No. 10-7515

IN THE SUPREME COURT OF THE UNITED STATES

JUAN PINEDA-MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

KEVIN R. GINGRAS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the use of a tracking device on petitioner's vehicle was a "search" within the meaning of the Fourth Amendment.

2. Whether the placement of a tracking device on petitioner's vehicle while it was parked in his driveway was a "search" within the meaning of the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 591 F.3d 1212. The order of the court of appeals denying rehearing (Pet. App. 22a-23a), and the opinions dissenting from the denial of rehearing en banc (Pet. App. 23a-34a) are reported at 617 F.3d 1120. The order of the district court denying petitioner's motion to suppress (Pet. App. 19a-21a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2010. A petition for rehearing was denied on August 12, 2010 (Pet. App. 22a-23a). The petition for a writ of certiorari was

filed on November 10, 2010. 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 District of Oregon, petitioner was convicted of conspiracy to manufacture marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(vii), and 846. The district court sentenced petitioner to 51 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 9. The court of appeals affirmed. Pet. App. 1a-10a.

1. In May 2007, a Drug Enforcement Administration (DEA) special agent noticed three men purchasing a large quantity of fertilizer from Home Depot. Pet. App. 3a. Recognizing the fertilizer as a type commonly used for large marijuana grow sites, the agent followed the men as they left the store and saw them leave in a silver 1997 Jeep Grand Cherokee. Ibid. Law enforcement officers later identified petitioner as one of the individuals and as the owner of the Jeep. Ibid.

DEA agents later obtained information that petitioner and his associates had purchased large quantities of groceries, irrigation equipment, and deer repellent at several stores. Pet. App. 3a. On several of these occasions, the men traveled in petitioner's Jeep. Ibid. Agents eventually followed the group to a mobile home park where petitioner was renting a trailer. Ibid.

In July 2007, DEA agents began monitoring petitioner's Jeep using mobile tracking devices. Pet. App. 4a; Gov't C.A. Br. 4. The tracking devices were about the size of a bar of soap and could be attached to the metal part of a vehicle within a few seconds using a magnetic strip. Ibid. Some of the devices permitted agents to access information remotely using cellular towers or global positioning satellites (GPS); other devices required agents to remove the device from the vehicle and download the information directly. Ibid.

The agents kept a log of when and where they placed the tracking devices on petitioner's Jeep. Gov't C.A. Br. 4. On four occasions, agents placed tracking devices on the Jeep while it was parked on a public street in front of petitioner's residence. Pet. App. 4a. On one occasion, agents placed a tracking device on the Jeep while it was parked in a public parking lot. Ibid. On two occasions, agents placed tracking devices on the Jeep early in the morning while the vehicle was parked in petitioner's driveway, approximately five feet from the side of petitioner's residence. Ibid.; Gov't C.A. Br. 4-5.

The tracking devices revealed that petitioner's car drove to rural areas with suspected large marijuana grow sites on multiple occasions in July and August 2007. Gov't C.A. Br. 6. On September 12, 2007, information from one of the devices indicated that petitioner's Jeep was leaving a suspected marijuana grow site.

Pet. App. 4a. Agents followed the Jeep, pulled it over, and smelled the odor of marijuana emanating from the vehicle. Ibid.; Gov't C.A. Br. 6. Petitioner subsequently consented to a search of his vehicle and his trailer, where agents found approximately 29 pounds of processed marijuana. Pet. App. 4a; Gov't C.A. Br. 7.

2. A federal grand jury in the District of Oregon charged petitioner with conspiring to manufacture 1000 or more marijuana plants, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(vii), and 846; and manufacturing 1000 or more marijuana plants, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(vii). Pet. App. 4a-5a. Petitioner moved to suppress the evidence obtained from the mobile tracking devices, arguing that agents violated the Fourth Amendment by attaching the devices to his vehicle. Id. at 5a. The district court denied petitioner's motion, concluding that placing a mobile tracking device on a suspect's vehicle while it was "parked either on a public road or lot, or in [an] open driveway" did not violate the Fourth Amendment. Id. at 19a-20a. Petitioner entered a conditional guilty plea, reserving his right to appeal the district court's denial of his motion to suppress. Id. at 5a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court rejected petitioner's claim that by attaching mobile tracking devices to the undercarriage of his Jeep, agents invaded an area in which petitioner possessed a reasonable expectation of privacy, thereby violating his Fourth Amendment rights. Id. at 5a-8a. The

court concluded that petitioner's claim was foreclosed by its previous decision in United States v. McIver, 186 F.3d 1119 (9th Cir. 1999), cert. denied, 528 U.S. 1177 (2000), in which the court held under similar facts that attaching a tracking device to a vehicle did not constitute a "search" within the meaning of the Fourth Amendment. Pet. App. 7a-8a. In McIver, agents suspected that the defendant was growing marijuana, and they attached a tracking device to his vehicle at 3:30 a.m. while the vehicle was parked in his driveway. 186 F.3d at 1122-1123. The McIver court concluded that the agents had not "searched" the vehicle by placing a tracking device on it because a person has no reasonable expectation of privacy in the exterior of his car, including the undercarriage. Pet. App. 7a-8a.

The court of appeals further rejected petitioner's claim that agents violated his Fourth Amendment rights by entering his driveway on two occasions to attach tracking devices to his Jeep. Pet. App. 6a-7a. The court acknowledged that in McIver, the defendant had conceded that his driveway was not part of the curtilage of his home, whereas in this case the government conceded that petitioner's Jeep was within the curtilage of his home on the two occasions when they entered his driveway. Id. at 6a. The court determined that it "need not decide * * * whether [petitioner]'s vehicle was parked within the curtilage of his home" because even assuming it was, petitioner's driveway was "only a

semi-private area." Ibid. (internal quotation marks and citation omitted). The court explained that petitioner's driveway had "no gate, no 'No Trespassing' signs, and no features to prevent someone standing in the street from seeing the entire driveway" and that anyone walking to petitioner's door would have to walk on the driveway to get there. Id. at 6a-7a. The court concluded that because petitioner did not "take steps to exclude passersby" from his driveway, "he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home." Id. at 7a.

Finally, the court of appeals rejected petitioner's claim that the agents' use of mobile tracking devices continuously to monitor the location of his Jeep violated his Fourth Amendment rights because the devices attached to his vehicle are not generally used by the public. Pet. App. 8a-10a.[1] The court of appeals explained that in United States v. Knotts, 460 U.S. 276 (1983), this Court held that law enforcement officers did not conduct a "search" within the meaning of the Fourth Amendment when they tracked the movements of a vehicle on public roads using an electronic beeper that had been placed in a container of chemicals,

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[1] The government argued that petitioner did not raise this argument before the district court and that it should therefore be reviewed only for plain error. The court concluded that it did not need to determine whether petitioner raised the argument below, because "the district court committed no error, plain or otherwise," and petitioner's claim would fail under any standard of review. Pet. App. 8a n.1.

because a person has no reasonable expectation of privacy in his public movements. Pet. App. 8a-9a. The court was unpersuaded by petitioner's contention that the Court heavily modified the Fourth Amendment analysis applicable to technological devices in Kyllo v. United States, 533 U.S. 27 (2001), such that law enforcement officers conduct a Fourth Amendment search whenever they use "sense-enhancing technology not available to the general public." Pet. App. 9a. The court explained that the thermal-imaging technology used in Kyllo provided information about the interior of a home and thus acted as "a substitute for a search unequivocally within the meaning of the Fourth Amendment." Ibid. In contrast, "in Knotts, as in this case, '[t]he substitute . . . is for an activity, namely following a car on a public street, that is unequivocally not a search within the meaning of the amendment.'" Ibid. (quoting United States v. Garcia, 474 F.3d 994, 997 (7th Cir.), cert. denied, 552 U.S. 883 (2007)). The court stated that insofar as petitioner was complaining that the tracking devices enabled the police to be more effective in detecting crime, the argument "simply has no constitutional foundation." Ibid. (internal quotation marks omitted).

4. The court of appeals denied rehearing en banc. Pet. App. 22a-23a. Chief Judge Kozinski, joined by Judges Reinhardt, Wardlaw, Paez, and Berzon dissented. Id. at 23a-33a. Chief Judge Kozinski believed that the expectation of privacy in one's driveway

(as "curtilage") is the same as in the home itself and that the agents' installation of devices while the vehicle was parked in the defendant's driveway was therefore problematic. Id. at 23a-28a. Chief Judge Kozinski also believed that rehearing en banc was warranted to address whether prolonged warrantless surveillance using a mobile tracking device is permissible under the Fourth Amendment, given the Court's decision in Kyllo, supra, to "take the long view" from the original meaning of the Fourth Amendment in order to guard against advances in technology that can erode Fourth Amendment privacy interests. Pet. App. 28a-33a (quoting Kyllo, 533 U.S. at 40).

Judge Reinhardt also dissented, Pet. App. 33a-34a, noting his "regret that over * * * time the courts have gradually but deliberately reduced the protection of the Fourth Amendment," id. at 33a.

DISCUSSION

1. Petitioner contends (Pet. 8-17) that the government's "prolonged" use of mobile tracking devices to monitor the public movements of his Jeep was a "search" within the meaning of the Fourth Amendment. Because petitioner did not raise this argument in his motion to suppress in the district court and his claim would therefore be reviewable only for plain error, this case does not present a suitable vehicle to resolve a conflict with the D.C. Circuit on that issue. Instead, the court should grant the

government's petition to review the D.C. Circuit's decision in United States v. Maynard, 615 F.3d 544 (2010), petition for cert. pending sub nom. United States v. Jones, No. 10-1259 (filed April 15, 2011), where the issue was properly preserved. Although petitioner's forfeiture of his claim by failing to raise it before the district court would likely preclude relief even if the claim had merit, the petition in this case should be held pending the resolution of the petition in Jones.

a. This Court has held that a "search" within the meaning of the Fourth Amendment occurs only where a "legitimate expectation of privacy * * * has been invaded by government action." United States v. Knotts, 460 U.S. 276, 280 (1983) (internal quotation marks omitted). As a result, "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). Applying those principles in Knotts, the Court held that a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281.

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

in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancements as science and technology afforded them in this case." Id. at 282. As in Knotts, petitioner had "no reasonable expectation of privacy in his movements from one place to another" as he traveled on public roads, id. at 281, and law enforcement agents therefore did not conduct a search by using an electronic device to track those movements.

Petitioner contends (Pet. 14-15) that the court of appeals was not bound by Knotts because the Court left open in Knotts the possibility that "twenty-four hour surveillance of any citizen of this country" could violate the Fourth Amendment. Pet. 14 (quoting Knotts, 460 U.S. at 283). Although Knotts involved police monitoring of a single journey with the assistance of an electronic tracking device, the Court applied the same Fourth Amendment principles to "prolonged" electronic tracking in United States v. Karo, 468 U.S. 705, 715 (1984). In Karo, agents placed a tracking device in a can of ether and left the device in place for five months as the can was transported between different locations. Id. at 709-710. The Court held that certain transmissions from the beeper during that prolonged period -- i.e., those that revealed information about private spaces -- could not be used to establish probable cause in an application for a warrant to search a residence, but the Court's holding did not depend upon the duration

of the electronic monitoring. Id. at 714-718. Although the court of appeals had distinguished Knotts on the ground that "[t]he Knotts case involved surveillance over only a few days; monitoring in [this] case took place over five months," United States v. Karo, 710 F.2d 1433, 1439 (10th Cir. 1983), rev'd 468 U.S. 705 (1984), the Court concluded that the remaining evidence, including "months-long tracking" of the ether can through "visual and beeper surveillance," established probable cause supporting issuance of the warrant. Karo, 468 U.S. at 719-720. The Court expressed no concern about the prolonged monitoring.

Nor was the electronic monitoring in this case "dragnet" surveillance (Pet. 14-15), which the Court in Knotts stated it would leave for another day. 460 U.S. at 284. The Court generally has used the term "dragnet" to refer to high-volume searches that are often conducted without any articulable suspicion. See, e.g., Florida v. Bostick, 501 U.S. 429, 441 (1991); Cupp v. Murphy, 412 U.S. 291, 294 (1973) (discussing police "dragnet" procedures without probable cause in Davis v. Mississippi, 394 U.S. 721 (1969)); Berger v. New York, 388 U.S. 41, 65 (1967). That scenario is not presented here. The agents in this case tracked the movements of a single vehicle driven by an individual suspected of manufacturing large quantities of marijuana. Pet. App. 6a-7a. Even if this were (incorrectly) deemed a search, it would be a reasonable one. This record does not raise concerns about mass, suspicionless GPS monitoring described by petitioner's amici. See

Information Soc'y Project et al. Amici Br. (Amici Br.) 9-10. Any constitutional questions about hypothetical programs of mass surveillance can await resolution if they ever occur.

Petitioner and his amici further contend (Pet. 16-17; Amici Br. 11-17, 22-24) that this Court's decision in Kyllo v. United States, 533 U.S. 27 (2001), rather than Knotts, should control this case. In Kyllo, the Court held that using thermal imaging technology to obtain "information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search -- at least where * * * the technology in question is not in general public use." Id. at 34 (internal quotation marks and citation omitted). As the court of appeals correctly explained, the thermal-imaging technology in Kyllo provided a substitute for a search unequivocally within the meaning of the Fourth Amendment, "whereas in Knotts, as in this case, '[t]he substitute . . . is for an activity, namely following a car on a public street, that is unequivocally not a search within the meaning of the amendment.'" Pet. App. 9a (quoting United States v. Garcia, 474 F.3d 994, 997 (7th Cir.), cert. denied, 552 U.S. 883 (2007)). Kyllo is thus irrelevant to the resolution of the question presented.

Contrary to the assertions of petitioner's amici (Amici Br. 6-7, 20-21), the enhanced accuracy of the mobile tracking devices

used to track petitioner's vehicle, compared to the beeper used in Knotts, does not change that analysis. See Knotts, 460 U.S. at 284 ("Insofar as respondent's complaint appears to be * * * that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation."); Smith v. Maryland, 442 U.S. 735, 744-745 (1979) (noting that petitioner had conceded that he would have no reasonable expectation of privacy in the phone numbers he dialed if he had placed the calls through an operator, and stating that "[w]e are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate"). Electronic tracking of a vehicle as it moves on public roads offends no reasonable expectation of privacy because it reveals only information that any member of the public could have seen, and it is therefore not a search within the meaning of the Fourth Amendment. See Katz, 369 U.S. at 351.

b. Petitioner correctly notes (Pet. 8-11) that there is a conflict among the federal courts of appeals on the question whether "prolonged" GPS monitoring constitutes a Fourth Amendment search.

The court of appeals' decision in this case conflicts with the D.C. Circuit's decision in Maynard, supra.[2] In Maynard, the D.C.

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[2] As petitioner notes (Pet. 11-12), several state courts have also held that police use of GPS devices to monitor the public movements of vehicles is unlawful, but have done so only under

Circuit concluded that the defendant had a reasonable expectation of privacy in the public movements of his vehicle over the course of a month because he had not exposed the totality of those movements to the public. 615 F.3d at 558-563. The government's use of a GPS device to monitor those movements, the court held, was therefore a search within the meaning of the Fourth Amendment. Id. at 563-564; see Katz, 389 U.S. at 351. The court concluded that the defendant's movements while he drove on public roads in his Jeep were not "actually exposed" to the public because "the likelihood a stranger would observe all those movements * * * is essentially nil." Maynard, 615 F.3d at 558, 560. The court further concluded that the defendant's movements were not "constructively exposed" to the public, even though each individual movement was in public view, because a reasonable person "does not expect anyone to monitor and retain a record of every time he drives his car * * * rather, he expects each of those movements to remain disconnected and anonymous." Id. at 561-562, 563 (internal quotation marks omitted).[3]

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their respective state constitutions, not under the Fourth Amendment. See People v. Weaver, 909 N.E.2d 1195, 1202 (N.Y. 2009); Commonwealth v. Connolly, 913 N.E.2d 356, 366-372 (Mass. 2009); State v. Jackson, 76 P.3d 217, 224 (Wash. 2003); State v. Campbell, 759 P.2d 1040, 1049 (Or. 1988).

[3] Chief Judge Sentelle, joined by Judges Henderson, Brown, and Kavanaugh, dissented from the D.C. Circuit's denial of rehearing en banc. United States v. Jones, 625 F.3d 766 (2010). Chief Judge Sentelle criticized the panel opinion for giving law enforcement officers no guidance about "at what point the

The D.C. Circuit's opinion in Maynard creates a conflict with the court of appeals' decision in this case, as well as with a decision of the Seventh Circuit. In United States v. Garcia, 474 F.3d 994, cert. denied, 552 U.S. 883 (2007), police officers received information that Garcia was manufacturing methamphetamine, and they placed a GPS device on his car without applying for a warrant. Id. at 995. The Seventh Circuit held that no warrant was required to conduct continuous electronic tracking using a GPS device because the device was a "substitute * * * for an activity, namely following a car on a public street, that is unequivocally not a search within the meaning of the amendment." Id. at 997.

The Eighth Circuit similarly concluded that a warrant was not required in United States v. Marquez, 605 F.3d 604 (2010). In that case, DEA agents placed a GPS device on a truck that the agents believed was involved in drug trafficking. Id. at 607. The agents changed the battery on the device seven times over the course of a prolonged investigation, and the device "allowed police to determine" that the truck was traveling back and forth between Des Moines, Iowa, and Denver, Colorado. Ibid. The Eighth Circuit held

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likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private." Id. at 768. According to Chief Judge Sentelle, "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in Knotts, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." Id. at 769.

that the defendant did not have "standing" to challenge the warrantless use of the GPS device because he was only an occasional passenger in the vehicle. Id. at 609. But the court further concluded that "[e]ven if [the defendant] had standing, we would find no error." Ibid. The court stated that "[a] person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another," ibid., and concluded that "when police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time," id. at 610.[4]

c. This Court's resolution of the conflict is critically important to law enforcement efforts throughout the United States. The government has accordingly sought certiorari from the D.C. Circuit's decision in Maynard, supra, in which the respondent properly preserved a challenge to the introduction of evidence obtained from a GPS device attached to his vehicle by moving to

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[4] As petitioner notes (Pet. 12-13), appellate courts in Virginia, Wisconsin, and Maryland have also concluded that police officers do not need to obtain a warrant before using a GPS device to track the movements of a vehicle on public roads. See Foltz v. Commonwealth, 698 S.E.2d 281, 285-292 (Va. Ct. App. 2010), aff'd on other grounds, No. 0521-09-4, 2011 WL 1233563 (Va. Ct. App. Apr. 5, 2011) (en banc); State v. Sveum, 769 N.W.2d 53, 57-61 (Wis. Ct. App. 2009); Stone v. State, 941 A.2d 1238, 1249-1250 (Md. Ct. Spec. App. 2008). Petitioner also contends (Pet. 12) that the Supreme Court of Nevada has so held, but that case was decided under the Nevada Constitution. See Osburn v. State, 44 P.3d 523, 524-526 (Nev. 2002) (upholding attachment of electronic monitoring device under state constitution).

suppress the evidence on the grounds that "prolonged" electronic monitoring constituted a search. 615 F.3d at 549; see Pet. 23-27, United States v. Jones, No. 10-1259 (filed Apr. 15, 2011).

This case, in contrast to Jones, is a poor vehicle in which to resolve the conflict because petitioner did not properly preserve his claim. As a result, petitioner's claim would be reviewable, if at all, only for plain error under Federal Rule of Criminal Procedure 52(b). See United States v. Marcus, 130 S. Ct. 2159, 2164 (2010); United States v. Olano, 507 U.S. 725 (1993).

Petitioner's sole argument in his motion to suppress the evidence obtained from the electronic tracking devices attached to his Jeep was that the government's "installation of an electronic tracking device on the undercarriage" of his vehicle was an "unlawful search and seizure." 1:07-cr-30036-PA Docket entry No. 50, at 2 (D. Or. May 2, 2008), at 2 (emphasis added).[5] The district court denied petitioner's motion, holding that under the Ninth Circuit's decision in United States v. McIver, 186 F.3d 1119 (1999), the installation was not a search or seizure under the

[5] See also 1:07-cr-30036-PA Docket entry No. 50, at 3 (D. Or. May 2, 2008) ("Defendant contends the placement of the mobile electronic tracking device on the undercarriage of defendant's automobile was an invasion of an area for which there is a reasonable expectation of privacy."); id. at 4 ("It is defendant's position that installing a mobile electronic tracking device on a vehicle interferes with his possessory interests, including his right to exclude others from touching or altering mechanical parts of his vehicle without consent.").

Fourth Amendment. Pet. App. 19a-20a.[6] Petitioner claimed for the first time before the court of appeals that under Kyllo, the use of mobile tracking devices continuously to monitor the location of his Jeep violated his Fourth Amendment rights because the devices are "not generally used by the public." Pet. App. 8a; Pet. C.A. Br. 25-31. That argument appears nowhere in petitioner's motion to suppress, and petitioner's claim could therefore only be reviewed, if at all, for plain error under Rule 52(b).[7]

To establish plain error, a defendant must show that there was "an 'error' that is 'plain' and that 'affect[s] substantial

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[6] Unlike the issue of "prolonged" electronic monitoring of vehicles, there has been no disagreement in the courts of appeals after Knotts about whether the installation of an electronic monitoring device on a vehicle constitutes a Fourth Amendment search or seizure. See McIver, 186 F.3d at 1126-1127; Garcia, 474 F.3d at 997; Marquez, 605 F.3d at 610. Petitioner does not contend otherwise.

[7] Federal Rule of Criminal Procedure 12(b)(3)(C) provides that "a motion to suppress evidence" "must be raised before trial," and Rule 12(e) in turn states that a party who fails to raise "any Rule 12(b)(3) defense, objection, or request" within the time specified by the district court "waives" that defense, objection, or request (subject to relief for good cause shown). That waiver operates to bar appellate review of unpreserved suppression claims, even under Rule 52(b)'s plain error standard. See, e.g., United States v. Burke, 633 F.3d 984, 988 (10th Cir. 2011) ("Rule 12, and not Rule 52, applies to pretrial suppression motions and a suppression argument raised for the first time on appeal is waived (i.e., completely barred) absent a showing of good cause for why it was not raised before the trial court."), petition for cert. pending, No. 10-9519 (filed Mar. 9, 2011). Although the government did not press Rule 12 in the court of appeals, and the court of appeals did not rely on Rule 12 in its decision, Rule 12 nonetheless supplies an independent reason for this Court to deny review.

rights.'" Olano, 507 U.S. at 732. Even if a defendant makes such a showing, a reviewing court should correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Ibid.; United States v. Cotton, 535 U.S. 625, 632-633 (2002) (assuming an effect on substantial rights, but finding relief unwarranted under the fourth plain error prong).

Petitioner cannot satisfy the plain error standard. Because the courts of appeals are divided on the Fourth Amendment issue in this case, petitioner could not show that it was a clear or obvious error for the district court to admit evidence obtained from the electronic tracking devices. See, e.g., United States v. Williams, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error when there is no controlling case law and circuits are divided); United States v. Teague, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006). Moreover, petitioner could not demonstrate that the introduction of such evidence affected his substantial rights. Petitioner was not, as he suggests (Pet. 14-15), the subject of a "police practice[] used to collect information of an indiscriminate scope and with only a tenuous nexus to criminal behavior." Law enforcement agents reasonably suspected that petitioner was manufacturing marijuana and had him under physical surveillance months before they attached electronic tracking devices to his Jeep. Pet. App. 3a. Furthermore, the agents did not use the information they obtained from the tracking devices to establish

probable cause to search petitioner's trailer; rather, the agents seized 29 pounds of processed marijuana from petitioner's trailer after petitioner consented to a search. Id. at 4a. Given these facts, not only were petitioner's substantial rights unaffected by the introduction of evidence obtained from the tracking devices, but the district court's denial of petitioner's suppression motion also could not have seriously affected the fairness or integrity of the judicial proceedings. Puckett v. United States, 129 S. Ct. 1423, 1433 (2009) ("The fourth [plain error] prong is meant to be applied on a case-specific and fact-intensive basis.").

The court of appeals did not resolve the parties' dispute over the applicable standard of review. Pet. App. 8a n.1 (noting that the government urged applicability of the plain error standard, while petitioner claimed that "language in the government's response to his motion was broad enough to bring the argument to the court's attention"). But that issue presents a threshold question that does not merit this Court's attention. Accordingly, the Court should hold this petition pending resolution of the petition for certiorari filed in Jones and then dispose of it accordingly.

2. Petitioner further contends (Pet. 17-21) that the court of appeals erred in holding that DEA agents' entry into the "curtilage" of his home to place tracking devices on his Jeep was not a search within the meaning of the Fourth Amendment. The court

of appeals correctly rejected this argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

a. An individual's ability to "claim the protection of the Fourth Amendment depends * * * upon whether" he "has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978). This Court has long recognized that "searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586 (1980). Beyond the home, the Court has recognized that an expectation of privacy within the "curtilage" surrounding the home is also reasonable. United States v. Dunn, 480 U.S. 294, 300-301 (1987).

In Dunn, the Court explained that "the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself" and that the "central component of this inquiry" was "whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." 480 U.S. at 300 (internal quotation marks and citations omitted). The Court in Dunn did not, as petitioner suggests (Pet. 21-22), attach Fourth Amendment significance to curtilage per se, nor did the Court do so in Oliver v. United States, 466 U.S. 170 (1984). See id. at 180 n.11 (stating that it was unnecessary for

the Court to consider "the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself").

Thus, courts have consistently held that even if an area falls within the curtilage of a home, the resident may nevertheless fail to have a reasonable expectation of privacy in that area. See United States v. Titemore, 437 F.3d 251, 258 (2d Cir. 2006) ("Even if society is willing to recognize certain general areas as curtilage, that determination does not answer the two principal questions, objective and subjective, that must be resolved under the Fourth Amendment."); Knott v. Sullivan, 418 F.3d 561, 574 (6th Cir. 2005) ("The fact that a driveway is within the curtilage of a house is not determinative if its accessibility and visibility from a public highway rule out any reasonable expectation of privacy."); United States v. Shanks, 97 F.3d 977, 979-980 (7th Cir. 1996) ("[T]he mere intonation of curtilage does not end the inquiry."), cert. denied, 519 U.S. 1135 (1997); United States v. Ventling, 678 F.2d 63, 66 (8th Cir. 1982) ("The standard for determining when the search of an area surrounding a residence violates fourth amendment guarantees no longer depends on outmoded property concepts, but whether the defendant has a legitimate expectation of privacy in that area."); United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980) (Friendly, J.) ("Terming a particular area curtilage expresses a conclusion; it does not advance Fourth Amendment analysis."), cert. denied, 450 U.S. 917 (1981); United States v.

Magana, 512 F.2d 1169, 1170 (9th Cir.) ("The driveway where Magana was arrested was within the curtilage of the house Magana was using, but 'a reasonable expectation of privacy,' and not common-law property distinctions, now controls the scope of the Fourth Amendment."), cert. denied, 423 U.S. 826 (1975). Applying what petitioner calls a "curtilage plus" approach (Pet. 20-21), courts routinely conduct a reasonable-expectation-of-privacy analysis to determine whether the curtilage is entitled to the same Fourth Amendment protection as a person's home.

Consistent with these decisions, the court of appeals in this case appropriately conducted a fact-specific inquiry into whether petitioner had a reasonable expectation of privacy in his driveway, and it correctly determined that he did not. Pet. App. 6a-7a. As the court of appeals explained, any individual approaching the house "to deliver the newspaper or to visit someone" would have to pass through the driveway to get to petitioner's door, and the driveway had no gate, no "No Trespassing" signs, and no features to prevent someone standing in the street from seeing the entire driveway. Ibid. That factbound holding does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

b. Petitioner contends (Pet. 20-21) that, in contrast to the court of appeals' approach in this case of conducting a reasonable

expectation of privacy analysis to determine whether curtilage is entitled to Fourth Amendment protection, the Tenth Circuit treats the "bright-line question of whether an area is within the home's curtilage as dispositive." The cases petitioner cites do not support his assertion.

In Lundstrom v. Romero, 616 F.3d 1108 (2010), the Tenth Circuit reversed the district court's dismissal of plaintiff's claims under 42 U.S.C. 1983 and held that police officers were not entitled to qualified immunity for scaling a fence or opening a gate to gain access to the plaintiff's backyard. 616 F.3d at 1128. While the court stated that individuals "have a reasonable expectation of privacy in the curtilage of their homes," ibid., the court explained that the plaintiff's backyard not only directly abutted the rear of his house but, "was enclosed * * * , was used in a manner typical of an ordinary residential backyard, and was protected from observation" with a fence which neighbors could not peer over. Id. at 1128-1129. And in United States v. Cousins, 455 F.3d 1116 (10th Cir.), cert. denied, 549 U.S. 866 and 549 U.S. 1070 (2006), the court determined that a sideyard was not within the curtilage of the defendants' home because, inter alia, the area was accessed by an open walkway and was not enclosed. 455 F.3d 1122-1124. Thus, in both Lundstrom and Cousins, the Tenth Circuit, like all other courts of appeals, conducted a reasonable-expectation-of-privacy analysis to determine whether an area

adjacent to a home was entitled to Fourth Amendment protection.

The Tenth Circuit's approach and the approaches of other courts of appeals are, in practice, equivalent. Petitioner implicitly acknowledges as much (Pet. 21), noting that even the Tenth Circuit has held that a determination that an area is part of a home's curtilage does not necessarily mean that it will receive Fourth Amendment protection. See United States v. Long, 176 F.3d 1304, 1308 ("Whether the officers violated the Fourth Amendment does not depend solely on curtilage. Defendant must still show that he had a reasonable expectation of privacy.") (citation omitted), cert. denied, 528 U.S. 921 (1999). And even if there were any tension amongst Tenth Circuit decisions, a conflict among decisions of the same court of appeals does not warrant this Court's review. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

c. Finally, petitioner contends (Pet. 18-19) that the court of appeals' decision "is in tension with the reasoning" of cases from the Second, Fourth, and Seventh Circuits holding that law enforcement agents may enter a home's curtilage only to engage in legitimate activities like seeking a consensual "knock and talk" encounter with the residents. The cases petitioner cites (Pet. 17-20) demonstrate only that government agents may enter a private area for limited investigative purposes; the cases place no

limitations on the circumstances in which officers may enter an open area adjacent to a home in which the court has determined that the residents have no reasonable expectation of privacy.

In United States v. Hayes, 551 F.3d 138 (2d Cir. 2008), the court held that a drug-sniffing dog who entered the defendant's backyard and retrieved a bag of cocaine from the hedges "did not invade the curtilage of [the] home" because the access route to the hedges "was in full view of the street for its entire length," but that even if the dog had invaded the curtilage, a "transient trespass" into a private area would not implicate the Fourth Amendment. Id. at 147. Because the area the dog entered was exposed to public view, the court determined that the Fourth Amendment was not implicated. Ibid. And in United States v. French, 291 F.3d 945 (7th Cir. 2002), officers did enter the defendant's property with the legitimate purpose of asking questions about a probationer's whereabouts, and the court therefore had no occasion to hold that entry onto the property -- where "[t]here were neither gates, nor fences, nor barricades obstructing or otherwise preventing the public from entering upon the driveway from the public road" -- would have been a search if the officers had a different purpose. Id. at 948.

The Fourth Circuit's unpublished decision in Pena v. Porter, 316 Fed. Appx. 303 (2009), is also distinguishable. In Pena, police officers entered an area behind a trailer that was enclosed

by a "six-foot tall privacy fence" and "searched the three foot wide area between [the] trailer and the privacy fence." Id. at 306. The Fourth Circuit concluded that although police could have entered this private area if it was necessary to reach the front door, they could not simply enter the enclosed area to conduct a search. Id. at 313. The holding in Pena was based on the premise that the homeowner had a reasonable expectation of privacy in the "private, enclosed storage area abutting [his] trailer." Id. at 314-315. In this case, in contrast, the agents entered an open area adjacent to petitioner's trailer that had "no gate, no 'No Trespassing' signs, and no features to prevent someone standing in the street from seeing the entire driveway," and the court determined that petitioner had no reasonable expectation of privacy in that area. Pet. App. 6a.

Whether police have legitimately entered a private area is a fact-specific inquiry that is determined in each case using well-established legal principles. Petitioner has identified no legal issue on which the courts of appeals are in conflict, and this Court's review is therefore unwarranted.

CONCLUSION

As to the first question presented, the petition should be held pending the disposition of United States v. Jones, No. 10-1259 and then disposed of accordingly. As to the second question presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

LANNY A. BREUER
Assistant Attorney General

KEVIN R. GINGRAS
Attorney

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