
**CAUTION! GOVERNMENT INTRUSION MAY BE
CLOSER THAN IT APPEARS: THE SEVENTH
CIRCUIT CONSIDERS GPS DEVICES UNDER THE
FOURTH AMMENDMENT**

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Cite as: Catherine A. Stephens, *Caution! Government Intrusion May Be Closer Than It Appears: The Seventh Circuit Considers GPS Devices Under the Fourth Amendment*, 3 SEVENTH CIRCUIT REV. 617 (2008), at <http://www.kentlaw.edu/7cr/v3-2/stephens.pdf>.

INTRODUCTION

The Fourth Amendment provides protection for individuals from unreasonable searches and seizures of their persons, property, and effects.¹ However, as technology advances and the need for security in this country increases, individuals' Fourth Amendment rights are in danger. Global Positioning System ("GPS") tracking devices can now be easily installed on anyone's car. The GPS device can then track that person's movement for an extended period of time through the use of sophisticated computer and satellite technology. Under the current state of the law, the police are able to place these GPS devices on cars or possessions without reasonable suspicion, probable cause, or a warrant.

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¹ U.S. Const. amend. IV.

This convergence of rapidly improving technology and Fourth Amendment rights has created a novel legal issue: If the police install a GPS device on an individual's car or possession without first proving reasonable suspicion or probable cause, or without first obtaining a warrant, does their action violate the Fourth Amendment?

In *Katz v. United States*, the Supreme Court found that the police violate the Fourth Amendment when they infringe on an individual's privacy in a place where that individual has a reasonable expectation of privacy.² However, a few years later in *United States v. Knotts*, the Supreme Court found that police monitoring of a beeper installed on an individual's car did not constitute a search or seizure and therefore did not violate the Fourth Amendment, because the individual did not have a reasonable expectation of privacy while traveling on a public road.³

GPS technology is very new; therefore, few cases across the country have addressed the possible Fourth Amendment violation that installing the GPS device creates. The Supreme Court has yet to decide the issue of "whether installing [a GPS] device in [a] vehicle convert[s] the subsequent tracking into a search."⁴ The circuits are split over the issue with the Fifth and Ninth Circuits holding that installing a GPS device does not constitute a search, and the First, Sixth, and Tenth Circuits holding the opposite.⁵ In the circuit split cases, it is important to note that these cases concern tracking devices in general, not just GPS devices.

The Seventh Circuit recently addressed this issue in *United States v. Garcia*.⁶ In *Garcia*, the Seventh Circuit agreed with the Fifth and the Ninth Circuits' finding that the evidence obtained by using the GPS

² *Katz v. United States*, 389 U.S. 347 (1967).

³ *United States v. Knotts*, 460 U.S. 276 (1983).

⁴ *United States v. Garcia*, 474 F.3d 994, 996-97 (7th Cir. 2007); *See Knotts*, 460 U.S. 276 (where the Court found that monitoring a beeper, as opposed to installing a beeper, to track a vehicle did not constitute a search. The court did not decide the issue of whether installing the device constituted a search).

⁵ *See Garcia*, 474 F.3d. at 997 (listing cases).

⁶ *Id.*

device was not the fruit of an illegal search.⁷ Therefore, there was no Fourth Amendment violation.⁸ The Seventh Circuit put heavy weight on the fact that the police used the GPS device simply to make their job of tracking the suspect easier.⁹ Instead of assigning an officer to follow a suspect in a car—an activity that would not violate the Fourth Amendment—the court held that the police can install a GPS device to follow the suspect instead.¹⁰ However, in deciding *Garcia*, the Seventh Circuit made many errors in its reasoning. The court should have found that installing a GPS device constitutes a search; therefore, a warrant is required prior to installing the device. The Seventh Circuit should have protected the Fourth Amendment by requiring that the police obtain a warrant prior to commencing the search, that is, prior to installing the GPS device.

Part 1 of this comment will provide a background on beeper and GPS technology; a discussion of searches and seizures within the Fourth Amendment; and an overview of the warrant requirement, and the probable cause and reasonable suspicion standards. Part 2 will examine judicial precedent surrounding the issue, including four United States Supreme Court cases and circuit and state court cases. Part 3 will examine a recent Seventh Circuit decision, *United States v. Garcia*, where the court found that installing a GPS device without a valid warrant was not a search; therefore, there was no Fourth Amendment violation. Part 4 will explain why *Garcia* was wrongly decided and why a warrant should be required before the police can install a GPS device on an individual's car or possession.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

I. BACKGROUND

A. *Beepers and GPS Technology*

GPS technology is a very recent technological advancement. The U.S. Air Force launched the twenty-fourth NAVSTAR satellite into orbit on June 26, 1993.¹¹ Launching NAVSTAR was the last step in creating the Global Positioning System.¹² GPS tracking is a much more technologically advanced tracking system than the beepers and radio transmitters used by the police prior to GPS to track suspects.¹³ The GPS system consists of a network of at least twenty-four satellites that send radio signals transmitting their location.¹⁴ Then, GPS receivers on Earth “triangulate their own three-dimensional position using information from at least four of the satellites.”¹⁵ Triangulating means that the GPS “calculates the distance to each satellite by measuring the time necessary for a radio signal to travel to that satellite.”¹⁶

The information gained from a GPS device is called a “fix” and includes the longitude, latitude, and time.¹⁷ Once the fix is recorded, it operates as a track or precise record of travel.¹⁸ The fix must then be downloaded because the actual device does not hold much information, and then the police can obtain a precise chronological

¹¹ Kevin Keener, note, *Personal Privacy in the Face of Government Use of GPS*, 3 I/S: J.L. & POL’Y FOR INFO. SOC’Y 473, 474 (2008) (citing National Parks Service, Global Positioning Systems: History, <http://www.nps.gov/gis/gps/history.html>).

¹² *Id.*

¹³ John S. Ganz, *It’s Already Public: Why Federal Officers Should Not Need Warrants To Use GPS Vehicle Tracking Devices*, 95 J.CRIM. L. & CRIMINOLOGY 1325, 1328 (2005).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Keener, *supra* note 11, at 474.

¹⁷ Ganz, *supra* note 13, at 1328.

¹⁸ *Id.*

record of travel.¹⁹ Typically, GPS devices fit on the underside of a car, are the size of a book, and can be installed by using magnets.²⁰ GPS allows the police to track suspects without having to do real-time visual surveillance and without taking up any individual police officer's time.²¹ GPS devices can be tracked in real time as well as by using a computer and a map that displays where the device is currently located.²² The GPS device is capable of storing information for days, weeks, or even years.²³

Prior to GPS, police used beepers and radio transmitters to aid them in tracking a suspect.²⁴ Police attached a beeper to a suspect's car or possessions allowing the police to more effectively follow the suspect live.²⁵ The beeper or radio transmitter "emits periodic signals that can be picked up by a radio receiver."²⁶ Then, the police can follow the suspect visually in the car and also follow the signal being emitted by the beeper.²⁷ Beepers allow the police to follow a suspect by following the radio signals or to find a suspect if the police lose track during live visual surveillance. In comparison to today's technology—namely GPS technology—beepers are considered unsophisticated.²⁸

Therefore, because of its amazing capabilities including its ability to keep a precise record of one's travel for an unlimited amount of time, and the fact that the police do not need to actively follow the suspect in real time in their cars, the GPS device is radically different and much more technologically advanced than beeper technology.

¹⁹ *Id.* at 1329.

²⁰ *Id.*

²¹ *State v. Scott*, 2006 WL 2640221, at *6 (N.J. Super. Ct. App. Div. Sept. 15, 2006).

²² *Id.*

²³ *Id.*

²⁴ *Ganz*, *supra* note 13, at 1328.

²⁵ *Id.*

²⁶ *United States v. Knotts*, 460 U.S. 276, 277 (1983).

²⁷ *Id.*

²⁸ *United States v. Berry*, 300 F.Supp.2d 366, 367-68 (D. Md. 2004).

Because GPS technology is so new, courts often look at cases involving beepers for guidance. However, strict dependence on beeper cases might not be wise considering the vast differences between the two technologies.

B. The Fourth Amendment

GPS and beeper cases are typically examined under the Fourth Amendment.²⁹ The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³⁰

The Fourth Amendment serves a gate keeping function between free society and police actions.³¹ The Supreme Court has clearly stated that “[a] ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”³² Prior to *Katz v. United States*, the government typically had to physically intrude for a search to occur.³³ However, in *Katz*, the Court found physical intrusion was not necessary in order to perform a search.³⁴ The *Katz* court found that the Fourth Amendment protected people, not just places.³⁵

²⁹ *Katz v. United States*, 389 U.S. 347 (1967); *Knotts*, 460 U.S. 276; *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

³⁰ U.S. Const. amend. IV.

³¹ Renée McDonald Hutchins, *Tied Up In Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L.REV. 409, 444 (2007).

³² *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

³³ Hutchins, *supra* note 31, at 409; *Katz*, 389 U.S. 347.

³⁴ *Katz*, 389 U.S. 347, 353.

³⁵ *Id.* at 351.

In addition, a seizure “occurs when there is some meaningful interference with an individual’s possessory interests in that property.”³⁶ Further, the Court has stated that:

The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation.³⁷

C. Warrant, Probable Cause, and Reasonable Suspicion

There are three different standards that describe the level of proof that the police must have before commencing certain activities such as seeking a warrant, conducting a search of a person or property, or frisking an individual. The highest standard is a warrant, followed by probable cause, and then reasonable suspicion.

The Supreme Court has created a presumption that the police must secure a warrant prior to conducting a search, absent exigent circumstances.³⁸ In GPS cases, a central issue is whether the use of the GPS device constitutes a search. If it does, then absent exigent circumstances, it would follow that the police must secure a warrant prior to using the device.

However, if a court finds that police use of a GPS device is not a search and therefore a warrant is not required, then the courts could find that police must show probable cause before the GPS device can be properly installed on a vehicle or possession. Proving probable cause imposes a higher burden than proving reasonable suspicion, but a lower burden than a obtaining a warrant.³⁹ Police can prove probable cause when, looking at the totality of the circumstances, they can show

³⁶ *Jacobsen*, 466 U.S. at 113.

³⁷ *United States v. Karo*, 468 U.S. 705, 712-13 (1984).

³⁸ *United States v. Leon*, 468 U.S. 897, 913-14 (1984); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

³⁹ *United States v. Garcia*, No. 05-CR-155-C, 2006 WL 1294578, at *5 (W.D. Wis. May 10, 2006).

that a reasonably prudent person would believe that the search of a particular area will produce evidence of a crime.⁴⁰ In proving probable cause, the officers must make common sense judgments and reasonable inferences, based on the totality of the circumstances and their training and experience, about what a search will uncover.⁴¹ As long as the officers can prove this, then they can prove probable cause exists.⁴²

The lowest threshold—below a warrant and probable cause—is reasonable suspicion.⁴³ To prove reasonable suspicion, one must show some objective finding that someone is about to do something typically prohibited.⁴⁴ Reasonable suspicion is similar to probable cause in that reasonable suspicion can be based on an officer's common sense and inferences about how people typically act.⁴⁵ The totality of the circumstances will determine if the officers had a reasonable belief that illegal activity was likely and that their intrusion was justified.⁴⁶ Therefore, the officers' experience and common sense, as well as inferences about the suspect, come into play.⁴⁷

II. JUDICIAL PRECEDENT

The Supreme Court has yet to decide whether the installation of a tracking device constitutes a search under the Fourth Amendment.⁴⁸ However, the Supreme Court has held that the warrantless monitoring

⁴⁰ *Id.*

⁴¹ *Id.* at *6.

⁴² *Id.* (quoting *United States v. Parra*, 402 F.3d 752, 763-64 (7th Cir. 2005)).

⁴³ *Garcia*, 2006 WL 1294578, at *3 (finding “[r]easonable suspicion is the lowest cognizable evidentiary threshold, one step above an inchoate and unparticularized hunch, but below probable cause and considerably lower than a preponderance of the evidence.”).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *United States v. Garcia*, 474 F.3d 994, 996-97 (7th Cir. 2007).

of a *beeper* or *radio transmitter* does not constitute a search.⁴⁹ The Court first tackled the issue in *Katz v. United States*;⁵⁰ it was further fleshed out in *United States v. Knotts*,⁵¹ *United States v. Karo*,⁵² and *United States v. Kyllo*.⁵³ Subsequent to these cases, a split has developed among the circuit courts and state courts as to whether the installation of a tracking device constitutes a search under the Fourth Amendment. This section will focus on all of these cases which examine whether the warrantless installation and monitoring of a GPS device constitutes a search.

A. *Supreme Court Cases: Katz, Knotts, Karo, and Kyllo*

1. *Katz v. United States*

In *Katz*, the Supreme Court found that a search or seizure under the Fourth Amendment occurs when one's justified expectation of privacy is violated.⁵⁴ In *Katz*, the defendant made gambling bets via a pay phone on a public street.⁵⁵ The FBI then attached an electronic listening and recording device to that public phone booth.⁵⁶

The trial court and the appellate court found that recording the defendant's calls did not violate the Fourth Amendment.⁵⁷ The Supreme Court disagreed and stated that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."⁵⁸ The Court stated that "what he seeks to

⁴⁹ *United States v. Knotts*, 460 U.S. 276, 284-85 (1983).

⁵⁰ *Katz v. United States*, 389 U.S. 347 (1967).

⁵¹ *Knotts*, 460 U.S. 276.

⁵² *United States v. Karo*, 468 U.S. 705 (1984).

⁵³ *Kyllo v. United States*, 533 U.S. 27 (2001).

⁵⁴ *Katz*, 389 U.S. at 353.

⁵⁵ *Id.* at 348.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 351.

preserve as private, even in an area accessible to the public, may be constitutionally protected.”⁵⁹ The Court held that the presence of a physical intrusion is not necessary and that:

The government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.⁶⁰

Therefore, the Court determined that the defendant’s belief that his conversation would be private was reasonable, and accordingly, the government’s actions infringed on his Fourth Amendment rights.⁶¹ Searches conducted without probable cause or a warrant “are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.”⁶²

Justice Harlan wrote a concurring opinion in *Katz* and laid out a two-part test for determining reasonable expectations of privacy.⁶³ The first part of the test involves determining “that a person [has] exhibited an actual (subjective) expectation of privacy.”⁶⁴ The second part of the test involves determining “that the expectation be one that society is prepared to recognize as ‘reasonable’.”⁶⁵ This two-part test has been followed by countless courts and now represents the standard for a court to determine if an individual has a reasonable expectation of privacy.

⁵⁹ *Id.* at 351.

⁶⁰ *Id.* at 353

⁶¹ *Id.*

⁶² *Id.* at 357.

⁶³ *Id.* at 360-62.

⁶⁴ *Id.* at 361.

⁶⁵ *Id.*

2. *United States v. Knotts*

Unlike in *Katz* where the government attached a recording device to a public phone booth, *United States v. Knotts* dealt with the police using a beeper inside a canister for the purpose of electronically tracking the suspect.⁶⁶ In *Knotts*, law enforcement officials believed that the defendant was involved in the manufacture of illegal drugs.⁶⁷ Therefore, they coordinated with the seller of a chloroform product the defendant was about to purchase and placed a radio transmitter beeper inside the container.⁶⁸ Using the beeper, the police followed the defendant to a cabin in Wisconsin, obtained a warrant and searched the cabin, and discovered an amphetamine laboratory.⁶⁹

The trial court denied the defendant's motion to suppress evidence based on the warrantless monitoring of the beeper.⁷⁰ However, the appellate court reversed "finding that the monitoring of the beeper was prohibited by the Fourth Amendment because its use had violated respondent's reasonable expectation of privacy."⁷¹

The Supreme Court, relying on *Katz*, noted that Fourth Amendment claims turn on whether the individual had a reasonable expectation of privacy.⁷² The Court then noted that monitoring the beeper was akin to the police following the defendant in a car on a public street.⁷³ The Court then cited multiple cases that state that when one is in an automobile, he has a diminished expectation of privacy.⁷⁴ Specifically, the Court quoted a case that stated:

⁶⁶ *United States v. Knotts*, 460 U.S. 276 (1983).

⁶⁷ *Id.* at 278.

⁶⁸ *Id.*

⁶⁹ *Id.* at 279.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 280 (citing *Smith v. Maryland*, 442 U.S. 735 (1979)).

⁷³ *Knotts*, 460 U.S. at 281.

⁷⁴ *Id.* at 281 (citing *Rakas v. Illinois*, 439 U.S. 128 (1978); *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.⁷⁵

As noted, the Court placed a heavy emphasis on the idea that the information gathered by the police could have been gathered by simply following the defendant in his car.⁷⁶ Police use of the beeper merely assisted the police in gathering information and did not indicate to the Court that the police could not have obtained the information without it.⁷⁷ The Court stated that “[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.”⁷⁸ Therefore, the Court held that “monitoring the beeper signals did not invade any legitimate expectation of privacy on the respondent’s part, and thus there was neither a ‘search’ nor a ‘seizure’ within the contemplation of the Fourth Amendment.”⁷⁹

However, the author of the opinion, Justice Rehnquist, stated that if law enforcement begins using “dragnet type law enforcement practices,” perhaps then it will be time to consider whether a constitutional issue arises.⁸⁰ The Court ultimately determined that in *Knotts*, the beeper merely served to make the police search more effective; therefore, there was no constitutional violation.⁸¹

⁷⁵ *Knotts*, 460 U.S. at 281 (citing *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)).

⁷⁶ *Knotts*, 460 U.S. at 282.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 276.

⁸⁰ *Id.* at 284.

⁸¹ *Id.*

3. *Unites States v. Karo*

Shortly after *Knotts*, the Court again tackled whether beepers violated the Fourth Amendment in *United States v. Karo*. In *Karo*, the Court focused on the monitoring of a beeper that ended up inside of a house, where occupants typically have a reasonable expectation of privacy.⁸²

In *Karo*, Drug Enforcement Administration agents suspected the defendant was manufacturing drugs.⁸³ They obtained a court order to attach and monitor a beeper in a can of ether that the defendant was about to purchase.⁸⁴ After a period of days during which the agents monitored the can of ether, including while the can was inside a private residence, the police arrested the defendant for conspiring to possess cocaine with the intent to distribute.⁸⁵ The trial court granted the defendant's pretrial motion to suppress evidence because the court found that the beeper installation and monitoring was unauthorized and invalid.⁸⁶ The Tenth Circuit affirmed the trial court, reasoning that a warrant was required prior to the beeper installation.⁸⁷ The Tenth Circuit argued that the defendant's Fourth Amendment rights were violated when he obtained the can of ether.⁸⁸ The Tenth Circuit stated:

All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken.⁸⁹

⁸² *United States v. Karo*, 468 U.S. 705, 714 (1984).

⁸³ *Id.* at 708.

⁸⁴ *Id.*

⁸⁵ *Id.* at 709-10.

⁸⁶ *Id.* at 710.

⁸⁷ *Id.*

⁸⁸ *Id.* at 711-12.

⁸⁹ *Id.* at 712.

In *Karo*, Justice White stated that the Court needed to decide two issues left unresolved by *Knotts*: first, whether the installation of a beeper installed with the consent of the original owner before the ultimate buyer takes possession constitutes a search or seizure when the ultimate buyer has no knowledge of the beeper; and second, “whether monitoring of a beeper falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance.”⁹⁰

First, the Court found that the installation of the beeper on the can of ether was not a search or seizure.⁹¹ The Court reasoned that at the time the beeper was placed on the can of ether, it was the property of the DEA.⁹² Second, the Court held that monitoring of the beeper did violate the defendant’s rights because the DEA agents monitored Karo by monitoring the beeper while it was inside a private residence.⁹³ Private residences are typically recognized as spaces where individuals have a right to expect privacy from government intrusion without a warrant.⁹⁴

To be clear, the difference between *Knotts* and *Karo* is that in *Knotts*, the information the police obtained could have been obtained by following the defendant on a public street.⁹⁵ However, in *Karo*, the police could not have obtained the information without performing an unreasonable search under the Fourth Amendment.⁹⁶ They could not have visually obtained the information without entering the defendant’s home.⁹⁷ Therefore, in *Karo*, the Court found that the

⁹⁰ *Id.* at 707.

⁹¹ *Id.* at 712-13.

⁹² *Id.*

⁹³ *Id.* at 714.

⁹⁴ *Id.* at 714-15 (citing *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984); *Steagald v. United States*, 451 U.S. 204, 211-12 (1981)).

⁹⁵ *Karo*, 468 U.S. at 715.

⁹⁶ *Id.*

⁹⁷ *Id.*

defendant's Fourth Amendment rights were violated by the monitoring of the beeper while inside a private residence.⁹⁸

4. *United States v. Kyllo*

Many years after *Karo*, the Supreme Court again dealt with a case involving government surveillance, although this time with a new, novel technology.⁹⁹ In *Kyllo*, government agents suspected the defendant was growing marijuana in his home, an activity which required the use of high-intensity lamps.¹⁰⁰ Therefore, government agents quickly scanned the defendant's home with a thermal imager in the middle of the night from the street, unbeknownst to the defendant.¹⁰¹ This scanner helped the agents determine if the amount of heat radiating out of the defendant's home was consistent with the use of the required high-intensity lamps.¹⁰² The scan revealed that the area over the garage and on one side of the defendant's home were "relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex."¹⁰³

From the scan, the agents obtained a warrant, searched the defendant's home, and discovered he was indeed growing marijuana.¹⁰⁴ The trial court denied defendant's petition to suppress the evidence resulting from the scan.¹⁰⁵ The court of appeals found that the defendant made no attempt to hide the heat escaping from his home; therefore, he had no subjective expectation of privacy.¹⁰⁶ Also, even if he had shown a subjective expectation, there was no objective

⁹⁸ *Id.*

⁹⁹ *Kyllo v. United States*, 533 U.S. 27 (2001).

¹⁰⁰ *Id.* at 29.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 30.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 31.

expectation of privacy, because the scan only revealed hot spots in the defendant's home, not any intimate details of his life.¹⁰⁷

The Court found that:

[T]he Government use[d] a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.¹⁰⁸

Therefore, similar to *Karo*, because the police would not have been able to obtain the information without entering the defendant's home, the Court found the scan to be a search.¹⁰⁹

B. A Chronological Look at Circuit Court and State Court Cases Finding the Use of GPS Devices or Beepers Is a Search

The Supreme Court has created a presumption that in order for police to legally conduct a search, they must obtain a warrant when doing so is feasible.¹¹⁰ However, a warrant is only required when there is an actual search under the Fourth Amendment.¹¹¹ Therefore, the issue of whether the installation and monitoring of a beeper or GPS device constitutes a search or seizure under the Fourth Amendment is central to the issue of whether a warrant is required. In the cases that follow, the courts ruled that there was a search within the meaning of the Fourth Amendment.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 40.

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007).

¹¹¹ *Id.*

1. *United States v. Moore* (First Circuit, 1977)—Beeper Case

In *Moore*, the district court found that evidence obtained by using beepers to track movement violated the Fourth Amendment.¹¹² DEA agents attached a beeper to a box carrying chemicals before the defendant possessed it.¹¹³ Another beeper was attached to the underside of the defendant's vehicle.¹¹⁴ Relying on *Katz*, the First Circuit looked to whether the use of a beeper violated a reasonable expectation of privacy, and commented that although one does not have an expectation of privacy when on public roads; one does not expect to be tracked while in public.¹¹⁵ The court concluded that a beeper "transforms the vehicle, unknown to its owner, into a messenger."¹¹⁶ Therefore, "[w]hile a driver has no claim to be free from observation while driving in public, he properly can expect not to be carrying around an uninvited device that continuously signals his presence."¹¹⁷ Recognizing these competing ideas, the First Circuit held that the state must show that it had probable cause before attaching a beeper. In *Moore*, the court found such probable cause so that the use of the beepers did not violate the Fourth Amendment.¹¹⁸

2. *United States v. Shovea* (Tenth Circuit, 1978)—Beeper Case

In *Shovea*, federal agents suspected the defendant of being involved in the manufacture of methamphetamine, so they attached a

¹¹² *United States v. Moore*, 562 F.2d 106, 108 (1st Cir. 1977).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 112.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 113. Compare with *United States v. Bernard*, 625 F.2d 854 (9th Cir. 1980), where DEA agents attached a beeper into a can while it was in the DEA's possession. *Id.* at 860. There, the court held that the defendant's possessory interests were not interfered with because the installation did not take place while the can was in his possession. *Id.*

beeper to his car in order to track his movements.¹¹⁹ After days of observation and after accumulating evidence that their suspicion was correct, the agents arrested the defendant.¹²⁰ The Tenth Circuit attempted to balance the fact that the installation of the beeper was a trespass with the fact that one may not have a reasonable expectation of privacy when traveling on public roads.¹²¹ Inexplicably deciding to ignore the trespass in its decision, the court found that it need not resolve this problem because the police had probable cause to attach the device.¹²² The court stated that: “[i]f there is probable cause, an automobile, because of its mobility, may be searched without a warrant in circumstances that would not justify a warrantless search of a house or office.”¹²³ Therefore, because there was probable cause, there was no violation of the defendant’s Fourth Amendment rights.¹²⁴

3. *United States v. Bailey* (Sixth Circuit, 1980)—Beeper Case

The Sixth Circuit determined that a beeper installed even after police obtained a warrant violated the Fourth Amendment.¹²⁵ In *Bailey*, DEA agents installed a beeper into a drum of chemicals that the defendant was about to purchase, obtained a warrant to enter the building the defendant was in, and arrested him for drug crimes.¹²⁶ The Sixth Circuit did not characterize the installation of the beeper as a search or a seizure.¹²⁷ Rather the court focused on if the installation violated a legitimate expectation of privacy.¹²⁸ The court noted that even de minimis intrusions are relevant to the Fourth Amendment if

¹¹⁹ *United States v. Shovea*, 580 F.2d 1382, 1384 (10th Cir. 1978).

¹²⁰ *Id.*

¹²¹ *Id.* at 1387.

¹²² *Id.*

¹²³ *Id.* at 1388.

¹²⁴ *Id.*

¹²⁵ *United States v. Bailey*, 628 F.2d 938, 939 (6th Cir. 1980).

¹²⁶ *Id.*

¹²⁷ *Id.* at 940.

¹²⁸ *Id.*

they violate an expectation of privacy.¹²⁹ The court disagreed with the government's assertion that the intrusion was minor, stating that "the intrusion is minor only if it does not violate protected individual privacy."¹³⁰

The court disregarded whether the beeper installation constituted a search because the police installed the beeper while the container was in the agents' custody, and not the defendant's.¹³¹ Therefore, the only issue to consider was whether the monitoring constituted a search, and the court concluded that it did.¹³² The court found under *Katz*, the defendant had a subjective expectation of privacy because his actions of keeping the chemicals in private areas and out of public view demonstrated that he wanted to keep the location of the chemicals private.¹³³ Additionally, the court found that "the law is prepared to recognize as legitimate an individual's expectation of privacy with respect to what he does in private with personal property he has a right to possess."¹³⁴

4. *State v. Jackson* (Washington State, 2003)—GPS Case

In *Jackson*, the defendant called the police to report his missing daughter.¹³⁵ After a few days, police believed the defendant was involved in his daughter's disappearance, so they obtained warrants to search his house and two cars and also installed GPS tracking devices on his cars.¹³⁶

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 943.

¹³² *Id.*

¹³³ *Id.* at 943-44.

¹³⁴ *Id.* at 944; *See also* *State v. Campbell*, 759 P.2d 1040 (Or. 1988) (where the court found that because the police failed to effectively follow the defendant in his car and therefore had to install a radio transmitter to track him, there was a search under the Oregon Constitution).

¹³⁵ *State v. Jackson*, 76 P.3d 217, 220 (Wash. 2003).

¹³⁶ *Id.* at 220-21.

Police then tracked him to two remote locations.¹³⁷ At the first location, police found the body of the missing daughter in a shallow grave, and at the second location, police found duct tape and plastic bags containing hair and blood from the victim.¹³⁸ Police then arrested the defendant.¹³⁹ The trial court found him guilty of first degree murder and sentenced him to prison time.¹⁴⁰ On appeal, the defendant argued that the use of the GPS device violated the Washington Constitution.¹⁴¹ The appellate court held that the warrantless installation of a GPS device did not violate the Washington constitution.¹⁴²

Accordingly, Jackson appealed to the Washington Supreme Court.¹⁴³ The court found that while they were affirming Jackson's conviction, police should be required to obtain warrants prior to installing GPS devices pursuant to the state constitution.¹⁴⁴

5. *Biddle v. State* (Delaware State, 2006)—GPS Case

In *Biddle*, a civilian installed a GPS device in another civilian's vehicle.¹⁴⁵ The State argued that there is "an expectation of privacy in the undercarriage of one's vehicle" and that the defendant violated this when she installed the GPS device.¹⁴⁶ The court held that there is a reduced privacy expectation when traveling on public roads, "but the police do not have the unfettered right to tamper with a vehicle by surreptitiously attaching a tracking device without either the owner's

¹³⁷ *Id.* at 221.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 221-22.

¹⁴² *Id.* at 222.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 224.

¹⁴⁵ *Biddle v. State*, No. 05-01-1052, 2006 WL 1148663, at *1 (Del. Super. Ct. Feb. 14, 2006).

¹⁴⁶ *Id.*

consent or without a warrant issued by the court.”¹⁴⁷ The court held that “the basic principle that a person has a protected privacy interest in his/her automobile is still applicable.”¹⁴⁸ Therefore, the court held that the defendant violated this legitimate privacy expectation.¹⁴⁹

C. A Chronological Look at Circuit Court and State Court Cases Finding the Use of GPS Devices or Beepers is NOT a Search

In the cases that follow, the courts ruled that there was not a search within the meaning of the Fourth Amendment.¹⁵⁰

1. *United States v. Pretzinger* (Ninth Circuit, 1976)—Beeper Case

In *Pretzinger*, DEA agents attached a beeper to a plane to track the defendant’s movements.¹⁵¹ After doing so, the agents were able to arrest the defendant for drug related crimes.¹⁵² The defendant argued that his arrest was the product of an illegal search because the police attached a beeper to the plane.¹⁵³ The court noted that the law in the Ninth Circuit is clear that when a device is attached to a vehicle moving on public roads—or airspace in this case—it is not a search because it does not infringe on a reasonable expectation of privacy.¹⁵⁴ The court found that no warrant is required in a case like this unless Fourth Amendment rights could be violated.¹⁵⁵ In *Pretzinger*, the Tenth Circuit noted that the DEA agents had established probable

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *2.

¹⁴⁹ *Id.*

¹⁵⁰ *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981); *United States v. Bernard*, 625 F.2d 854 (9th Cir. 1980); *United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976).

¹⁵¹ *Pretzinger*, 542 F.2d at 519.

¹⁵² *Id.* at 520.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

cause and had applied for a warrant, protecting the Fourth Amendment.¹⁵⁶

2. *United States v. McIver* (Ninth Circuit, 1999)—GPS Case

In *McIver*, the police placed a GPS device on the underside of the defendant's vehicle.¹⁵⁷ The court found that the warrantless installation of the GPS device did not violate the Fourth Amendment for many reasons.¹⁵⁸ First, the defendant never did anything to manifest his intent to keep the underside of the vehicle private.¹⁵⁹ Second, the defendant failed to prove that the warrantless installation of the GPS device deprived him of dominion and control of his vehicle.¹⁶⁰ Therefore, the Ninth Circuit held a search or seizure did not occur and that the Fourth Amendment was not violated.¹⁶¹

3. *People v. Gant* (New York, 2005)—GPS Case

In *Gant*, the police placed a GPS device on an RV, leading to the defendant's arrest.¹⁶² The defendant unsuccessfully moved to suppress all evidence obtained as a result of the GPS device.¹⁶³ The court stated

¹⁵⁶ *Id.*

¹⁵⁷ *United States v. McIver*, 186 F.3d 1119, 1126 (9th Cir. 1999).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1127.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; *See Osburn v. Nevada*, 44 P.3d 523 (Nev. 2002), where the court held that the defendant did not have a reasonable expectation of privacy in the exterior of his car; therefore, there was no search or seizure. *Id.* at 526; *See also People v. Lacey*, 2004 WL 1040676, at *8 (N.Y. Co. Ct. May 6, 2004), where the court held that the police should have obtained a warrant before attaching the GPS device. *Id.* at *8. However, the court found that the defendant did not have a reasonable expectation of privacy in his vehicle because it was used in connection with committing a crime and he did not own the vehicle. *Id.* at *9. Therefore, the court held that installing the GPS was allowed. *Id.*

¹⁶² *People v. Gant*, 9 Misc.3d 611, 617 (N.Y. Co. Ct. 2005).

¹⁶³ *Id.*

that without a valid expectation of privacy, there can be no search or seizure under the Fourth Amendment.¹⁶⁴ Therefore, the defendant had the burden of proving a valid expectation of privacy, which he failed to do.¹⁶⁵ Accordingly, the court determined that the police were not required to obtain a warrant before installing the GPS device.¹⁶⁶ In doing so, the court relied on *Knotts*, which stated that “a person traveling on a public roadway has no reasonable expectation of privacy in his movements from one place to another.”¹⁶⁷ The court, again relying on *Knotts*, noted that “one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.”¹⁶⁸

III. SEVENTH CIRCUIT DECISION: *UNITED STATES V. GARCIA*

United States v. Garcia is the first case where the Seventh Circuit squarely faced the issue of whether covert use of a GPS device is a search under the Fourth Amendment.¹⁶⁹ In an opinion authored by Judge Posner, the Seventh Circuit found that GPS use does not constitute a search; therefore, the Fourth Amendment is not violated.¹⁷⁰

¹⁶⁴ *Id.* at 618-19.

¹⁶⁵ *Id.* at 618.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 619.

¹⁶⁸ *Id.*; *See also* *United States v. Moran*, 349 F.Supp.2d 425 (N.D.N.Y. 2005) (where the court held that because the defendant did not have a valid expectation of privacy while traveling on a public road, it was not a search or seizure and the Fourth Amendment was not implicated); *State v. Scott*, 2006 WL 2642001, at *4 (NJ Aug. 8, 2006) (where the court held that that when the police had probable cause prior to attaching a GPS device, that was enough to avoid implicating the Fourth Amendment).

¹⁶⁹ *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

¹⁷⁰ *Id.*

A. *The Facts of Garcia*

In *Garcia*, the police suspected the defendant was involved in making methamphetamine.¹⁷¹ Therefore, they installed a GPS device on the vehicle he was using, without his knowledge, while the car was parked on a public street.¹⁷² The police did not obtain a search warrant or court order prior to doing so.¹⁷³ After reviewing the information obtained from the GPS device, the police learned the locations where the vehicle had been driven.¹⁷⁴ Then, the agents obtained a warrant to search those locations and found materials used to make methamphetamine.¹⁷⁵ While the agents were searching the property, the defendant drove onto the property whereby the agents searched his car, finding other methamphetamine materials.¹⁷⁶ Accordingly, the defendant was charged “with crimes related to methamphetamine cooking.”¹⁷⁷

B. *First Report and Recommendation*

In the first of two Report and Recommendations, the defendant attempted to suppress evidence obtained as a result of the GPS device, alleging a Fourth Amendment violation.¹⁷⁸ The magistrate judge noted that the Seventh Circuit, among others, had yet to decide this issue.¹⁷⁹ After *Knotts*, the defendant knew that he would likely be unsuccessful in any GPS monitoring challenge because he was tracked on a public

¹⁷¹ United States v. Garcia, No. 05-CR-155-C, 2006 WL 298704, at *1 (W.D. Wis. Feb. 3, 2006).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *2.

¹⁷⁸ *Id.* at *1.

¹⁷⁹ *Id.*

street.¹⁸⁰ Therefore, “Garcia limit[ed] his challenge to the question left open in *Knotts*: the reasonableness of the warrantless installation of a tracking device on his vehicle.”¹⁸¹ The court noted that this issue has been previously avoided by the Supreme Court.¹⁸²

The court then discussed the *Knotts* decision, specifically noting that individuals do not have a reasonable expectation of privacy while traveling on public roads and that using a beeper is simply augmenting what the police could have done on their own without it.¹⁸³ The district court then noted that three justices concurred in *Knotts*—Justices Brennan, Stevens, and Marshall—stating that “it would have been a much thornier case if the defendants had challenged the installation of the beeper.”¹⁸⁴ The district court also noted that *Karo* held that the Fourth Amendment was violated when the device was used on private property, but that *Karo* was not directly on point because in *Karo* the defendants did not challenge the installation of the beeper.¹⁸⁵

The court then analyzed many federal and state court cases that dealt with beepers being used in surveillance, but noted that many of them were not as damaging to Garcia as the government wanted them to be.¹⁸⁶ The court settled on the single issue it needed to decide: “under what circumstances, if any, does the Fourth Amendment forbid the government from installing a tracking device on a person’s private property?”¹⁸⁷ The court then stated it seemed “reasonably clear that the government must at least have a reasonable suspicion that the suspect is engaged in criminal activity and that monitoring his motor vehicle will produce evidence useful to the investigation.”¹⁸⁸

¹⁸⁰ *Id.* at *2.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *4.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *5.

¹⁸⁷ *Id.* at *7.

¹⁸⁸ *Id.*

Further, the court did not agree with the government's idea that the government could install a GPS device "on nothing more than its say-so."¹⁸⁹ The court then narrowed the issues down.¹⁹⁰ First, "[m]ust the government go a step further and establish probable cause to install a locational transmitter in a case like Garcia's?"¹⁹¹ Second, "[r]egardless which level of proof must be established, may the government obtain the court's post-hoc imprimatur in a case like Garcia's?"¹⁹²

The court found that reasonable suspicion is enough, and that a post-hoc hearing is enough to protect the defendant's rights.¹⁹³ The court then noted that the GPS installation on Garcia's car caused minimal government intrusion, and that the real intrusion is the monitoring of the car that follows.¹⁹⁴ However, since the monitoring was not deemed an intrusion in *Knotts*, the court reasoned that the installation could not be a more significant intrusion than the monitoring.¹⁹⁵ The court finally noted that the government had to prove that no violation had occurred, but failed to do so.¹⁹⁶ Therefore, the magistrate judge recommended that suppression was appropriate unless the government could prove it had reasonable suspicion to install the GPS device.¹⁹⁷ The magistrate judge recommended the following:

Before the government may install a [GPS on a vehicle] . . . it must establish at least a reasonable suspicion that the car's owner(s)/driver(s) are engaged in criminal activity, and that

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at *8.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

knowledge of the car's movement in public places will lead to the discovery of evidence relevant to the criminal investigation.¹⁹⁸

C. Second Report and Recommendation

In the First Report and Recommendation, the magistrate judge stated that the police must have reasonable suspicion before installing the GPS device.¹⁹⁹ Therefore, the issue before the court in the Second Report and Recommendation was whether the government could prove that it had reasonable suspicion to install the GPS device.²⁰⁰ After analyzing the facts the agents had available to them before installing the GPS device, the court determined that the agents had more than a reasonable suspicion that the defendant was involved in criminal activity.²⁰¹ Therefore, the court denied Garcia's motion to suppress.²⁰²

However, the court went on to note that “[a]lthough this court has not imposed on the government a duty to establish probable cause to attach the GPS device, the Seventh Circuit might, so we should address the issue prophylactically. As a technical matter, this section of the report is dicta.”²⁰³ After a long discussion of the probable cause standard, the court found that if the government had to prove probable cause in this case, it would have no trouble.²⁰⁴

D. Order

The defendant objected to the Second Report and Recommendation on the grounds that although the police may have

¹⁹⁸ *Id.* at *1.

¹⁹⁹ *Id.* at *1.

²⁰⁰ *United States v. Garcia*, No. 05-CR-155, 2006 WL 1294578, at *1 (W.D. Wis. May 10, 2006).

²⁰¹ *Id.* at *5.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at *5-*6

had reasonable suspicion to suspect that the defendant was involved in criminal activity, they did not have reasonable suspicion that tracking the defendant's vehicle would lead to the discovery of evidence.²⁰⁵ Both were required according to the First Report and Recommendation.²⁰⁶ The judge did not agree with Garcia, finding that the agents had reasonable suspicion (and actually had probable cause as well) to support their decision to install a GPS tracking device.²⁰⁷

E. Appellate Court Case: February 2, 2007

The issue on appeal was “whether evidence obtained as a result of a [GPS] . . . should have been suppressed as the fruit of an unconstitutional search.”²⁰⁸ The Seventh Circuit held that the GPS installation was not a search; therefore, the evidence should not be suppressed and did not violate the Fourth Amendment.²⁰⁹

On appeal, the defendant argued that in addition to reasonable suspicion and probable cause, the police had to have a warrant before installing the GPS device.²¹⁰ The government argued that a warrant was not needed because the police actions did not constitute a search under the Fourth Amendment.²¹¹ The court noted that there is nothing in the Fourth Amendment requiring a warrant for a search to be reasonable.²¹² However, the Supreme Court “has created a presumption that a warrant is required, unless infeasible, for a search

²⁰⁵ United States v. Garcia, No. 05-CR-155-C, 2006 WL 1601716, *1 (W.D. Wis. May 31, 2006).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at *2.

²⁰⁸ United States v. Garcia, 474 F.3d 994, 995 (7th Cir. 2007).

²⁰⁹ *Id.* at 994.

²¹⁰ *Id.* at 996.

²¹¹ *Id.*

²¹² *Id.*

to be reasonable.”²¹³ The court went on to note that this presumption only matters when there has been an actual search or seizure.²¹⁴

The defendant claimed that when the police installed the GPS device, it was a seizure.²¹⁵ The court disagreed, stating:

[t]he device did not affect the car’s driving qualities, did not draw power from the car’s engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not even alter the car’s appearance, and in short did not “seize” the car in any intelligible sense of the word.²¹⁶

The court next considered if monitoring the GPS device was a search, but following *Knotts*, determined it was not.²¹⁷ However, the court noted that *Knotts* did not answer the question of “whether installing the device in the vehicle converted the subsequent tracking into a search.”²¹⁸ The Seventh Circuit noted a circuit split over this exact issue and that *Garcia* was a case of first impression in the Seventh Circuit.²¹⁹ The Fifth and Ninth Circuits have held that installation does not constitute a search and the First, Sixth, and Tenth circuits have held the opposite.²²⁰

The court noted the issue here is the difference between the police following the defendant in their own cars and the police using GPS devices to do it for them.²²¹ Judge Posner called this a difference between the new technology and the old.²²² Judge Posner concluded

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 996-97.

²¹⁹ *Id.* at 997.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

that GPS tracking is not a Fourth Amendment violation because it is just new technology which makes following defendants easier.²²³

However, Judge Posner wrote that *Katz* must be considered because in *Katz*, the Supreme Court noted “that the meaning of a Fourth Amendment search must change to keep pace with the march of science.”²²⁴ Additionally, the court noted that in *Kyllo*, “the use of a thermal imager to reveal details of the interior of a home that could not otherwise be discovered without a physical entry” was a search.²²⁵ However, the court went on to distinguish *Kyllo* because in *Kyllo* the technology completed a search that the police could not otherwise have done without the imager.²²⁶ Judge Posner called the imager a “substitute for a form of a search,” but in *Garcia* the GPS device was a substitute for an activity, an activity already determined not to be a search.²²⁷ Accordingly, the court noted that when the officers installed the GPS device, it was not a search under the Fourth Amendment.²²⁸

Further, Judge Posner noted that GPS could allow for wholesale surveillance.²²⁹ The police could install GPS devices to thousands of cars at random,²³⁰ or laws could be passed requiring all cars to have GPS so that the police can easily monitor them.²³¹ Importantly, Judge Posner noted that at this time he cannot say that those situations would not implicate the Fourth Amendment.²³² However, he noted that there is no reason to think that the police should not get more efficient as

²²³ *Id.*

²²⁴ *Id.* (citing *Katz v. United States*, 389 U.S. 347 (1967)).

²²⁵ *Garcia*, 474 F.3d at 997 (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

²²⁶ *Garcia*, 474 F.3d at 997.

²²⁷ *Id.*

²²⁸ *Id.* at 994.

²²⁹ *Id.* at 998.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

time goes on.²³³ He stated that “there is a tradeoff between security and privacy, and often it favors security.”²³⁴ Judge Posner noted:

Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive. Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues that fortunately we need not try to resolve.²³⁵

Therefore, Judge Posner was aware of the danger his ruling could create, but inexplicably avoided dealing with it, stating that there was no evidence of mass surveillance at this time.²³⁶ Rather, he said that in *Garcia*, the police had “abundant grounds for suspecting the defendant.”²³⁷ But he also noted, “[s]hould 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.”²³⁸

IV. *GARCIA* WAS WRONGLY DECIDED

The Seventh Circuit decided *Garcia* incorrectly. The Seventh Circuit should have held a warrant is required prior to the police installing a GPS device. Four separate arguments for why *Garcia* should have come out differently are detailed below.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

A. *The Seventh Circuit Made Many Errors in Its Reasoning*

1. Beeper Cases Should Not Be Controlling in Deciding GPS Cases

A dissenting opinion by Justice Douglas from *United States v. White* stated that “[w]hat the ancients knew as ‘eavesdropping,’ we now call ‘electronic surveillance’; but to equate the two is to treat man’s first gunpowder on the same level as the nuclear bomb.”²³⁹ So too is comparing beepers and GPS devices. GPS technology is so new and so different than anything that the drafters of the Fourth Amendment and the authors of previous beeper cases could have imagined. Therefore, the beeper line of cases should not be controlling in deciding GPS cases.

The level of intrusiveness, invasiveness, and sophistication of GPS devices as compared to beepers mandates that beeper cases cannot be controlling in deciding GPS cases. There are many differences between GPS devices and beepers as discussed above in the Background section. To recap, GPS devices, as noted in *State v. Jackson*, are particularly invasive because they provide constant uninterrupted surveillance.²⁴⁰ Beepers do not and cannot provide a detailed report of the vehicle’s movements like GPS devices can. GPS devices can track and record every single movement that a defendant makes for days, weeks, and months on end. Beeper devices are not that reliable and they can lose their signal. GPS devices do not lose their signal.

Perhaps most important, GPS devices can be installed and then left alone. Someone can then go back and download the data from the GPS days, weeks, or months later. Beepers must be followed in real time by an actual person as the search is occurring.²⁴¹ Beepers do not locate exactly where an object is, but rather emit a signal when the

²³⁹ *United States v. White*, 401 U.S. 745, 756 (1971).

²⁴⁰ *State v. Jackson*, 150 Wash.2d 251 (Wash. 2003) (where the court discussed the possible dangers of not requiring warrants before attaching GPS devices).

²⁴¹ *Id.*

beeper is nearby.²⁴² Therefore, the police must stay with the beeper during a live search to derive the benefit from it.²⁴³ In short, following a beeper signal requires an active search, whereas a GPS is a passive search.

Because beepers and GPS are so different, courts are wrong to rely on beeper cases when deciding GPS cases. When the Supreme Court was deciding the various beeper cases discussed above,²⁴⁴ GPS technology was not yet available.²⁴⁵ There is no way the justices could have contemplated the “all-encompassing surveillance that is possible today” by using GPS.²⁴⁶ Their decisions were based on beeper technology. To compare the two is to compare apples and oranges, gun powder and the atomic bomb.

Back when the beeper cases jurisprudence was being formulated, the resources required to track a suspect 24/7 proved to be a necessary check on the police.²⁴⁷ Therefore, the police would only follow a suspect 24/7 when they were pretty sure that it would produce evidence.²⁴⁸ Now, however, police can install a GPS device even without strong evidence and without having to prove reasonable suspicion or probable cause and without having to obtain a warrant.²⁴⁹

Because GPS is a technology that was not at all contemplated when beeper cases were being decided, the reasoning from those cases is irrelevant to GPS cases and should not apply. Following this argument then, the “no reasonable expectation of privacy while travelling on public roads” argument from *Knotts* should not be relevant to GPS cases.

²⁴² Hutchins, *supra* note 31, at 435.

²⁴³ *Id.*

²⁴⁴ United States v. Karo, 468 U.S. 705 (1984); United States v. Knotts, 460 U.S. 276 (1983); Katz v. United States, 389 U.S. 347 (1967).

²⁴⁵ *Constitutional Law—Fourth Amendment—Seventh Circuit Holds That GPS Tracking is Not a Search*, 120 HARV. L. REV. 2230, 2233 (2007).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 2234.

2. *Garcia*: Missed Opportunity to Keep Science in Check

Technology in this country is rapidly advancing, as evidenced by the rise of GPS technology. When the Fourth Amendment was written, there was no way for the drafters to even contemplate GPS technology. Therefore, courts today have to reconcile Fourth Amendment protections in a time of rapidly advancing technology. First, in 1963, in a concurring opinion in *United States v. Lopez*, Chief Justice Warren expressed concern over advances in science posing a threat to the privacy of individuals and a threat to an individual's Fourth Amendment rights.²⁵⁰ Chief Justice Warren stated:

Fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system.²⁵¹

GPS technology constitutes a “fantastic” advancement in technology that Chief Justice Warren warned against back in 1963.²⁵²

Additionally, in *United States v. Knotts*, Justice Rehnquist, “recognizing that constitutional protections may be warranted if tracking surveillance revealed more than the limited quantity of information disclosed by a beeper,”²⁵³ stated that if law enforcement begins using “dragnet type law enforcement practices” then perhaps it will be time to consider whether a constitutional issue arises.²⁵⁴ Therefore, Justice Rehnquist was aware that the issue of warrantless installation of beepers could pose a constitutional problem. He warned

²⁵⁰ *Lopez v. United States*, 373 U.S. 427, 441 (1963).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Hutchins*, *supra* note 31, at 440.

²⁵⁴ *United States v. Knotts*, 460 U.S. 276, 284 (1983).

future courts that if the beeper technology expands beyond what it was in 1983, then courts will need to take a second look to determine if constitutional issues arise. Today, it is time for courts to heed Justice Rehnquist's warning and take this second look.

Further, in *Dow Chemical Company v. United States*, the Environmental Protection Agency took aerial photographs of a plant.²⁵⁵ The Supreme Court found it was not a search for many reasons including that the information gained from the pictures was nothing more than augmentation of naked-eye view.²⁵⁶ However, the Court noted, “[i]t may well be . . . that surveillance of private property by using highly sophisticated surveillance equipment . . . such as *satellite technology*, might be constitutionally proscribed absent a warrant.”²⁵⁷

Furthermore, Judge Posner spent about a quarter of the *Garcia* decision discussing how there is a danger of “dragnet type law enforcement practices” in the form of mass surveillance lurking in the *Garcia* case. He discussed the tradeoff between privacy and security. He talked about how science is advancing and the meaning of the Fourth Amendment needs to change to keep current with science. He even referenced the above quote from Chief Justice Warren about the fantastic advances in science.²⁵⁸ But then, after noting all the possible problems with police use of GPS devices, Judge Posner stated that for now the problems are not big enough to cause concern.²⁵⁹

Judge Posner could have, and should have, offered some guidance on how the police should lawfully use GPS devices and he could and should have guided future courts on how to rule on GPS use without infringing on the Fourth Amendment. Judge Posner could have and should have taken the opportunity to state that police must obtain a warrant before the police can lawfully install the device. This ruling would have kept in line with the balance between privacy and security

²⁵⁵ *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986).

²⁵⁶ *Id.* at 238.

²⁵⁷ *Id.* (emphasis added).

²⁵⁸ *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007).

²⁵⁹ *Id.*

that he spoke of in his opinion. Why did Judge Posner avoid the opportunity to address these issues? *Garcia* was a case of first impression after all.²⁶⁰ It would have been a great chance for the Seventh Circuit to set out clear standards that would serve to protect the Fourth Amendment.

The invention of GPS and the advent of the police using it without having to show reasonable suspicion or probable cause or without having to obtain a warrant is exactly the type of “dragnet type law enforcement practices” that Justice Rehnquist warned about. Therefore, the Seventh Circuit and other courts should have heeded Chief Justice Warren’s warning and found that installing GPS devices constitutes a search; therefore, a warrant is required prior to installation.

3. The Seventh Circuit’s Discussion of the Possibility of 24/7 Police Surveillance is Impractical

Judge Posner stated that the police could have accomplished the search in *Garcia* without GPS, but that GPS made the search easier. However, on closer inspection, it is pretty clear that the police could not have accomplished the 24/7 tracking of the defendant if they had to do it with manpower alone. It is nearly impossible to imagine a police force that could handle such a task. It is very unlikely that the police could follow any defendant long enough to maintain a perfect record of all of movements.²⁶¹

Imagine a police force attempting to obtain the same results by following a person that they could obtain with a GPS. The discussion below will prove this to be impossible. If the police had five suspects who they wanted to follow for a period of two months, this would take at the very least forty officers dedicated full time to tracking these suspects and maintaining the perfect record. There are three eight-hour shifts a day, seven days a week, for a total of twenty-one shifts a week. Imagine that each officer works four shifts a week with a partner.

²⁶⁰ *Id.*

²⁶¹ *Id.*

Therefore, it would take eight officers tracking a suspect full-time to track just one suspect. If there are five suspects, that would require forty officers tracking the suspects full-time.

Therefore, it is easy to see that police officers likely cannot perform such searches without the use of a GPS device. What police force has forty police officers—eight per suspect—to spare? Therefore, the Seventh Circuit's argument that the police could have performed the search without the GPS, but the GPS made it easier, is impractical, and that reasoning should have no bearing on the decision. The Seventh Circuit should have found, like in *Kyllo*, that when the officers cannot perform the search without the device, they should not be able to do it.

B. Requiring a Warrant Imposes a Rather Low Burden on Police, but Provides a High Benefit to Individuals

In today's rapidly advancing electronic day and age, obtaining a warrant is not hard to do. A police officer could ask a judge for a quick meeting, could call him or her on the phone, or can even send the judge an *email* requesting a warrant. Generally speaking, the decision to install a GPS device to a suspect's car is likely made in a police station. And presumably, the decision is made after looking at the evidence in a case and deciding that it would be worthwhile to follow a particular subject. Also, presumably, the police officer has to request a GPS device from somewhere. Is it really possible that police officers have handfuls of GPS devices just laying around? Doubtful.

Considering that at least part of this process is presumably done in the police station, it would not be that difficult to require the police officer to send a quick email to the judge to get a warrant before installing the GPS device. It is hard to imagine a circumstance that would arise where in the middle of an emergency a police officer would absolutely need to install a GPS device, and if he did it is likely this situation would fall under the exigent circumstances exception to requiring a warrant anyway. Therefore, it seems like a very small

burden to impose on the police, for a very high payoff for individuals—the utmost protection of the Fourth Amendment.²⁶²

C. Previous Cases Provide Valuable Insight that the Seventh Circuit Should Have Adopted

Previous cases that have addressed electronic surveillance could have provided the Seventh Circuit with valuable insight that would have led the court to make the proper ruling in *Garcia*. The First Circuit in *Moore*, as previously discussed above, stated that when a beeper is attached to a car, the beeper “transforms the vehicle . . . into a messenger” to aid the police.²⁶³ The court noted that people “properly can expect not to be carrying around an uninvited device that continuously signals his presence.”²⁶⁴ This court clearly noted that even though people might not have an expectation of privacy on public roads, they do have certain privacy expectations deserving of protection.

“In the case of GPS-enabled tracking, it is this aggregation of substantial amounts of personal data that makes the limitless use of the technology constitutionally troublesome.”²⁶⁵ Therefore, it is quite likely that back when *Knotts* was decided in 1983, the Supreme Court did not envision “the unfettered use of GPS-enabled tracking” and the sophistication of GPS technology.²⁶⁶

Further, the Sixth Circuit in *Bailey* expressed its opinion that no matter how small the intrusion, it can still have an effect on Fourth Amendment concerns when the intrusion invades an expectation of

²⁶² See Hutchins, *supra* note 31, at 463; *United States v. Berry*, 300 F.Supp.2d 366 (D. Md. 2004); *State v. Jackson*, 76 P.3d 217 (Wash. 2003).

²⁶³ *United States v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977).

²⁶⁴ *Id.*

²⁶⁵ Hutchins, *supra* note 31, at 453.

²⁶⁶ *Id.* at 453-54.

privacy.²⁶⁷ The court clearly expressed its idea that the Fourth Amendment can be violated even when the violation is de minimus.²⁶⁸

In addition, the Delaware Supreme Court in *Biddle* noted that “the police do not have the unfettered right to tamper with a vehicle by surreptitiously attaching a tracking device without either the owner’s consent or without a warrant issued by a court.”²⁶⁹ The court held that “the basic principle that a person has a protected privacy interest in his/her automobile is still applicable.”²⁷⁰

Therefore, the Seventh Circuit would not have been the only court to find that one has a reasonable expectation of privacy that their possessions will not be meaningfully interfered with. It is not unreasonable to expect that one’s possessions will not be tampered with on a public road. The Seventh Circuit should have adopted the holdings or reasoning of these courts when they decided *Garcia*.

D. Installation of a GPS is A Seizure; Therefore, There are Fourth Amendment Concerns

A concurring opinion from the Ninth Circuit in *McIver* by Judge Kleinfeld sets out an interesting way of addressing the GPS problem—a way that the *Garcia* court and all courts should follow. He stated that installing tracking devices on vehicles should be subject to Fourth Amendment concerns.²⁷¹ He disagreed with the majority in *McIver* that doing so was not a seizure.²⁷² He noted that under the Fourth Amendment, a seizure occurs when there is “some meaningful interference with an individual’s possessory interests.”²⁷³ He argued that the meaningful interference in *McIver* was not the liberty to drive

²⁶⁷ United States v. Bailey, 628 F.2d 938, 940 (6th Cir. 1980).

²⁶⁸ *Id.*

²⁶⁹ *Biddle v. State*, No. 05-01-1052, 2006 WL 1148663, at *1 (Del. Super. Ct. Feb. 14, 2006).

²⁷⁰ *Id.* at *2.

²⁷¹ United States v. McIver, 186 F.3d 1119, 1133 (9th Cir. 1999).

²⁷² *Id.*

²⁷³ *Id.* at 1127 (quoting United States v. Karo, 468 U.S. 705, 712 (1984)).

on a public street without being watched, but rather the “possessory interest of the owner of a vehicle in excluding individuals from performing mechanical work on his vehicle or altering it without his consent.”²⁷⁴

Further, Judge Kleinfeld noted that the Supreme Court has extended Fourth Amendment analysis recently.²⁷⁵ He stated that it was extended to include situations “to protect privacy from government intrusion even where the individuals intruded upon lack any property interest in the area where the intrusion was made.”²⁷⁶ The Supreme Court held that “the Fourth Amendment protects property as well as privacy.”²⁷⁷ Therefore, he argued that even if the defendant in *McIver* did not have a privacy interest in the car, “he had a right guaranteed by the Fourth Amendment to be free of a ‘seizure’ of his car unless a search warrant issued upon probable cause” existed in the case.²⁷⁸

The concurrence stated that one of the main property rights “is the right to exclude others.”²⁷⁹ Therefore, car owners’ possessory rights are interfered with when the police install a device to their car even if there is not a reasonable expectation of privacy in the car.²⁸⁰

Judge Posner stated that the use of GPS did not constitute a seizure.²⁸¹ He stated that the GPS device “in short did not ‘seize’ the car in any intelligible sense of the word.”²⁸² While it is true that the GPS device did not interfere with the functioning of the car and did not take up space, that is not the correct way to determine if the car was seized however. It was a seizure in the *Garcia* case for the reasons Judge Kleinfeld stated above and because of the reasons previously discussed in *Moore*, *Bailey*, and *Biddle*.

²⁷⁴ *McIver*, 186 F.3d at 1133.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* (quoting *Soldal v. Cook County*, 506 U.S. 56 (1992)).

²⁷⁸ *McIver*, 186 F.3d at 1133-34.

²⁷⁹ *Id.* at 1134 (quoting *Rakas v. Illinois*, 439 U.S. 128 (1978)).

²⁸⁰ *McIver*, 186 F.3d at 1134.

²⁸¹ *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007).

²⁸² *Id.*

CONCLUSION

The focus of this comment is not to question whether police officers should use GPS technology, but rather to argue that police should be required, before using GPS technology, to successfully pass through the gate keeping functions set out to protect individuals' Fourth Amendment rights, namely requiring a warrant prior to commencing a search. Currently, courts are deciding GPS cases based off of beeper jurisprudence. However, when courts were deciding beeper cases, GPS technology had yet to even be contemplated. Therefore, beeper cases should not be used to analyze GPS cases. Instead, GPS cases should be analyzed under an entire new line of reasoning based on the idea that people do have a reasonable expectation that their every movement is not being 100% accurately tracked by the police. Therefore, the installation of GPS devices should be considered a search. Accordingly, police officers should be required to obtain a warrant prior to installing a GPS device.