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Is Big Brother Watching You? United States v. Pineda-Moreno and the Ninth Circuit's Dismantling of the Fourth Amendment's Protections

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Is Big Brother Watching You? *United States v. Pineda-Moreno* and the Ninth Circuit's Dismantling of the Fourth Amendment's Protections

I. INTRODUCTION

In *United States v. Pineda-Moreno*,[1] the Ninth Circuit was presented with the question of whether federal agents, without a warrant, were authorized to "enter the curtilage of [a suspect's] home and attach a mobile tracking device to the undercarriage" of the suspect's vehicle.[2] The court held that, notwithstanding the lack of a warrant, the agents did not conduct an illegal "search" because they did not encroach on an area in which the suspect "possessed a reasonable expectation of privacy."[3] The court arrived at this conclusion despite the fact that the agents walked up the suspect's driveway, stood "a few feet" from his home, and attached a surveillance device to the underside of his vehicle.[4]

Over the last thirty years, the Ninth Circuit has effectively "decimated" the "zone of privacy" that traditionally included the home, "the home's curtilage," and "public" places.[5] Consequently, the Fourth Amendment's protection "against unreasonable searches and seizures"[6] in the zone of privacy without a warrant is rapidly crumbling away in the Ninth Circuit.[7] In *Pineda-Moreno I*, the Ninth Circuit wrongly balanced the competing interests of law enforcement against Fourth Amendment rights. Rather than expanding the scope of warrantless searches, the court should have

1. United States v. Pineda-Moreno (*Pineda-Moreno I*), 591 F.3d 1212 (9th Cir. 2010), *reh'g denied*, 617 F.3d 1120 (9th Cir. 2010).

2. *Id.* at 1213.

3. *Id.* at 1215.

4. *Id.* at 1213, 1215.

5. United States v. Pineda-Moreno (*Pineda-Moreno II*), 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, J., dissenting).

6. U.S. CONST. amend. IV.

7. *See generally* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974) (stating that if a "particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society").

recognized that by ruling in favor of the interests of law enforcement, it was not only dismantling the Fourth Amendment, but it was also enabling the creation of a modern-day Oceania[8] in the United States.[9]

This Note proceeds as follows. Part II describes the facts and procedural history of *Pineda-Moreno I*. Next, Part III of this Note outlines the legal background of the case. Following the legal background, Part IV sets out the court's ruling in *Pineda-Moreno I*. The ruling is analyzed in Part V, concluding that the Ninth Circuit made three notable errors in its decision. This Note is then briefly summarized in Part VI.

II. FACTS AND PROCEDURAL HISTORY

In May 2007, a Drug Enforcement Administration ("DEA") agent noticed a group of men, including Pineda-Moreno, shopping in Home Depot's home and garden section.[10] The men were seen purchasing "large amounts of Vigoro 21-0-0 fertilizer," which the agent recognized as a type often used to grow marijuana.[11] A month later, representatives from several stores reported to the DEA that the men, using cash,[12] were purchasing "large quantities of groceries, irrigation equipment, and deer repellant."[13] After observing that the men frequently used what turned out to be Pineda-Moreno's Jeep to go to and from the stores, the DEA agents tracked the Jeep to a trailer that Pineda-Moreno was renting.[14] Once the DEA located Pineda-Moreno's residence, it quickly ramped up its investigation of him, and, "over a four-month period," agents "monitored [his] Jeep using various types of [discrete GPS] mobile tracking devices."[15] The

8. Oceania is the depressed totalitarian society envisioned by George Orwell in his book *1984*.

9. *See Pineda II*, 617 F.3d at 1121 (Kozinski, J., dissenting) ("The needs of law enforcement, to which my colleagues seem inclined to refuse nothing, are quickly making personal privacy a distant memory. 1984 may have come a bit later than predicted, but it's here at last.").

10. United States v. Pineda-Moreno, CR 07-30036-PA, 2008 U.S. Dist. LEXIS 46844, at *1 (D. Or. June 16, 2008).

11. *Id.*

12. *Id.*

13. *Pineda-Moreno I*, 591 F.3d 1212, 1213 (9th Cir. 2010), *reh'g denied*, 617 F.3d 1120 (9th Cir. 2010).

14. *Id.*

15. *Id.* The devices were "about the size of a bar of soap and had a magnet affixed to its

agents attached the tracking units to the "underside of Pineda-Moreno's vehicle on seven different occasions."[16] In four instances, agents installed the devices while the Jeep "was parked on a public street in front of Pineda-Moreno's home"; on another occasion, the Jeep was parked in a "public parking lot"; and, in the remaining two instances, the vehicle was not only parked in Pineda-Moreno's driveway, but it was parked only "a few feet from the side of his [home]."[17] On each occasion, the DEA agents attached the GPS tracking devices to the Jeep in the early hours of the morning, between 4:00 and 5:00 a.m.[18]

Once installed, the tracking units "recorded and logged the precise movements of the vehicle" and permitted the information to be accessed remotely, or, in other instances, downloaded once the device had been removed from the vehicle.[19] In September 2007, after compiling the tracking information for four months, the agents noticed the Jeep "leaving a suspected marijuana grow site."[20] The agents followed the Jeep for some time, and eventually pulled it over.[21] Smelling marijuana on one of the passengers in the vehicle, the agents called in Immigration and Customs Enforcement agents, who then arrested the three occupants "for violations of immigration laws."[22] After Pineda-Moreno consented to a search of his trailer and Jeep, the agents discovered "two large garbage bags full of marijuana" inside the trailer.[23]

In November 2007, Pineda-Moreno was indicted by a grand jury on one count of conspiracy to manufacture marijuana and one count

side, allowing it to be attached to the underside of a car." *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* Using the GPS devices, the DEA discovered that the Jeep "traveled several times between a remote highway turnout just south of the Oregon-California border," and to a rural location in Oregon. United States v. Pineda-Moreno, CR 07-30036-PA, 2008 U.S. Dist. LEXIS 46844, at *2 (D. Or. June 16, 2008). The vehicle "usually stayed only a few minutes at either location." *Id.* While the agents were unable to discover marijuana grows at the two locations to which the Jeep regularly traveled, they had discovered a marijuana grow "several miles from the turnout" two months prior. *Id.* In addition, an informant had notified the agents that there remained yet another marijuana grow near the turnout, presumably the one that Pineda-Moreno and his friends frequented. *Id.* at *2–3.

20. *Pineda-Moreno I*, 591 F.3d at 1214.

21. *Id.*

22. *Id.*

23. *Id.*

of manufacturing marijuana.[24] At trial, Pineda-Moreno argued that by installing tracking devices on his vehicle, the DEA agents had violated his Fourth Amendment rights and he "moved to suppress the evidence obtained from the [devices]."[25] The district court denied his motion, after which Pineda-Moreno "entered a conditional guilty plea, reserving the right to appeal the denial of his motion to suppress"; a timely appeal followed.[26]

III. SIGNIFICANT LEGAL BACKGROUND

The court's decision in *Pineda-Moreno I* is the offspring of the Ninth Circuit's treatment of Fourth Amendment claims over the last thirty years. In that time, the Ninth Circuit has consistently undermined the protections offered by the Fourth Amendment.[27] While the court's decisions at first may have seemed innocent and even agreeable to some, their combination over time has lead to a decimation of fundamental liberties.[28] This section of the Note will describe five cases that paved the way for the court's decision in *Pineda-Moreno I*.

The Ninth Circuit first chipped away Fourth Amendment rights in 1982 in *United States v. Flores*, where it misapplied precedent and drastically broadened when a "sufficient relationship" existed among "the crime, the thing to be seized, and the place to be searched."[29] In its ruling, the court upheld the conviction of Flores, who was

24. *Id.*

25. *Id.*

26. *Id.*

27. *See Pineda-Moreno II*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Reinhardt, J., dissenting) ("[C]ourts have gradually but deliberately reduced the protections of the Fourth Amendment to the point at which it scarcely resembles the robust guarantor of our constitutional rights we knew when I joined the bench [thirty years ago].").

28. In Judge Reinhardt's dissent in *Pineda-Moreno II*, he lists almost a dozen cases in which he has dissented against the Ninth Circuit's continuing obliteration of the Fourth Amendment's protections. *Id.* at 1126–27. His list includes, from 1982 to the present: United States v. Flores, 679 F.2d 173 (9th Cir. 1982); United States v. Alvarez, 899 F.2d 833 (9th Cir. 1990); United States v. Kelley, 953 F.2d 562 (9th Cir. 1992); United States v. Barona, 56 F.3d 1087 (9th Cir. 1995); Acton v. Vernonia School District 47J, 66 F.3d 217 (9th Cir. 1995); United States v. Hudson, 100 F.3d 1409 (9th Cir. 1996); United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc); United States v. Gourde, 440 F.3d 1065 (9th Cir. 2006) (en banc); United States v. Crapser, 472 F.3d 1141 (9th Cir. 2007); United States v. Ankeny, 502 F.3d 829 (9th Cir. 2007); Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir. 2009) (en banc). *Id.*

29. *Flores*, 679 F.2d at 175.

arrested because of evidence seized "during a search of [his] apartment for evidence that another convicted felon," Bontempi, was committing a crime.[30] In sustaining the search warrant, the court found that because Bontempi had been arrested in Flores's apartment before, and since he was pictured in photographs in Flores's apartment, a "sufficient relationship" connected "the crime, the thing to be seized, and the place to be searched."[31] This directly contradicted the Ninth Circuit's previous ruling in *United States v. Bailey*, where it held that "the fact that an individual has been arrested at a residence is insufficient to support the issuance of a warrant to search that residence for items believed to be in the arrested individual's possession."[32]

Ten years later, in *United States v. Kelley*, the court held that without a search warrant, agents could obtain consent to search a suspect's private bedroom and closet from a third-party housemate.[33] After arresting the suspect, Kelley, and taking him to FBI headquarters, agents asked his housemate, Bakker, to give her consent to a search of the house, including Kelley's private quarters.[34] The court rejected Kelley's argument that Bakker "lacked authority to consent to a search of [Kelley's] bedroom and closet" and held that Bakker had "joint access and control . . . of the residence she shared with Kelley," thereby giving her authority to consent to the search.[35] However, this finding of joint access and control, which was required by Supreme Court precedent,[36] was

30. *Id*. at 174.

31. *Id*. at 175–76.

32. *Id*. at 178 (Reinhardt, J., dissenting) (citing United States v. Bailey, 458 F.2d 408, 412 (9th Cir. 1972)). In an effort to assist law enforcement, the *Flores* court distinguished *Bailey* by noting that "whereas the Bailey affidavit contained no additional information linking the suspect to the residence," in *Flores*, the home "contained photographs of Bontempi and other persons." *Id*. at 175–76 (majority opinion). However, Judge Reinhardt noted that the sentence regarding photographs in the affidavit "is vague and ambiguous at best and can not [sic] serve to provide the additional facts, required by *Bailey*, to support a conclusion that Bontempi was in possession of the apartment." *Id*. at 179 (Reinhardt, J., dissenting).

33. *Kelley*, 953 F.2d at 566.

34. *Id*.

35. *Id*. at 563, 566.

36. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (holding that authority to consent to a search "rests 'on mutual use of the property by persons generally having joint access or control for most purposes'" (quoting United States v. Matlock, 415 U.S. 164, 171 n.7 (1974))); *see also* Cunningham v. Heinze, 352 F.2d 1, 5 (9th Cir. 1965) (holding that "[e]ven if [the housemate] had express or implied authority to enter appellant's bedroom for housekeeping purposes, it would not follow that she could permit a police search of appellant's

fiction.[37] The extent of Bakker's access and control over Kelley's quarters was to use the telephone kept within; however, even this use was hypothetical as the two had been housemates "for only three days prior to her 'consent,'" the phone was "installed just one day prior" to the search, and Bakker said that "she merely assumed that she had permission to enter" the bedroom to use the phone—she had not used it before, addressed the matter with Kelley, nor even been in the bedroom.[38] Even if Bakker had access to Kelley's telephone, this would be insufficient for her to consent to a search of Kelley's bedroom and closet.[39] This decision was all the more shocking because until this point, "no reported federal opinion [had] *ever* held that third party consent is valid in a situation such as the one presented here."[40]

Then, in *United States v. McIver*, the Ninth Circuit held that law enforcement did not need a warrant to install two tracking devices to the underside of a vehicle because "there is no reasonable expectation of privacy in the exterior of a car," and the vehicle was "outside the curtilage" of the suspect's home.[41] In *McIver*, federal agents used tracking devices to monitor two individuals suspected of growing marijuana.[42] The investigation ultimately resulted in convictions, which were appealed on the basis that by installing tracking equipment to their car, the agents violated the Fourth Amendment's protections against warrantless searches and seizures.[43] The court applied the reasoning of a decision from the Tenth Circuit, which held that "'[t]he undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy.'"[44] Because the placement of the tracking devices "did not

room, closet, and effects").

37. *See Kelley*, 953 F.2d at 568 (Reinhardt, J., dissenting).

38. *Id.* at 567 n.2.

39. *Id.* at 568 ("One who has been granted permission to enter a room solely for the purpose of using the telephone certainly does not have 'joint access or control *for most purposes*' over that area.").

40. *Id.*

41. United States v. McIver, 186 F.3d 1119, 1126 (9th Cir. 1999). The Supreme Court has held that "only the curtilage . . . warrants the Fourth Amendment protections that attach to the home." Oliver v. United States, 466 U.S. 170, 180 (1984). Here, the appellants conceded that the vehicle in question "was outside the curtilage." *McIver*, 186 F.3d at 1126.

42. *McIver*, 186 F.3d at 1122.

43. *Id.*

44. *Id.* at 1127 (quoting United States v. Rascon-Ortiz, 994 F.2d 749 (10th Cir. 1993).

pry into a hidden or enclosed area," the warrantless invasion of privacy was upheld.[45]

Some eight years after *McIver*, the Ninth Circuit decided *United States v. Black*, in which it affirmed a denial to suppress evidence and upheld a warrantless search of a home on the theory that the search was a "welfare search" and so was "justified by exigent circumstances."[46] In *Black I*, the police received a call from a woman who claimed that her ex-boyfriend, Black, had beaten her earlier that morning, that he had a gun, and that she was going to return home to pick up some belongings but would wait in her car for the police to arrive.[47] After arriving at the scene three minutes later, the police did not see the car or the woman outside the apartment.[48] Seeking access to the apartment, the police "circled the building to inspect the backyard area," where they discovered a man matching Black's description.[49] After the man identified himself as Black, the police searched him, and, finding a key, entered and searched his apartment to see if the woman was there.[50] Although the police did not find anyone inside the apartment, the court upheld the search because it found that the officers had an "objectively reasonable" basis for their search, namely, the possibility that the woman was badly injured, or dead, inside the apartment.[51]

In *United States v. Lemus*, the Ninth Circuit held that despite the lack of a search warrant, officers were authorized to search the area "'immediately adjoin[ing] the place of arrest' . . . without either probable cause or reasonable suspicion" and to seize "anything in

45. *Id.*

46. United States v. Black (*Black I*), 482 F.3d 1035, 1039–40 (9th Cir. 2007), *reh'g denied*, United States v. Black (*Black II*), 482 F.3d 1044, 1045 (9th Cir. 2007).

47. *Black I*, 482 F.3d at 1039.

48. *Id.* at 1039, 1040.

49. *Id.* at 1039.

50. *Id.*

51. *Id.* at 1040. The majority's acceptance of the officers' objectively reasonable belief is questionable. *See id.* at 1044 (Berzon, J., dissenting) (stating that the officers did not have "the kind of 'specific and articulable facts' that, when 'taken together with rational inferences' would 'support the warrantless intrusion'" (citation omitted)); *Black II*, 482 F.3d at 1045 (Kozinski, J., dissenting) ("The panel majority dutifully recites the right standard, but guts it of all meaning by approving an intrusion into the home that does not remotely satisfy it."). Judge Kozinski further pointed out that the majority's opinion "is entirely backwards," as it calls for officers "to err on the . . . side of caution," like those in *Black I*, and to enter homes to search for possible victims, as opposed to "erring on the side of caution," and obtaining search warrants to enter homes. *Black II*, 482 F.3d at 1046 (Kozinski, J., dissenting) (quoting *Black I*, 482 F.3d at 1040).

plain view that they discovered" during their search.[52] In *Lemus I*, officers arrested a suspect "before he could fully enter the doorway" to his apartment. They then searched the suspect's living room, bedroom, and bathroom to prevent a possible ambush, and after noticing "something sticking out" from underneath a couch cushion, lifted the cushion to find a pistol.[53] The court's decision is surprising. Police were allowed access to someone's home, "[t]he place where warrantless searches are deemed 'presumptively unreasonable,'" with no support at all save for mere "curiosity."[54] This decision destroyed "[w]hatever may have been left of the Fourth Amendment after" the court's decision in *Black*.[55] While it may seem that the Ninth Circuit could not possibly gut the Fourth Amendment any more after the holding described above, its latest decision in *Pineda-Moreno I* found a way to do just that.

IV. THE COURT'S DECISION

On appeal, Pineda-Moreno argued that the DEA agents violated his Fourth Amendment rights by (1) "invad[ing] an area in which he possesse[d] a reasonable expectation of privacy,"[56] (2) "attaching mobile tracking devices to his Jeep while it was parked on a street in front of his home and in a public parking lot,"[57] and (3) "monitor[ing] the location of his Jeep" using devices "not generally used by the public."[58] Each of these arguments will be analyzed below.

52. United States v. Lemus (*Lemus I*), 582 F.3d 958, 960 (9th Cir. 2009) (quoting Maryland v. Buie, 494 U.S. 325, 334 (1990)), *reh'g denied*, United States v. Lemus (*Lemus II*) 596 F.3d 512 (9th Cir. 2010). Tellingly, the court declared that "[e]ven assuming that there were no articulable facts which would warrant a reasonably prudent police officer to believe that Lemus's apartment harbored an individual posing a danger to those on the arrest scene, we nevertheless affirm the district court's denial of the suppression motion." *Id*. at 959–60.

53. *Lemus I*, 582 F.3d at 960.

54. *Lemus II*, 596 F.3d at 513 (Kozinski, J., dissenting) (quoting Payton v. New York, 445 U.S. 573, 586 (1980)).

55. *Id*. ("The evisceration of this crucial constitutional protector of the sanctity and privacy of what Americans consider their castles is pretty much complete. Welcome to the fish bowl.").

56. *Pineda-Moreno I*, 591 F.3d 1212, 1214 (9th Cir. 2010), *reh'g denied*, 617 F.3d 1120 (9th Cir. 2010).

57. *Id*. at 1215.

58. *Id*. at 1216.

A. Agents Intruded upon Pineda-Moreno's Curtilage

Pineda-Moreno's first argument is that federal agents violated his Fourth Amendment rights by "entering his driveway" in the early morning hours, crossing into his curtilage, and attaching "tracking devices to the underside of his Jeep."[59] Citing *United States v. McIver*,[60] the court rejected his argument and held that while the agents conceded that the "Jeep *was* parked within the curtilage of his home . . . it was parked in his driveway, which 'is only a semi-private area.'"[61] To properly "establish a reasonable expectation of privacy in [his] driveway," the court held that he had to show that he used "special features" such as "enclosures, barriers, [or] lack of visibility from the street" to exclude others from his driveway.[62] Because no "special features" protected Pineda-Moreno's driveway, he could not "claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home."[63] The court also rejected the argument that Pineda-Moreno "possessed a reasonable expectation of privacy" in his driveway during the early morning hours by holding that "the time of day is immaterial" in such an analysis.[64] Finally, the court held that Pineda-Moreno had no reasonable expectation of privacy in the underside of his car because its undercarriage is "part of its exterior."[65]

B. Agents Attached Tracking Units While Pineda-Moreno's Jeep was Parked in Public Places

Pineda-Moreno next argued that by "attaching mobile tracking devices to his Jeep while it was parked on a street in front of his

59. *Id.* at 1214.

60. 186 F.3d 1119 (9th Cir. 1999). See text at *supra* note 41 for a summary of the court's decision.

61. *Pineda-Moreno I*, 591 F.3d at 1215 (first alteration in original) (quoting United States v. Magana, 512 F.2d 1169, 1171 (9th Cir. 1975)).

62. *Id.* (first alteration in original).

63. *Id.* The court substantiated its holding by reasoning that there were "no features to prevent someone standing in the street from seeing the entire driveway," and further, "[i]f a neighborhood child had walked up Pineda-Moreno's driveway and crawled under his Jeep to retrieve a lost ball or runaway cat, Pineda-Moreno would have no grounds to complain," as his "driveway had no gate," and no "'No Trespassing' signs." *Id.*

64. *Id.*

65. *Id.* (citing *McIver*, 186 F.3d at 1127 (holding that "the undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy" (quotations omitted))).

home and in a public parking lot," agents violated his Fourth Amendment rights.[66] The court rejected this argument as well, again citing *McIver* where the court held that officers did not "invade an area in which a suspect possesses a reasonable expectation of privacy when they attach[ed] a mobile tracking device to a car parked in his driveway but outside the curtilage of his home."[67] Noting that Pineda-Moreno conceded that *McIver* "foreclosed" his argument, the court held that "Pineda-Moreno [could] assert no reasonable expectation of privacy" to a public area, including a public street or parking lot.[68]

C. Agents Monitored Pineda-Moreno's Jeep Using Spy Equipment

Finally, Pineda-Moreno argued that the DEA agents violated his Fourth Amendment rights by "monitor[ing] the location of his Jeep" using devices "not generally used by the public."[69] Pineda-Moreno pointed to *Kyllo v. United States*, where the Supreme Court held that the use of "sense-enhancing technology" to obtain "'any information . . . 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.'"[70] Applying this language, Pineda-Moreno argued that agents "conduct a 'search' whenever they use sense-enhancing technology not available to the general public to obtain information."[71] The court rejected this argument, reasoning that the sense-enhancing technology used in *Kyllo* was "a substitute for a search unequivocally within the meaning of the Fourth Amendment."[72] Instead, the court ruled that this issue was controlled by *United States v. Knotts*[73]: because officers do not

66. *Id.*

67. *Id.* (citing *McIver*, 186 F.3d at 1126).

68. *Id.*

69. *Id.* at 1216.

70. *Id.* (second alteration in original) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).

71. *Id.*

72. *Id.*

73. 460 U.S. 276, 281 (1983) ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."); *see also* United States v. Garcia, 474 F.3d 994, 997 (7th Cir. 2007) ("But *Kyllo* does not help our defendant, because his case unlike *Kyllo* is not one in which technology provides a substitute for a form of search unequivocally governed by the Fourth Amendment.

conduct a search by following a car on public roads, the agents "did not conduct an impermissible search of Pineda-Moreno's car by monitoring its location with mobile tracking devices."[74]

V. ANALYSIS

In deciding *Pineda-Moreno I*, the Ninth Circuit made three errors: (1) it wrongly concluded that DEA agents did not conduct an unreasonable search when they monitored the location of Pineda-Moreno's car over a period of four months; (2) it incorrectly held that Pineda-Moreno had no reasonable expectation of privacy as to his driveway; and (3) it wrongly relied on *United States v. Knotts* in reaching its conclusion. These three arguments are set out below.

A. Federal Agents Conducted an Unreasonable Search

The Ninth Circuit erred in concluding that DEA agents did not conduct an unreasonable search of Pineda-Moreno's Jeep despite the fact that they continuously and "repeatedly monitored" its movements over a period of four months.[75] In determining whether GPS surveillance constitutes a "search," courts apply the *Katz* test in which a court determines (1) whether an individual has exhibited a "subjective expectation of privacy," and (2) whether that expectation is "one that society is prepared to recognize as [objectively] 'reasonable.'"[76] In balancing the two prongs, "the Court has chosen to weigh far more heavily" the second prong.[77]

1. Pineda-Moreno had a subjective expectation of privacy

A person demonstrates a subjective expectation of privacy when he or she "seeks to preserve [something] as private."[78] This privacy

The substitute here is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.").

74. *Pineda-Moreno I*, 591 F.3d at 1217.

75. *Id.* at 1213.

76. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

77. Renee McDonald Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 429 (2007) (citing Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1984) ("The Court has always emphasized the second of these two requirements.")).

78. *Katz*, 389 U.S. at 351. For example, in California v. Ciraolo, 476 U.S. 209, 211 (1986), the court reasoned that because the defendant had installed two fences, one six feet tall, the other ten feet tall, around the perimeter of his property, he showed a "subjective intent and desire to maintain privacy." However, since he did not shield his land from aerial views,

extends even to objects that otherwise would have been accessible to the public.[79] Here, the court concluded that because agents merely obtained "a log of the locations where Pineda-Moreno's car traveled," no privacy interest was invaded.[80] Sadly, the court failed to consider the totality of the agents' intrusion into Pineda-Moreno's privacy. The agents continuously monitored and recorded his vehicle's every movement over a period of four months.[81] Unlike a person's "movements during a single journey, the whole of one's movements over the course of [four months] is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil."[82] Moreover, despite the exposure of "each individual movement," the "whole reveals more—sometimes a great deal more—than does the sum of its parts."[83] Furthermore, rather than completely dismissing the fact that Pineda-Moreno's Jeep was parked on his driveway, only "a few feet" from his home, the panel should have afforded his privacy a heightened degree of protection since it was parked within his home's curtilage.[84] By failing to recognize the totality of the agents' privacy invasion, the court erred in concluding that the agents "conducted no search."[85]

2. Pineda-Moreno's expectation of privacy was objectively reasonable

In determining whether society is prepared to accept a person's privacy expectation as objectively reasonable, the second prong of *Katz*, courts look to the degree of the government's intrusion into a person's privacy.[86] If the government's actions are such that they

the government was free to inspect his backyard from the air. *Id.*

79. *Katz*, 389 U.S. at 351.

80. *Pineda-Moreno I*, 591 F.3d at 1216–17.

81. *Id.* at 1213.

82. United States v. Maynard, 615 F.3d 544, 555 (D.C. Cir. 2010) (holding that the police's continuous use of a GPS tracking device for one month "was a search because it defeated [the defendant's] reasonable expectation of privacy").

83. *Id.* Moreover, "[we] largely expect the freedom to move about in relative anonymity without the government keeping an individualized, turn-by-turn itinerary of our comings and goings." Hutchins, *supra* note 78, at 455.

84. *See Pineda-Moreno I*, 591 F.3d at 1213, 1215; *see also infra* Part V.B.

85. *Pineda-Moreno I*, 591 F.3d at 1215.

86. Hutchins, *supra* note 77, at 430 (citing United States v. Jacobsen, 466 U.S. 109, 122–23 (1984)). *Compare* Katz v. United States, 389 U.S. 347, 353 (1967) (finding a high degree of government intrusion, and holding that because the government "listen[ed] to and record[ed] the petitioner's words," it "violated the privacy upon which he justifiably relied while using [a] telephone booth," and thus, it violated the Fourth Amendment), *with* Smith v.

"would have been objectionable to the framers,"[87] or, if they violate "understandings that are recognized or permitted by society,"[88] then the privacy expectation is considered objectively reasonable. Here, the court should have found that the government used an "extrasensory surveillance aid" as opposed to a "sense-augmenting" device[89] to monitor Pineda-Moreno. This extrasensory surveillance aid enabled the government to gather a large quantity of data regarding Pineda-Moreno's movements, and by doing so, the court should have found a high degree of government intrusion into Pineda-Moreno's privacy. Furthermore, the government's intrusion was such that the Framers would have surely objected to the warrantless invasion of privacy.[90]

The high degree of intrusion into Pineda-Moreno's privacy is evidenced by comparing the tracking devices from *Pineda-Moreno I* to the tracking device at issue in *United States v. Knotts*.[91] In *Knotts*, the Supreme Court held that a beeper unit, which emitted a periodic electronic beep tone and which enabled officers to follow a suspect's vehicle, was a sense-augmenting device and did not invade a suspect's reasonable expectation of privacy.[92] Unlike the beeper, the surveillance unit in *Pineda-Moreno I* was a GPS-enabled tracking

Maryland, 442 U.S. 735, 742 (1979) (finding a low degree of government intrusion because the surveillance device used by authorities, a pen register, had only "limited capabilities").

87. Hutchins, *supra* note 77, at 430 (citing Rakas v. Illinois, 439 U.S. 128, 152–53 (1978) (Powell, J., concurring)).

88. United States v. Maynard, 615 F.3d 544, 563 (D.C. Cir. 2010) (quoting *Jacobsen*, 466 U.S. at 123 n.22) (internal quotation marks omitted).

89. *See* Hutchins, *supra* note 77, at 432–38 (explaining the difference between "extrasensory surveillance," or a device that "reveals information otherwise indiscernible to the unaided human senses," and "sense-augmenting surveillance," which refers to a device that "reveals information that could theoretically be attained through one of the five human senses").

90. The Fourth Amendment

> was the answer of the Revolutionary statesmen to the evils of searches without warrants . . . . Because the experience of the framers of the Bill of Rights was so vivid, they assumed that [their experiences] would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed . . . . When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it.

United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

91. 460 U.S. 276 (1983).

92. *Id.*

device, which allowed federal agents to remotely monitor every single movement Pineda-Moreno made from June to September 2007.[93] To have accomplished the same feat with beeper units would have required multiple vehicles and dozens of agents working around the clock, seven days a week. The sophistication and capability of the devices in *Pineda-Moreno I* had such a degree of "technological enhancement of ordinary perception"[94] that it turned the remote monitoring into a Fourth Amendment search.

Even if the surveillance were "sense-augmenting," and thus not deserving of a heightened degree of protection, because of the undoubtedly large quantity of data collected by the agents, the persistent surveillance of Pineda-Moreno constituted a search.[95] This "quantity analysis,"[96] acknowledged by the Court in *Dow Chemical Co. v. United States*,[97] aggregates the data logged by law enforcement. It has Fourth Amendment implications because of "the quantity of information revealed,"[98] and not because of the information's quality.[99] Pineda-Moreno may have understood that portions of his travels would be observed by others, but it is most unlikely that he "contemplate[d] a comprehensive mapping of [his] whereabouts over a span of [four months], including the location of each stop and the duration of every trip segment."[100] Because of the invasive nature of the extrasensory tracking device used by the DEA, and the large amount of personal data collected, the Ninth Circuit should have found that agents conducted an unreasonable search, and therefore, should have had a warrant to track Pineda-Moreno's Jeep.

93. *Pineda-Moreno I*, 591 F.3d 1212, 1213 (9th Cir. 2010).

94. Kyllo v. United States, 533 U.S. 27, 33 (2001).

95. *See* Hutchins, *supra* note 77, at 456. Professor Hutchins further stated that "the appropriate constitutional treatment of GPS-enhanced surveillance is not tied up in *Knotts* because, as a factual matter, beeper and GPS technology are fundamentally different in terms of the quantity of information revealed by the science." *Id.* at 457.

96. *Id.* at 453.

97. 476 U.S. 227, 238 (1986) (holding that federal agents' aerial photography of an industrial plant was not a search (1) because it was a mere enhancement of human vision, and (2) because the quantity of information discovered was minimal).

98. Hutchins, *supra* note 77, at 457.

99. *Id.* at 459.

100. *Id.* at 453.

B. Agents Intruded upon Pineda-Moreno's Curtilage Without a Warrant

The Ninth Circuit also incorrectly held that Pineda-Moreno had no reasonable expectation of privacy as to his driveway. The majority itself acknowledged "that Pineda-Moreno's Jeep *was* parked within the curtilage of his home when the agents attached the tracking device."[101] However, the court then reasoned that even if the car were "parked within the curtilage of the home," because "it was parked in [the] driveway [it was] only a semiprivate area."[102] By focusing its analysis on whether the driveway was open to the public, the court failed to consider the controlling issue—the fact that federal agents had intruded upon the curtilage of the home.

"Curtilage" is defined as "[t]he land or yard adjoining a house," or, for purposes of "the Fourth Amendment, the curtilage is an area usu[ally] protected from warrantless searches."[103] Indeed, "it has come to mean those portions of a homeowner's property so closely associated with the home as to be considered part of it," and "once it is determined that something is part of the curtilage, it's entitled to precisely the same Fourth Amendment protections as the home itself."[104] Thus, regardless of whether a driveway is only "semiprivate," as both the government and the court conceded, the Jeep was parked within an area that should have been entitled to the same degree of Fourth Amendment protection as Pineda-Moreno's home, and therefore, the agents should have been required to have a warrant to attach the tracking device.

Even if the Jeep were not parked within the home's curtilage, the majority's reliance on the driveway being open to the public is also flawed. The court would require persons to support an expectation of privacy in their driveway by constructing "special features," such as "enclosures, barriers, [or] lack of visibility from the street";[105] otherwise, like a "neighborhood child" retrieving a ball from beneath a car, federal agents can similarly "crawl under [one's]

101. *Pineda-Moreno I*, 591 F.3d 1212, 1215 (9th Cir. 2010).

102. *Id.* (internal quotation marks omitted).

103. BLACK'S LAW DICTIONARY (8th ed. 2004).

104. *Pineda-Moreno II*, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, J., dissenting) (citing Oliver v. United States, 466 U.S. 170, 180 (1984) ("[O]nly the curtilage . . . warrants the Fourth Amendment protections that attach to the home.")).

105. *Pineda-Moreno I*, 591 F.3d at 1215.

car . . . and tinker with [its] undercarriage."[106] The court's rule allows only those willing to spend money to adequately protect their property by implementing "special features": installing video cameras, motion sensors, and electronic gates; constructing security booths and towering fences; and hiring security guards and canines.[107] Unfortunately, for most "of the 60 million people living in the Ninth Circuit," their privacy will be "materially diminished" by the court's decision.[108]

C. The Court Wrongly Relied on Knotts

The Ninth Circuit wrongly applied language from *United States v. Knotts*[109] in reaching its conclusion in *Pineda-Moreno I*. Because the DEA agents obtained information that they "could have obtained by following the car"[110] (albeit everywhere he went, 24-hours-a-day, seven-days-a-week, for four months), the court applied *Knotts*, and 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.'"[111] However, the panel erroneously applied *Knotts* to the set of facts in *Pineda-Moreno I*.[112] In fact, the Supreme Court "explicitly 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"[113] in *Pineda-Moreno I*. Further, the *Knotts* court reserved for a later date the specific question of

106. *Pineda-Moreno II*, 617 F.3d at 1123 (Kozinski, J., dissenting) ("To say that the police may do on your property what urchins might do spells the end of Fourth Amendment protections for most people's curtilage.").

107. *See id.*

108. *Id.*

109. United States v. Knotts, 460 U.S. 276 (1983).

110. *Pineda-Moreno I*, 591 F.3d at 1216 (9th Cir. 2010).

111. *Id.* (quoting *Knotts*, 460 U.S. at 281–82).

112. *Pineda-Moreno II*, 617 F.3d at 1126 (Kozinski, J., dissenting) ("[W]hat the Supreme Court actually held in *Knotts*, . . . is that you have no expectation of privacy as against police who are conducting visual surveillance, albeit 'augmenting the sensory faculties bestowed upon them at birth with such enhancements as science and technology afford[s] them.'" (third alteration in original) (quoting *Knotts*, 460 U.S. at 282)).

113. United States v. Maynard, 615 F.3d 544, 556 (D.C. Cir. 2010) ("*Knotts* held only that '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another,' not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it." (citations omitted) (quoting *Knotts*, 460 U.S. at 281)).

"whether a warrant would be required in a case involving 'twenty-four hour surveillance'"[114] and stated that "'if such dragnet-type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.'"[115] Accordingly, there is a definite distinction between using a beeper, a sensory-enhancing device to facilitate visual tracking, and using a GPS-enabled tracking device to conduct constant surveillance of a vehicle for four months.[116] Therefore, the Ninth Circuit erred by improperly applying the ruling of *Knotts* to the very different set of facts of *Pineda-Moreno I*.

VI. CONCLUSION

The Ninth Circuit's decision in *Pineda-Moreno I* continues the circuit's decimation of the Fourth Amendment. It is frightening that the court continues to disregard the Fourth Amendment's protections for "one-fifth of the country's population,"[117] especially considering the many errors in the majority's analysis. Rather than continuing to bow to the interests of law enforcement, the court must soon realize that "[t]he Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use."[118] The court assures the reader that "[s]hould [the] government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search."[119] However, the court continues to create a dangerous collection of precedents, and its decisions, in the aggregate, may very well be "dire and irreversible,"[120] and they certainly bring cautioning words from *1984* to mind:

114. *Id.* (quoting *Knotts*, 460 U.S. at 283–84).

115. *Id.*

116. "The technological precursor to GPS, the beeper, is a battery-operated device that emits a weak radio signal that [must] be followed using a receiver. Beepers do not provide pinpointed targeting of suspects and do not permit the remote tracking of targets [unlike a GPS-enabled device]." Hutchins, *supra* note 76, at 411 n.8.

117. *Pineda-Moreno II*, 617 F.3d at 1126 (Kozinski, J., dissenting).

118. Florida v. Riley, 488 U.S. 445 (1989) (Brennan, J., dissenting).

119. *Pineda-Moreno I*, 591 F.3d 1212, 1217 n.2 (9th Cir. 2010) (alterations in original) (internal quotations marks omitted).

120. *Pineda-Moreno II*, 617 F.3d at 1126 (Kozinski, J., dissenting); *see also* BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759) ("They that can give up essential

> There was of course no way of knowing whether you were being watched at any given moment. . . . It was even conceivable that they watched everybody all the time. . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.[121]

If the Ninth Circuit does not change its approach to Fourth Amendment claims and begin restoring the Amendment's protections, one day soon, those living in the Ninth Circuit may "wake up and find [they're] living in Oceania."[122]

*Phillip R. Sumpter**

liberty to obtain a little safety deserve neither liberty nor safety."); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 121 (William Peden ed., 1955) ("[T]he time to guard against corruption and tyranny is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.").

121. GEORGE ORWELL, 1984 3 (Signet Classic 1961) (1949).

122. *Pineda-Moreno II*, 617 F.3d at 1126 (Kozinski, J., dissenting).

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