

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellant)
)
 v.) No. 30, 2011
)
 MICHAEL D. HOLDEN,)
)
 Defendant-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF DELAWARE
AS AMICUS CURIAE IN SUPPORT OF APPELLEE
URGING THAT THE DECISION OF THE LOWER COURT BE AFFIRMED

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STATEMENT OF INTEREST

Proposed Amicus Curiae, the American Civil Liberties Union Foundation of Delaware ("ACLU of Delaware"), submits this brief in support of appellee, defendant below, to urge affirmance of the Superior Court decision. The issue presented is whether the Fourth Amendment to the United States Constitution and Art. I, § 6 of the Delaware Constitution prohibit police who do not obtain a warrant from installing and using a remotely-monitored Global Positioning System ("GPS") location-tracking device to track the location and movement of an individual's automobile. The prospect of remote GPS tracking without traditional judicial supervision raises profound questions about Delawareans' right to be free from unreasonable searches and seizures in an ever more technologically capable society. This case is especially important because of its impact on the privacy rights of all Delawareans, including the vast majority who will never be charged with a crime, and its potential precedential value, the United States Supreme Court having never addressed the issue.

The ACLU of Delaware has worked since 1961 through legal advocacy, engagement in the legislative process and public education to support the right of privacy. The ACLU of Delaware is a state affiliate of the American Civil Liberties Union ("ACLU"), a nonprofit, nonpartisan, 400,000 member organization founded in 1920 to protect and advance civil liberties throughout the United States. State ACLU affiliates have previously submitted amicus briefs to four appellate courts addressing the issue addressed by this brief. The motion to file this brief has been approved by ACLU-DE's Legal Review Panel.

ARGUMENT

THE FOURTH AMENDMENT REQUIRES A WARRANT FOR GPS TRACKING

A. The Fourth Amendment's Protection Against Unreasonable Searches and Seizures Prohibits Warrantless GPS Monitoring

1. Introduction

The Fourth Amendment protects all persons, regardless of their location, from government searches, absent exigent circumstances, unless a court has issued a warrant upon proof of probable cause. *Groh v. Ramirez*, 540 U.S. 551, 559 (2004); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."). A search occurs for Fourth Amendment purposes whenever governmental action violates an individual's subjective expectation of privacy that society recognizes as reasonable. *United States v. Knotts*, 460 U.S. 276, 280-81 (1983). This principle prohibits electronic as well as physical intrusions. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (citing *Silverman v. United States*, 365 U.S. 505 (1961)). A violation of this reasonable expectation of privacy "is, as the Court has long held, presumptively unreasonable in the absence of a search warrant." *See id.* at 361.

Knotts held that police were not required to obtain a warrant in order to use technology merely "augmenting the sensory faculties bestowed upon them at birth" to actively follow a vehicle. 460 U.S. at 282. Responding to the argument that if it approved the warrantless use of a beeper for that purpose "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision," *id.* at 283, the Court stated that "if such dragnet-

type law enforcement practices as respondent envisions should eventually occur, there will be time enough then" to address them. *Id.* at 284. That time has arrived in Delaware, with police use of GPS tracking.

As the court below correctly recognized, and as is demonstrated *infra* at 4 - 7, "society reasonably expects to be free from constant police scrutiny," and law enforcement use of prolonged GPS tracking "without adequate judicial supervision infringes upon th[at] reasonable expectation of privacy." *State v. Holden*, 2010 WL 5140744, *7-8 (Del. Super. Ct. Dec. 14, 2010). For this reason, in addition to violating Art. I, § 6 of the Delaware Constitution, an issue *amicus curiae* is not addressing because that is the primary focus of appellee's brief, warrantless GPS monitoring violates the Fourth Amendment of the United States Constitution.

2. GPS Monitoring and the Public's Reasonable Expectation of Privacy

The power, ease of use and low manpower cost of GPS monitoring is extraordinary. In *Knotts*, a beeper was used to facilitate visual surveillance during a single trip. *Knotts*, 460 U.S. at 278-79. GPS is not so limited:

GPS is a vastly different and exponentially more sophisticated and powerful technology that is easily and cheaply deployed and has virtually unlimited and remarkably precise tracking capability. With the addition of new GPS satellites, the technology is rapidly improving so that any person or object, such as a car, may be tracked with uncanny accuracy to virtually any interior or exterior location, at any time and regardless of atmospheric conditions. Constant, relentless tracking of anything is now not merely possible but entirely practicable, indeed much more practicable than the surveillance conducted in *Knotts*. GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of

the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or "seeing" by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp.

People v. Weaver, 909 N.E.2d 1195, 1199 (N.Y. 2009).

The expanding use of sophisticated electronics has not produced "a corresponding societal expectation that government authorities will use such devices to track private citizens" *Commonwealth v. Connolly*, 913 N.E.2d 356, 369 (Mass. 2009). As the New York Court of Appeals explained in commenting on technology's movement of private activity into public areas, "[i]t is fair to say, and we think consistent with prevalent social views, that this change in venue has not been accompanied by any dramatic diminution in the socially reasonable expectation that our communications and transactions will remain to a large extent private." *Weaver*, 909 N.E.2d at 1200.

Weaver rejected the view that when we drive or ride in a vehicle "our expectations of privacy are so utterly diminished that we effectively consent to the unsupervised disclosure to law enforcement authorities of all that GPS technology can and will reveal." *Id.* The state urges this Court to ignore *Weaver*, *Connolly*, and the opinions of the Supreme Courts of Washington and Oregon, which also recognize that a reasonable expectation of privacy is invaded by GPS monitoring, *State v. Jackson*, 76 P.3d 217, 224 (Wash. 2003) and *State v. Campbell*, 759 P.2d 1040, 1048-49 (Or. 1988), because they "use completely incommensurable legal frameworks," *i.e.*, different state constitutions. Opening Brief ("Op. Br.") at 38. But that takes nothing away from the truth of their observations about societal

expectations and beliefs. Regardless of which constitution applies, *Weaver's* recognition that "where there was no voluntary utilization of the tracking technology, and the technology was surreptitiously installed, there exists no basis to find an expectation of privacy so diminished as to render constitutional concerns de minimis" rings true. *Weaver*, 909 N.E.2d at 1200.

The expectation that police may not make open ended warrantless use of GPS technology to keep track of all our movements by automobile is one society sees as reasonable because of what the converse would mean. The risk from the use of GPS technology at the unsupervised discretion of agents of the state "engaged in the often competitive enterprise of ferreting out crime", is patent. *Johnson v. United States*, 333 U.S. 10, 14 (1948). "[I]f no warrant is required, any individual could be tracked indefinitely without suspicion of any crime," *Connolly*, 913 N.E.2d at 369, citing, *Weaver*, 909 N.E.2d at 1199-1200 and *Jackson*, 76 P.3d at 224. And, as the opinion below recognized, a vast amount of potentially embarrassing personal information may be obtained on any citizen at the whim of any police officer if warrantless GPS monitoring is permitted:

The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possible limited only by the need to change the transmitting unit's batteries. Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue, or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and

quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations-political, religious, amicable and amorous, to name a few-and of the pattern of our professional and advocational pursuits.

Holden, 2010 WL 5140744 at *5 (citing Weaver, 909 N.E.2d at 1199).

3. Application of the Fourth Amendment

Permitting police to obtain such information whenever they see fit would be a rejection of settled authority. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Knotts*, 460 U.S. at 282 (citing *Johnson*, 333 U.S. at 14).

There should be no departure from that rule in the context of GPS monitoring. In the words of one commentator:

[T]he authors of the Bill of Rights had known oppressive government. . . . they meant to erect every safeguard against it. . . . they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit. GPS-enabled technology, when used with wireless transmitters and monitored by the police, fundamentally alters this expectation of privacy in ways that are not reasonable under our constitutional system. The Fourth Amendment mounts a defense against such an erosion of a free society. And for this reason, the use of GPS-enhanced technology cannot be countenanced without judicial oversight.

Renee McDonald Hutchins, *Tied Up In Knotts? GPS Technology and The Fourth Amendment*, 55 UCLA L. REV. 409, 459 (2007) (citations and internal quotation marks omitted).

The state argues that a rule requiring a warrant for prolonged GPS monitoring is not workable because the police will not know beforehand which cases will involve monitoring that becomes prolonged.

Op. Br. at 29. The solution for that is readily apparent. They can – and should – always seek a warrant before employing this technology. If there is probable cause justifying GPS monitoring, the warrant will be issued. The warrant requirement will protect the vast majority of Delawareans who should never be subjected to governmental use of this intrusive technology, while enabling law enforcement personnel to do their job. That this will require the prosecution to prepare the necessary documents for submission to the court is constitutionally insignificant. In the words of this Court: "If forced to choose between convenience to the prosecutor and a deprivation of constitutional guarantees to the citizen, we in fact have no choice." *Dorsey v. State*, 761 A.2d 807, 818 (Del. 2000) (citing *Rickards v. State*, 77 A.2d 199, 205 (Del. 1950)).

The issue presented by this appeal is much greater than whether Mr. Holden must face trial. See *Elkins v. United States*, 364 U.S. 206, 210 (1940) ("Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.") (quoting *Brinegar v. United States*, 338 U.S. 160, 181 (1969) (dissenting opinion)). "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks v. United States*, 232 U.S. 383, 393 (1914). Affirming the Superior Court's decision will protect all Delawareans from inappropriate, intrusive searches, while leaving

the police free to use a powerful search tool when there is probable cause. Application of longstanding principles of constitutional law to this new technology, especially in light of the high value Delaware has traditionally place on privacy,¹ mandates recognition of the expectation that we may not be subjected to the type of monitoring described by the court below unless the court issues a warrant upon a showing of probable cause.

B. The State Has Not Shown That Traditional Principles Should Be Rejected In This Case

The state argues that GPS monitoring is not a search because the target's car is monitored while on the public roads where it could be seen and followed by a police officer. Op. Br. at 14-16, 18-19. But the reasonable expectation of privacy is not lost when we enter our cars. *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979) ("Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed."); *Arizona v. Gant*, 556 U.S. --, 129 S. Ct. 1710, 1720 (2009) ("Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home . . . the former interest is nevertheless important and

¹ Delaware residents have a strong expectation that their privacy will be respected absent a showing of probable cause entitling the police to a warrant. See, e.g., *Jones v. State*, 745 A.2d 856, 866 (Del. 1999) (recognizing Delaware's "commitment to protecting the privacy of its citizens"); *Dorsey*, 761 A.2d at 820 (rejecting federal exception for good faith reliance by the police on a search warrant later held to be invalid for lack of probable cause); cases cited by the court below at 2010 WL 5140744, *3-4, and by appellee at page 18-19 of his answering brief.

deserving of constitutional protection.").

To support its argument, the state cites *Knotts*, 460 U.S. at 281 (" [a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. "), Op. Br. at 15-16, and several federal decisions. *Id.* at 14, n. 38. Given its explicit refusal to decide whether a warrant would be required for twenty-four surveillance of public movement until "such dragnet-type law enforcement practices" become possible, *Knotts*, 460 U.S. at 284, *Knotts* provides no support, and the Court of Appeals cases are not well reasoned, see *infra* at 11 - 14.

The expectation that residents of Delaware will not lose their privacy rights to warrantless GPS monitoring is especially strong in light of the General Assembly's amendment of 11 Del. C. §1335(a)(8), which makes it a crime to install an electronic or mechanical location tracking device in or on a motor vehicle without the consent of the registered owner, lessor or lessee of said vehicle. It is a crime even when done by a police officer, unless the officer's use of the device is "lawful." *Id.* The statute is significant because it shows the General Assembly was sufficiently concerned about the threat to privacy from GPS monitoring to make GPS monitoring a crime even when done by a police officer, unless the use was lawful. The legislation did not give police discretion to use GPS monitoring whenever they wanted. Instead, it included the lawfulness requirement, leaving it to this Court to decide when the state and federal constitutions require a warrant for the use of GPS tracking in a police investigation. Thus, as the Separation of Powers Doctrine requires,

it is this Court that must decide what the Constitution means and when a warrant is required for a search or seizure. See *Evans v. State*, 872 A.2d 539, 550 (Del. 2005) ("It is emphatically the province and judgment of the judicial department to say what the law is.") (quoting *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 177).

The state's argument that its warrantless use of a GPS was "akin to an officer's use of binoculars or a flashlight to augment his or her senses" and should be treated like following a car on a public street, for which a warrant would not be required, Op. Br. at 10 (internal quotation marks and citations omitted), ignores the extensive factual differences between those activities and GPS monitoring. See *Jackson*, 76 P.3d at 223 (rejecting argument "that use of the GPS devices to monitor [target's] travels merely equates to following him on public roads where he has voluntarily exposed himself to public view"). *Jackson* recognized that "unlike binoculars or a flashlight, the GPS device does not merely augment the officers' senses, but rather provides a technological substitute for traditional visual tracking." *Id.* It reached that conclusion because of facts equally present here: police using GPS need not and do not follow the target vehicle for most of the surveillance period, (2) GPS tracking does not depend on whether police could have maintained visual contact over the tracking period -- the device had been in place for two and one-half weeks and it was unlikely that police could have successfully maintained uninterrupted 24-hour surveillance for that duration by following the target, and (3) the GPS equipment provides a record of every place the vehicle has traveled, something sense enhancement

devices like binoculars and flashlights cannot and do not do. *Id.*

The state points to a handful of federal circuit court cases addressing GPS tracking, Op. Br. at 13 n.30, but none of them bind this Court and all are either distinguishable or fail to appreciate the invasive nature of GPS tracking. All address the applicability of the federal Fourth Amendment, an issue this Court need not reach if it concludes that the protections of Article 1, § 6 of the Delaware Constitution require the state to obtain a warrant and demonstrate probable cause. Regardless, if this Court reaches the Fourth Amendment issue, none of them bind this Court, which is free to conduct an independent evaluation of whether the Fourth Amendment countenances unsupervised use of GPS tracking by the police.

While both the Seventh and Ninth Circuits have held that attaching a GPS device to a car and tracking it was not a search, see *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010) (petition for cert. pending) and *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), the D.C. Circuit correctly pointed out that the defendants in those cases did not even argue that *Knotts* does not apply to prolonged surveillance, depriving those circuits of the opportunity to consider and rule on the basis of that argument. *United States v. Maynard*, 615 F.3d 544, 557 (D.C. Cir. 2010) (en banc review denied, petition for certiorari pending). More recently, the Seventh Circuit, in a highly fractured opinion in which all three judges wrote separately, suggested that a GPS tracking case involving prolonged surveillance could lead it to adopt the reasoning in *Maynard* in a situation involving prolonged surveillance. *United States v.*

Cuevas-Perez, 2011 WL 1585072, *2 (7th Cir. Apr. 28, 2011) ("We believe that the present case is not like *Maynard*, and accordingly, we believe that the analysis of that case does not apply here."). In *Garcia*, the defendant was tracked for 60 hours, *id.*, far less than the tracking at issue here.

More significantly, the five judges who dissented from denial of *en banc* review in *Pineda-Moreno* had the better of the argument, because they recognized that *Knotts* "involved very different technology" and that the more invasive GPS tracking rises to the level of a search:

The modern devices used in *Pineda-Moreno's* case can record the car's movements without human intervention—quietly, invisibly, with uncanny precision. A small law enforcement team can deploy a dozen, a hundred, a thousand such devices and keep track of their various movements by computer, with far less effort than was previously needed to follow a single vehicle. The devices create a permanent electronic record that can be compared, contrasted and coordinated to deduce all manner of private information about individuals. By holding that this kind of surveillance doesn't impair an individual's reasonable expectation of privacy, the panel hands the government the power to track the movements of every one of us, every day of our lives.

United States v. Pineda-Moreno, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting). The dissenting judge in *Cuevas-Perez* made much the same point, writing that "[t]his case presents a critically important question about the government's ability constantly to monitor a person's movements, on and off the public streets, for an open-ended period of time. The technological devices available for such monitoring have rapidly attained a degree of accuracy that would have been unimaginable to an earlier generation. They make the system that George Orwell depicted in his famous novel, *1984*, seem clumsy and

easily avoidable by comparison." *Cuevas-Perez*, 2011 WL 1585072 at *13 (Wood, J., dissenting).²

Maynard presents a more reasoned analysis of Fourth Amendment principles to prolonged GPS surveillance. In *Maynard*, law enforcement agents attached a GPS device to a car and recorded the defendant's movements for 28 days. *Maynard*, 615 F.3d at 558. The D.C. Circuit found that *Knotts* was not applicable because the Supreme Court had "distinguished between the limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case." *Id.* at 556. It then found that the defendant had a reasonable expectation of privacy in the totality of his movements, for two reasons:

First, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed *constructively* even though each individual movement is exposed, because that whole reveals more—sometimes a great deal more—than does the sum of its parts.

Id. at 558 (emphasis in original). The court continued on to note the extremely invasive nature of prolonged GPS surveillance:

² The Eighth Circuit has also addressed GPS tracking, in *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010). In an unusual decision, it found that the defendant lacked standing to challenge the use of the GPS device but addressed the merits anyway, writing in a brief passage 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. This Court need not linger long over this decision, which offers little in the way of analysis to support its conclusion.

Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.

Id. at 562. *Amicus* believes that GPS surveillance is sufficiently invasive that the government needs a warrant and probable cause even where the duration of such surveillance is short. However, even if this Court is not prepared to recognize that argument, it can join the D.C. Circuit in recognizing that prolonged surveillance of the sort that took place here does amount to a Fourth Amendment search.

The state argues there was no prolonged monitoring because the "monitoring that led to the evidence at issue spanned a few hours." *Op. Br.* at 9. That focuses on how the device led to the evidence that was suppressed, and ignores the privacy concern at the heart of this case. The GPS was installed on February 5, 2010 and was still sending information to the police computer 19 days later, when the information was used in the investigation. It was installed to monitor Holden's activities and transmitted the location information to a computer monitoring device that receives and stores the information. (A9 -10) It may have taken nearly three weeks before the GPS produced

potentially incriminating facts, but appellee's privacy rights were disregarded for the entire period. The argument that the only period to be considered in evaluating a violation of an individual's expectation of privacy is the time when the government is receiving evidence that leads to an arrest is curious, at the very least. By that reasoning, one who never does anything that may lead to an arrest can never have his privacy invaded, no matter what information is collected on his personal affairs through GPS monitoring.

CONCLUSION

For the reasons stated herein, *Amicus Curiae* urges this Court to affirm the decision of the Superior Court on the ground that the GPS monitoring of appellee violated the Fourth Amendment or Art.I, § 6 of the Delaware Constitution.

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CERTIFICATE OF SERVICE

I, Beth Moskow-Schnoll, counsel for Proposed *Amicus Curiae*, do hereby certify that, on this 20th day of May, 2011, I caused the Brief for the American Civil Liberties Union Foundation of Delaware as *Amicus Curiae* in Support of Appellee Urging that the Decision of the Lower Court be Affirmed to be electronically filed and served upon the following persons, pursuant to Supreme Court Rule 10.1:

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