No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EMILIO JEAN,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Brad Bransky
Deputy Coconino County Public
Defender/Counsel of Record
Sandra Diehl
Coconino County Public Defender
110 E. Cherry Avenue
Flagstaff, Arizona 86001
(928)679-7700
bbransky@coconino.az.gov
sdiehl@coconino.az.gov

Attorneys for Petitioner Emilio Jean

APPENDIX INDEX

Appendix 1: *State v. Jean*, 243 Ariz. 331 (2018)

Appendix 2: State v. Jean, 239 Ariz. 495 (2016)

Appendix 3: Partial Reporter's Transcript, Sept. 20th, 2014

APPENDIX 1

State v. Jean, 243 Ariz. 331 (2018)

We've updated our Privacy Statement. Before you continue, please read our new Privacy Statement and familiarize yourself with the terms.

WESTLAW

Original Image of 407 P.3d 524 (PDF)

243 Ariz. 331
Supreme Court of Arizona.

State v. Jean
Supreme Court of Arizona. January 3, 2018 243 Ariz. 331 407 P.3d 524 *(Approx. 33 pages)*

STATE of Arizona, Appellee,

v.

Emilio JEAN, Appellant.

No. CR-16-0283-PR
Filed January 3, 2018

Synopsis

Background: Defendant was convicted in the Superior Court, Coconino County, No. S0300CR201200246, Cathleen Brown Nichols, J., of money laundering, transportation of marijuana, conspiracy, and illegally conducting an enterprise. He appealed. The Court of Appeals, Orozco, J., 239 Ariz. 495, 372 P.3d 1019, affirmed. Defendant appealed.

Holdings: The Supreme Court, Bales, C.J., and Pelander, V.C.J., held that:
1 defendant lacked standing to challenge, under trespass theory, global positioning system (GPS) monitoring of commercial truck, in which he was a passenger, as an illegal search in violation of Fourth Amendment, and
2 good-faith exception to exclusionary rule applied to allow for admission of evidence of drugs discovered as result of officers' warrantless placement and monitoring of global positioning system (GPS) tracking device on commercial truck in which defendant was a passenger.

Affirmed in part and vacated in part.

Bales, C.J., filed opinion dissenting in part and in the judgment, in which Bolick, J., joined.

Pelander, V.C.J., filed opinion dissenting in part in which Gould and Espinosa, JJ., joined.

Bolick, J., filed opinion concurring in part and dissenting in part.

West Headnotes (12)

Change View

1 **Searches and Seizures** Use of electronic devices; tracking devices or 'beepers.'
Global positioning system (GPS) tracking may constitute a search for Fourth Amendment purposes if its use involves a common law trespass or invades a person's reasonable expectation of privacy. U.S. Const. Amend. 4.

SELECTED TOPICS

Searches and Seizures

Purposes of Fourth Amendment Analysis of Search

Secondary Sources

Entry and search of premises for purpose of arresting one without search warrant

5 A.L.R. 263 (Originally published in 1920)

...It is well settled that a police officer or a private person may make a peaceable or forcible entry to search any premises without a search warrant, for the purpose of arresting one accused of felony, ...

When Is Warrantless Entry of House or Other Building Justified Under "Hot Pursuit" Doctrine

17 A.L.R.6th 327 (Originally published in 2006)

...This annotation collects and analyzes all the state and federal cases discussing whether a police pursuit that culminated in the entry of a house or other building to search for or arrest the suspect w...

s 30:14. Exceptions to the exclusionary rule-Exigent circumstances

Ariz. Prac. Arizona Trial Handbook § 30:14

...The exigent circumstances exception to the requirement that a warrant be obtained is triggered when "there is a substantial risk of harm to the persons involved or to the law enforcement process ... if t...

See More Secondary Sources

Briefs

Brief of the National League of National Conference of State Legislatures, International Mun Lawyers Association, Internatic... City/County Management Association, U.S. Conference of Mayors, and National Association of Counties as Amici Curiae Supporting Petitioner

2006 WL 422137
BRIGHAM CITY, Petitioner, v. Charles W. STUART, Shayne R. TAYLOR, and Sandra TAYLOR, Respondents.
Supreme Court of the United States
Feb. 21, 2006

...FN* Counsel of Record for theAmici Curiae Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. State and local governments ...

Brief for the Appellants

1979 WL 199762
Theodore PAYTON, Appellant, v. NE... YORK, Appellee. No. 78-5420 Obie Riddick, Appellant, v. New York, Appellee. No. 78-5421
Supreme Court of the United States
Jan. 23, 1979

...The opinion of the New York Court of Appeals (A. 69-93) is reported at 45 N.Y.2d 300, 408 N.Y.S.2d 395. The order of affirmance of the Appellate Division, First Department in the Payton case (A. 42) is...

Brief of the National Associatic Criminal Defense Lawyers as A

2 **Criminal Law** Evidence wrongfully obtained
Criminal Law Reception of evidence
In reviewing a trial court's denial of a motion to suppress, the appellate court considers only the evidence adduced at the suppression hearing and views the facts and reasonable inferences therefrom in the light most favorable to sustaining the trial court's ruling.

1 Case that cites this headnote

3 **Criminal Law** Review De Novo
Criminal Law Competency of evidence
The appellate court reviews for abuse of discretion the trial court's factual findings on a motion to suppress, but reviews de novo the trial court's ultimate legal determination that a search complied with the Fourth Amendment. U.S. Const. Amend. 4.

1 Case that cites this headnote

4 **Searches and Seizures** Use of electronic devices; tracking devices or 'beepers.'
Searches and Seizures Motor Vehicles
A vehicle is an "effect" under the Fourth Amendment, and the installation and use of a global positioning system (GPS) tracking device may constitute a search. U.S. Const. Amend. 4.

5 **Searches and Seizures** Standing to Object
Fourth Amendment rights are personal rights which may not be vicariously asserted. U.S. Const. Amend. 4.

6 **Searches and Seizures** Automobile searches
Trespass Necessity and effect in general
Police officers' monitoring of commercial truck through use of global positioning system (GPS) tracking device that was placed on truck without warrant did not constitute a common law trespass as to defendant, who was truck's passenger, and, thus, defendant lacked standing to challenge, under trespass theory, GPS monitoring as an illegal search in violation of Fourth Amendment, in prosecution for various drug-related offenses; defendant did not own truck or ever possess the truck outside the presence of truck's owner, nor did defendant, who was merely traveling with owner and sometimes driving, have the right to exclude others from the truck. U.S. Const. Amend. 4.

7 **Searches and Seizures** Standing to Object
A person can only challenge a search if it invades his or her own Fourth Amendment rights. U.S. Const. Amend. 4.

8 **Criminal Law** Reply briefs

Curiae in Support of Responde

2006 WL 820363
BRIGHAM CITY, UTAH, Petitioner, v. Charles W. STUART, et al., Respondents.
Supreme Court of the United States
Mar. 28, 2006

...This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as amicus curiae in support of respondents. FN1. Pursuant to Rule 37, letters of consent from the parties have ...

See More Briefs

Trial Court Documents

Michael E ALLEN, et al., v. CITY PHOENIX POLICE DEPARTMEN

2004 WL 5203596
Michael E ALLEN, et al., v. CITY OF PHOENIX POLICE DEPARTMEN, et al.
Superior Court of Arizona.
Dec. 02, 2004

...11/30/2004 CLERK OF THE COURT E. Schneider Deputy PERCIVAL R BRADLEY DAVID J DAMRON The Court took under advisement Defendant City of Phoenix's Motion for Summary Judgment as to all Plaintiffs Michael ...

State v. Davis

2007 WL 5210222
State of Arizona, (Plaintiff), v. John M..... DAVIS, (Defendant).
Superior Court of Arizona.
Dec. 17, 2007

...By: Diane Troxell - Judicial Assistant The Court has considered the Defendant's Motion to Suppress, the State's Response, the Supplement to Defendant's Motion to Suppress, the State's Response to the S...

State of Arizona, v. Aaron Scott HOSKINS (CR 94-11396) Scott L Deshaw (CR 94-11397).

1996 WL 34398129
State of Arizona, v. Aaron Scott HOSKINS (CR 94-11396) Scott Lee Deshaw (CR 94-11397).
Superior Court of Arizona.
May 06, 1996

...COUNTY ATTORNEY BY: TERESA SANDERS RICHARD D. GIERLOFF ROBERT L. STORRS Defendants have both filed various pre-trial motions in their respective cases. Defendant Hoskins has filed a "Motion to Suppress...

See More Trial Court Documents

Defendant, a passenger in commercial truck, waived his contention that police officers' monitoring of truck through use of global positioning system (GPS) tracking device that was placed on truck without warrant violated state constitutional protections against unreasonable searches and seizures, where he raised such claim for the first time in his reply brief before appellate court, on appeal from convictions for various drug-related offenses. Ariz. Const. art. 2, § 8.

9 **Criminal Law** Reliance on statute, ordinance, or precedent; mistake of law

Good-faith exception to exclusionary rule applied to allow for admission of evidence of drugs discovered as result of police officers' warrantless placement and monitoring of global positioning system (GPS) tracking device on commercial truck in which defendant was a passenger, in violation of Fourth Amendment, in prosecution for various drug offenses arising from subsequent discovery of marijuana in truck; there was clearly binding appellate precedent that officers could have relied on that concluded that exclusionary rule should not apply to GPS tracking at time such device was installed, and there was nothing to suggest that officers' conduct was deliberate, reckless, or grossly negligent. U.S. Const. Amend. 4.

10 **Criminal Law** Reliance on statute, ordinance, or precedent; mistake of law

Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. U.S. Const. Amend. 4.

11 **Criminal Law** Purpose of Exclusionary Rule

The exclusionary rule is a prudential doctrine invoked to deter future violations of constitutional rights.

12 **Criminal Law** Operation and extent of, and exceptions to, the exclusionary rule in general

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system; thus, exclusion is appropriate only where law enforcement conduct is both sufficiently deliberate that deterrence is effective and sufficiently culpable that deterrence outweighs the costs of suppression.

***525** Appeal from the Superior Court in Coconino County, The Honorable Cathleen Brown Nichols, Judge, No. CR2012–00246. **AFFIRMED**

Opinion of the Court of Appeals, Division One, 239 Ariz. 495, 372 P.3d 1019 (App. 2016). **VACATED IN PART**

Attorneys and Law Firms

Mark Brnovich, Arizona Attorney General, Dominic Draye, Solicitor General, Joseph T. Maziarz, Chief Counsel, Criminal Appeals Section, Terry M. Crist, III (argued), Assistant Attorney General, Phoenix, Attorneys for State of Arizona

Sandra Diehl, Coconino County Public Defender, Brad Bransky (argued), Deputy Public Defender, Flagstaff, Attorneys for Emilio Jean

Stefan M. Palys, Stinson Leonard Street, LLP, Phoenix, and Kathleen E. Brody, American Civil Liberties Union Foundation of Arizona, Phoenix, Attorneys for Amicus Curiae American Civil Liberties Union of Arizona

David J. Euchner (argued), Slade E. Smith, Rule 38(d) Certified Law Student, Arizona Attorneys for Criminal Justice, Tucson, Attorneys for Amicus Curiae Arizona Attorneys for Criminal Justice

CHIEF JUSTICE BALES authored the opinion of the Court with respect to Parts I, II(A), (B), (C), and (D), in which JUSTICES BRUTINEL, TIMMER, and BOLICK joined. VICE CHIEF JUSTICE PELANDER authored the opinion of the Court with respect to Parts II(E) and III, in which JUSTICES BRUTINEL, TIMMER, and GOULD and JUDGE ESPINOSA joined.* CHIEF JUSTICE BALES, joined ***526** by JUSTICE BOLICK, filed an opinion dissenting in part and dissenting in the judgment. VICE CHIEF JUSTICE PELANDER, joined by JUSTICE GOULD and JUDGE ESPINOSA, filed an opinion dissenting in part. JUSTICE BOLICK filed an opinion concurring in part and dissenting in part.

Opinion

BALES, C.J., opinion of the Court with respect to Parts I, II(A), (B), (C), and (D); and PELANDER, V.C.J., opinion of the Court with respect to Parts II(E) and III:

1 ¶ 1 We consider whether the Fourth Amendment rights of defendant Emilio Jean, a passenger of a truck that he sometimes drove while accompanied by its owner, were violated when police officers collected information over several days from a Global Positioning System ("GPS") tracking device they had placed on the truck without obtaining a warrant. GPS tracking may constitute a search for Fourth Amendment purposes if its use involves a common law trespass, *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), or invades a person's reasonable expectation of privacy, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Although we conclude Jean was subjected to a warrantless search that violated his reasonable expectation of privacy and thus his Fourth Amendment rights, the evidence obtained need not be suppressed because the good-faith exception to the exclusionary rule applies.

I.

2 ¶ 2 In reviewing a trial court's denial of a motion to suppress, we consider only the evidence adduced at the suppression hearing and view the facts and reasonable inferences therefrom in the light most favorable to sustaining the court's ruling. *State v. Valenzuela*, 239 Ariz. 299, 301 ¶ 3, 371

P.3d 627, 629 (2016). In February 2010, Jean and David Velez–Colon shared the driving of a commercial tractor-trailer from Georgia to Arizona. While the vehicle was in Phoenix, Department of Public Safety ("DPS") officers became suspicious and ran a license plate search, revealing that the trailer, marked "Swift," was reported stolen and that the truck was registered to "Swiff" with Velez–Colon as the company owner. Suspecting that the vehicle was being used to transport drugs, DPS officers installed a GPS tracking device on the truck without obtaining a warrant. Although the officers knew Velez–Colon owned the truck, they did not know Jean was traveling with him.

¶ 3 Federal Drug Enforcement Agency officers followed the vehicle to Tucson where they witnessed Velez–Colon engage in a suspicious hand-to-hand exchange. The federal agents continued their surveillance of the truck as it returned to Phoenix without dropping off a load. After the truck left Phoenix at 9:30 pm on February 17, 2010, and then as it traveled to California, law enforcement officers monitored it exclusively through GPS, tracking the vehicle to a truck stop, to a warehouse, and then back to a truck stop in Ontario, California, before it returned to Arizona. Velez–Colon and Jean took turns driving. Overall, the officers monitored the truck's movements with GPS for about thirty-one hours over three days.

¶ 4 Assisted by the GPS location data, a DPS officer stopped the vehicle around 4:00 am on February 19 after it reentered Arizona. When the officer approached the truck, Velez–Colon was in the driver's seat and Jean was lying, apparently asleep, in the truck cabin's sleeping bunk. The officer asked Jean, as the co-driver, to present his driver's license and logbook and asked about their journey. Jean said he was paid to drive by Velez–Colon. The officer separately asked both Velez–Colon and Jean for permission to search the truck; they each refused. After a drug-detection dog alerted to the trailer, officers searched it and found 2140 pounds of marijuana.

¶ 5 The State charged Jean with conspiracy, illegally conducting an enterprise, money laundering, and transportation of marijuana in an amount over two pounds. Jean moved to suppress the evidence, arguing that the discovery of the marijuana in the trailer was the result of an illegal search because the officers lacked a warrant when they placed ***527** the GPS tracking device on the truck. Jean argued that the GPS tracking violated his possessory and privacy rights under the Fourth and Fourteenth Amendments to the U.S. Constitution and article 2, section 8 of the Arizona Constitution. The trial court held an evidentiary hearing on Jean's motions; he did not testify at the hearing. (Jean also unsuccessfully moved to suppress the evidence based on the officer's allegedly illegal stop of the vehicle, but he abandoned that argument and therefore issues relating to the stop are not before us.)

¶ 6 The trial court denied Jean's motion to suppress, reasoning that Jean, as a passenger, did not have standing to object to the State's use of the GPS tracking device on the truck owned by Velez–Colon. Jean was subsequently found guilty as charged and sentenced to two concurrent prison terms of ten years, followed by two concurrent probation terms of five years.

¶ 7 The court of appeals affirmed. *State v. Jean*, 239 Ariz. 495, 372 P.3d 1019 (App. 2016). It reasoned that Jean could not claim his Fourth Amendment rights were violated based on a trespass theory because he was not a bailee and did not otherwise have a possessory interest in the vehicle. *Id.* at 500 ¶¶ 18–19, 372 P.3d at 1024. The court also held that Jean had "no reasonable expectation of privacy in his movements as a passenger or driver of the truck" because "a person travelling in a vehicle on public roads has no reasonable expectation of privacy in the person's movements from one place to another," *id.* ¶ 20 (citing *United States v. Knotts*, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)), "particularly where the government's monitoring is short-term," *id.* (quoting *State v. Estrella*, 230 Ariz. 401, 404 ¶ 12, 286 P.3d 150, 153 (App. 2012)).

¶ 8 We granted review to determine whether the warrantless GPS tracking constituted a search and violated Jean's rights under the Fourth Amendment, and if so, whether the evidence gathered therefrom should be excluded. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12–120.24.

II.

A.

3 4 ¶ 9 "We review for abuse of discretion the trial court's factual findings on the motion to suppress, but review de novo the trial court's ultimate legal determination that the search complied with the Fourth Amendment." *State v. Gilstrap*, 235 Ariz. 296, 297 ¶ 6, 332 P.3d 43, 44 (2014). The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. A vehicle is an "effect" under the Fourth Amendment, and the installation and use of a GPS tracking device may constitute a search. *Jones*, 565 U.S. at 404, 132 S.Ct. 945.

5 ¶ 10 Although our courts, including the trial court in this case, have sometimes referred to a person's ability to challenge a search "as 'standing' for the sake of brevity," *State v. Peoples*, 240 Ariz. 244, 247 ¶ 8, 378 P.3d 421, 424 (2016), the key inquiry is whether the search "has infringed an interest of the defendant which the Fourth Amendment was designed to protect," *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). "Fourth Amendment rights are personal rights which ... may not be vicariously asserted." *Id.* at 133–34, 99 S.Ct. 421 (quoting *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969)). Thus, whether Jean can challenge the government's use of GPS tracking turns on whether the search violated his own Fourth Amendment rights. *See id.* at 140, 99 S.Ct. 421.

B.

6 ¶ 11 Jean argues that the warrantless GPS tracking violated his Fourth Amendment rights because it involved a trespass. The State counters that Jean cannot challenge the GPS tracking on a trespass theory because he did not own or possess the truck and concededly "was not the target of the investigation." The State acknowledges that, under *Jones*, the GPS tracking did amount to a trespass, and thus a search, with respect to Velez–Colon, the truck's owner. But the ***528** State correctly observes that Jean cannot

complain about the search by arguing that it invades another person's constitutional rights. *Cf. Rakas*, 439 U.S. at 137, 99 S.Ct. 421 (refusing to "grant standing to a criminal defendant to assert a violation, not of his own constitutional rights but of someone else's").

¶ 12 In *Jones*, the United States Supreme Court held that governmental "installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " 565 U.S. at 404, 132 S.Ct. 945 (footnote omitted). The Court explained that "[t]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 409, 132 S.Ct. 945. Thus, a "search" occurs when the government physically trespasses on "persons, houses, papers and effects" to obtain information, irrespective of the *Katz* test. *Id.* at 406–08, 88 S.Ct. 507 (noting that "Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation").

7 ¶ 13 Although *Jones* recognized that a government trespass may constitute a search, the opinion did not alter the settled principle that a person can only challenge a search if it invades his or her own Fourth Amendment rights. 565 U.S. at 404–06, 132 S.Ct. 945; *see Rakas*, 439 U.S. at 137, 99 S.Ct. 421; *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1186 (9th Cir. 2015) (noting that because Fourth Amendment rights are personal rights that cannot be asserted vicariously, "when police trespass on property to carry out a search, a defendant has standing to raise the Fourth Amendment only if it was *his* person, house, paper, or effect searched"). In *Jones*, the vehicle was registered to Jones's wife, but Jones was the exclusive driver. 565 U.S. at 404 n.2, 132 S.Ct. 945. The Court observed that "[i]f Jones was not the owner, he had at least the property rights of a bailee," yet it declined to address "the Fourth Amendment significance of Jones's status" because the government had not challenged his "ability to make a Fourth Amendment objection." *Id.*

¶ 14 Jean cannot challenge the GPS monitoring as a "search" under the trespass theory unless the use of the device constituted a common law trespass as to him. *See id.* at 409–10, 132 S.Ct. 945 (noting that Jones possessed the vehicle when the government "trespassorily inserted" the GPS device); *see also id.* at 419, 132 S.Ct. 945 (Alito, J., concurring in the judgment) ("[T]he law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels. And for this reason, the Court concludes, the installation and use of the GPS device constituted a search." (footnote omitted)). Jean did not own the truck or, as far as the record reflects, ever possess the truck outside the owner's presence.

¶ 15 We agree with Jean's contention that a bailee of a vehicle could challenge a search under *Jones* because a bailee would be able to challenge a trespass occurring while the bailee possessed the chattel. *See State v. Mitchell*, 234 Ariz. 410, 415 ¶ 19, 323 P.3d 69, 74 (App. 2014) (finding lawful possession "sufficient to confer standing under *Jones*" when defendant driver "had the rights of a bailee"); Restatement (Second) of Torts § 217 (Am. Law Inst. 1967) ("Restatement"). But Jean was not a bailee—the record does not reflect that Velez–Colon, the owner, ever ceded possession of the truck to Jean, who instead merely traveled in it, sometimes driving, along with the owner. *See Nava v. Truly Nolen Exterminating of Hous., Inc.*,

140 Ariz. 497, 500, 683 P.2d 296, 299 (App. 1984) (stating that a bailment is created "[w]here personal property is delivered to one party by another in trust for a specific purpose, with the ... agreement that the property will be returned ... when the purpose is accomplished"); *Webb v. Aero Int'l*, 130 Ariz. 51, 52–53, 633 P.2d 1044, 1045–46 (App. 1981) (discussing requirement that bailor deliver custody and control of item to bailee).

¶ 16 Jean argues that a person who is neither an owner nor a bailee may nonetheless have a possessory interest in property sufficient to challenge a search under the trespass test. *Cf. Mitchell*, 234 Ariz. at 417 ¶ 25, 323 P.3d at 76–77 (concluding that "one who comes into lawful possession of a vehicle upon which law enforcement has installed a GPS device without permission may assert a Fourth Amendment violation under *Jones* ***529** based on a continuing trespass"). Even if we accept this general proposition, it does not avail Jean here. In applying the trespass test, the United States Supreme Court has not clarified whether 18th–century common law or instead more recent precedent determines whether government conduct involves a trespass. *Compare Jones*, 565 U.S. at 404–05, 132 S.Ct. 945 (observing that the government's physical intrusion onto property would have been regarded as a trespass, and thus a search, "within the meaning of the Fourth Amendment when it was adopted"), *with Florida v. Jardines*, 569 U.S. 1, 10–12, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (applying the *Jones* trespass test and holding that a dog's sniff from the doorstep of a home constituted a search); *id.* 16–22, 133 S.Ct. 1409 (Alito, J., dissenting) (observing that "[t]he Court's decision ... is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo–American jurisprudence," and noting that common law generally recognized a license for people to walk to the front door of a residence); *see also United States v. Sweeney*, 821 F.3d 893, 899–900 (7th Cir. 2016) (remarking that "[n]either *Jones* nor the common law provides sharp boundaries for the meaning of trespass").

¶ 17 Whether we look to common law or more recent precedent, Jean did not have a possessory interest that would allow him to challenge the GPS installation or monitoring as a trespass. The older common law would not allow someone paid to drive another's vehicle to complain about a trespass to the vehicle. *See* Restatement § 216 cmt. b (noting "older common law" rule that "a servant entrusted with the chattel by his master was not permitted to recover from a third person for trespass to the chattel"). "One who has possession of a chattel for another, and not for himself, cannot maintain an action.... So one who is driving the wagon of another is not in possession for himself, but as the servant of the other. His possession is that of the man who hired him to take charge of the wagon." *Scott v. Elliott*, 61 N.C. 104, 106 (1867); *see also Ludden v. Leavitt*, 9 Mass. 104 (1812).

¶ 18 Although more recent cases recognize that servants, and others who are not owners of a chattel, may have a possessory interest sufficient to maintain an action for trespass, *see* Restatement §§ 216, 217 (citing cases and describing trespass to a chattel, respectively), Jean has not shown that he had such an interest here. When—as the record suggests—a vehicle's owner pays another to drive in the owner's company, the law protects the owner's "right to immediate physical control of it as against all others" by "attributing possession to the one who thus has the right to it." *Id.* § 216 cmt.

d.; *see also id.* illus. 3 ("A's chauffeur drives him to his office, and remains in the car to wait for A. During A's absence from the car, A is regarded in possession of it.").

¶ 19 In addition, unlike Velez–Colon, Jean—on the record before us—did not have the right to exclude others from the truck. That right is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *accord Rakas*, 439 U.S. at 143 n.12, 99 S.Ct. 421. Accordingly, courts routinely emphasize the importance of the right to exclude in analyzing Fourth Amendment issues. *See, e.g.*, *Rawlings v. Kentucky*, 448 U.S. 98, 105, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) (rejecting a defendant's Fourth Amendment claim when he had no "right to exclude other persons from access" to a friend's purse into which he had placed drugs); *Rakas*, 439 U.S. at 148–49, 99 S.Ct. 421 (denying Fourth Amendment protection to defendants who "asserted neither a property nor a possessory interest in [an] automobile" and had no right to exclude others from the areas searched); *Lyall*, 807 F.3d at 1188, 1189 & n.10 (in evaluating warrantless search of warehouse and whether various occupants had protectible Fourth Amendment interests under trespass theory, court differentiated those who had no "right to exclude others from any portion of the warehouse" from those who did); *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006) (stating that "indicia of ownership—including the right to exclude others—coupled with possession and the permission ***530** of the rightful owner, are sufficient grounds upon which to find standing").

¶ 20 Thus, while Velez–Colon as the owner could challenge the GPS monitoring because it violated his possessory interest (the right to exclude others), Jean cannot because by merely traveling in the vehicle with the owner and sometimes driving, he did not have a right to exclude others. *Cf. Jones*, 565 U.S. at 409–10, 132 S.Ct. 945 (distinguishing Jones's ability to challenge GPS monitoring with device installed while he possessed vehicle from situation where owner consented to installation of tracking device in container before it was acquired by defendant). This conclusion comports with Arizona cases recognizing that a driver who is a "permissive user alone in the car" has Fourth Amendment protection, but a driver of a vehicle "in which the owner was an accompanying passenger" does not. *State v. Orendain*, 185 Ariz. 348, 351, 916 P.2d 1064, 1067 (App. 1996) ("[Courts] expressly distinguish[ ] [between] cases in which the permissive driver is alone in the car from those in which the owner was present [and] ... 'constantly in a position to assert his possessory interest to the extent that he desired to do so....' " (quoting *United States v. Jefferson*, 925 F.2d 1242, 1250 (10th Cir. 1991))), *vacated in part on other grounds*, 188 Ariz. 54, 932 P.2d 1325 (1997).

¶ 21 Our conclusion may appear inconsistent with decisions by our court of appeals and several federal circuit courts holding that a non-owner driver may consent to a vehicle search even if the owner is present. *See, e.g.*, *State v. Flores*, 195 Ariz. 199, 204 ¶ 14, 986 P.2d 232, 237 (App. 1999) (citing numerous federal cases). The issues, however, are different. To challenge a governmental intrusion as a search under the *Jones* test, a person must show that it constitutes a trespass as to him or her, not

someone else. The third-party-consent cases, in contrast, turn on whether a driver, although not an owner, had sufficient actual or apparent authority to validly consent to a vehicle search. This is not at issue here. *See id.* at 204 ¶ 17, 986 P.2d at 237.

¶ 22 That Jean has no viable Fourth Amendment claim based on a trespass theory, however, does not end the inquiry. As *Jones* noted, even absent a trespass, "the *Katz* reasonable-expectation-of-privacy test" may apply, and thus "[s]ituations involving merely the transmission of electronic signals without trespass ... remain subject to the *Katz* analysis." 565 U.S. at 409–11, 132 S.Ct. 945 (emphasis omitted).

C.

¶ 23 Even in the absence of a trespass, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Jean contends the warrantless GPS tracking of his movements over a few days constituted a search under the *Katz* reasonable-expectation-of-privacy test. The State counters that the Supreme Court's decisions in *Rakas* and *Knotts* establish, respectively, that Jean, as a passenger, had no reasonable expectation of privacy with respect to the truck or its movements over public roadways. The State has never argued that Jean lacked a subjective expectation of privacy with respect to GPS monitoring, and we accordingly do not address that issue, but instead deem it waived by the State. *Cf. Jones*, 565 U.S. at 413, 132 S.Ct. 945 (characterizing as "forfeited" government's alternative argument that warrantless GPS monitoring, if a search, was reasonable because not raised in lower courts).

¶ 24 Here we must consider whether a passenger who travels in a vehicle with its owner has a reasonable expectation that the vehicle's movements will not be tracked by non-consensual, surreptitious GPS monitoring by the government. Thus, we have no occasion to consider the effect of an owner's consent to GPS tracking. Moreover, although this case involves a commercial truck, and commercial trucking is a closely regulated industry, *see United States v. Delgado*, 545 F.3d 1195, 1202 (9th Cir. 2008), the State has not argued that this fact is significant in determining whether the GPS monitoring constituted a search as to Jean. Thus, we have no occasion to address whether the regulated status of a commercial truck may affect the legality of investigatory GPS monitoring ***531** by law enforcement. *Cf. Owner–Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 840 F.3d 879, 886–88 (7th Cir. 2016) (discussing 2015 federal regulations regarding on-board electronic data collection for commercial trucks).

¶ 25 To be objectively reasonable, an expectation of privacy must have "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (quoting *Rakas*, 439 U.S. at 143 n.12, 99 S.Ct. 421); *see also Katz*, 389 U.S. at 361–62, 88 S.Ct. 507 (Harlan, J., concurring). The reasonableness of an expectation of privacy depends in part on whether it relates to information that has been "expose[d] to the public." *Katz*, 389 U.S. at 351, 88 S.Ct. 507. That the public might conceivably obtain information, however, does not necessarily mean that it

has been "exposed to the public." Instead, "[i]n considering whether something is 'exposed' to the public as that term is used in *Katz* we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do." *United States v. Maynard*, 615 F.3d 544, 559 (D.C. Cir. 2010), *aff'd on other grounds sub nom. United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012); *see also Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038 (holding that surveillance of home from street with thermal imaging device "not in general public use" constituted a search).

¶ 26 Because the State contends that *Rakas* and *Knotts* establish that Jean did not have any reasonable expectation of privacy and thus are dispositive, we first consider those cases. In *Rakas*, the Supreme Court held that passengers in a car driven by its owner did not have a reasonable expectation of privacy in the car's interior, and thus their Fourth Amendment rights were not violated when police conducted a warrantless search of the glove compartment and under the seat. 439 U.S. at 148–49, 99 S.Ct. 421. Although *Rakas* suggests that Jean cannot complain that the State's attachment of the GPS device to the truck constituted a "search" because he had some expectation of privacy in the vehicle's exterior, that observation does not resolve the issue presented here: whether the continual GPS monitoring of a vehicle's movements invaded a reasonable expectation of privacy. Stated differently, whether a passenger reasonably expects to not be subjected to surreptitious government GPS tracking does not depend on whether a passenger has an expectation of privacy in the vehicle's interior or exterior. (Indeed, such tracking conceivably could be conducted by use of devices that are not physically attached to the vehicle.) *Cf. Katz*, 389 U.S. at 351, 88 S.Ct. 507 (noting "the Fourth Amendment protects people, not places").

¶ 27 We also reject the State's argument that *Knotts* precludes Jean from challenging the GPS tracking. In *Knotts*, the government placed a beeper inside a metal drum. 460 U.S. at 277, 103 S.Ct. 1081. The beeper emitted periodic signals detectable by a radio receiver. *Id.* Police monitored the drum as it was transported by vehicle over public roads to a private residence. *Id.* at 278, 103 S.Ct. 1081. The United States Supreme Court held the government monitoring of the beeper signals did not amount to a search. *Id.* at 285, 103 S.Ct. 1081. The Court reasoned that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another" because "he voluntarily convey[s] to anyone who want[s] to look the fact that he [is] traveling over particular roads in a particular direction, the fact of whatever stops he [makes], and the fact of his final destination." *Id.* at 281–82, 103 S.Ct. 1081.

¶ 28 As *Jones* acknowledged, however, "*Knotts* noted the 'limited use which the government made of the signals from this particular beeper,' and reserved the question whether 'different constitutional principles may be applicable' to 'dragnet-type law enforcement practices' of the type that GPS tracking made possible here." 565 U.S. at 409 n.6, 132 S.Ct. 945 (citation omitted) (quoting *Knotts*, 460 U.S. at 284, 103 S.Ct. 1081). Furthermore, five Justices in *Jones* declined to adopt the *Knotts* reasoning regarding public roads when applying the reasonable-expectation-of-privacy test to

GPS tracking. *See* ***532** *id.* at 430, 132 S.Ct. 945 (Alito, J., concurring in the judgment) (finding that longer-term tracking, *even on public roads*, intrudes upon a reasonable expectation of privacy); *id.* at 414–15, 417, 132 S.Ct. 945 n.* (Sotomayor, J., concurring) (noting that *Knotts* "does not foreclose the conclusion that GPS monitoring, in the absence of a physical intrusion, is a Fourth Amendment search"). Even before *Jones*, other courts had similarly recognized that *Knotts* was not dispositive as to GPS monitoring. *See People v. Weaver*, 12 N.Y.3d 433, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1199, 1200 (2009) (noting that *Knotts* involved a "single trip" and the Court "pointedly acknowledged and reserved for another day the question of whether a Fourth Amendment issue would be posed if 'twenty-four hour surveillance of any citizen of this country [were] possible, without judicial knowledge or supervision' " (quoting *Knotts*, 460 U.S. at 283, 103 S.Ct. 1081)).

¶ 29 GPS monitoring involves materially different technology than did the "very primitive" radio technology used decades ago in *Knotts*. *Weaver*, 882 N.Y.S.2d 357, 909 N.E.2d at 1199. As the New York State Court of Appeals has noted:

> GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or "seeing" by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp.

Id.

¶ 30 Such technology allows the government to continually gather, store, and mine vast amounts of information at relatively little cost. *See Jones*, 565 U.S. at 415–16, 132 S.Ct. 945 (Sotomayor, J., concurring) (noting the wealth of detail GPS monitoring collects and that "[t]he [g]overnment can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.' " (citation omitted) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004))); *Maynard*, 615 F.3d at 565 (finding GPS to be a special kind of intrusion because practical considerations prevent visual surveillance from lasting very long and GPS has such a low marginal cost); *see also State v. Jackson*, 150 Wash.2d 251, 76 P.3d 217, 223 (2003) ("In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life."); *cf. United States v. Carpenter*, 819 F.3d 880, 889 (6th Cir. 2016) (distinguishing *Jones* because GPS is much more accurate than cell-site data and can tell a much more detailed story of an individual's life), *cert. granted sub nom. Carpenter v. United States*, —— U.S. ——, 137 S.Ct. 2211, 198 L.Ed.2d 657 (2017). Moreover, GPS devices do not distinguish between private property and public thoroughfares, continuing to generate data even from locations where police themselves

would have no right to be. *Cf. United States v. Karo*, 468 U.S. 705, 714–15, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) (distinguishing *Knotts* and holding that monitoring of beeper in private residence violated a reasonable expectation of privacy).

¶ 31 Courts in other contexts have recognized the need to consider the impact of evolving technology when applying the Fourth Amendment. Illustrative is the United States Supreme Court's decision in *Riley v. California*, ——U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), which held that police may not search a cell phone incident to arrest without a warrant, *id.* at 2485. The *Riley* Court reasoned that cell phones can "reveal an individual's private interests or concerns" and "[d]ata on a cell phone can also reveal where a person has been," thus "reconstruct[ing] someone's specific movements down to the minute, not only around town but also within a particular building." *Id.* at 2489, 2490 (citing *Jones*, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring)); ***533** *see also Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038 (holding that use of thermal imaging device "to explore details of the home that would previously have been unknowable without physical intrusion" constituted a search).

¶ 32 We conclude that passengers traveling with the owner in a private vehicle generally have a reasonable expectation of privacy that is invaded by the government's continually tracking the vehicle through a surreptitious GPS tracking device. In addition to the reasons noted above, we note that since *Jones*, at least one other state supreme court has found the government's warrantless electronic monitoring of an individual's movements to be a violation of the Fourth Amendment under the *Katz* reasonable-expectation-of-privacy test. *See Tracey v. State*, 152 So.3d 504, 526 (Fla. 2014) ("[W]e conclude that such a subjective expectation of privacy of location as signaled by one's cell phone—even on public roads—is an expectation of privacy that society is now prepared to recognize as objectively reasonable under the *Katz* 'reasonable expectation of privacy' test."). And other courts have found that warrantless GPS tracking violates an individual's right to privacy based on their own state constitutions. *See State v. Holden*, 54 A.3d 1123, 1132–33 (Del. Super. Ct. 2010) (finding warrantless GPS tracking violated state constitution on privacy grounds and noting GPS "represents more than a mere alternative to conventional physical surveillance" by enabling "24/7" surveillance); *Commonwealth v. Rousseau*, 465 Mass. 372, 990 N.E.2d 543, 553 (2013) (finding thirty-day GPS tracking of passenger in vehicle violated state constitution because "a person may reasonably expect not to be subjected to extended GPS electronic surveillance by the government"); *Jackson*, 76 P.3d at 224 (holding, prior to *Jones*, that warrantless GPS tracking of vehicles violates state constitutional privacy provision).

¶ 33 Other states have also enacted laws that impose civil and criminal penalties for using electronic tracking devices and require evidence obtained by such devices to be excluded unless the government obtains the evidence through a warrant. *See Maynard*, 615 F.3d at 564 (citing Fla. Stat. §§ 934.06, 934.42; Haw. Rev. Stat. §§ 803–42, 803–44.7; Minn. Stat. §§ 626A.37, 626A.35; Okla. Stat., tit. 13 §§ 176.6, 177.6; 18 Pa. Cons. Stat. § 5761; S.C. Code Ann. § 17–30–140; Utah Code Ann. §§ 77–23a–4, 77–23a–7, 77–23a–15.5). Such case law and legislation further reflect that

society deems reasonable an expectation of privacy in one's movements as concerns GPS monitoring.

¶ 34 We also reject the State's contention that the GPS monitoring here did not constitute a search because it lasted for only a few days and the truck stayed on public roadways throughout the surveillance. Although Justice Alito's concurrence in *Jones* distinguished between "relatively short-term monitoring of a person's movements on public streets" and "longer term GPS monitoring," 565 U.S. at 430, 132 S.Ct. 945 (Alito, J., concurring in the judgment), we conclude that the duration of the government's GPS monitoring should not determine whether it constitutes a search. As Justice Sotomayor observed, the unique attributes of GPS monitoring in terms of the government's ability to collect information apply even in cases involving short-term monitoring. *Id.* at 415, 132 S.Ct. 945 (Sotomayor, J., concurring). Not only is there no analytical basis to distinguish between longer and shorter-term GPS monitoring for purposes of determining if a search has occurred, but such a distinction would also fail to provide clear guidance to law enforcement for when a warrant is required. *See Estrella*, 230 Ariz. at 409–410 ¶ 33, 286 P.3d 150 (Eckerstrom, J., dissenting); *cf. Jones*, 565 U.S. at 412, 132 S.Ct. 945 (noting that concurrence had not explained "why a 4–week investigation is 'surely' too long" (quoting *id.* at 430, 132 S.Ct. 945 (Alito, J., concurring in the judgment))).

¶ 35 We similarly are not persuaded by the dissent's contention that even if longer term GPS monitoring may constitute a search, Jean cannot complain about the GPS tracking here because it lasted only days and was "reasonable" under the circumstances. *Infra* ¶¶ 76, 80. Such an ad hoc approach to determining whether GPS tracking constitutes a search would ill serve the interests protected by the Fourth Amendment. The United ***534** States Supreme Court "repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances," with the main difficulty being "a danger that constitutional rights will be arbitrarily and inequitably enforced." *Oliver v. United States*, 466 U.S. 170, 181–82, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *see also Riley*, 134 S.Ct. at 2491–92 (noting that "[i]f police are to have workable rules, the balancing of the competing interests ... 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers' " (quoting *Michigan v. Summers*, 452 U.S. 692, 705 n.19, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981))).

¶ 36 Equally unconvincing is the dissent's assertion that our decision, as a practical matter, requires "probable cause and a warrant for any governmental installation and use of a GPS device on vehicles." *Infra* ¶ 87. *Jones* establishes that GPS surveillance of a vehicle is a search, and thus subject to the general requirement of a warrant supported by probable cause, with respect to the vehicle owner and others lawfully possessing the vehicle. Our decision recognizes, consistent with societal understandings, that a passenger traveling with a vehicle's owner reasonably does not expect his or her travels to be subject to warrantless, non-consensual, surreptitious GPS monitoring by the government. To instead hold, as the dissent suggests, that whether the GPS monitoring constituted a search as to Jean depends on whether Velez–Colon entrusted the truck to Jean to

drive in his absence rather than allowing him to drive and travel in it with Velez–Colon would not serve any interests protected by the Fourth Amendment. Instead, it would ignore the Supreme Court's nearly sixty-year-old admonition that distinctions "often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." *Jones v. United States*, 362 U.S. 257, 266, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), *overruled in part on other grounds by United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

¶ 37 By holding that Jean, like the owner Velez–Colon, can challenge the GPS monitoring as a search, we reaffirm the protections embodied in the Fourth Amendment against warrantless government surveillance. Requiring such searches generally to be supported by a warrant based on probable cause does not unduly burden the government's interests, particularly because this requirement already applies with respect to the person who owns or lawfully possesses the vehicle. Treating such surveillance as a search as to passengers protects the privacy interests of both those who own or possess the vehicle and those who travel with them. *Cf. United States v. U.S. District Court (Keith)*, 407 U.S. 297, 314–15, 321, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (balancing governmental and privacy interests in concluding, categorically, that surveillance for domestic security purposes should be subject to "the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance"). Moreover, we have no occasion here to consider, and therefore do not address, how the many well-established exceptions to the warrant requirement, such as exigent circumstances, may apply to GPS monitoring of vehicular travel.

¶ 38 GPS tracking is qualitatively different from visual surveillance, even on public roadways, because it can monitor "[t]he whole of a person's progress through the world." *Weaver*, 882 N.Y.S.2d 357, 909 N.E.2d at 1199. For the reasons noted, we conclude that *Rakas* and *Knotts* are not controlling and that Jean's expectation of privacy from the warrantless GPS monitoring of his movements is one that "society is prepared to recognize as reasonable." *Hudson v. Palmer*, 468 U.S. 517, 525 n.7, 104 S.Ct. 3194 (internal quotation marks omitted) (quoting *Katz*, 389 U.S. at 360, 361, 88 S.Ct. 507 (Harlan, J., concurring)).

D.

8 ¶ 39 Jean also argues that the GPS monitoring violated article 2, section 8 of the Arizona Constitution. That provision states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without ***535** authority of law." Jean, however, waived this argument before the court of appeals by raising it for the first time in his reply brief. *See State v. Edmisten*, 220 Ariz. 517, 522 ¶ 10 n.2, 207 P.3d 770, 775 (App. 2009). Even so, he has not addressed why or how our constitution should afford greater protection than the Fourth Amendment in this context. Merely referring to the Arizona Constitution without developing an argument is insufficient to preserve a claim that it offers greater protection than the Fourth Amendment. *See State v. Fisher*, 226 Ariz. 563, 565 ¶ 7 n.3, 250 P.3d 1192,1194 (2011); *State v. Dean*, 206 Ariz. 158, 161 ¶ 8 n.1, 76 P.3d 429, 432 (2003). For these reasons, we do not address whether the police conduct violated the Arizona Constitution.

E.

9 10 ¶ 40 The State argues that if we find that the GPS monitoring amounted to a search and violated the Fourth Amendment, we should not apply the exclusionary rule to suppress the evidence. Under *Davis v. United States*, "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 564 U.S. 229, 232, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). The State contends that *Knotts* was clearly binding precedent and correctly notes that almost all federal circuit courts have concluded, based on *Davis*, that the exclusionary rule should not apply to pre-*Jones* GPS tracking. *See, e.g., United States v. Brown*, 744 F.3d 474, 478 (7th Cir. 2014) (observing that "all of the extant appellate precedent is on the side of applying *Davis*" to pre-*Jones* GPS tracking).

¶ 41 We agree with the many courts that have concluded that the good-faith exception applies based on *Knotts*. *See United States v. Katzin*, 769 F.3d 163, 173–75, 182–83 (3d Cir. 2014) (holding officers' reliance on binding appellate precedent of *Knotts* and *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), was objectively reasonable); *United States v. Aguiar*, 737 F.3d 251, 261–62 (2d Cir. 2013) (same); *United States v. Sparks*, 711 F.3d 58, 67 (1st Cir. 2013) (holding that agents' GPS placement on vehicle and monitoring was reasonable under *Knotts* and in-circuit beeper case). As one court has stated, "[w]ithout the benefit of hindsight ... and with no contrary guidance from the Supreme Court or this Court ... a reasonably well-trained officer in this [jurisdiction] could have relied on *Knotts* as permitting the type of warrantless GPS usage in this case." *United States v. Stephens*, 764 F.3d 327, 338 (4th Cir. 2014).

¶ 42 Other state supreme courts have considered the issue and have likewise found the good faith exception applicable to pre-*Jones* GPS monitoring. *See, e.g., People v. LeFlore*, 392 Ill.Dec. 467, 32 N.E.3d 1043, 1051–53 (2015) (finding *Knotts* and *Karo* binding appellate precedent that officer could have reasonably relied upon when installing and using GPS device and that Illinois state officer reasonably relied on Seventh Circuit precedent he considered binding); *Kelly v. State*, 436 Md. 406, 82 A.3d 205, 214 (2013) (finding *Knotts* sufficiently binding appellate precedent to authorize GPS tracking at the time officers installed the device on defendant's vehicle); *State v. Johnson*, 141 Ohio St.3d 136, 22 N.E.3d 1061, 1072 (2014) (holding that before *Jones*, "*Knotts* and *Karo* provided binding appellate precedent in this state to support the objectively reasonable conclusion that placing a GPS tracking device on a suspect's vehicle did not implicate any protections of the Fourth Amendment").

¶ 43 The Chief Justice's partial dissent on this issue is unpersuasive. Asserting that "*Knotts* was not clearly binding precedent on the issue of whether warrantless GPS installation and monitoring constituted an illegal search," and that "neither the United States Supreme Court nor our Court had addressed the propriety of GPS monitoring" as of early 2010, he contends the good-faith exception is inapplicable and therefore the exclusionary rule applies. *Infra* ¶¶ 51, 54. We agree, however, with other courts that have soundly rejected such reasoning.

¶ 44 In *Katzin*, for example, the Third Circuit held that the warrantless GPS tracking of the defendant's vehicle for two days in late 2010 was supported

by the officers' "objectively reasonable" belief in its constitutionality, "in large part, because it fell squarely within *Knotts* and *Karo*'s well-accepted rationale." ***536** 769 F.3d at 179, 182. As had other federal circuits, the *Katzin* court concluded that for "purposes of the good faith inquiry ... the technological distinctions between the beepers of yesteryear and the GPS device used herein are irrelevant." *Id.* at 176 (citing *Aguiar*, 737 F.3d at 255, 261; *Sparks*, 711 F.3d at 66; *United States v. Fisher*, 745 F.3d 200, 205 (6th Cir. 2014); *United States v. Andres*, 703 F.3d 828, 835 (5th Cir. 2013)); *accord Sparks*, 711 F.3d at 66 (concluding that officers' pre-*Jones* use for eleven days of "a GPS tracker rather than a beeper," despite their different technologies, did not render inapplicable "*Knotts*'s apparent bright-line rule that the Fourth Amendment is unconcerned with police surveillance of public automotive movements").

¶ 45 Significantly, *Katzin* expressly rejected the following proposition advanced by the Chief Justice here: to qualify as "binding appellate precedent under *Davis*," a case "must specifically authorize the precise conduct under consideration." 769 F.3d at 176; *see also id.* at 173–74 ("Although the underlying facts in the cases differed—which will nearly always be true—the rationale underpinning ... *Knotts* and *Karo* clearly authorized" the officers' GPS monitoring). Although the Chief Justice asserts that we read "*Davis* and *Knotts* too broadly and *Jones* too narrowly," *infra* ¶ 49, it is he who reads *Davis* and *Knotts* too narrowly and *Jones* too broadly. The good-faith exception does not require officers to anticipate that *Jones* would "fundamentally alter[ ] [the] legal landscape," *Katzin*, 769 F.3d at 181, by "unexpectedly depart[ing] from the framework established by *Katz*," on which *Knotts* rested. *Johnson*, 22 N.E.3d at 1071. *Davis* requires good faith and reasonableness, not a crystal ball.

11 12 ¶ 46 "The exclusionary rule ... is a prudential doctrine invoked to deter future violations of constitutional rights." *State v. Valenzuela*, 239 Ariz. 299, 308–09 ¶ 31, 371 P.3d 627 (2016) (citing *Davis*, 564 U.S. at 236, 131 S.Ct. 2419). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). Thus, "exclusion is appropriate only where law enforcement conduct is both 'sufficiently deliberate' that deterrence is effective and 'sufficiently culpable' that deterrence outweighs the costs of suppression." *Katzin*, 769 F.3d at 171 (quoting *Herring*, 555 U.S. at 144, 129 S.Ct. 695). Neither factor is present here—there is no allegation, let alone evidence, that the DPS officers' conduct was "deliberate, reckless, or grossly negligent," or involved "recurring or systemic negligence," situations in which "deterrence holds greater value and often outweighs the associated costs." *Id.* (internal quotation marks omitted) (quoting *Davis*, 564 U.S. at 237–39, 131 S.Ct. 2419); *cf. State v. Havatone*, 241 Ariz. 506, 511 ¶ 21, 389 P.3d 1251 (2017) (rejecting the good-faith exception based on a finding of "recurring or systemic negligence").

¶ 47 Because the search in this case was conducted in objectively reasonable reliance on *Knotts* and *Karo*, which constituted binding appellate precedent under *Davis* and the Supremacy Clause, U.S. Const. art. VI; Ariz. Const. art. 2, § 3, we decline to apply the exclusionary rule. *See Valenzuela*,

239 Ariz. at 309 ¶ 31, 371 P.3d at 637 (quoting *Davis*, 564 U.S. at 238, 131 S.Ct. 2419) ("[W]hen law enforcement officers 'act with an objectively reasonable good-faith belief that their conduct is lawful,' deterrence is unnecessary and the exclusionary rule does not apply."). Accordingly, we uphold the trial court's denial of Jean's motion to suppress the evidence obtained from the warrantless GPS installation and monitoring in this case.

III.

¶ 48 We vacate paragraphs 11–20 of the court of appeals' opinion, affirm the denial of Jean's motion to suppress, and affirm Jean's convictions and sentences.

BALES, C.J., joined by BOLICK, J., dissenting in part and dissenting from the judgment.

¶ 49 I respectfully dissent from Part II(E) of the Court's opinion because applying the good-faith exception to the exclusionary rule ***537** here, in my view, reads *Davis* and *Knotts* too broadly and *Jones* too narrowly.

¶ 50 *Davis*, as the majority notes, *supra* ¶ 40, held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 564 U.S. at 232, 131 S.Ct. 2419. Thus, critical to applying the good-faith exception in this context is determining whether "binding appellate precedent" exists with regard to the challenged search. *See id.* at 247, 131 S.Ct. 2419 (differentiating the defendant in *Davis* from "defendants in jurisdictions in which the question remains open"); *id.* at 250, 131 S.Ct. 2419 (Sotomayor, J., concurring in the judgment) (noting *Davis* "does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled").

¶ 51 The State argues that the good-faith exception should apply because "*Knotts* was clearly binding precedent officers followed in good faith." However, *Knotts* was not clearly binding precedent on the issue of whether warrantless GPS installation and monitoring constituted an illegal search. In *Jones*, the district court ruled that the GPS device installation and monitoring was not a search under *Knotts*. *See United States v. Jones*, 451 F.Supp.2d 71, 88 (D.D.C. 2006), *aff'd in part, rev'd in part sub nom. United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff'd in part on other grounds sub nom. United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

¶ 52 In *Jones*, contrary to the district court's ruling in that case—and the State's argument here—the United States Supreme Court recognized that *Knotts* did not resolve the issue of the placement and use of a GPS tracking device. *See Jones*, 565 U.S. at 408–09, 409 n.6, 132 S.Ct. 945 (stating that *Knotts* "reserved the question whether different constitutional principles may be applicable to dragnet-type law enforcement practices of the type that GPS tracking made possible here" (quoting *Knotts*, 460 U.S. at 284, 103 S.Ct. 1081) (internal quotation marks omitted)); *see also id.* at 417 n.*, 132 S.Ct. 945 (Sotomayor, J., concurring) (noting same); *Knotts*, 460 U.S. at 284, 103 S.Ct. 1081.

¶ 53 For the good-faith exception to apply, it is insufficient that law enforcement might have reasonably interpreted precedent as supporting the

challenged conduct. Instead, "*Davis* instructs that law enforcement acts in good faith if 'binding appellate precedent specifically *authorizes* a particular police practice.' " *Havatone*, 241 Ariz. at 512 ¶ 24, 389 P.3d at 1257 (quoting *Davis*, 564 U.S. at 241, 131 S.Ct. 2419); *cf. United States v. Pineda–Moreno*, 688 F.3d 1087, 1090 (9th Cir. 2012) (reviewing, for purposes of applying *Davis*, whether binding Ninth Circuit precedent existed at time of 2007 GPS search).

¶ 54 If *Knotts* had authorized GPS tracking, the Court in *Jones* would have had to overrule rather than distinguish *Knotts*. Because neither the United States Supreme Court nor our Court had addressed the propriety of GPS monitoring, no binding appellate precedent specifically authorized the monitoring here, and the State therefore cannot rely on the good-faith exception to admit the evidence. *See Mitchell*, 234 Ariz. at 419 ¶ 32, 323 P.3d at 78 (concluding that *Knotts* was "not sufficiently apposite on the trespass question and, therefore, cannot trigger application of the good-faith exception" under *Davis*); *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341, 346–47 (2014) (applying the exclusionary rule and concluding that "*Knotts* and *Karo* did not constitute binding precedent that authorized law enforcement's warrantless" installation and monitoring of a GPS vehicle tracker).

¶ 55 In applying the exclusionary rule, the majority does not identify binding appellate precedent (i.e., a decision by the United States Supreme Court or this Court) that *specifically authorized* the warrantless installation and use of a GPS vehicle tracker within Arizona. The majority instead opines that because "the search in this case was conducted in objectively reasonable reliance on *Knotts* and *Karo*, which constituted binding appellate precedent," the good-faith exception applies under *Davis*. *Supra* ¶ 47.

¶ 56 At bottom, the majority applies the good-faith exception because law enforcement officers might have reasonably interpreted ***538** *Knotts* and *Karo* as allowing warrantless GPS surveillance of vehicle travel. That approach misapprehends *Davis*, *see Katzin*, 769 F.3d at 187–97 (Greenway, J., dissenting); *Stephens*, 764 F.3d at 341–42 (Thacker, J., dissenting), and conflicts with our own caselaw, *see Havatone*, 241 Ariz. at 512–13 ¶¶ 29–30, 389 P.3d 1251 (refusing to apply good-faith exception in absence of binding precedent specifically authorizing particular practice).

¶ 57 When caselaw is unsettled regarding the legality of a warrantless search, applying the exclusionary rule desirably prompts law enforcement to err on the side of obtaining a warrant, *see id.* at 512–13 ¶ 29, 389 P.3d at 1257–58, and thus better protects the rights of privacy enshrined in the Fourth Amendment and our state constitution. Consistent with *Davis* and *Havatone*, I believe we should follow that approach here.

PELANDER, V.C.J., joined by GOULD, J. and ESPINOSA, J., dissenting in part.

¶ 58 I fully join the Court's opinion in Parts I, II(A), (B), (D), and III. Although I also join in Part II(E) regarding the good-faith exception to the exclusionary rule, I find that discussion unnecessary inasmuch as Jean's Fourth Amendment rights were not violated in this case. I therefore respectfully dissent from Part II(C) of the Court's opinion because it is supported by neither the law nor the extremely thin record here.

¶ 59 The majority finds a Fourth Amendment violation under the *Katz* reasonable-expectation-of-privacy rubric, reasoning that "*Rakas* and *Knotts* are not controlling and that Jean's expectation of privacy from the warrantless GPS monitoring of his movements is one that 'society is prepared to recognize as reasonable.' " *Supra* ¶ 38 (citation omitted). But DPS used the GPS device to simply monitor the movement of Velez–Colon's truck for a short period and only on public thoroughfares, where the truck was plainly visible to anyone; and no evidence in the record suggests that the device was used, or even usable, for more than that. (In addition, Jean was unknown to DPS and not a target of its investigative surveillance.) Thus, the majority's concerns about Orwellian invasions of privacy are unfounded here.

¶ 60 In *Katz*, Justice Harlan (in a concurring opinion that has since been adopted as binding) declared that a defendant seeking to invoke the Fourth Amendment's protection bears the burden of proving that he or she has "exhibited an actual (subjective) expectation of privacy ... that society is prepared to recognize as 'reasonable.' " *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring); *accord State v. Jeffers*, 135 Ariz. 404, 413, 661 P.2d 1105, 1114 (1983) ("The application of the fourth amendment depends on whether the person invoking its protection can claim a justifiable, reasonable, legitimate expectation of privacy that has been invaded by the challenged government action."). And for a half-century, courts nationwide have applied this two-pronged *Katz* test.

¶ 61 The *Katz* analysis "normally embraces two discrete questions": (1) "whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' " that is, whether "the individual has shown that 'he seeks to preserve [something] as private' "; and (2) "whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable,' " that is, whether "the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (quoting *Katz*, 389 U.S. at 351, 353, 361, 88 S.Ct. 507); *see also Kyllo v. United States*, 533 (U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 2001) ("[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."). Jean meets neither of those two prerequisites.

A.

¶ 62 The Supreme Court has made clear that the first, subjective prong of the *Katz* test requires that a defendant take "normal precautions to maintain his privacy." *Rawlings v. Kentucky*, 448 U.S. 98, 105, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). Indeed, what a person does—or fails to do—directly affects ***539** that person's Fourth Amendment protections. *See Rakas v. Illinois*, 439 U.S. 128, 149, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). This first aspect of the *Katz* test requires courts to conduct a fact-intensive inquiry that varies from case to case. *Compare United States v. Chadwick*, 433 U.S. 1, 11, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (stating that "placing personal effects inside a double-locked footlocker ... manifested an expectation" of privacy), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), and *Katz*,

389 U.S. at 352, 88 S.Ct. 507 ("One who occupies [a telephone booth] [and] shuts the door behind him ... is entitled to assume that the words he utters ... will not be broadcast to the world."), *with United States v. Knotts*, 460 U.S. 276, 281–82, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) ("When [a motorist] travel[s] over the public streets he voluntarily convey[s] [the details of his travels] to anyone who want[s] to look....").

¶ 63 A defendant's failure to present evidence in a suppression hearing about his or her expectation of privacy militates against finding that the first *Katz* prong is satisfied and can thus undermine a Fourth Amendment claim. *See People v. Bryant*, 60 Cal.4th 335, 178 Cal.Rptr.3d 185, 334 P.3d 573, 612 (2014) (affirming denial of motion to suppress evidence seized in warrantless search of house when defendant "presented no competent evidence showing he had an expectation of privacy" in the residence). That is particularly so when, as here, a "deficient record" provides no information at all on whether the defendant had or exhibited a subjective expectation of privacy. *Id.*

¶ 64 In *Bryant*, the California Supreme Court found a defendant's failure to testify at the suppression hearing particularly problematic: "[G]iven the subjective portion of the expectation of privacy analysis, it is questionable whether a defendant could carry his burden without presenting his own testimony." *Id.* Other courts are in accord. *See, e.g., United States v. Mendoza*, 438 F.3d 792, 795 (7th Cir. 2006) (quoting *United States v. Ruth*, 65 F.3d 599, 605 (7th Cir. 1995) ("[W]ithout an affidavit or testimony from the defendant, it is almost impossible to find a privacy interest...." (internal quotation marks omitted))); *United States v. Erwin*, 875 F.2d 268, 271 (10th Cir. 1989) (concluding that a "defendant, who did not testify at the suppression hearing, failed to introduce any evidence to ... establish a legitimate expectation of privacy in the particular area searched").

¶ 65 This approach is quite sensible because finding a subjective expectation of privacy hinges largely—if not entirely—on what the defendant personally intended or expected regarding his privacy interests. *See Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (explaining that the aggrieved party "must demonstrate that he *personally* has an expectation of privacy in the place searched, and that his expectation is reasonable" (emphasis added)). And requiring some showing that the defendant subjectively expected privacy in a particular situation does not prejudice or otherwise disadvantage him because the defendant's testimony in a pretrial suppression hearing generally cannot be used against him at trial. *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *see also* Ariz. R. Crim. P. 16.2(A)(4). If no evidence were needed to establish a particular defendant's subjective expectation of privacy, or if that element no longer exists or is automatically presumed in every case involving a warrantless search that reveals contraband, then one would expect the Supreme Court to say so. But it has not. *See, e.g., Bond v. United States*, 529 U.S. 334, 338, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000) (reaffirming that the "Fourth Amendment analysis embraces two questions").

¶ 66 Like the defendant in *Bryant*, Jean did not testify at the suppression hearing, and the record here contains no evidence regarding his subjective expectation of privacy in his location while on public roads. Absent any such evidence or showing on that point, and based on the limited record in this

case, Jean's Fourth Amendment claim necessarily fails.[1] *Cf.* ***540** *Peoples*, 240 Ariz. at 247 ¶ 5, 248–49 ¶¶ 11–16, 378 P.3d at 424–26 (upholding trial court's order, entered after suppression hearing at which defendant testified, suppressing evidence derived from defendant's cell phone, in which he showed a legitimate expectation of privacy based on his actions and testimony). Therefore, the trial court did not abuse its discretion in denying Jean's motion to suppress based on his failure to satisfy the requisite first prong under *Katz*.

B.

¶ 67 Even assuming that Jean somehow exhibited an actual, subjective expectation of privacy in his whereabouts while travelling on public roadways as a passenger in a commercial truck, this is not a case in which any such expectation is one that "society is prepared to recognize as 'reasonable.' " *See Katz*, 389 U.S. at 361, 88 S.Ct. 507. It is well established that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts*, 460 U.S. at 281, 103 S.Ct. 1081; *see also Oliver v. United States*, 466 U.S. 170, 186 n.2, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) ("Our cases establish ... that car owners' diminished expectations that their cars will remain free from prying eyes warrants a corresponding reduction in the constitutional protection accorded cars."); *State v. Estrella*, 230 Ariz. 401, 404–05 ¶ 12, 286 P.3d 150, 153–54 (App. 2012) (same); *cf. State v. Ditren*, 126 A.3d 414, 419 (R.I. 2015) (noting that a mere passenger does not have a reasonable expectation of privacy in the vehicle in which he or she is riding); *Sidener v. State*, 55 N.E.3d 380, 384 (Ind. App. 2016) (same). (My conclusion that Jean lacked a reasonable expectation of privacy rests on this fundamental principle—"[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection," *Katz*, 389 U.S. at 351, 88 S.Ct. 507—not, as the majority suggests, on whether Velez–Colon entrusted the truck to Jean to drive by himself. *Supra* ¶ 36.)

¶ 68 Neither *Knotts* nor *Rakas* has been modified, let alone overruled, by the Supreme Court. And, more importantly, "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afford[ ] them." *Knotts*, 460 U.S. at 282, 103 S.Ct. 1081. Nonetheless, the majority finds those cases inapplicable to the "materially different technology" of GPS tracking and therefore "not controlling" in a world of "evolving technology." *Supra* ¶¶ 29, 31, 38. *Contra United States v. Sparks*, 711 F.3d 58, 66 (1st Cir. 2013) ("[T]he fact that the device was a GPS tracker rather than a beeper does not render *Knotts* inapplicable."); *United States v. Aguiar*, 737 F.3d 251, 261 (2d Cir. 2013) (finding "the beeper technology used in *Knotts* sufficiently similar to ... GPS technology"). But is the state's GPS monitoring of a suspicious commercial vehicle's location on public roadways for less than thirty-one hours any more intrusive, or more violative of a passenger's expectation of privacy, than a warrantless search of the vehicle's interior, including the glove compartment and under the passenger's seat? *See Rakas*, 439 U.S. at 148–49, 99 S.Ct. 421 ("[T]he glove compartment or area under the seat of a car ... are areas in which a passenger ... simply would not normally have a legitimate expectation of privacy.").

¶ 69 The majority also contends that "five Justices in *Jones* declined to adopt the *Knotts* reasoning regarding public roads when applying the reasonable-expectation-of-privacy test to GPS tracking." *Supra* ¶ 28. But my colleagues read too much into *Jones*, as the Court expressly declined to address whether Jones had a reasonable expectation of privacy "in the locations of [his] Jeep on the public roads, which were visible to all," and reaffirmed *Knotts*'s holding that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." ***541** *Jones*, 565 U.S. at 406, 412, 132 S.Ct. 945 (alteration in original) (internal quotation marks omitted) (quoting *Knotts*, 460 U.S. at 281, 103 S.Ct. 1081).

¶ 70 In his concurring opinion, Justice Alito likewise noted that the Court "accept[ed]" *Knotts*'s holding "that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search." *Id.* at 420, 132 S.Ct. 945 (Alito, J., concurring in the judgment). Rather than questioning *Knotts*, he acknowledged its continued validity in permitting "relatively short-term monitoring of a person's movements on public streets." *Id.* at 430, 132 S.Ct. 945. Although Justice Sotomayor in her separate, sole concurrence opined on GPS technology and reasonable-expectation-of-privacy issues, she too agreed that the majority's trespassory test "suffice[d] to decide [the] case" as a "narrower basis for decision," and thus found resolution of the "difficult questions" concerning the other issues "unnecessary." *Id.* at 414, 418, 132 S.Ct. 945 (Sotomayor, J., concurring). Accordingly, although our colleagues valiantly attempt to bootstrap *Jones* as support for their *Katz*-based holding, nothing in *Jones* renders the public thoroughfares doctrine inapplicable to this case —it is still good law. *United States v. Sparks*, 711 F.3d 58, 66 (1st Cir. 2013) (stating that "*Knotts* clearly authorized the ... use [of] a GPS–based tracking device in the place of a beeper").

¶ 71 As such, Jean's alleged expectation of privacy must arise from some other source. That source, Jean urges, is the duration and extent of the GPS tracking. He further contends that "[n]o citizen would possibly envision having their every movement tracked" during a two-day, interstate journey. But Jean confuses the relevant standard. The issue is not one of foreseeability, but whether society is prepared to recognize as reasonable Jean's expectation of privacy in his location on public thoroughfares in a commercial vehicle for less than thirty-one hours. *See Estrella*, 230 Ariz. at 404 ¶¶ 10–11, 286 P.3d at 153.

¶ 72 On that issue, "nothing is better established in Fourth Amendment jurisprudence than the distinction between one's expectation of privacy in an automobile and one's expectation of privacy when in other locations." *Rakas*, 439 U.S. at 153–54, 99 S.Ct. 421; *see also Knotts*, 460 U.S. at 281, 103 S.Ct. 1081 (discussing the diminished expectation of privacy in vehicles). A diminished expectation of privacy in automobiles is largely due to the highly visible nature of vehicular travel, *see, e.g., Cardwell v. Lewis*, 417 U.S. 583, 591, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), and the "range of police regulation[s]" to which licensed motor vehicles are subject, *California v. Carney*, 471 U.S. 386, 393, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985).[2]

¶ 73 Jean argues that DPS's monitoring was unreasonable because it was more than ***542** "fleeting[ ] observ[ation] by the public," and the majority

apparently agrees. But this also confuses the relevant inquiry. For purposes of the *Katz* test, it matters *what* the police are surveilling, and the *locations* they are observing. That new technology allows police to surveil more effectively public locations and activities does not change the public nature of the location or constitute a violation of one's reasonable expectation of privacy. *See Knotts*, 460 U.S. at 284, 103 S.Ct. 1081 (dismissing concerns over technologically enhanced police efficiency as "simply ha[ving] no constitutional foundation"). The Supreme Court cases addressing the government's use of new technologies do not focus on what members of the public likely observe, but whether the surveillance will reveal information that is legitimately considered private or outside public view. *Compare Knotts*, 460 U.S. at 281–82, 103 S.Ct. 1081 (stating that a person has no expectation of privacy in information he voluntarily conveys to the public), *with Karo*, 468 U.S. at 716, 104 S.Ct. 3296 (stating that electronic monitoring within a residence, or "[i]ndiscriminate monitoring of property that has been withdrawn from public view ... present[s] far too serious a threat to privacy interests in the home" to escape Fourth Amendment scrutiny).

¶ 74 When viewed through that proper lens, this case is much closer to *Knotts* than to cases such as *Karo*, 468 U.S. at 716, 104 S.Ct. 3296, *Kyllo*, 533 U.S. at 34, 36, 121 S.Ct. 2038 (involving thermal-imaging-device "search of the interior of homes" and "observations of the intimate details of a home"), or *Katz*, 389 U.S. at 353, 88 S.Ct. 507 (involving governmental monitoring of a person's confidential conversation in a closed telephone booth, a private setting in which the caller reasonably and justifiably relied on privacy). Nor does this case involve a search of an area that, without technology, police would have to physically intrude to obtain the information sought. In *Kyllo*, for example, thermal imaging allowed the police to penetrate the interior of a home, something mere police surveillance from a public location could not do. 533 U.S. at 40, 121 S.Ct. 2038. In contrast, *Knotts* simply allowed the police to follow a car on a public road—something they could accomplish without a beeper or GPS. 460 U.S. at 284, 103 S.Ct. 1081. This distinction is critical.

¶ 75 One who, like Jean, exposes to the public his movements or those of a vehicle in which he rides generally assumes the risk that police may collect information regarding those movements and use it for investigative and law enforcement purposes. *See Smith*, 442 U.S. at 744, 99 S.Ct. 2577. The principles underlying this well-established proposition are so robust that the Supreme Court extended their application to aerial surveillance of the curtilage surrounding one's home. *See Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989); *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986). (The majority apparently questions such well-accepted means of surveillance as aircraft detection of speeding motorists because unconstitutional monitoring may "be conducted by use of devices that are not physically attached to the vehicle." *Supra* ¶ 26.) Yet, under the majority's holding, an individual's expectation of privacy in a satellite-assisted reporting of his public vehicular movements is somehow stronger than his expectation to remain free from real-time visual surveillance of his curtilage—"the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " *Oliver*, 466 U.S. at 180, 104 S.Ct. 1735 (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886)).

¶ 76 Circumstances certainly may arise where the government's surveillance of a person or a vehicle—even on public thoroughfares—is so pervasive that it violates the Fourth Amendment. *See Jones*, 565 U.S. at 431, 132 S.Ct. 945 (Alito, J., concurring in the judgment). But this is not such a case. Unlike the targeted and nearly month-long GPS monitoring in *Jones*, 565 U.S. at 403, 132 S.Ct. 945, and *Mitchell*, 234 Ariz. at 412 ¶ 4, 323 P.3d 69, the GPS device was situated on Velez–Colon's truck for less than three days and monitored for approximately thirty-one hours total. Thus, this case does not involve "the use of longer term GPS monitoring" that prompted Justice Alito's concerns in *Jones*, but rather involves "relatively short-term monitoring of a [vehicle's] movements ***543** on public streets," which "accords with expectations of privacy that our society has recognized as reasonable." *Jones*, 565 U.S. at 420, 132 S.Ct. 945 (Alito, J., concurring in the judgment).

¶ 77 Although it might be difficult to draw the line between permissible and impermissible GPS monitoring based on its duration alone, this case requires no such line-drawing—it simply does not approach any reasonable line that might be drawn. *See Estrella*, 230 Ariz. at 405 ¶ 14, 286 P.3d at 154 ("Because ... the use of the GPS device ... did not constitute a search ..., we need not determine whether the warrantless but minimally-intrusive use of GPS tracking for the period of time involved here is reasonable and permissible...."). No evidence in the record suggests that the state's limited use of the GPS tracking in this case constituted the "dragnet-type law enforcement practice[ ]" to which *Jones* referred. 565 U.S. at 408 n.6, 132 S.Ct. 945 (quoting *Knotts*, 460 U.S. at 284, 103 S.Ct. 1081), and my colleagues envision, *supra* ¶ 28.

¶ 78 In addition, even if line-drawing were required, "[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *Jones*, 565 U.S. at 429–30, 132 S.Ct. 945 (Alito, J., concurring in the judgment).[3] That some state legislatures have done so, as the majority observes, *supra* ¶ 33, does not mean that all warrantless installations and use of GPS devices on vehicles, regardless of circumstances or duration, are unconstitutional. (Neither Congress nor the Arizona Legislature has enacted laws relating to the government's use of GPS, thus refuting the majority's suggestion of any national or state consensus "that society deems reasonable an expectation of privacy in one's movements as concerns GPS monitoring." *Supra* ¶ 33). Again, the relevant question is "whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated," *Jones*, 565 U.S. at 430, 132 S.Ct. 945 (Alito, J., concurring in the judgment), and the answer with respect to Jean is "no." *See Sparks*, 711 F.3d at 67 ("[N]o such expectation attaches to information that is, like one's public movements, 'voluntarily conveyed to anyone who wanted to look.' " (quoting *Knotts*, 460 U.S. at 281, 103 S.Ct. 1081)); *Estrella*, 230 Ariz. at 404 ¶ 11, 286 P.3d at 153 (stating that "the remote electronic monitoring of a vehicle's movement on a public road is considerably less intrusive than" other types of searches).

¶ 79 The majority expresses grave concerns about the potential "wealth of detail GPS monitoring collects," including locational information that "can reveal preferences, alignments, associations, personal ails and foibles" and

"a detailed picture of one's life." *Supra* ¶ 30. The majority also asserts that GPS inexpensively and indiscriminately "generate[s]data even from locations where police themselves would have no right to be," *id.*, echoing concerns voiced by Justice Sotomayor in an opinion no other justice joined, *see Jones*, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring) (bemoaning that GPS may allow the government to intrusively obtain intimate details about one's personal life, including his or her "familial, political, professional, religious, and sexual associations"). Although admittedly "gather[ing] a wealth of highly-detailed information about an individual's life over an extended period of time" clearly raises Fourth Amendment concerns, *see* ***544** *State v. Zahn*, 812 N.W.2d 490, 498 (S.D. 2012), no such concerns are warranted on the limited facts before us.

¶ 80 The record contains no evidence whatsoever regarding the capabilities of the GPS device used in this case; the nature and extent of data collected, or even collectable, by the device; or what use DPS made (or could have made) of the GPS data, other than monitoring the movements and whereabouts of Velez–Colon's truck on public roadways. The record merely reflects that the state tracked the location of that truck over a couple days, but it does not otherwise show that the GPS device was used (or even potentially usable) for any of the types of obvious invasions of privacy (for example, surveilling private activities within a residence or other structure, or within the vehicle itself) that cause the majority such consternation. (The relatively brief GPS tracking in this case is a far cry from the "massive invasion of privacy" that resulted from the government's 65–day–long monitoring in *People v. Weaver*, 12 N.Y.3d 433, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1201 (2009). *See supra* ¶¶ 29, 38.)

¶ 81 The majority cites *Riley v. California*, —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), to support its position, *supra* ¶ 31, but that case is inapposite because it did not address surveillance of any sort.[4] At issue in *Riley* was a warrantless search of the data contained on the defendant's cell phone, which the police seized during a search incident to an arrest. 134 S.Ct. at 2480–81. In finding the search unconstitutional, the Court reasoned that search of a smartphone, "a [technology] ... unheard of ten years ago," is so invasive that it "would typically expose to the government far more than the most exhaustive search of a house." *Id.* at 2484, 2491.

¶ 82 Again, this case does not involve the government's scouring of a newly invented vault of private information, the invasiveness of which eclipses even the most exhaustive search of a home. Rather, this case involves the government's collection of information that individuals have knowingly exposed to the public, a permissible practice ever since the Fourth Amendment was adopted. *See Katz*, 389 U.S. at 351, 88 S.Ct. 507; *see also Knotts*, 460 U.S. at 283, 103 S.Ct. 1081. That DPS used a GPS device to aid in collecting the information does not infringe Jean's Fourth Amendment rights, inasmuch as the Supreme Court "ha[s] never equated police efficiency with unconstitutionality." *Id.* at 284, 103 S.Ct. 1081.

¶ 83 A different *Riley* case is more instructive here than the Supreme Court's *Riley* cellphone-search case. In *United States v. Riley*, 858 F.3d 1012 (6th Cir. 2017) (per curiam), *petition for cert. filed*, —— U.S.L.W. —— (U.S. Sept. 12, 2017) (No. 17–5943), the Sixth Circuit held that law enforcement's warrantless tracking of a defendant using "real-time GPS

location data for approximately seven hours preceding his arrest, did not amount to a Fourth Amendment search." *Id.* at 1013. The police used the GPS data to follow the defendant to the hotel where he was hiding. *Id.* at 1014. After learning which room was his, the police arrested him. *Id.* at 1014–15. Central to the court's analysis was "[t]he fact that the defendant's movements ... were visible from public vantage points," *id.* at 1017, such that the GPS tracking did not "reveal movements within the ... hotel room," *id.* at 1018 (emphasis omitted). The court also noted that both *Knotts* and *Karo* teach that electronically assisted tracking does not violate the Fourth Amendment as long as the tracking "does not cross the sacred threshold of the home." *Id.* The same reasoning and result should obtain here.

¶ 84 "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness ***545** of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *United States v. Knights*, 534 U.S. 112, 118–19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)); *see also Maryland v. King*, 569 U.S. 435, 447, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013) (quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)) ("[T]he ultimate measure of the constitutionality of a governmental search is reasonableness." (citation and internal quotation marks omitted)); *cf. State v. Adair*, 241 Ariz. 58, 59 ¶ 1, 383 P.3d 1132, 1133 (2016) (warrantless search of probationer's residence "complies with the Fourth Amendment if it is reasonable under the totality of the circumstances"). The installation and short-term use of the GPS device in this case to track and stop Velez–Colon's truck and then apprehend its occupants, though undertaken without a warrant, were reasonable, as those actions clearly were supported by ample and well-supported suspicion of illegal activity. These factors militate against finding a Fourth Amendment violation here based on any alleged reasonable expectation of privacy.

¶ 85 Rejecting what it characterizes as an "ad hoc approach," *supra* ¶ 35, the majority instead adopts a categorical bright-line rule that automatically prohibits warrantless GPS monitoring regardless of the duration or circumstances. *Supra* ¶¶ 32, 36. But the Supreme Court's jurisprudence is replete with cases that embrace case-specific and fact intensive examinations of Fourth Amendment challenges, a framework Justice Alito found appropriate in this very context. *See Jones*, 565 U.S. at 430, 132 S.Ct. 945 (Alito, J., concurring in the judgment) (noting that Fourth Amendment challenges to GPS tracking must be decided in the "particular case"); *see also Grady v. North Carolina*, —— U.S. ——, 135 S.Ct. 1368, 1371, 191 L.Ed.2d 459 (2015) ("The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.").

¶ 86 The majority cites no authority for the proposition that a non-owner/intermittent driver of a vehicle, who has no right to exclude others from it, nevertheless has an objectively reasonable expectation that the movements of the vehicle will not be monitored via GPS for less than two days. Yet, the majority broadly holds that "passengers traveling with the

owner in a private vehicle generally have a reasonable expectation of privacy that is invaded by the government's continually tracking the vehicle through a surreptitious GPS tracking device," *supra* ¶ 32, and that "Jean's expectation of privacy from the warrantless GPS monitoring of his movements is one that 'society is prepared to recognize as reasonable,' " *supra* ¶ 38.

¶ 87 At bottom, the majority's holding means this: any non-owner/passenger who, with permission and in the presence of the owner, sometimes drives the vehicle has a reasonable expectation of privacy regarding the vehicle such that the warrantless installation of a GPS device on the vehicle's exterior violates that person's Fourth Amendment rights and precludes the government's use of any information or evidence derived from the GPS. In other words, the majority requires probable cause and a warrant for any governmental installation and use of a GPS device on vehicles, even for short-term use for an hour or so and even though reasonable suspicion of illegal activity is evident. The law does not yet compel that result, and the limited facts before us certainly do not warrant it. Therefore, I respectfully dissent from Part II(C) of the Court's opinion.

¶ 88 One final note: the United States Supreme Court recently held oral argument in *Carpenter v. United States*, No. 16–402 (U.S. filed Sept. 16, 2016), involving the continued viability of the "third-party doctrine" in the digital age. At issue is whether police may, without a warrant, obtain cellphone location information that is routinely collected and stored by wireless providers, as the Sixth Circuit held. *See United States v. Carpenter*, 819 F.3d 880, 890 (6th Cir. 2016) (distinguishing *Jones* and *Riley* and holding "that the ***546** government's collection of business records containing cell-site data was not a search under the Fourth Amendment"). The Supreme Court also recently granted certiorari and scheduled oral argument in *Byrd v. United States*, No. 16–1371 (U.S. filed May 11, 2017), which involves whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement, *see United States v. Byrd*, 679 Fed. Appx. 146 (3d Cir. 2017) (holding that sole occupant of a rental vehicle has no Fourth Amendment expectation of privacy and therefore no standing to challenge search of the vehicle when occupant is not named in the rental agreement). *See also United States v. Kennedy*, 638 F.3d 159, 165–67 (3d Cir. 2011) (noting split among the federal circuit courts and collecting cases).

¶ 89 Whether *Carpenter*, *Byrd*, or some other Supreme Court case will eventually resolve, clarify, or shed light on the GPS issue before us is now unknown. But given the current state of the law, this Court should follow *Rakas* and *Knotts* unless and until those decisions are held to be inapplicable or overruled in the GPS context. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *accord State v. Ring*, 204 Ariz. 534, 557 ¶ 61, 65 P.3d 915, 938 (2003) ("We cannot ignore a Supreme Court decision interpreting federal law unless the Court expressly

overrules or casts cognizable doubt on that decision."); *see also Sparks*, 711 F.3d at 66 (finding nothing about GPS monitoring, "except for the duration of its use, ... that could meaningfully distinguish it from the beeper in *Knotts*"). For all of these reasons, I would affirm the trial court's denial of Jean's motion to suppress (without the need for invoking the good-faith exception to the exclusionary rule) and affirm the court of appeals' opinion.

BOLICK, J., concurring in part and dissenting in part.

¶ 90 The Court today honors our forebears by holding that the state must obtain approval from a disinterested magistrate before it may engage in GPS surveillance under the circumstances presented. Although in many instances this will merely impose inconvenience on the authorities, the warrant requirement marks the dividing line between the rule of law and tyranny. Were the Court to hold otherwise, the state could subject countless individuals and their movements to pervasive and continuous GPS surveillance without meaningful limits. The founders could not have imagined the technology that makes such invasive surveillance possible, but they more than imagined the threat.

¶ 91 I join fully the Chief Justice's majority and dissenting opinions. I write additionally to express the view that had Jean adequately developed the argument, we might have more easily and appropriately decided this case under the Arizona Constitution.

¶ 92 Americans enjoy the protections of not one constitution but fifty-one. Our federalist system allows us to interpret our state constitution differently than the U.S. Supreme Court interprets the national Constitution, so long as we do not diminish federal constitutional protections or transgress federal laws enacted pursuant to the U.S. Constitution. In doing so, we frequently may find that our constitution provides greater protections of individual liberty and constraints on government power because of provisions that do not exist in its national counterpart, *see, e.g.*, *Turken v. Gordon*, 223 Ariz. 342, 345–49 ¶¶ 10–22, 224 P.3d 158, 161–65 (2010) (analyzing the "Gift Clause" under article 9, section 7 of the Arizona Constitution which forbids corporate subsides), or because we more strictly construe such protections that exist in both constitutions. *Compare Kelo v. City of New London*, 545 U.S. 469, 488–89, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) (holding that the Fifth Amendment's "public use" provision requires only a public benefit), *with Bailey v. Myers*, 206 Ariz. 224, 229–30 ¶¶ 21–26, 76 P.3d 898, 903-04 (App. 2003) (vigorously enforcing the public use requirement under ***547** article 2, section 17 of the Arizona Constitution).

¶ 93 On the issue presented here, our constitution may lend itself to greater clarity than its federal counterpart. The Fourth Amendment provides: "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 it specifies a warrant procedure for such searches and seizures. U.S. Const. amend. IV. By contrast, article 2, section 8, of the Arizona Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

¶ 94 On its face, article 2, section 8 provides a categorical bar against the state disturbing individuals in their private affairs without authority of law. In law, the definition of "disturb" is "[t]o interfere with in the lawful enjoyment of

a right." *Disturb*, Webster's New International Dictionary 757 (2d ed. 1944). The right to travel is recognized as a fundamental constitutional right. *See, e.g., Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44, 18 L.Ed. 745 (1868). Applying article 2, section 8 could extricate the Court from the Fourth Amendment jurisprudential thicket outlined in the preceding pages in which the Court must determine whether a police-installed GPS device is a "search," whether a vehicle is "an effect," and whether a co-driver has a possessory interest in the vehicle or a reasonable expectation of privacy. It also could provide greater certainty and predictability to defendants and law-enforcement alike than hitching our jurisprudence to often amorphous and constantly evolving U.S. Supreme Court decisions.[5]

¶ 95 Other state courts have relied on their own constitutions to determine the propriety of electronic surveillance. *See, e.g., Weaver*, 882 N.Y.S.2d 357, 909 N.E.2d at 1200–02 (N.Y. 2009) (requiring warrant for GPS surveillance because "the alternative would be to countenance an enormous unsupervised intrusion by the police agencies of government upon personal privacy" and "the consequent marginalization of the State Constitution"); *State v. Campbell*, 306 Or. 157, 759 P.2d 1040, 1044 (1988) (rejecting the reasonable expectation of privacy analysis under the Oregon Constitution).

¶ 96 Most salient are cases from Washington State, whose pertinent constitutional provision is identical to ours. *See, e.g., Kotterman v. Killian*, 193 Ariz. 273, 291 ¶ 68, 972 P.2d 606, 624 (1999) (concluding that we may find useful guidance in Washington State jurisprudence as much of our constitution was derived from theirs). In *State v. Jackson*, the Washington Supreme Court observed that "vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life." 76 P.3d at 223. The court thus held that the warrantless placement of a GPS device on a suspect's vehicle was precisely the "trespass into private affairs" that the constitution prohibits. *Id.* at 224; *see also State v. Samalia*, 186 Wash.2d 262, 375 P.3d 1082, 1086–87 (2016) (applying the same analysis to cellphone searches).

¶ 97 Unfortunately, we cannot resolve this case under the Arizona Constitution because the issue was not fully developed and argued. The vitality of our state constitution requires not only judicial vigilance but adversarial diligence. I hope that future cases will present an opportunity to determine whether our Constitution provides greater limits on government discretion in this context.

All Citations

243 Ariz. 331, 407 P.3d 524

Footnotes

* Justice John R. Lopez IV has recused himself from this case. Pursuant to article 6, section 3 of the Arizona Constitution, the Honorable Philip G. Espinosa, Judge of the Arizona Court of Appeals, Division Two, was designated to sit in this matter.

1 According to the majority, the State waived any assertion "that Jean lacked a subjective expectation of privacy" by not specifically raising that point. *Supra* ¶ 23. But the State expressly argued that Jean "lacked a reasonable expectation of privacy in his movements on public roads" and specifically referred to *Katz*'s requirement of "a subjective expectation of privacy," a showing only the defendant can and must make. *See Smith*, 442 U.S. at 740, 99 S.Ct. 2577; *Bryant*, 178 Cal.Rptr.3d 185, 334 P.3d at 612.

2 These considerations now apply with even greater force to commercial vehicles, which are subject to far more regulations than private vehicles. Currently, extensive federal and state regulations govern commercial tractor-trailers as part of a "pervasively regulated industry." *See United States v. Delgado*, 545 F.3d 1195, 1202 (9th Cir. 2008). For example, federal laws subject drivers of commercial vehicles to "hours of service" limitations, *see* 49 U.S.C. § 31137, and require them to install on their vehicles an "electronic logging device" that records, among other things, the hours when and locations where the driver operates the commercial vehicle. 49 U.S.C. § 31137(b)(1); 49 C.F.R. §§ 395.8(a)(1), 395.26(b) (2016). Significantly, these laws "allow law enforcement to access the data contained in the[se] device[s] during a roadside inspection." *Id.* 49 U.S.C. § 31137(b)(1)(B); *accord* 49 C.F.R. § 395.15(b)(2) (2016). And operators of commercial vehicles must now constantly record much more information than the vehicle's location alone, and disclose seven days' worth of this information upon the warrantless demand of a government official. *See* 49 C.F.R. § 395.15(b)(2).

In addition, many states, including Arizona, have laws that require commercial vehicles to report for weigh-ins at ports of entry. *See* A.R.S. §§ 28–369, –5432. The majority does not address these recently-amended laws because they were not argued and do not directly impact this particular case. *Supra* ¶ 24. But given its broad holding, *see supra* ¶ 32, such laws clearly should affect the analysis of future cases involving Fourth Amendment reasonable-expectation-of-privacy claims arising from warrantless searches of commercial vehicles covered by the regulations. *See Owner–Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 840 F.3d 879, 893 (7th Cir. 2016) ("In these industries, reasonable expectations of privacy are diminished because an individual who 'embarks upon such a business ... has voluntarily chosen to subject himself to a full arsenal of governmental regulation.' " (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978))).

3 Legislative solutions in this area might well be influenced by current realities. In this age of pervasive and perpetually-connected "smartphones" and tablets, most of the populace is constantly tracked and physically located by a multitude of "apps" and interests that are routinely granted permission to do

so. *See* Andrew G. Ferguson, The Internet of Things and the Fourth Amendment of Effects, 104 Cal. L. Rev. 805, 818–23 (2016). In a similar vein, the public understands that video cameras are ubiquitous, both in cities and on the highways. Thus, the electronic tracking of people's location, both digital and visual, at the very least in public areas, arguably has gained widespread acceptance and cannot be deemed something society would nevertheless reasonably expect to be private. *See* Derek M. Alphran, Changing Tides: A Lesser Expectation of Privacy in a Post 9/11 World, 13 Rich. J.L. & Pub. Int. 89, 129, 135 (2010) (advocating for increased privacy protections and observing that "mass video surveillance" and other forms of digital surveillance in public "reduce objective expectations of privacy").

4 The majority also cites *Tracey v. State*, 152 So.3d 504 (Fla. 2014), for support, *supra* ¶ 32, but that case is also inapplicable to the facts before us. In *Tracey*, the Florida Supreme Court concluded that one has a reasonable expectation of privacy in cell site location data. 152 So.3d at 526. But the court noted "perhaps most important[ ]" to its holding was the fact that a cell phone is an " 'effect[ ]' as that term is used in the Fourth Amendment." *Id.* at 524. Moreover, the court's holding was based, in part, on the "inexorable and significant fact" that because of cell phones' size and their pervasive use, "cell phone tracking can easily invade the right to privacy in one's home or other private areas." *Id.* Neither of these factors is implicated here. As discussed above, the vehicle was not an effect as to Jean, and nothing in the record indicates that the GPS monitoring revealed any confidential details of Jean's private life, personal habits, or the like.

5 For instance, we are admonished to determine whether a particular expectation of privacy is "one that society is prepared to recognize as 'reasonable.' " *Katz*, 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring). While I accept that as a standard we must apply under Fourth Amendment jurisprudence, it is not immediately evident how a court is equipped to determine what society is "prepared to recognize." Nor am I persuaded that constitutional meaning should hinge on what "society" is "prepared to recognize" at any given point. As we develop our state constitutional jurisprudence, we should rely to the greatest possible extent on the text's plain meaning, rather than concoct hopelessly subjective tests that evolve the text's meaning without the benefit of constitutional amendment.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

APPENDIX 2

State v. Jean, 239 Ariz. 495 (2016)

We've updated our Privacy Statement. Before you continue, please read our new Privacy Statement and familiarize yourself with the terms.

WESTLAW

Affirmed in Part, Vacated in Part by State v. Jean, Ariz., January 3, 2018

Original Image of 372 P.3d 1019 (PDF)

State v. Jean
Court of Appeals of Arizona, Division 1. June 21, 2016 239 Ariz. 495 372 P.3d 1019 741 Ariz. Adv. Rep. 5 *(Approx. 12 pages)*

Court of Appeals of Arizona,
Division 1.

State of Arizona, Appellee,
v.
Emilio **Jean**, Appellant.

No. 1 CA–CR 14–0444
FILED 6/21/2016

Synopsis

Background: Defendant was convicted in the Superior Court, Coconino County, No. S0300CR201200246, Cathleen Brown Nichols, J., of offenses including money laundering and transportation of marijuana. Defendant appealed.

Holdings: The Court of Appeals, Orozco, J., held that:
1 trial court acted within discretion in admitting evidence of defendant's prior arrest for incident involving irregularities in commercial truck with which defendant was associated, including presence of marijuana in truck;
2 defendant, who was purportedly the driver-in-training of a commercial truck, lacked standing to challenge constitutionality of placement of global positioning system (GPS) device on truck; and
3 trial court acted within discretion in declining to grant mistrial after witness referred in trial testimony to trips made to transport marijuana that were not part of charged offenses.

Affirmed.

West Headnotes (16)

Change View

1 **Criminal Law** Conspiracy, racketeering, and money laundering
Criminal Law Controlled substances
Criminal Law Remoteness
Trial court acted within discretion in admitting evidence of defendant's prior arrest for incident involving irregularities in commercial truck with which defendant was associated, including presence of marijuana in truck, in instant prosecution for money laundering and transportation of marijuana arising out of presence

SELECTED TOPICS

Criminal Law

Trial
Evidence of Defendant Prior Police Contacts
Bad Acts Evidence of Defendant Prior Drug Sales

Searches and Seizures

Standing to Object
Search and Expectation of Privacy

Secondary Sources

APPENDIX III - JUDICIAL OPINIONS

FDA Enforcement Man. Appendix III

...No. 74-215 Supreme Court of the United **States** 421 U.S. 658; 95 S. Ct. 1903 2d 489 Argued March 18-19, 1975 June 9, 1975 Mr. Chief Justice Burger delivered the opinion of the Court. We granted certiorar...

APPENDIX V COURT CASES

ADA Compliance Guide Appendix V

...Appendix V contains summaries of significant ADA decisions. See the Index for an alphabetical listing of court cases in the Guide. Readers should note that these cases were decided before the 2008 amen...

APPENDIX IV-FDA WARNING LETTERS

FDA Advertising and Promotion Man. Appendix IV

...The following Warning Letters were issued to pharmaceutical companies by CDER for alleged promotion violations between 1998 and 2017. Issuance of a Warning Letter does not necessarily mean that a viola...

See More Secondary Sources

Briefs

Replacement Brief of Appellee

2006 WL 3223944
UNITED **STATES** OF AMERICA, Pl... Appellee, **v.** Lezmond MITCHELL, Defendant-Appellant.
United **States** Court of Appeals, Ninth Circuit.
Sep. 05, 2006

...The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 based on an 11 count Second Superseding Indictment charging defendant with offenses against the United **States**. (CR 130; E...

Joint Appendix

2011 WL 2472601
Eric Greene, Petitioner, **v.** Jon Fishe..., Respondent.
Supreme Court of the United **States**
June 17, 2011

...BEFORE: THE HONORABLE CAROLYN ENGEL TEMIN APPEARANCES: FOR THE COMMONWEALTH: David Augenbraun, Esq. Office of the District Attorney 1421 Arch Street Philadelphia, PA 19102 (215) 686-8000 FOR THE DEFEND...

JOINT APPENDIX, VOL. I

2017 WL 5565028
Robert MCCOY, Petitioner, **v.** LOUI... Respondent.
Supreme Court of the United **States**
Nov. 13, 2017

...HUGHES, J. This is a direct appeal under LSA-Const. Art. V, § 5(D) by the defendant,

of defendant, who was purportedly a driver-in-training, in commercial truck carrying marijuana, even though prior arrest occurred 11 years earlier; evidence was relevant to show defendant's knowledge, and other cases had allowed admission of acts which occurred much more than 11 years prior to charged offense. Ariz. R. Evid. 404(b).

2 **Criminal Law** Degree of proof
Clear and convincing evidence that another crime was committed and that defendant committed it, as required to support introduction of other crimes evidence, is evidence that makes a proposition highly probable; clear and convincing evidence need not, however, establish that it is certainly or unambiguously true. Ariz. R. Evid. 404(b).

3 **Criminal Law** Remoteness
Although remoteness between incidents affects weight to be given testimony on evidence of other crimes, it generally does not determine such evidence's admissibility. Ariz. R. Evid. 404(b).

4 **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused
Not all harmful evidence is unfairly prejudicial, as could support exclusion of such evidence; "unfair prejudice" is prejudice that could cause a jury to render a decision on an improper basis, such as emotion, sympathy, or horror.

1 Case that cites this headnote

5 **Criminal Law** Objections and disposition thereof
Court presumes juries follow their instructions.

6 **Criminal Law** Review De Novo
Appellate court reviews de novo the ultimate legal question of whether a search violated defendant's constitutional rights. U.S. Const. Amend. 4.

7 **Searches and Seizures** Automobile searches
Defendant, who was purportedly the driver-in-training of a commercial truck, lacked standing to challenge constitutionality of placement of global positioning system (GPS) device on truck, where there was no evidence that truck's owner made full transfer of truck to defendant, that truck was placed in defendant's actual or constructive possession, that defendant ever had exclusive use of truck, or that defendant ever had permission to drive truck. U.S. Const. Amend. 4.

8 **Bailment** Delivery and acceptance

Robert LeRoy McCoy. The defendant was indicted by a Caddo Parish grand jury, on May 29, 2008, on three counts of fir...

See More Briefs

Trial Court Documents

United States of America v. Be

2016 WL 2839319
UNITED **STATES** OF AMERICA, Pl... ..., ...
Jesse R. BENTON, John F. Tate and Dimitrios N. Kesari, Defendants.
United **States** District Court, S.D. Iowa. Central Division.
Apr. 20, 2016

...The original indictment in this matter charged that from in or about October, 2011, to in or about August, 2014, Defendants violated reporting requirements established by the Federal Election Campaign ...

United States of America v. Da

2015 WL 10571519
UNITED **STATES** OF AMERICA, Pl..., ...
Khalil DAVIS, Defendant.
United **States** District Court, W.D. Tennessee, Western Division.
July 15, 2015

...Before the Court is Defendant Khalil Davis's Motion to Suppress (ECF No. 50) filed on May 28, 2015. The United **States** has responded in opposition to Defendant's Motion. For the reasons set forth below,...

In re Zayat Stables, LLC

2010 WL 6982309
In re: ZAYAT STABLES, LLC, Debto. ...
Possession.
United **States** Bankruptcy Court, D. New Jersey.
July 15, 2010

...Chapter 11 Hearing Date and Time: July 15, 2010, at 10:00 a.m. The relief set forth on the following pages, numbered two (2) through thirty-four (34), is hereby ORDERED. THIS MATTER having been opened ...

See More Trial Court Documents

To constitute a bailment, there must be a delivery by the bailor and acceptance by the bailee of the subject matter of the bailment; it must be placed in the bailee's possession, actual or constructive, and there must be such a full transfer, actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and give the bailee for the time being the sole custody and control thereof.

9 **Criminal Law** ⇐ Persons entitled to object
A necessary predicate to the application of the fruits-of-the-poisonous-tree doctrine is that the search violated the constitutional rights of the person who challenges the legality of the search. U.S. Const. Amend. 4.

10 **Searches and Seizures** ⇐ Standing to Object
A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. U.S. Const. Amend. 4.

11 **Searches and Seizures** ⇐ Expectation of privacy
A person travelling in a vehicle on public roads has no reasonable expectation of privacy in the person's movements from one place to another. U.S. Const. Amend. 4.

12 **Searches and Seizures** ⇐ Expectation of privacy
Defendant, as either the passenger or driver of commercial truck, lacked reasonable expectation of privacy in his movements as such, and thus police officers' placement of global positioning system (GPS) device on truck to monitor truck's movements did not violate any expectation of privacy by defendant, where officers monitored truck for only two days. U.S. Const. Amend. 4.

13 **Criminal Law** ⇐ Other Misconduct; Character of Accused
Trial court acted within discretion in declining to grant mistrial after witness referred in trial testimony to trips made to transport marijuana that were not part of charged offenses, in prosecution for money laundering and transportation of marijuana arising out of defendant's presence in commercial truck which was carrying marijuana, where testimony did not necessarily refer to other trips with defendant.

14 **Criminal Law** ⇐ Issues related to jury trial
The denial of a motion for mistrial is reviewed for abuse of discretion.

15 **Criminal Law** ⇐ Issues related to jury trial

Criminal Law Conduct and Deliberations of Jury
Appellate court will reverse denial of a motion for a mistrial only if the court's decision was both improper and clearly prejudicial.

1 Case that cites this headnote

16 **Criminal Law** Discharge of Jury Without Verdict; Mistrial
Criminal Law Fairness and justice in general
A mistrial is the most dramatic remedy and only appropriate when justice requires.

***1020** Appeal from the Superior Court in Coconino County, No. S0300CR201200246, The Honorable Cathleen Brown Nichols, Judge.
AFFIRMED

Attorneys and Law Firms

Arizona Attorney General's Office, Phoenix, By Terry M. Crist, III, Counsel for Appellee.

***1021** Coconino County Public Defender's Office, Flagstaff, By Brad Bransky, Counsel for Appellant.

Judge Patricia A. Orozco delivered the opinion of the Court, in which Presiding Judge Diane M. Johnsen and Judge Kenton D. Jones joined.

Opinion

OPINION

OROZCO, Judge:

497 ¶ 1 Emilio **Jean** appeals his convictions and sentences for money laundering, conspiracy to commit money laundering and transportation of marijuana, transportation of marijuana for sale in an amount over two pounds and illegally conducting an enterprise. **Jean** argues the trial court erred when it: admitted evidence of other acts, denied his motion to suppress evidence based on lack of standing to challenge a warrantless global positioning system (GPS) device and denied his motion for mistrial. For the reasons that follow, we affirm **Jean's** convictions and sentences.

FACTS [1] AND PROCEDURAL HISTORY

¶ 2 Arizona Department of Public Safety (DPS) officers placed a GPS tracking device on a commercial truck in 2010 because they suspected the truck and its attached trailer were involved in criminal activity. The officers did not, however, obtain a warrant before they placed the device on the truck. Two days later, at the request of investigators who were tracking the truck, a DPS officer stopped the truck as it traveled eastbound on Interstate 40. When the officer stopped the truck, the truck's owner was in the driver's seat and **Jean** was in the sleeper berth. **Jean** claimed he was simply a driver-in-training. A search of the trailer revealed ninety-five bales of marijuana weighing a total of 2140 pounds.

¶ 3 A jury found **Jean** guilty. The trial court sentenced him to concurrent terms of ten years' imprisonment for conspiracy and transportation of

marijuana for sale and placed him on five years' probation for illegally conducting an enterprise and money laundering. **Jean** timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12–120.21.A, 13–4031 and –4033.A (West 2016).[2]

DISCUSSION

I. Admission of Evidence of Other Acts

1 ¶ 4 **Jean** argues the trial court erred when it granted the **State's** motion to admit evidence pursuant to Arizona Rule of Evidence 404(b). **Jean** argues the **State** failed to prove by clear and convincing evidence that he committed the prior act, the prior act was too remote to the charged offenses to be relevant, and any probative value was substantially outweighed by the danger of unfair prejudice. We review admission of evidence pursuant to Rule 404(b) for abuse of discretion. ***State*** *v. Van Adams*, 194 Ariz. 408, 415, ¶ 20, 984 P.2d 16, 23 (1999).

¶ 5 The **State** filed a notice of its intent to offer evidence of other acts, to which **Jean** objected. At a pretrial hearing, the **State** introduced the testimony of a Missouri **State** Highway Patrol Officer who arrested **Jean** in Missouri in 1999. The officer testified that in 1999, he performed safety inspections of commercial trucks at a weigh station as part of his "criminal interdiction" assignment. During a routine inspection of a truck and the associated paperwork, the officer noted various factors that suggested drug smuggling, including irregularities with the drivers' log books, air fresheners and multiple cell phones.[3] The officer found three people in the truck with **Jean** in the sleeper berth. Another passenger claimed to be a driver-in-training, yet the log books showed he had done very little driving. The driver consented to a search after a drug detection dog alerted to the trailer. The search revealed 1774 ***1022 *498*** pounds of bundled marijuana. The primary driver claimed **Jean** was the person who monitored the loading of the trailer. The officer arrested all three individuals, including **Jean**, but no one was prosecuted.

¶ 6 The trial court held it would admit the Missouri incident as evidence of other acts, **stating** the evidence was relevant to show **Jean's** knowledge. The court also **stated** that the **State** proved by clear and convincing evidence both that the prior incident occurred and **Jean** was involved as a participant in the activity, not merely present. The trial court found the similarities between the two events "quite striking" and **stated** that "the Missouri incident really mirrors in almost every respect the incident in this case." **Jean** was in the sleeper berth during both stops. Both involved similarly large quantities of marijuana in the trailer of a large commercial truck. There were similar concerns with the drivers' log books. Both stops involved trucks seemingly owned by small trucking companies that were having empty trucks drive long distances to pick up cargo, which made no economic sense. Additionally, the court found it "compelling" that there was evidence **Jean** supervised the loading of the trailer in the Missouri incident. The court acknowledged eleven years had passed since the Missouri incident, but held that went to the weight of the evidence and not its admissibility. The court also considered the evidence in the context of Rule 403, finding the danger of unfair prejudice did not substantially outweigh the

probative value of the evidence. The Missouri officer subsequently recounted the prior incident at trial.

2 ¶ 7 Evidence of other crimes, wrongs or acts is admissible if relevant and admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ariz. R. Evid. 404(b). The trial court did not abuse its discretion when it held the **State** proved by clear and convincing evidence the Missouri incident occurred and **Jean** was involved, not merely present, and that the incident was relevant to prove **Jean's** knowledge in the current case. *See* ***State*** *v. Prion*, 203 Ariz. 157, 163, ¶ 37, 52 P.3d 189 (2002) ("For other act evidence to be admissible, it must be shown by the clear and convincing standard that the act was committed and that the defendant committed it."). Clear and convincing evidence is evidence that makes the proposition "highly probable." ***State*** *v. Renforth*, 155 Ariz. 385, 388, 746 P.2d 1315, 1318 (App. 1987) (citation omitted). Clear and convincing evidence need not, however, "establish that it is certainly or unambiguously true." ***State*** *v. Vega*, 228 Ariz. 24, 29 n. 4, ¶ 19, 262 P.3d 628, 633 n. 4 (App. 2011).

3 ¶ 8 The testimony of the Missouri officer, combined with other documentary evidence regarding the Missouri incident, was sufficient to permit the trial court to find it "highly probable" the Missouri incident occurred and that **Jean** was involved. The trial court did not abuse its discretion when it also determined the Missouri incident was not too remote in time. "Although remoteness between the two incidents affects the weight to be given the testimony by the jury, it generally does not determine its admissibility." *Van Adams*, 194 Ariz. at 416, ¶ 24, 984 P.2d at 24. We have held that acts which occurred much more than eleven years prior to the charged offenses were not too remote. *See* ***State*** *v. Weatherbee*, 158 Ariz. 303, 304–05, 762 P.2d 590, 591–92 (App. 1988) (holding prior acts that occurred twenty-two years before trial were not too remote to be admitted at trial); ***State*** *v. Salazar*, 181 Ariz. 87, 92 n. 5, 887 P.2d 617, 622 n. 5 (App. 1995) (finding a prior act that occurred twenty years before the charged offense was relevant). The trial court did not abuse its discretion in finding that the eleven years that elapsed between the Missouri incident and the charged offenses did not render the Missouri incident too remote.

4 ¶ 9 Regarding the danger of unfair prejudice, there is no question but that evidence of the Missouri incident was prejudicial to **Jean**. However,

> not all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent. The use of the word "prejudicial" for this class of evidence, while common, is inexact. "Prejudice," as used in this *****1023 *499*** way, is not the basis for exclusion under Rule 403.

State *v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (citations omitted). "[A]ll good relevant evidence" is "adversely probative." *Id.* "Unfair prejudice" is prejudice that could cause a jury to render a decision on an improper basis, "such as emotion, sympathy or horror." *Id.*

5 ¶ 10 The trial court did not abuse its discretion when it determined the probative value of the evidence of the Missouri incident was not

substantially outweighed by the danger of unfair prejudice. Moreover, the trial court gave an instruction that directed the jury to consider the Missouri incident only as it might show **Jean's** motive, intent, preparation, plan, knowledge, absence of mistake or accident. We presume juries follow their instructions. ***State*** *v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

II. Motion to Suppress

6 7 ¶ 11 **Jean** next argues the trial court erred when it denied his motion to suppress. We review de novo the ultimate legal question of whether the search violated **Jean's** constitutional rights. *See Adams*, 197 Ariz. at 572, ¶ 16, 5 P.3d at 906.

¶ 12 **Jean** does not directly challenge the constitutionality of the stop of the truck or the resulting search; instead, he argues the use of the GPS to monitor the truck constituted an illegal search. **Jean** argues that absent the information authorities obtained by monitoring the truck through the GPS, there would have been no stop, so that the evidence obtained therefrom was fruit of the poisonous tree. **Jean** also argues that GPS tracking of the truck over several days violated his reasonable expectation of privacy.

¶ 13 **Jean** relies upon the decisions in *United* ***States*** *v. Jones*, ——U.S. ——, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), and ***State*** *v. Mitchell*, 234 Ariz. 410, 323 P.3d 69 (App. 2014), to argue that the warrantless placement of a GPS to monitor an individual's movements is an unlawful search under the Fourth Amendment. *Jones* held for the first time that the installation of a GPS on a vehicle constituted a trespass and the use of the GPS to monitor the vehicle's movements constituted a search under the Fourth Amendment.[4] *Jones*, 132 S.Ct. at 949. We relied upon *Jones* in *Mitchell*, a case very similar to *Jones*. *Mitchell*, 234 Ariz. at 418, ¶ 26, 323 P.3d at 77.

¶ 14 The trial court found **Jean** did not own or have a possessory interest in the truck, and on that basis, held **Jean** had no standing to challenge the placement of the GPS because he had no "reasonable expectation of privacy in a vehicle that he was just a passenger in." **Jean** argues on appeal, however, that as a co-driver, he had as much of a possessory interest in the truck as the defendants in *Jones* and *Mitchell*, neither of whom owned the vehicle they drove.

¶ 15 The defendant in *Jones* did not own the vehicle at issue; it belonged to his wife, but he was "the exclusive driver." *Jones*, 132 S.Ct. at 946 and n. 2. The defendant, therefore, had the rights of a bailee and standing to challenge the GPS. *Id.* Likewise, the defendant in *Mitchell* did not own the vehicle at issue, but he had permission from the owner to use the vehicle, sufficient to confer standing as in *Jones*. *Mitchell*, 234 Ariz. at 412, 415, ¶¶ 3, 19, 323 P.3d at 71, 74. Just as in *Jones*, the defendant in *Mitchell* had the rights of a bailee. *Id.* at 415, ¶ 19, 323 P.3d at 74. In neither *Jones* nor *Mitchell* was the owner within the vehicle and in operational control of the vehicle at the time of the stop.

¶ 16 In *Mitchell*, we held that "lawful possession" of a vehicle when the GPS is installed "is sufficient to confer upon a defendant standing to challenge GPS tracking" under *Jones*. 234 Ariz. at 416, ¶ 17, 323 P.3d at 75. We explained that standard "is consistent with basic principles of tort law

regarding trespasses." *Id.* at ¶ 18. Under those principles, a bailor or a bailee of chattel could maintain a trespass; we concluded the same status confers standing to challenge a trespass and resulting search under *Jones*. *Id.*

8 ***1024 *500** ¶ 17 The defendants' rights as bailees in *Jones* and *Mitchell* gave them standing to challenge the warrantless placement of GPS devices on the vehicles.[5] **Jean**, however, was not a bailee:

> To constitute a bailment there must be a delivery by the bailor and acceptance by the bailee of the subject matter of the bailment. It must be placed in the bailee's possession, actual or constructive. There must be such a full transfer, actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and [g]ive the bailee for the time being the sole custody and control thereof.

Blair v. Saguaro Lake Dev. Co., 17 Ariz.App. 72, 74, 495 P.2d 512 (1972) (internal citations omitted) (quoting *Freeman v. Myers Automobile Service, Co.*, 226 N.C. 736, 40 S.E.2d 365, 366 (1946)).

¶ 18 Here, there is no evidence the owner of the truck made a "full transfer" of the truck to **Jean**, nor is there any evidence of a delivery and acceptance. There is no evidence the owner placed the truck in **Jean's** actual or constructive possession so "as to exclude the possession of the owner and all other persons and give **[Jean]** for the time being the sole custody and control thereof." *Id.* There is no evidence **Jean** ever had exclusive use of the truck nor evidence he ever had permission to drive the truck or actually drove the truck without the owner present. There is no evidence **Jean** ever possessed the keys to the truck. In sum, even if **Jean** may have occasionally operated the truck as a co-driver while in the owner's presence, there is no evidence the owner did not reserve his right to possess and control the truck at all times.[6] Therefore, there is no evidence that **Jean** was a bailee of the truck. ***State*** *v. Orendain*, 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (App. 1996) *overruled on other grounds* (holding that a defendant driving codefendant's vehicle lacked standing to assert Fourth Amendment challenge to the search of the vehicle when he had neither possessory nor property interest in the vehicle).

9 10 ¶ 19 "[A] necessary predicate to the application of the 'fruits' doctrine" is that the search violated the constitutional rights of the person who challenges the legality of the search. ***State*** *v. Super. Ct. (Treadaway)*, 119 Ariz. 573, 581, 583 P.2d 229, 237 (1978). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Ill.*, 439 U.S. 128, 134, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Because **Jean** did not own the truck and did not otherwise have a possessory interest in it, he had no standing to challenge the placement of the GPS device on the truck.

11 12 ¶ 20 Finally, regarding **Jean's** claim that use of the GPS violated his reasonable expectation of privacy, **Jean** had no reasonable expectation of privacy in his movements as a passenger or driver of the truck. It is well settled that a person travelling in a vehicle on public roads has no

reasonable expectation of privacy in the person's movements from one place to another. *United* ***States*** *v. Knotts*, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). This court has held from this principle that there is no reasonable expectation of privacy that is infringed by GPS monitoring of a device placed on a vehicle, and that "[t]his is true particularly where the government's monitoring is short-term." ***State*** *v. Estrella*, 230 Ariz. 401, 404, 286 P.3d 150, 153 (App. 2012). Given that authorities monitored the truck in which **Jean** was riding for only two days, we conclude he established no Fourth Amendment violation.

III. The Motion for a Mistrial

13 ¶ 21 **Jean** argues the trial court erred when it denied his motion for mistrial *****1025 *501*** after the owner of the truck referred, during his testimony, to other trips made to transport marijuana that were not part of the charged offenses. **Jean** objected when the truck's owner first referred to other trips in which he and **Jean** transported marijuana. The trial court sustained the objection, granted **Jean's** motion to strike the testimony and instructed the jury accordingly.

¶ 22 The owner later testified "we" made "so many trips" from Atlanta and "we" usually stopped for fuel in Texas. **Jean** did not object, but he asked the court and the **State** to admonish the owner again to not mention unrelated trips. The **State** admonished the owner accordingly. Later in the owner's testimony, when there was confusion as to whether he and **Jean** made two trips to Tucson in one day as part of the charged offenses, the owner testified, "[w]e usually often did." He further testified that "[i]t was [sic] so many trips that same way that they all kind of blurred together."

¶ 23 **Jean** again did not object, but **stated** that if this kept occurring he would move for a mistrial. The court again admonished the owner not to talk about anything outside the scope of the question. Later, when he explained the route he planned to take for the trip at issue, the owner testified that "we always used to take a cutoff and make a round—around the weigh station from Arizona and New Mexico." **Jean** moved for a mistrial based on the owner's references to unrelated trips and the inference that **Jean** participated in those trips. The court denied the motion but instructed the jury to disregard the testimony regarding how "we always used to take" a certain route.

14 15 16 ¶ 24 The denial of a motion for mistrial is reviewed for abuse of discretion. ***State*** *v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). We will reverse only if the court's decision was both improper and clearly prejudicial. *Id.* The trial court is in the best position to determine whether an incident calls for a mistrial because the court is aware of the "atmosphere of the trial, the manner in which the objectionable statement was made, and its possible effect it had on the jury and the trial." ***State*** *v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983); ***State*** *v. Brown*, 195 Ariz. 206, 209, ¶ 12, 986 P.2d 239, 242 (App. 1999). A mistrial is the most dramatic remedy, only appropriate when justice requires. ***State*** *v. Lamar*, 205 Ariz. 431, 439, ¶ 40, 72 P.3d 831, 839 (2003) (citation omitted).

¶ 25 The testimony at issue did not necessarily refer to other trips with **Jean**. The owner testified he had been involved in drug trafficking for several years and described his involvement in that trade before he met

Jean. The owner also identified several other individuals he worked with when he transported marijuana by truck. The jury knew that over the course of several years, the owner had made a number of trips in which he transported marijuana by truck with individuals other than **Jean**. Finally, the court struck the references **Jean** expressly objected to and instructed the jury to disregard them. Again, we presume juries follow their instructions. *Dunlap*, 187 Ariz. at 461, 930 P.2d at 538. Under these circumstances, the trial court did not abuse its discretion when it denied **Jean's** motion for mistrial.

CONCLUSION

¶ 26 Finding no error, we affirm **Jean's** convictions and sentences.

All Citations

239 Ariz. 495, 372 P.3d 1019, 741 Ariz. Adv. Rep. 5

Footnotes

1 We review the facts in the light most favorable to sustaining the trial court's ruling. ***State*** *v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). We give deference to the trial court's factual findings. ***State*** *v. Adams*, 197 Ariz. 569, 572, ¶ 16, 5 P.3d 903, 906 (App. 2000).

2 Absent a change material to our opinion, we cite to a statute's most current version.

3 The trial court observed that cell phones were not as prevalent in 1999 as they are today.

4 *Jones* was decided after DPS officers placed the GPS on the truck in this case but before trial began.

5 *Jones* and *Mitchell* also found it significant that the defendants were the targets of the respective investigations. *Jones*, 132 S.Ct. at 947; *Mitchell*, 234 Ariz. at 411, ¶ 2, 323 P.3d at 70. As noted above, DPS officers here had no idea **Jean** was in the truck until they stopped it.

6 While **Jean** unquestionably "controlled" the truck when he drove it with the owner beside him, we do not equate that type of control with the type of "control," coupled with a possessory interest, necessary to establish a bailment.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

APPENDIX 3

Partial Reporters Transcript, September 20th, 2014

in the file?

MR. STEVENS: Yes, thank you, if that's acceptable.

THE COURT: All right. If you need a copy, let us know.

All right. So those have been dealt with.

So let me go back to, I just need to make a record on a couple more things here. On the two motions that the Court had under advisement. One of them was the motion to suppress on the GPS tracking.

And one of the arguments -- well, one of the key arguments made by the State is that Mr. Jean doesn't really have standing to argue that he had a reasonable expectation of privacy in a vehicle that he was just a passenger in and not an owner of.

I believe, Mr. Conti, correct?

MR. CONTI: That's correct.

THE COURT: All right. And I just -- I looked at that. I am pretty familiar with standing. I've spent a lot of time looking at that issue over the years. And I do find that the defendant does not have standing to argue that he had a reasonable expectation of privacy in a vehicle that he was just a passenger in.

That would allow the Court to then make a determination based on the arguments made by defense