Jones is Tied Up in Knotts:
A Commentary on United States v. Jones

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In a case that some are calling the most important Fourth Amendment case in recent years, on June 27, 2011, the Supreme Court granted certiorari to the Court of Appeals for the District of Columbia Circuit and agreed to hear *United States v. Jones*, 10-1259 (Ct. App. D.C., 2010), *sub nom*. *United States v Maynard*, 615 F.3d 544 (Ct. App. D.C. 2010).

The sole question before the Court is: Whether the warrantless use of a tracking device on petitioner's vehicle to monitor its movements on public streets violated the Fourth Amendment. *U.S. v. Jones*, Petition for Certiorari, at 3.

Jones involves an appeal by the government of a decision of the Court of Appeals for the District of Columbia Circuit that use by police of a GPS unit surreptitiously installed on the defendants vehicle without a warrant to track all of the defendant's movement for a month violated the defendant's reasonable expectation in the privacy of the totality of his movements over a protracted period and, therefore, violated his rights under the Fourth Amendment.

Interestingly, contrary to the belief of most commentators who foresee this case as a platform the Court will use to significantly update the jurisprudence of *Katz v. United States*, 389 U.S. 347 (1967) in light of evolving privacy issues raised by technological capabilities unimaginable to the *Katz* Court, this case might be more prosaically resolved by revisiting the Court's decision in *United States v. Knotts*, 460 U.S. 276 (1983). *Knotts* held, *inter alia*, that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements (460 U.S. 281); consequently, police monitoring of signals from a "beeper" installed on the defendant's vehicle without a warrant did not invade any legitimate expectation of privacy the defendant may have had, and thus was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. (460 U.S. 285).

According to the *Knotts* Court, a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy because he voluntarily conveys to anyone who wants to look the fact that he is traveling over particular roads in a particular direction, the locations of whatever stops he makes, and the location of his final destination when he exits public roads onto private property. (460 U.S. 281-282). Further, "A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." 460 U.S. 281 citing *Cardwell v. Lewis,* 417 U. S. 583, 417 U. S. 590 (1974) (plurality opinion). *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).[1]

The *Jones* case will give the Court an opportunity to revisit the premises of *Knotts* in the context of early 21st Century society. A thoughtful review should cause the Court to either entirely reject the the premises underlying its holding in *Knotts*, or to limit *Knotts* to its facts and curtail the breadth of the *Knotts* precedent.[2]

1 This is consistent with the fundamental principle in the seminal *Katz* case. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351, citations omitted.

2 The analysis of the decision of the Court of Appeals for the D.C. Circuit is entirely unsatisfactory. In finding that the use by police of a GPS tracking device on Jones vehicle was impermissible, the court below distinguished the *Knotts* decision because *Knotts* involved permissible use of evidence from an electronic tracking device on one trip, while Jones' vehicle was tracked by GPS for a month.

When *Knotts* was decided in 1983, factory window-tint was not commonly available on most automotive models; after-market window-tint was virtually unknown. Now, both factory and after-market window-tint are ubiquitous. Thus, while the premise of the *Knotts* Court that persons traveling in automobiles on public thoroughfares had no expectation of privacy because anyone along the route of travel could see and identify them may have been reasonable in 1983 – when both occupants and contents of vehicles generally were in plain view – the Court reviewing *Jones* under prevailing contemporary standards may reach a different conclusion.

Virtually all states have enacted laws limiting the permissible level of window-tint because many citizens seek a level of privacy the states deem unreasonable in light of concerns for the safety of law enforcement officers.[3] And, most of these state laws set permissible levels of window-tint so that the occupants and contents of vehicles are concealed from view at any distance, but can be seen in the immediate proximity of the vehicle (for instance, by a traffic officer in close proximity). Thus, state window-tint law balances citizens' conduct to maintain privacy while driving generally against state interests in viewing the occupants and contents of vehicles in specific cases – traffic stops – to protect the safety of law enforcement personnel.

Reviewing vehicle owners' manuals from the 1983 era, one finds quaint and dire warnings not to drive

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The court held that although the principle of *Knotts* - a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy because he voluntarily conveys to anyone who wants to look the fact that he is traveling over particular roads in a particular direction, the locations of whatever stops he makes, and the location of his final destination when he exits public roads onto private property. (460 U.S. 281-282) – is valid for a single trip (or perhaps a limited number of trips?), "we hold the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil." (U.S. v. Maynard, No. 08-3030, (Ct. App. D.C. 2010), slip op. at 26.)

The first problem is that the Constitutional rights of the defendant should not turn on the capabilities and motivations of third parties. The likelihood that, if necessary, FBI counterintelligence would attempt to observe all movements of a suspected foreign intelligence agent for a month is not "nil." Hopefully, the same is true of the Department of Homeland Security attempting to ascertain whether an individual is involved in a terrorist plot. State and federal investigators attempting to gather evidence in complex organized crime cases have been known to monitor "bugged" locations (with bugs authorized by warrant) for extensive periods.

Worse, the decision below makes the breathtaking assumption that, "(a) reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain —disconnected and anonymous." (citation omitted). Slip op. at 31. Putting aside, for the moment, government employees and their contractors in the intelligence community, there is no end to the number of executives of major corporations, corporate security consultants, private security personnel who protect celebrities and high-profile individuals, celebrities and high-profile individuals themselves etc., all of whom have been trained in operational security and, consequently, operate under no such assumption.

The opinion below then concludes, relying as it must on *Katz*, that Jones had a reasonable expectation of privacy in the totality of his movements in his vehicle over the course of a month. The difficulty, of course, is that the first question *Katz* posits (Did the individual's conduct show an actual (subjective) expectation of privacy?) requires an act – *conduct* – on the part of the individual asserting an impermissible invasion of privacy. Nothing in the record reflects any such conduct.

Jones is alleged to be a ringleader in an illegal drug distribution operation. It is likely his vehicle had tinted windows. He may have used pre-paid phone cards and pre-paid cell phones. Location can be tracked by triangulating signal data from cell phone towers. (See, Stevens, Gina, Alison M. Smith, and Jordan Segall. *Legal Standard for Disclosure of Cell-Site Information (CSI) and Geolocation Information*. Legal Memorandum to the Senate Intelligence Committee. Congressional Research Service, 29 June 2010. Print.)

Showing, if true, that Jones attempted to obscure his identity as driver or passenger in his vehicle using tinted glass, and that he used anonymous, pre-paid cell phones while traveling would go a long way toward showing that he engaged in conduct with a reasonable expectation that his movements would not be publicly disclosed. Finally, prudence suggests that anyone dealing with large amounts of cash – whether earned legally or illegally – would take reasonable security precautions, including varying times and routes of travel. If Jones took such precautions, this fact would further corroborate his privacy expectation claim.

3 State laws limiting window-tint have been enacted for the protection of law enforcement officers in traffic stops, arguably a legitimate concern. Such statutes are rarely, if ever, enforced against drivers who – recognizing the legitimate safety concerns of law enforcement officers – turn on the dome lights and roll down the windows when stopped so officers can see into the vehicle.

the vehicle with the doors locked lest first responders be impaired in reaching accident victims. Most current models automatically lock all of the doors after the vehicle has reached a certain speed. Moreover, in light of car-jacking and other crimes in urban areas, drivers are now advised to watch for surveillance, vary their routes, conceal valuable contents, and park vehicles (particularly expensive makes or those uniquely subject to theft or vandalism) where they cannot be seen.

As applied, the *Knotts* premise that anyone can see *a vehicle* along the route of travel is correct, if limited to any one place. But, a broad assumption that current drivers voluntarily convey to anyone (presumably, any one person) an entire route of travel and itinerary seems unsupportable. Further, the notion that the ability for anyone to see the *vehicle* includes the ability to identify *the vehicle's driver and occupant*s is out-of-date. Many citizens opt for legal (or illegal) window-tint to protect their identities or the identities of their loved ones and passengers while driving.

As to vehicular contents, *Knotts* accepted precedents noting that the primary purpose of motor vehicles is transportation, and not commonly as repositories for personal effects. *Knotts* at 281, citing cases. Again, this was a reasonable premise in 1983 when: (i) cellular technology was in its infancy, and "cell phones" were "car phones" permanently installed in the vehicle; (ii) GPS, let alone portable GPS, was not available; (iii) in-car entertainment was limited to permanently installed AM/FM radio and cassette tape; and (iv) rapid evolution of cellular and in-car entertainment was not forseen, making permanent installation reasonable. In contrast, citizens now often have a variety of small, technological "personal effects" they use while driving, including portable GPS units, portable rechargers for cell phones (that have now become, if anything, too small), portable DVD players to entertain passengers, and various items (such as low-power FM transmitters) to link portable devices (music players, cell phones) to the legacy devices (AM/FM radios) still installed in vehicles. And, rapid technological development now discourages permanent installation of many of these items. The upshot is that, contrary to the premise on which *Knotts* was based, vehicles have become repositories for personal effects of substantial value, another reason for the wide use of window-tint to maintain privacy and deter theft.

Thus, at least for many who use public thoroughfares, although anyone can see the vehicle passing a specific location at a particular date and time, and may see the vehicle make intermediate stops, many citizens have taken prudent measures to conceal the identity of the driver, the occupants and the vehicle's contents and ultimate destination.[4] The blanket assumptions underlying *Knotts* simply do not reflect contemporary reality or prevailing practice by many law-abiding citizens.

If, upon reconsideration, the premises underlying *Knotts* are undermined based on the broad societal changes discussed above, application of the seminal *Katz* decision is simplified (and many of its thorny problems avoided).

As Justice Harlan succinctly noted in his concurring opinion in *Katz,* that Court's decision was based on two questions: First, did the conduct of the individual show an actual (subjective) expectation of privacy? 389 U.S. 361. Second, was the individual's subjective expectation of privacy one that society will recognize as reasonable and justifiable? *Id.*

Unfortunately, in the *Jones* case, the decision below does not address the first question one way or the other.[5] It does, however, gratuitously grant Jones an expectation of privacy in the totality of his movements over

4 Witness the many state and Federal advisories for drivers on how to recognize whether your vehicle is being followed, recommendations in such cases not to continue to the ultimate destination, but instead to go to the nearest police station or safe, well-lighted, public place, etc.

5 See note 2.

an extended period.[6] And, instead of a straightforward Fourth Amendment analysis under *Knotts* and *Katz,* it sidesteps *Knotts* and raises, unnecessarily, the ugly spectre of government exploitation of technology to facilitate "dragnet" type enforcement practices, mass surveillance, protracted and detailed warrantless surveillance of individuals, etc.

Information and communication technology pose thorny issues in any purportedly free society, particularly one governed by a written constitution that specifically protects the rights of citizens from unreasonable searches and seizures.[7] Constitutional law at the intersection of technology and privacy is, at best, unsettled. The *Jones* case, however, is far from the optimal forum in which to address these issues.

A final, and somewhat extraneous, comment: The Fourth Amendment, prohibiting *unreasonable* searches and seizures[8] is problematic because it is subjective. Unlike the First Amendment, which speaks in objective, absolute, terms ("Congress shall make no law …), and where there are fairly bright lines governing permissible regulation, or (in very rare circumstances) prohibition, of expression, the subjectivity of the Fourth Amendment has led to a jurisprudential Tower of Babel built on a balance between government conduct justified by public welfare on one side, and the privacy interests of individuals on the other. Since amendment of the Fourth Amendment is neither conceivable nor, at this point, desirable, the privacy rights of U.S. citizens is difficult to delineate clearly, and this is very dangerous. As Camus wrote,

> "The welfare of the people … has always been the alibi of tyrants, and it provides the further advantage of giving the servants of tyrrany a good conscience. … The very ones who make use of such alibis know they are lies; they leave to their intellectuals on duty the chore of believing in them and of proving that religion, patriotism, and justice need for their survival the sacrifice of freedom."[9]

6 Id.

7 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution, Amendment IV.

8 *Cf.* U.S. Constitution, Amendment I, providing that, "Congress shall make no law …" abridging freedoms of speech, religion, or association. The First Amendment speaks in absolute, not relative terms.

9 Camus, Albert. "Homage to an Exile." 1955, in Camus, Albert. *Resistance, Rebellion, and Death.* Trans. Justin O'Brien. New York: Knopf, 1961. Print.