MEMORANDUM

TO: All Federal Prosecutors

FROM: Patty Merkamp Stemler /s PMS
Chief, Criminal Appellate Section


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In United States v. Jones, 132 S. Ct. 945 (2012), the Supreme Court affirmed the suppression of location data generated by a GPS tracking device surreptitiously affixed to a car without court authorization and monitored continuously over a 28-day period.
I. THE DECISION

a. In *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court held “that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'” within the meaning of the Fourth Amendment. *Id.* at 949 (footnote omitted). Because the government had installed a GPS tracking device on the undercarriage of Jones's vehicle without a valid warrant and had then monitored the vehicle's location by means of satellite signals over the course of 28 days, the Court affirmed the suppression of the GPS-derived locational data. The Court did not consider whether reasonable suspicion could have supported the search, because the government had not raised that argument in the court of appeals. *Id.* at 954.

Although all nine Justices agreed that the evidence should be suppressed, the Court relied on a common-law trespass theory, while the concurring Justices relied on a theory based on interference with a reasonable expectation of privacy. The opinion for the Court, written by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, held that a Fourth Amendment search takes place when, “as here, the Government obtains information by physically intruding on a constitutionally protected area **.” *Jones*, 132 S. Ct. at 951 n.3. The Court did not analyze whether a search had occurred under the reasonable-expectation-of-privacy test established in *Katz v. United States*, 389 U.S. 347 (1967), finding instead that “a classic trespassory search” had occurred. *Jones*, 132 S. Ct. at 954. Prior to *Katz*, the Court explained, its “Fourth Amendment jurisprudence was tied to common-law trespass **.” *Id.* at 949. The “*Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.” *Id.* at 952 (emphasis in original). *Katz* thus “did not erode the principle 'that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'” *Id.* at 951 (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)). “By attaching the [GPS] device to the [vehicle],” the Court concluded, “officers encroached on a protected area.” *Jones*, 132 S. Ct. at 952. The vehicle is an “effect,” and “[t]he Fourth Amendment protects against trespassory searches ** with regard to those items (persons, houses, papers, and effects) that it enumerates.” *Id.* at 953 & n.8.

criticized the majority for resurrecting a trespass-based Fourth Amendment standard rather than applying the reasonable-expectation-of-privacy test. *Jones*, 132 S. Ct. at 957-962 (Alito, J., concurring in the judgment). In his view, "Katz ** finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation." *Jones*, 132 S. Ct. at 959. Justice Alito would thus ask "whether the [warrantless] use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated." *Id.* at 964.

Under Justice Alito's approach, "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Jones*, 132 S. Ct. at 964. (citing *Knotts*, 460 U.S. at 281-282). In contrast, "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Jones*, 132 S. Ct. at 964. Without "identify[ing] with precision the point at which the tracking of [Jones's] vehicle became a search," Justice Alito opined that "the line was surely crossed before the 4-week mark." *Ibid.* He thus concluded that "the lengthy monitoring that occurred in this case constituted a [warrantless] search under the Fourth Amendment" that required the suppression of the evidence obtained. *Ibid.*

c. Justice Sotomayor, who fully joined Justice Scalia's opinion for the Court, wrote an additional concurring opinion in which she also agreed with aspects of Justice Alito's opinion. *Jones*, 132 S. Ct. at 954-957 (Sotomayor, J., concurring). In her view, "the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs." *Id.* at 955. Thus, she emphasized that "Katz's reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it." *Ibid.*

At the same time, however, Justice Sotomayor argued that even in the absence of a physical intrusion, the government's use of invasive "nontrespassory surveillance techniques" might violate "a reasonable societal expectation of privacy **." *Jones*, 132 S. Ct. at 955, 956. "Under that rubric," she believed, "at the very least, longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Id.* at 955 (quoting Justice Alito's concurring opinion). She also suggested that unique attributes of "even short-term monitoring" through GPS would be relevant to the *Katz* inquiry: the low cost of GPS, its ability to acquire a comprehensive and storable record of a
person's movements, and its ability to "reveal private aspects of identity." Id. at 956.

Justice Sotomayor concluded by expressing a view that would extend the Fourth Amendment's protections beyond what either the Court's opinion or Justice Alito's concurrence envisioned: "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." Jones, 132 S. Ct. at 957. She "would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." Id. (citing Smith v. Maryland, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).