

No. 11-93

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**In the Supreme Court of the United States**

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JUAN MANUEL CUEVAS-PEREZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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### **QUESTIONS PRESENTED**

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

2. Whether the government violated petitioner's Fourth Amendment rights by attaching the GPS tracking device to his vehicle without a valid warrant and without his consent.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 640 F.3d 272.

**JURISDICTION**

The judgment of the court of appeals was entered on April 28, 2011. The petition for a writ of certiorari was filed on July 20, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a conditional guilty plea in the United States District Court for the Southern District of Illinois, petitioner was convicted of possession with intent to distribute heroin, in violation of 21 U.S.C. 841(b)(1)(A)(i). He was sentenced to ten years of impris-

onment, to be followed by five years of supervised release. Pet. App. 53a-55a. The court of appeals affirmed. *Id.* at 1a-31a.

1. In 2008, federal and state officers working in Arizona began investigating petitioner for drug trafficking. Pet. App. 2a. The officers installed a fixed camera near petitioner's home, and its footage showed petitioner manipulating the hatch and rear door panels of his Jeep Laredo. *Ibid.* On February 6, 2009, an officer installed a global positioning system (GPS) tracking device on petitioner's Jeep while it was parked in a public area. *Ibid.* The officers did not seek a warrant to install and track the location of the GPS device. *Ibid.*

The GPS device communicated with orbital satellites to establish the device's location, and it was accurate to within five to ten meters. 6/15/09 Suppression Hr'g Tr. 60, 67 (S.H.). The device was capable of forwarding location data to government agents using a cell-phone connection and was programmed to send officers notices when it crossed state lines. *Id.* at 65-66. The device provided information only about the vehicle's location; it did not reveal who was driving the car, what the driver and occupants were doing, or with whom they met at their destinations.

Using the device, the officers were able to track petitioner's Jeep on a road trip from Arizona through New Mexico, Texas, Oklahoma, Missouri, and ultimately to Illinois. Pet. App. 2a; S.H. 68. On February 8, 2008, while petitioner was nearing Illinois, the officers learned that battery in the GPS device was running low. Pet. App. 2a. Wishing to maintain surveillance of petitioner's Jeep, federal agents asked Illinois state police to follow the Jeep on its journey. *Id.* at 3a. Once that visual surveillance began, the officers ended their use of the GPS

device, which had been in use for a total of approximately 60 hours. *Ibid.*

An Illinois state trooper stopped petitioner for a traffic violation, and a drug-detecting dog indicated the scent of narcotics on petitioner's Jeep. Pet. App. 3a. A subsequent search uncovered more than a kilogram of heroin hidden in nine packages in the Jeep's doors and ceiling lining. *Ibid.*; see Indictment 1.

2. A federal grand jury in the Southern District of Illinois returned a one-count indictment charging petitioner with possession with intent to distribute heroin, in violation of 21 U.S.C. 841(b)(1)(A)(i). Petitioner moved to suppress the drug evidence on the grounds that the officers' use of a GPS device attached to petitioner's vehicle violated the Fourth Amendment. Pet. App. 3a. The district court denied the motion, explaining that petitioner's argument was foreclosed by the Seventh Circuit's decision in *United States v. Garcia*, 474 F.3d 994 (7th Cir.), cert. denied, 552 U.S. 883 (2007). Pet. App. 3a, 62a-64a. Petitioner entered a conditional guilty plea, and the district court sentenced petitioner to ten years of imprisonment, to be followed by five years of supervised release. *Id.* at 3a-4a, 54a-55a.

3. The court of appeals affirmed. Pet. App. 1a-9a.

a. Judge Cudahy, joined in part by Judge Flaum, stated that "[t]he foundational Supreme Court precedent for GPS-related cases is *United States v. Knotts*, 460 U.S. 276 (1983), which held that the use of a beeper to track a drug suspect did not violate the Fourth Amendment because it did not amount to a search or seizure." Pet. App. 4a. In *Knotts*, the Court held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at

281; see Pet. App. 4a. The court explained that the Seventh Circuit had previously applied *Knotts* to hold that tracking a vehicle's movements on public roads using a GPS device is not a search, because it "utilizes technology to substitute 'for an activity, namely following a car on a public street, that is unequivocally not a search within the meaning of the Fourth Amendment.'" *Id.* at 5a (quoting *Garcia*, 474 F.3d at 997) (brackets omitted). The court rejected petitioner's attempt to distinguish *Garcia* on the basis that the GPS tracking device in that case could not send data to operators remotely and thus needed to be physically retrieved to access its data. *Id.* at 8a (citation omitted); see *Garcia*, 474 F.3d at 995. The court did "not consider this particular advancement to be significant for Fourth Amendment purposes," as "real-time information is exactly the kind of information that drivers make available by traversing public roads." Pet. App. 8a.

The court also distinguished petitioner's case from *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), cert. granted *sub nom. United States v. Jones*, No. 10-1259 (oral argument scheduled for Nov. 8, 2011). In *Maynard*, the D.C. Circuit held that use of a GPS tracking device for a period of 28 days to monitor the movements of the defendant's vehicle on public roads amounted to a "search" within the meaning of the Fourth Amendment because it "reveals an intimate picture of the subject's life that he expects no one to have." *Id.* at 563. Without "approv[ing] or disapprov[ing] the result the D.C. Circuit reached," Pet. App. 6a n.3, the court of appeals held that "no warrant would be required even if the *Maynard* analysis were applied" because this case involves "a 'single-trip' duration of surveillance." *Id.* at 7a.

b. Judge Flaum concurred. Pet. App. 9a-31a. Judge Flaum wrote separately to emphasize that the court's decision did not approve the D.C. Circuit's reasoning in *Maynard*. *Id.* at 9a. Judge Flaum explained his view that *Maynard* was wrongly decided because "the holding of *Knotts* governs GPS monitoring" and reflects "the Court's consistent teaching that people do not have a legitimate expectation of privacy in that which they reveal to third parties or leave open to view by others." *Id.* at 10a.

c. Judge Wood dissented. Pet. App. 31a-52a. According to Judge Wood, the GPS surveillance of petitioner's vehicle on public roads was a Fourth Amendment search because it "intrude[d] upon [his] reasonable expectation of privacy by revealing information about [his] daily trajectory and patterns that would, as a practical matter, remain private without the aid of technology." *Id.* at 50a. Judge Wood concluded that "the police should have obtained a warrant before they activated the GPS device that they had affixed to the Jeep and began monitoring it." *Id.* at 48a.

#### ARGUMENT

Petitioner contends that (1) the warrantless use of a GPS tracking device on his vehicle to monitor its movements on public roads violated the Fourth Amendment, and (2) the warrantless attachment of the GPS device to his vehicle violated the Fourth Amendment. See Pet. 10. The Court granted certiorari on both of those questions in *United States v. Jones*, cert. granted, No. 10-1259 (oral argument scheduled for Nov. 8, 2011). The Court should hold this petition pending its decision in *Jones* and then dispose of the petition as appropriate in light of that decision.

If the Court in *Jones* holds that the attachment and use of the GPS tracking device in that case did not constitute a “search” or “seizure” under the Fourth Amendment, then the court of appeals correctly rejected petitioner’s arguments and the petition for a writ of certiorari should be denied. On the other hand, if the Court holds that the attachment or use of a GPS device to monitor a vehicle’s movements on public roads is or can be a Fourth Amendment search or seizure—or declines to reach those issues and holds that any such search or seizure is constitutionally reasonable based on reasonable suspicion or probable cause—then the Court should remand this case for further consideration in light of that decision. On remand, the court of appeals may reconsider whether the use or installation of the GPS device here constituted a search or seizure and, if appropriate, may remand to the district court for a determination of whether the officers had reasonable suspicion or probable cause allowing attachment and use of the GPS device.\*

Petitioner argues (Pet. 13-14) that the Court should grant the petition and consolidate it with *Jones*. As a preliminary matter, that course would be unworkable. The government filed its opening brief in *Jones* on August 11, 2011, the respondent’s brief is due on September 26, 2011, and the case is set for oral argument on November 8, 2011. Thus, the Court could not place the two cases on a joint briefing schedule allowing for con-

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\* The government preserved that argument in the district court, but the district court did not reach it because the court concluded that use of the GPS device was not a search. See Pet. App. 3a; Gov’t Response to Mot. to Suppress 7-8 (arguing that, even without a warrant, the GPS surveillance was reasonable “based upon information that the defendant was a drug courier and was transporting controlled substances”).

solidated briefing. Even if the Court were to grant a writ of certiorari in this case in an order issued shortly after the September 26, 2011, Conference, briefing in the normal course would not be completed until, at the earliest, December 12, 2011 (75 days later), which is more than a month after the date set for oral argument in *Jones*. See S. Ct. R. 25.1, 25.2 (petitioner's brief due within 45 days of order granting writ of certiorari; respondent's brief due 30 days after petitioner's brief is filed).

In any event, there is no need to consolidate the cases. Petitioner argues (Pet. 13-14) that because officers monitored the movements of his vehicle over a period lasting two and a half days (Pet. App. 3a), as opposed to the 28-day period in *Jones*, see U.S. Br. 28, *Jones, supra*, No. 10-1259, consolidating this case with *Jones* would allow the Court to provide better guidance to law enforcement. The Court can provide appropriate guidance without granting review and consolidating this case with *Jones*. If the Court in *Jones* concludes that monitoring the movements of a vehicle on public roads becomes a "search" within the meaning of the Fourth Amendment if the monitoring continues for a sufficiently long period of time, the Court can articulate the principles by which it defines that period of time. Apart from the duration of monitoring, the facts in this case and in *Jones* are similar; both cases involve attaching a GPS tracking device to the exterior of a suspect's vehicle and using the device to monitor the vehicle's movements on public roads. See Pet. App. 2a-5a, 9a; U.S. Br. 2-6, *Jones, supra* (No. 10-1259).

**CONCLUSION**

The petition for a writ of certiorari should be held pending this Court's decision in *United States v. Jones*, cert. granted, No. 10-1259 (oral argument scheduled for Nov. 8, 2011), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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