the town of Sydney Lewis. However, FBI agents chose not to act until they obtained additional corroborating evidence. Opportunity arose when FBI agents intercepted a phone call

between Respondent and her suspected suppliers, and gave them the reason to believe that Respondent would be receiving a sizable shipment of cocaine during late October of 2005.

The investigation culminated on October 24, 2005, when FBI agents executed search warrants on, *inter alia*, Respondent's Jeep and the suspected stash house in Sydney Lewis. They recovered nearly \$70,000 from the vehicle; as well as approximately ninety-seven kilograms of powder cocaine, almost one kilogram of crack cocaine, approximately \$850,000 in cash, and various items used to process and package narcotics, from the stash house in Sydney Lewis.

A federal grand jury indicted Respondent with conspiring to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base. Prior to trial, Respondent moved to suppress the information obtained from the GPS tracking device. However, on August 10, 2006, the District Court denied her motion, holding that the information obtained from the GPS tracking device was admissible. United States v. Vargo, 802 F.Supp.2d 87 (W.D.L. 2006). Respondent was subsequently convicted of both of her charges.

On August 2, 2010, the Twelfth Circuit overturned the District Court's decision. The Twelfth Circuit held (1) that the government's use of a GPS tracking system was a "search" within the meaning of the Fourth Amendment; and (2) that, even if it was not a "search" within the meaning of the Fourth Amendment, it was unreasonable. Vargo v. United States, 200 F.3d 1, 5–6 (12th Cir. 2010).

This Court granted the Government's petition for a writ of certiorari.

### SUMMARY OF THE ARGUMENT

The Fourth Amendment to the United States Constitution protects individuals from “unreasonable searches and seizures” in their persons and property. See U.S. Const. amend. IV. The United States respectfully submits to this Honorable Court that (1) the use of a GPS tracking device, even without a timely warrant, did not constitute a “search” within the meaning of the Fourth Amendment; and (2) that it did not violate Respondent’s Fourth Amendment rights by attaching a GPS device to her vehicle with neither her consent nor a valid warrant.

First, the use of a GPS tracking device to track Respondent did not constitute a “search” because it is well-established that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” United States v. Knotts, 460 U.S. 276, 281 (1983). Moreover, Supreme Court jurisprudence has established a high standard for what justifies an “objective expectation” of privacy, a standard that operating an automobile on a public thoroughfare fails to satisfy. See Smith v. Maryland, 442 U.S. 735 (1979).

Second, the government did not violate Respondent’s Fourth Amendment rights by attaching a GPS device to her vehicle with neither her consent nor a valid warrant. As the attachment in itself yielded no information, it was per se not a search. Nor, however, was it a seizure, since:

The device did not affect the car’s driving qualities, did not draw power from the car’s engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not even alter the car’s appearance, and in short *did not “seize” the car in any intelligible sense of the word.*

United States v. Garcia, 474 F.3d 994, 996 (7th Cir. 2007) (emphasis added).

## ARGUMENT

### I. THE USE OF A GPS TRACKING DEVICE, EVEN WITHOUT A TIMELY WARRANT, DID NOT CONSTITUTE A “SEARCH” WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The Court established in Katz v. United States, 389 U.S. 347 (1967), that Fourth Amendment protections apply only to the extent that there exists a sense of “privacy upon which [an individual] justifiably relie[s].” Id. at 353. Later courts have expounded on this basic principle to hold that Fourth Amendment protections are triggered only when (1) an individual has manifested a subjective expectation of privacy; and (2) that expectation is one that society—through the Court—accepts as objectively reasonable. See Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1984) (citing Katz, 389 U.S. at 360-61 (Harlan, J., concurring)); see also United States v. Jacobsen, 466 U.S. 109, 113 (1984) (explaining that a “search” occurs “when an expectation of privacy that society is prepared to consider reasonable is infringed.”).

A. *The use of a GPS tracking device to track Respondent did not constitute a “search” because a person traveling on a public thoroughfare has no reasonable expectation of privacy in his movements.*

In Knotts, the Court applied the Katz standard to the privacy rights of individuals traveling on public thoroughfares. The Court ruled that, although an individual has an expectation of privacy within his home, “no such expectation of privacy extended to the visual observation of [an individual’s] automobile arriving on his premises after leaving a public highway,” since “visual surveillance from public places along [his] route or adjoining [the] premises would have sufficed to reveal all of these facts to the police.” Id. at 282. In short, the Court explained that, since the operation of an automobile on a thoroughfare took place in public, and activities taking place in public enjoy no expectations of privacy, no search within the meaning of the Fourth Amendment took place. In Knotts, this standard meant that the police’s use of a beeper to track the defendant to his stash house did not violate any Fourth



Amendment rights, since that use took place in public, and the information yielded by the beeper was otherwise attainable by the police's natural senses. See id. at 282.

In the instant case, the FBI employed a GPS device to locate the Respondent's stash house by tracking the movements of Respondent's vehicle along public roads and highways. At every moment of this surveillance, as in Knotts, the movement of Respondent's automobile was otherwise visible to the naked eye. Per the application of the Katz standard as refined in Knotts, the public nature of Respondent's movements denied her any expectation of privacy, and thus Respondent cannot avail herself of Fourth Amendment protections, since no "search" took place.

*B. Even if Respondent did have a subjective expectation of privacy, that expectation is not one that society accepts as objectively reasonable.*

This Court has established a variety of the reasonable-person test for determining whether an individual's subjective expectation of privacy is objectively reasonable. This Court applied this standard in Smith v. Maryland, where it concluded that an individual dialing phone numbers within the privacy of his own home had "no actual expectation of privacy in the phone numbers he dialed, and even if he did, his expectation was not 'legitimate.'" Smith, 442 U.S. at 745. The Court explained that, "Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police." Id., 442 U.S. at 745. As a result, whatever subjective expectation of privacy the individual might have entertained failed to reach the standard of objective reasonability.

In the case at bar, whatever expectation of privacy Respondent possessed was similarly inadequate. At any given moment, and at all moments, Respondent operated the GPS-tagged automobile on public thoroughfares, and exposed herself to the sight of any witnesses who cared

to observe her. Just as the Court in Smith determined that the defendant's legitimate privacy expectation was not altered by whether or not the defendant realized her dialings were being recorded, or even by whether or not they actually were being recorded, the *reality* of the surveillance in the instant case is similarly immaterial. Whether or not Respondent detected any witnesses along her route, whether or not she viewed herself to be in private, and whether or not she was actually being surveilled had no impact on the objective reasonability of her privacy expectation. Because Respondent was moving in public, in sight of all observers, her expectation of privacy fails the objective reasonability test. As a result, no search took place within the meaning of the Fourth Amendment, and no warrant was required.

*C. The fact that the surveillance in this case was continuous and created a composite, aggregate image of the defendant's actions does not violate reasonable privacy expectations.*

The Twelfth Circuit, in reversing the District Court, drew a distinction between single instances of GPS surveillance, with continuous, protracted GPS surveillance, and concluded that an appreciable privacy expectation attaches to the latter. See Vargo, 200 F.3d at 3. However, the Twelfth Circuit erred in drawing this conclusion, having constructed a standard absent precedent and one that runs contrary to established Supreme Court jurisprudence while deviating from the approaches of other circuits.

Both the Smith case discussed above and the case at bar involved a variety of continuous surveillance. In Smith, whenever a phone-call was made, the number was recorded. See Smith, 442 U.S. at 737. Similarly, in the instant case, whenever the automobile was moved, the movement was recorded. The surveillance in both cases created an aggregate sum of data out of individual, non-private pieces. Smith demonstrated that actions lacking legitimate privacy expectations individually likewise lack such expectations when viewed in sum. See id., 422 U.S.

at 738. Just as the aggregate sum in Smith did not enjoy any legitimate privacy expectations, no such legitimate expectation can be afforded to the aggregate sum in this case.

United States v. Karo, 468 U.S. 705 (1984), another Supreme Court case, further demonstrates that this Court has never differentiated between brief and sustained surveillance with respect to privacy expectations. In Karo, a beeper was planted on the defendant's residence and was active throughout a period totaling more than five months. See Karo, 468 U.S. at 707–08. In addressing whether the defendant's Fourth Amendment rights were violated, the Court nowhere concerned itself with the continuous nature of the surveillance, which was of the same nature as the “24-hour” surveillance that so worried the Twelfth Circuit in this case. See id. at 707–09.

The Supreme Court's lack of concern with the continuous nature of the surveillance in Karo is perhaps best reflected in United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010), a Ninth Circuit appellate case where DEA agents repeatedly used GPS technology to track a defendant's vehicle over protracted periods of time. See Pineda-Moreno, 591 F.3d at 1213. In that case, the court characterized the defendant's final claim as a Fourth Amendment objection to “agents’ use of mobile tracking devices continuously to monitor the location of his Jeep.” See id., 591 F.3d at 1216. The court found no privacy violation and, as in Karo, the Court took no issue with the continuous nature of the surveillance. See id., 591 F.3d at 1215 (“In sum, Pineda-Moreno cannot show that the agents invaded an area in which he possessed a reasonable expectation of privacy when they walked up his driveway and attached the tracking device to his vehicle.”); United States v. Marquez, 605 F.3d 604, 610 (8th Cir. 2010) (“Consequently, when police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS

tracking device on it for a reasonable period of time.”). Hence, it is clear that the Twelfth Circuit’s decision attempted to apply a standard wholly at odds with the other circuit courts’ tacit approval of continuous surveillance.

II. THE GOVERNMENT DID NOT VIOLATE RESPONDENT’S FOURTH AMENDMENT RIGHTS BY ATTACHING THE GPS TRACKING DEVICE TO HER VEHICLE, WITH AN EXPIRED WARRANT AND WITHOUT HER CONSENT.

The Fourth Amendment guards against “unreasonable searches and seizures.” See U.S. Const. amend. IV. As this Court articulated in Jacobsen, “a ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed,” whereas “a ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” Jacobsen, 466 U.S. at 113.

A. *Installing a GPS tracking system, in and of itself, was not a “search” within the meaning of the Fourth Amendment.*

As discussed previously, the FBI agents’ use of the GPS tracking device did not constitute a “search” within the meaning of the Fourth Amendment, and even if it did, it was not objectively “reasonable.” Moreover, merely attaching a device cannot possibly constitute a “search” within the meaning of the constitution, because that, in itself, does not yield any information. Installing the GPS tracking device certainly created the *potential* for a search, in that it enabled FBI agents to chart and observe Respondent’s movements, but this Court has previously ruled that a potential invasion of privacy does not constitute a “search” within the meaning of the Fourth Amendment. See Karo, 468 U.S. at 712 (“[The installation of a tracking system] created a *potential* for an invasion of privacy, but we have never held that potential, *as opposed to actual*, invasions of privacy constitute searches for purposes of the Fourth Amendment.”) (emphases added); see also id., 468 U.S. at 722 (O’Connor, J., Concurring)

(explaining that an individual's privacy interests are implicated only when a tracking device is activated).

The Ninth Circuit recently addressed this issue under a nearly identical set of circumstances in U.S. v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010). In Pineda-Moreno, as in the instant case, police installed a GPS tracking device on the underside of the defendant's vehicle. See id., 591 F.3d at 1213. Unlike in the instant case, however, the vehicle in Pineda-Moreno was parked within the curtilage of the defendant's home when law enforcement agents installed the GPS tracking device. See id. Subsequently, the defendant in Pineda-Moreno claimed that the installation of the GPS tracking device violated his Fourth Amendment rights and constituted an unreasonable search. See id. at 1214. However, the Pineda-Moreno court determined that, even despite the fact that the car was parked on the curtilage surrounding his home, the defendant had no reasonable privacy expectation that would render the installation a "search." See id. at 1215 ("We conclude that the agents did not violate Pineda-Moreno's Fourth Amendment rights by affixing the mobile tracking devices to the underside of his Jeep while it was parked on a public street and parking lot-areas where Pineda-Moreno can assert no reasonable expectation of privacy."). Turning now to the case at bar, it is uncontested that Respondent's car was parked in public, which has traditionally yielded even less of an expectation of privacy than at the curtilage of one's home, at the time of the installation. Furthermore, the court in Pineda-Moreno found that no search took place in attaching the device to the underside, since "[t]he undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy." Pineda-Moreno, 591 F.3d at 1214 (quoting United States v. McIver, 186 F.3d 1119, 1127) (internal quotation marks omitted). In the same way, Respondent lacks such a reasonable expectation with regards to the device installed in this case.

B. *Likewise, installing a GPS tracking system, in and of itself, was not a “seizure” within the meaning of the Fourth Amendment.*

On the other hand, it also cannot be said that installing the GPS tracking device constituted a “seizure” within the meaning of the Fourth Amendment. The FBI agents’ installation of this particular GPS tracking device created no “meaningful interference” with Respondent’s possessory interest in her vehicle. As indicated previously, the GPS tracking device in question was battery powered and turned itself on only when the vehicle was in motion. Moreover, it was covertly installed on the underside of the vehicle, out of Respondent’s sight, and did not impede her in any way from fully using or enjoying her vehicle.

C. *Even if it could be argued that installing a GPS tracking system, with neither the individual’s consent nor a valid warrant, was impermissible search or seizure, it was nevertheless reasonable.*

It is well-established that the Fourth Amendment’s “touchstone” is reasonableness, which is “measured in objective terms by examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33, 34 (1996). This is a fact-intensive inquiry that requires “assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (internal citations omitted); see also Robinette, 519 U.S. at 34 (“In applying this test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”).

Applying this reasonableness test to the particular facts and circumstances of the case at bar, it is clear that neither Respondent’s consent nor a valid search warrant was required to install a GPS tracking device on her car. On the one hand, Respondent’s privacy interests--if, indeed, any existed--were minimal. As stated previously, the GPS tracking device provided information

only about the vehicle's location; it did not reveal who was driving the car, nor did it reveal what the driver and occupants were doing or who they were meeting at their destinations. On the other hand, FBI agents had a legitimate governmental interest in investigating, and ultimately enforcing, the law. While it could be argued that FBI agents could have relied on some of the more traditional investigative methods, including visual observation and wiretapping, to achieve the same end, that would have greatly and unnecessarily impeded their efforts. This was not an instance of a dragnet-type investigation. FBI agents had harbored reasonable suspicion that Respondent had been dealing narcotics long before they petitioned for, and were ultimately granted, the warrant to install the GPS tracking device on her car. In effect, the fact pattern in this case was not much different from the fact pattern in Garcia, in which Justice Posner, in ruling that the installation of a GPS tracking device absent a valid warrant did not constitute a search, stated:

So far as appears, the police of Polk County . . . are not engaged in mass surveillance. They do GPS tracking only when they have a suspect in their sights. They had, of course, abundant grounds for suspecting the defendant. Should government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.

Garcia, 474 F.3d 989–99.

It is worth stressing that it is not the position of Petitioner United States that this Court should do away with the warrant requirement in its entirety with respect to installing GPS tracking devices. However, the United States respectfully submits that, if the installation of such a device poses virtually no threat to the individual's privacy interests, and is outweighed by a legitimate governmental interest that is supported by reasonable suspicion, then a warrant should not be required.

### CONCLUSION

For all of the foregoing reasons, Petitioner United States respectfully requests this Honorable Court to hold (1) that the use of a GPS tracking device, even without a timely warrant, did not constitute a “search” within the meaning of the Fourth Amendment; and (2) that the government did not violate Respondent’s Fourth Amendment rights by attaching the GPS tracking device to her vehicle with neither her consent nor a valid warrant.

Respectfully submitted,

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September 18, 2011