FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JUAN PINEDA-MORENO, *Defendant-Appellant.*	No. 08-30385 D.C. No. 1:07-CR-30036-PA-1 OPINION

On Remand from the United States Supreme Court

Argued and Submitted
May 31, 2012—Portland, Oregon

Filed August 6, 2012

Before: Diarmuid F. O'Scannlain and N. Randy Smith, Circuit Judges, and Charles R. Wolle, District Judge.*

Opinion by Judge O'Scannlain

*The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa, sitting by designation.

COUNSEL

Harrison Latto, Portland, Oregon, argued the cause and filed the supplemental brief for the defendant-appellant.

Kelly Zusman, Appellate Chief, District of Oregon, Eugene, Oregon, argued the cause and filed the supplemental brief for the plaintiff-appellee. With her on the brief were S. Amanda Marshall, United States Attorney, District of Oregon, Eugene, Oregon, and Amy E. Potter, Assistant United States Attorney, Eugene, Oregon.

OPINION

O'SCANNLAIN, Circuit Judge:

In this matter which arose prior to the Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012), we must decide whether to apply the exclusionary rule where law enforcement agents attached mobile tracking devices to the

underside of a defendant's car and used those devices to track the car's movements.

I

In 2007 the Drug Enforcement Administration ("DEA") came to suspect that Juan Pineda-Moreno was growing marijuana in the back country of southern Oregon. That suspicion arose on May 28, when a DEA agent saw Pineda-Moreno and some other men pay cash for a large amount of a fertilizer favored by local marijuana growers. The men loaded the fertilizer into a Jeep Grand Cherokee that belonged to Pineda-Moreno.

The DEA began to investigate the men and to monitor the travels they made in Pineda-Moreno's Jeep (which had California license plates) and in a second Jeep with Oregon license plates. The DEA's surveillance disclosed that the men bought large quantities of food in the first half of June, that they bought deer repellent and a portable hand sprayer that same month, and that they visited an irrigation supply store in late June. The DEA eventually tailed the men to a single-wide mobile home in Phoenix, Oregon. The agents observed that the mobile home did not appear to have a deer problem or an irrigation system. That information supported the agents' suspicion that the men were involved in a remote grow operation: Irrigation equipment would facilitate such an operation, as would a spray designed to keep deer away from crops. The large food buys were also consistent with the needs of a remote operation. The home was, moreover, located in a mobile home park that, according to the DEA, was known for drug activity.

Suspicion mounted when the agents tailed the Oregon-plated Jeep on June 29. During that trip, the Jeep began traveling "in a very strange manner" as the driver seemed to be looking around for law enforcement. At one point, a man in

the Jeep seemed to write down the license plate numbers of some of the surveillance vehicles.

Until the end of June, the DEA had tracked the suspects' movements through visual surveillance and witness reports. That changed in July. On seven occasions from then until September, the agents attached mobile tracking devices to the underside of Pineda-Moreno's Jeep. On four of those occasions, the Jeep was on the public street in front of Pineda-Moreno's mobile home; once it was in a public parking lot; and twice it was on Pineda-Moreno's driveway in front of the carport. The driveway—which was a few feet from the south side of Pineda-Moreno's home—had no fence, gate, or "No Trespassing" signs on or near it.

Agents used the devices to monitor the movements of Pineda-Moreno's Jeep. The devices allowed the agents to pinpoint the Jeep's location using cellular towers or satellites; one of the devices also logged data that could later be downloaded to detail where the Jeep had traveled. By monitoring Pineda-Moreno's Jeep the agents learned that it traveled to two suspected marijuana grow sites on July 6, August 14, August 16, and September 12. The devices used during those grow-site visits had been attached to the Jeep when it was either on a public street or in a public parking lot.

Based on the information from the tracking devices and from their earlier surveillance, the DEA and other law enforcement agents stopped Pineda-Moreno's Jeep on September 12. The three men inside were taken into custody for immigration violations. Pineda-Moreno then consented to a search of his mobile home. That search uncovered two large garbage bags that contained marijuana.

II

In November 2007 Pineda-Moreno was indicted in the District of Oregon for conspiring to manufacture marijuana and

for manufacturing marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(vii), and 846. He moved to suppress the evidence derived from using the mobile tracking devices (which had helped to establish cause for the September 12 stop and led to Pineda-Moreno consenting to a search of his home). He argued that the agents violated the Fourth Amendment's prohibition against "unreasonable searches and seizures" by attaching the devices to his car and by trespassing on his driveway to do so, all without a warrant. The district court denied the motion.

Pineda-Moreno then pleaded guilty to the conspiracy charge, but reserved the right to appeal the denial of his motion to suppress. The district court accepted the plea, dismissed the manufacturing count of the indictment, and sentenced Pineda-Moreno to 51 months' imprisonment and five years' supervised release.

We affirmed the denial of Pineda-Moreno's motion to suppress, concluding that the installation and use of the tracking devices was not a Fourth Amendment search. 591 F.3d 1212, 1214-17 (9th Cir. 2010). Pineda-Moreno thereafter filed a petition for certiorari in the Supreme Court of the United States. *See* S. Ct. No. 10-7515.

Subsequent to our decision, the U.S. Supreme Court decided *Davis v. United States*, 131 S. Ct. 2419 (2011), and *United States v. Jones*, 132 S. Ct. 945 (2012). *Davis* holds that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 131 S. Ct. at 2423-24. *Jones* holds that the government's installation of a Global Positioning System (GPS) tracking device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search" under the Fourth Amendment. 132 S. Ct. at 949.

After issuing the latter decision, the Supreme Court granted Pineda-Moreno's certiorari petition, vacated our judgment in

the case, and remanded to our court so that we could consider it further in light of *Jones*. 132 S. Ct. 1533 (2012).

III

On remand Pineda-Moreno once again asks us to suppress the evidence derived from the DEA's mobile tracking devices. Invoking *Davis*, the United States contends that even if its agents' tracking-device conduct is unconstitutional under *Jones*, suppression is unwarranted because the agents acted in objectively reasonable reliance on binding precedent when they attached and used the tracking devices.

[1] *Jones* has made clear that the agents conducted Fourth Amendment searches when they attached tracking devices to Pineda-Moreno's Jeep and used the devices to monitor the Jeep's movements. Indeed, for purposes of this remand we will assume, without deciding, that those warrantless searches would be "unreasonable" under the Fourth Amendment after *Jones*.

But *Jones* had not been decided when those searches occurred. And when the agents attached and used the mobile tracking devices that yielded the critical evidence, they did so in objectively reasonable reliance on then-binding precedent. In 2007, circuit precedent held that placing an electronic tracking device on the undercarriage of a car was neither a search nor a seizure under the Fourth Amendment. *United States v. McIver*, 186 F.3d 1119, 1126-27 (9th Cir. 1999). Circuit law also held that the government does not violate the Fourth Amendment when it uses an electronic tracking device to monitor the movements of a car along public roads. *United States v. Hufford*, 539 F.2d 32, 34 (9th Cir. 1976); *see United States v. Miroyan*, 577 F.2d 489, 492 (9th Cir. 1978) (stating that "the monitorial use of [an electronic] tracking device cannot constitute a search" under the Fourth Amendment) (emphasis omitted).

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Our circuit precedent may also have permitted the agents to walk onto Pineda-Moreno's driveway to attach the devices to his Jeep. As of 2007 we had held that, "to establish a reasonable expectation of privacy in [one's] driveway"—and thus to obtain Fourth Amendment protection for it—one "must support that expectation by detailing the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it." *Maisano v. Welcher*, 940 F.2d 499, 503 (9th Cir. 1991); *see also United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975) ("A driveway is only a semiprivate area."). Pineda-Moreno's driveway was visible from the street, had no fence or gate, and did not have "No Trespassing" signs on or near it.

But we need not resolve whether the agents were authorized in 2007 to walk onto Pineda-Moreno's driveway because, even without the evidence obtained from the driveway-attached tracking devices, the government had amassed enough other evidence, in good faith reliance on binding precedent, to justify the September 12 stop of Pineda-Moreno's Jeep. The tracking-device attachments made in public areas showed four trips to suspected grow sites. That information supplemented the evidence obtained before the devices were used: the fertilizer buy, the purchase of deer spray and a hand sprayer, the visit to the irrigation supply store, the evasive driving, the large food buys, and the observations that the mobile home had no irrigation system or deer problems. The driveway attachments did disclose that the Jeep visited a Wal-Mart and a Home Depot on August 30, but that information was cumulative of other evidence that had been obtained in good faith.

[2] In short, the agents' conduct in attaching the tracking devices in public areas and monitoring them was authorized by then-binding circuit precedent. Those attachments yielded the critical information that justified stopping Pineda-Moreno. Whatever the effect of *Jones*, then, the critical evidence here

is not subject to the exclusionary rule. *See Davis*, 131 S. Ct. at 2423-24.[1]

IV

[3] We recognize that *Jones* at least partially overrules *McIver*, *Hufford*, and *Miroyan*, and may also affect the vitality of *Maisano* and *Magana*. We can address the effect of *Jones* more fully in future cases. For today, it is enough to conclude that suppression is not warranted here because the agents objectively relied on then-existing binding precedent when they approached Pineda-Moreno's Jeep in public areas, attached tracking devices to it, and used those devices to monitor the Jeep's movements.

AFFIRMED.

[1]In light of our conclusion, we deny Pineda-Moreno's pending Motion for Leave to Submit Supplemental Briefs.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

[ ] v. [ ] 9th Cir. No. [ ]

The Clerk is requested to tax the following costs against: [ ]

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
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* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

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Form 10. Bill of Costs - *Continued*

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("s/" plus attorney's name if submitted electronically)

Date ______

Name of Counsel: ______

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Date ______ Costs are taxed in the amount of $ ______

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By: ______ , Deputy Clerk