ADVANCE SHEET HEADNOTE
September 13, 2021

2021 CO 62

No. 20SC9, *People v. Tafoya* —Searches and Seizures—Expectation of Privacy—Search of a Curtilage.

In this case, the supreme court considers whether the police's use of a pole camera constituted a warrantless search. Having received information that Mr. Tafoya was involved in illegal drug sales, the police installed a video camera near the top of a utility pole across the street from Mr. Tafoya's home, without first obtaining a warrant. The police continuously surveilled the property, including his fenced-in backyard, for three months and stored the footage for later review. Later, based on observations obtained from the pole camera footage, the police obtained a warrant to search Mr. Tafoya's home. During the subsequent search, the police seized illegal drugs. The supreme court holds that police use of a pole camera continuously for a three-month-long video surveillance of fenced-in curtilage, stored indefinitely for later review constituted a warrantless search in

violation of the Fourth Amendment. Accordingly, the supreme court affirmed the court of appeals and the defendant's convictions are reversed.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2021 CO 62

Supreme Court Case No. 20SC9
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA1243

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Rafael Phillip Tafoya.

Judgment Affirmed
en banc
date

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CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 Because the police suspected Rafael Tafoya of drug trafficking, they mounted a camera on a utility pole across the street from his house without first securing a warrant. The pole camera continuously recorded footage of Tafoya's property—including his backyard, which was otherwise hidden by a six-foot-high privacy fence—for more than three months. The camera could pan left and right, tilt up and down, and zoom in and out—all features that police could control while viewing the footage live. Police also indefinitely stored the footage for later review.

¶2 Based on activity that they observed from the footage, police obtained a warrant to search Tafoya's property. During the subsequent search pursuant to the warrant, the police found large amounts of methamphetamine and cocaine. The People charged Tafoya with two counts of possession with intent to distribute and two counts of conspiracy. Before trial, Tafoya moved to suppress all evidence obtained as a result of the pole camera surveillance, including the evidence seized pursuant to the search warrant, arguing that police use of the camera violated the Fourth Amendment. The trial court denied his motion and found that police use of the camera was not a "search" within the meaning of the Fourth Amendment. Tafoya was subsequently convicted on all counts.

¶3 A division of the court of appeals reversed, finding that police use of the pole camera under the facts of this case was a warrantless search. *Tafoya v. People*,

2019 COA 176, ¶¶ 2–3, 490 P.3d 532, 534. The People appealed, and we granted certiorari review.[1] We hold that police use of the pole camera to continuously video surveil Tafoya's fenced-in curtilage for three months, with the footage stored indefinitely for later review, constituted a warrantless search in violation of the Fourth Amendment. Accordingly, we affirm the judgment of the court of appeals.

I. Facts and Procedural History

¶4 A confidential informant told police about a possible drug "stash house" in Colorado Springs. Police determined that the possible stash house was Tafoya's residence. As a result, the police mounted a camera to the utility pole across the street from Tafoya's house. While actively watching the footage, police could adjust the pole camera by panning left and right, tilting up and down, and zooming in and out. The pole camera continuously recorded footage for more than three months, and police stored the footage indefinitely for later review. The police did not obtain a warrant authorizing the pole camera.

¶5 The area surveilled included Tafoya's front yard, backyard, and driveway. Tafoya's property has a long driveway that runs from the front of the property

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[1] We granted certiorari to review the following issue:

> Whether the court of appeals erred in concluding that video surveillance through a camera mounted to a utility pole constituted a warrantless search in violation of the Fourth Amendment.

alongside the house and ends at a detached garage in the backyard. A six-foot-high, wooden privacy fence encloses the detached garage, the backyard, and the remaining half of the driveway. The fence includes a gate across the driveway, near where the driveway begins running alongside the house. The property has a large front yard so that the house and backyard are set back from the street. The pole camera, positioned across the street from the house, offered an elevated view of the front yard, front of Tafoya's house, driveway, backyard, and detached garage, including portions of Tafoya's property not usually visible to members of the public.[2] Due to the camera's elevated angle, it recorded any activity occurring in Tafoya's enclosed backyard, including Tafoya's movements on this portion of his property and his comings and goings. It also captured whether Tafoya had guests, how long they stayed, and any activities in which they engaged in the enclosed backyard.

¶6 Tafoya's backyard, however, was not completely shielded from the public. The fence had thin gaps between the wooden slats, which someone standing in the

[2] It is the camera's ability to record Tafoya's fenced-in curtilage—i.e., "[t]he land or yard adjoining a house," *Curtilage*, Black's Law Dictionary (11th ed. 2019)—that is at issue here.

neighboring yard could look through.[3] Additionally, the two-story apartment building abutting Tafoya's property had an exterior stairway leading to the second-floor units; from a particular spot on the stairway, one could look down and see some of Tafoya's backyard.

¶7 On June 25, 2015, police received a tip that a drug shipment would be delivered to Tafoya's house that day. A detective, therefore, started viewing the live footage from the pole camera and made the following observations: A man identified as Gabriel Sanchez drove a car up Tafoya's driveway. Tafoya then opened the gate to allow Sanchez to drive into the section of the driveway behind the privacy fence and closed the gate behind the car. Because of the pole camera's elevated position, the parked car remained partially visible over the privacy fence. The detective, who had previously zoomed in the pole camera, then observed Tafoya bend down at the front left tire of the car, but, because of the fence, the detective could not see what Tafoya was doing. After several minutes, Tafoya and Sanchez carried two white plastic bags into the detached garage.

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[3] Only people in the neighboring yard could peer through the gaps to see into Tafoya's backyard. A person standing on the street, however, could not see through these gaps because the fence was set too far back from the street.

¶8 Then, a pickup truck drove up Tafoya's driveway. Men from the truck carried a spare tire from the truck into Tafoya's detached garage. They eventually moved what appeared to be the same spare tire from the garage back to the truck and drove away. Police later stopped the truck and discovered $98,000 in the spare tire.

¶9 The pole camera continued to record Tafoya's property. On August 23, 2015, police received another tip that a drug shipment would be delivered to Tafoya's house the following day. On August 24, a detective began watching the pole camera's live footage. He observed the same routine: Sanchez drove the car up the driveway, Tafoya allowed the car past the gate, and Tafoya closed the gate. The detective zoomed the camera in and observed Tafoya bend down near the front left tire; again, because of the fence, the detective could not see what Tafoya was doing. The detective eventually saw Tafoya carry white plastic bags into the detached garage.

¶10 Based on these observations, police obtained a warrant to search Tafoya's property. During the subsequent search, the police discovered white plastic bags containing methamphetamine and cocaine inside the detached garage.

¶11 The People charged Tafoya with two counts of possession with intent to distribute controlled substances (methamphetamine and cocaine) and two counts of conspiracy to commit these offenses. Before trial, Tafoya moved to suppress all

evidence obtained as a result of the pole camera surveillance, including the evidence police found while executing the search warrant. He argued that police use of the pole camera constituted a warrantless search in violation of the Fourth Amendment.[4]

¶12 The trial court denied the motion to suppress. It found that Tafoya did not have a reasonable expectation of privacy in the area recorded by the pole camera on June 25 and August 24. The trial court recognized that the area at issue constituted curtilage and that, typically, "an individual has a reasonable expectation of privacy to his curtilage." However, it also noted that "curtilage is not protected from observations that are lawfully made from outside its perimeter not involving physical intrusion," and it cited *United States v. Bucci*, 582 F.3d 108, 116–17 (1st Cir. 2009), which held that video surveillance of a home using a pole camera for eight months was not a search where the home did not have a fence, gates, or shrubbery obscuring the view of the curtilage.

¶13 The trial court reasoned that, "notwithstanding the fencing" around Tafoya's property, the area surveilled was "exposed to the public" because

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[4] The People also charged Sanchez with the same offenses. Like Tafoya, he moved to suppress all evidence obtained as a result of the pole camera surveillance. A companion case we also announce today, *People v. Sanchez*, 2021 CO __, __ P.3d __, considers the same issue presented here.

members of the public could see it through the gaps in the fence, from the apartment stairway, or from the top of the utility pole. Because "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," *Katz v. United States*, 389 U.S. 347, 351 (1967), the trial court found that Tafoya had no reasonable expectation of privacy in the area surveilled. It also noted that "[l]aw enforcement may use technology . . . to 'augment[] the sensory faculties bestowed upon them at birth' without violating the Fourth Amendment" (quoting *United States v. Knotts*, 460 U.S. 276, 282 (1983)).

¶14 The trial court also rejected Tafoya's argument that, even if the area surveilled was "exposed to the public," the length of surveillance rendered the search unconstitutional because a person would not have been able to perch atop the utility pole and continuously surveil the area for over three months. The court deemed the impracticability of a person observing the curtilage for that length of time irrelevant under *United States v. Houston*, 813 F.3d 282, 289 (6th Cir. 2016), where the Sixth Circuit held that "it is only the *possibility* that a member of the public may observe activity from a public vantage point—not the *actual practicability* of law enforcement's doing so without technology—that is relevant for Fourth Amendment purposes" (emphases added).

¶15 Finally, the trial court rejected Tafoya's reliance on *United States v. Jones*, 565 U.S. 400 (2012), where the Supreme Court found that continuous physical GPS

tracking of the defendant's vehicle for approximately one month was unconstitutional.[5] *See id.* at 403, 04. The trial court distinguished *Jones* because the surveillance here was recorded from a stationary pole camera, meaning no "tracking" of Tafoya's movements occurred.

¶16 At trial, the footage from June 25 and August 24, the money seized on June 25, and the evidence seized pursuant to the search warrant were admitted into evidence, and the jury found Tafoya guilty on all counts. Tafoya appealed.

¶17 A division of the court of appeals held that the use of the pole camera to conduct continuous surveillance of Tafoya's fenced-in curtilage for more than three months constituted a warrantless search under the Fourth Amendment. *Tafoya*, ¶ 2, 490 P.3d at 534. The division began its analysis by explaining that "[a] search occurs when the government intrudes on an area where a person has a 'constitutionally protected reasonable expectation of privacy,'" *id.* at ¶ 23, 490 P.3d

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[5] The majority in *Jones* based its conclusion on the "property-based" approach to the Fourth Amendment, reasoning that the trespass on the defendant's vehicle was dispositive. 565 U.S. at 404–05. Justice Alito concurred in the judgment, joined by Justices Ginsburg, Breyer, and Kagan, and viewed the problem from *Katz*'s "reasonable expectation of privacy" approach to the Fourth Amendment. *Id.* at 419 (Alito, J., concurring in the judgment). He would have held that the GPS tracking was a search because of the long-term nature of the surveillance. *Id.* at 430. The Court later adopted Justice Alito's concurrence in *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018), with respect to taking the duration of surveillance into account.

at 537 (quoting *Henderson v. People*, 879 P.2d 383, 387 (Colo. 1994)), but that "a person can have no reasonable expectation of privacy in what [they] knowingly expose[] to the public," *id.* at ¶ 25, 490 P.3d at 537. Thus, "the fact that a search occurs within the curtilage [of a home] is not dispositive if the area's public accessibility dispels any reasonable expectation of privacy." *Id.* (alteration in original) (quoting *People v. Shorty*, 731 P.2d 679, 681 (Colo. 1987)).

¶18 The division then moved to the more challenging question: Does the nature, continuity, and extended duration of the pole camera surveillance make a difference in the "search" analysis? The division answered "yes": "[W]e (like some other courts) consider the nature, the continuity, and particularly the duration of pole camera surveillance to be extremely relevant to the issue of whether police have engaged in a 'search.'" *Id.* at ¶ 35, 490 P.3d at 539. In addition, the division stated that "not all governmental conduct escapes being a 'search' simply because a citizen's actions were otherwise observable by the public at large." *Id.* at ¶ 40, 490 P.3d at 540.

¶19 In so concluding, the division found Justice Alito's concurrence in *Jones* instructive and adopted his reasoning that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Id.* at ¶ 37, 490 P.3d at 549 (quoting *Jones*, 565 U.S. at 429–30 (Alito, J., concurring in the judgment)). The division "wholeheartedly disagree[d]" with distinguishing *Jones*

on the ground that GPS tracking is more invasive than video surveillance of a person's home, explaining instead that "[v]isual video surveillance spying on what a person is doing in the curtilage of his home behind a privacy fence for months at a time is at least as intrusive as tracking a person's location—a dot on a map—if not more so." *Id.* at ¶ 43, 490 P.3d at 540.

¶20 Finally, the division rejected the People's argument that, because the surveilled area could have been seen by a next-door neighbor peering through the gaps in the fence or a tenant of the apartment building standing on the exterior stairway, the pole camera surveillance here was not a search. *Id.* at ¶ 47, 490 P.3d at 541. "This argument ignores the improbability that a neighbor would peer through a gap in a privacy fence or stand on his or her outdoor stairway for three months at a time." *Id.* at ¶ 48, 490 P.3d at 541.

¶21 The People appealed, and we granted certiorari.

II. Analysis

¶22 We begin by identifying the appropriate standard of review. We then discuss broad Fourth Amendment principles, paying special attention to the reasonable expectation of privacy standard. Next, we discuss the relevance of these principles in cases like this one, involving curtilage, long-term and continuous surveillance, and pole camera surveillance. We then apply the law to the case before us and hold that police use of the pole camera to continuously

video surveil Tafoya's fenced-in curtilage for three months, with the footage stored indefinitely for later review, constituted a warrantless search in violation of the Fourth Amendment. Accordingly, we affirm the judgment of the court of appeals.

A. Standard of Review

¶23 When reviewing a suppression order, we defer to the trial court's factual findings if the record supports them, but we review the court's legal conclusions de novo. *People v. McKnight*, 2019 CO 36, ¶ 21, 446 P.3d 397, 402.

B. The Fourth Amendment and Reasonable Expectation of Privacy

¶24 The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures and requires that any authorization for the government to conduct a search be supported by probable cause:

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

The "basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 528 (1967)). For these reasons, the Fourth Amendment generally requires police to obtain a warrant for action that constitutes a "search."

Henderson, 879 P.2d at 387; *see also United States v. Karo*, 468 U.S. 705, 714–15 (1984) (stating that warrantless searches are presumptively unreasonable).

¶25 A "search," in the constitutional sense, occurs "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). "The existence of a legitimate expectation of privacy must be determined after examining all the facts and circumstances in a particular case." *Shorty*, 731 P.2d at 681.

¶26 "Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'" *Carpenter*, 138 S. Ct. at 2213–14 (alteration in original) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)). The home is of particular historical significance: "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

¶27 Whether a person has a reasonable expectation of privacy in a particular area is also informed by whether they have exposed the area to the public: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Taken out of

context, this statement may sound like an absolute—if an area is exposed to the public, then the Fourth Amendment analysis ends. But the *Katz* Court included an important qualifier: "[W]hat [one] seeks to preserve as private, *even in an area accessible to the public, may* be constitutionally protected." *Id.* (emphasis added). That is, public exposure may diminish an expectation of privacy, but it does not necessarily eliminate the expectation altogether. *See, e.g.*, *Shorty*, 731 P.2d at 682 (noting that "[r]easonable expectations of privacy are diminished," but not necessarily absent, "in common areas of multi-family dwellings").

¶28 In *Carpenter*, the Court held that the government's acquisition of a person's cell-site location information from wireless carriers was a "search." 138 S. Ct. at 2217. In so holding, the Court clarified that public exposure is not dispositive, stating that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Id.* The Court also adopted the *Jones* concurrences and noted that, "[s]ince GPS monitoring of a vehicle tracks 'every movement' a person makes in that vehicle . . . 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy'—*regardless whether those movements were disclosed to the public at large*." *Id.* at 2215 (emphasis added) (quoting *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment), 415 (Sotomayor, J., concurring)).

¶29 With these broad principles in mind, we now turn to cases that have applied *Katz*'s reasonable expectation of privacy analysis to facts pertinent here, i.e., cases involving curtilage, long-term and continuous surveillance, and pole cameras.

C. Law on Circumstances Relevant to This Case

¶30 The area recorded by the pole camera at issue in this case was curtilage. Curtilage—again, "[t]he land or yard adjoining a house," *Curtilage*, Black's Law Dictionary (11th ed. 2019)—is "part of the home itself for Fourth Amendment purposes," *Jardines*, 569 U.S. at 6 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). *See also Jardines*, 569 U.S. at 6 ("[The right to retreat into one's home and be free from governmental intrusion] would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity . . . ."). However, "the fact that a search occurs within the curtilage is not dispositive if the area's public accessibility dispels any reasonable expectation of privacy." *Shorty*, 731 P.2d at 681; *see also California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."). Where police or members of the public could view the curtilage from some public vantage point, courts have generally held that a person has no reasonable expectation of privacy in the curtilage. These cases, however, involved surveillance of limited duration.

¶31 For example, *Ciraolo* applied *Katz*'s reasonable expectation of privacy test in a case involving fly-over surveillance which revealed that the defendant, who had a ten-foot-high privacy fence, was unlawfully growing marijuana in his yard. 476 U.S. at 209–15. The Court held that it was not a search for police to fly over the property at an altitude of 1,000 feet to visually observe the marijuana plants. *Id.* at 214–15. It noted that "the mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *Id.* at 213. The Court concluded that a person cannot reasonably expect that activities in their yard "will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard." *Id.* at 214–15. Other courts have held similarly. In *Shorty*, the court held that the area underneath a doormat, while curtilage, was not constitutionally protected because it was open to the public and the doormat could be "moved, tripped over, walked upon, looked under, or lifted up by any business or personal visitor," so that "[t]he defendant could not reasonably expect privacy in [the] unsecured area." 731 P.2d at 682. In *Florida v. Riley*, 488 U.S. 445, 450–51 (1989), the Court held that aerial surveillance of the defendant's partially enclosed greenhouse was not a search because the defendant could not have reasonably expected the greenhouse to be "protected from public or official observation from a helicopter had it been

flying within the navigable airspace." In *Henderson*, the court held that aerial surveillance of the defendant's yard was not a search, factoring in the "very limited degree of intrusiveness" of the helicopter that flew over the property "over the course of several minutes." 879 P.2d at 390. All the above cases share a common trait relevant here: police surveillance for a brief period of time.

¶32 Courts have also applied *Katz*'s reasonable expectation of privacy test in cases involving long-term, continuous GPS tracking, focusing on the duration, continuity, and nature of the surveillance. One such case is *Jones*.

¶33 In *Jones*, the Court held that the attachment of a GPS tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets for four weeks, constituted a search within the meaning of the Fourth Amendment. 565 U.S. at 403–04. The majority concluded that this was a search because police physically occupied private property to install the GPS device on the vehicle to obtain information; it left open the question of whether "achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy." *Id.* at 412. Justice Alito's concurrence, however, applied *Katz*'s reasonable expectation of privacy analysis instead. He noted that "[i]n the precomputer age, the greatest protections of privacy were neither constitutional nor statutory, but practical," explaining that "[t]raditional surveillance for any extended period of time was

difficult and costly and therefore rarely undertaken." *Id.* at 429 (Alito, J., concurring in the judgment). Now, with technology constantly advancing to allow cheaper and more comprehensive monitoring, courts must ask whether the search at issue in a specific case "involved a degree of intrusion that a reasonable person would not have anticipated." *Id.* at 430. In Justice Alito's view, while short-term monitoring of a person's movements on public streets accords with society's expectations of privacy, *long-term*, *continuous* GPS monitoring does not: "[S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.*

¶34 Justice Sotomayor similarly argued that courts should factor in the nature of the surveillance when determining whether a person had a reasonable expectation of privacy. *Id.* at 415 (Sotomayor, J., concurring). Specifically, she expressed her concern with several unique attributes of GPS tracking technology: the creation of "a precise, comprehensive record of a person's public movements that reflects a wealth of detail about [the person's] familial, political, professional, religious, and sexual associations"; the storage of such information and the ability of the government to "efficiently mine [the record] for information years into the future"; the surreptitious nature of a tracking device compared to traditional surveillance; and that such cheap and surreptitious surveillance "evades the

ordinary checks" like "limited police resources and community hostility" that "constrain abusive law enforcement practices." *Id.* at 415–16 (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)).

¶35 Following *Jones*, the Court held in *Carpenter* that the government's acquisition of an individual's cell-site location information from wireless carriers was a "search" under the Fourth Amendment. 138 S. Ct. at 2217. The Court incorporated the *Jones* concurrences and held that "'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy'—regardless whether those movements were disclosed to the public at large." *Id.* at 2215 (quoting *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment), 415 (Sotomayor, J., concurring)).

¶36 Together, *Jones* and *Carpenter* suggest that when government conduct involves continuous, long-term surveillance, it implicates a reasonable expectation of privacy. Put simply, the duration, continuity, and nature of surveillance matter when considering all the facts and circumstances in a particular case.

¶37 Finally, we note that many courts have considered whether continuous, long-term pole camera surveillance constitutes a search. Those courts are split. *Houston* is representative of cases finding that such surveillance is not a search. In that case, the Sixth Circuit considered long-term pole camera surveillance of a rural farm property, including its curtilage. *Houston*, 813 F.3d at 287–91. It found

that because agents "only observed what [the defendant] made public to any person traveling on the roads surrounding the farm," the defendant had no reasonable expectation of privacy in the area. *Id.* at 287–88. It also found that the "length of the surveillance did not render the use of the pole camera unconstitutional" because law enforcement may use technology to "more efficiently conduct their investigations." *Id.* at 288. Even if it was impractical for law enforcement to conduct live surveillance, the Sixth Circuit found that "it is only the possibility that a member of the public may observe activity from a public vantage point—not the actual practicability of law enforcement's doing so without technology—that is relevant for Fourth Amendment purposes." *Id.* at 289. Finally, the Sixth Circuit found the GPS tracking in *Jones* distinguishable because it "secretly monitor[ed] and catalogue[d] every single movement" of the defendant. *Id.* at 290 (quoting *Jones*, 565 U.S. at 964 (Alito, J., concurring in the judgment)).

¶38 Similar reasoning has remained persuasive to many courts. Indeed, since oral arguments took place in this case, the Seventh Circuit decided *United States v. Tuggle*, 4 F.4th 505, 511 (7th Cir. 2021), holding that pole camera surveillance of the outside of the defendant's home for eighteen months was not a search.[6] In

[6] We note that the facts in *Tuggle* are distinguishable from those presented here. In *Tuggle*, the area surveilled was not curtilage or surrounded by a fence; instead, it

evaluating the duration of the surveillance, the Seventh Circuit similarly distinguished *Jones* and *Carpenter* on the ground that the stationary pole camera surveillance "did not paint the type of exhaustive picture of [the defendant's] every movement that the Supreme Court has frowned upon." *Id.* at 524.[7]

¶39 Yet many other courts have taken into account the duration of the surveillance, the fact that the surveillance is continuous, and the nature of the surveillance to find that long-term pole camera surveillance is a search. In *United States v. Cuevas-Sanchez*, 821 F.2d 248, 250–51 (5th Cir. 1987), the Fifth Circuit held that two-month-long pole camera surveillance of fenced-in curtilage constituted a search, distinguishing *Ciraolo*'s "minimally-intrusive" surveillance by noting that the pole camera surveillance "raises the spectre of the Orwellian state." In *United States v. Moore-Bush*, 381 F. Supp. 3d 139, 143–50 (D. Mass. 2019), the court reached the same conclusion regarding eight months of pole camera surveillance of events

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was the plainly visible front of the defendant's house and driveway, and his co-defendant's shed. 4 F.4th at 511.

[7] Despite its holding, the Seventh Circuit specifically rejected the Sixth Circuit's logic that surveillance is constitutional if the government could *theoretically* accomplish the same surveillance without technology, calling this a "fiction" that "contravenes the Fourth Amendment and *Katz*'s command to assess reasonableness." *Tuggle*, 4 F.4th at 526. It also admitted its "unease about the implications of [pole camera] surveillance for future cases" and called the eighteen-month duration of the surveillance "concerning." *Id.*

occurring near the exterior of the defendants' house, noting that, based on the neighborhood and home chosen by the defendants, they "did not subjectively expect to be surreptitiously surveilled with meticulous precision each and every time they or a visitor came or went from their home" and that such expectation was objectively reasonable.[8] The court also found that *Carpenter* clarified that public exposure is not dispositive. *Id.* at 144–45; *see also Shafer v. City of Boulder*, 896 F. Supp. 2d 915, 929–32 (D. Nev. 2012) (same holding regarding two months of pole camera surveillance of fenced-in curtilage); *State v. Jones*, 903 N.W.2d 101, 106–14 (S.D. 2017) (same holding regarding two months of pole camera surveillance of all activities outside the defendant's home, despite activities being visible from the street).

¶40 With this understanding of the reasonable expectation of privacy analysis in mind, we now turn to the facts of this case.

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[8] The People argue that *Moore-Bush* cannot serve as persuasive authority because a First Circuit panel reversed the district court and held that the government's use of the pole camera was not a search. *See United States v. Moore-Bush*, 963 F.3d 29 (1st Cir. 2020). However, since briefing, the First Circuit has voted to hear the case en banc and vacated the panel's judgment. *See United States v. Moore-Bush*, 982 F.3d 50 (1st Cir. 2020).

D. Application

¶41 To prevail in this case, Tafoya must show that the government violated a subjective expectation of privacy in the area surveilled that society is prepared to recognize as reasonable.

¶42 We begin with whether Tafoya demonstrated a subjective expectation of privacy in the area surveilled. First, no one disputes that the area surveilled by the pole camera was curtilage. Thus, the area was "part of" Tafoya's "home itself for Fourth Amendment purposes." *See Jardines*, 569 U.S. at 6. Second, the area was significantly set back from the street, so a person standing on the street could not see into the backyard. Finally, Tafoya maintained a six-foot-high privacy fence around the backyard. He used the fence's wooden gate to further prevent the public from being able to see into his backyard, closing it behind Sanchez on both June 25 and August 24. Accordingly, we conclude that Tafoya demonstrated a subjective expectation of privacy in the area at issue. *See Cuevas-Sanchez*, 821 F.2d at 251 (holding that the defendant manifested a subjective expectation of privacy in the area surveilled, given that "the area monitored by the camera fell within the curtilage of his home, an area protected by traditional fourth amendment analysis," and the defendant "erected fences around his backyard, screening the activity within from views of casual observers").

¶43 The more challenging question in this case is whether Tafoya's expectation of privacy in the area surveilled is one that society is prepared to recognize as reasonable. To reach an answer, we consider the public exposure of the area as well as the duration, continuity, and nature of the surveillance.

¶44 Here, the pole camera surreptitiously recorded the curtilage of Tafoya's property all day, every day for over three months. The police indefinitely stored the footage gathered by the camera and could review it at any later date. The camera could pan left and right, tilt up and down, and zoom in and out while viewing the footage live. In fact, police used these features on both June 25 and August 24 to observe Tafoya and Sanchez's actions. We find the extended duration and continuity of the surveillance here to be constitutionally significant. *See id.* ("[A] camera monitoring all of a person's backyard activities . . . provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state.").

¶45 As Justice Alito noted in his *Jones* concurrence, the lengthy duration of the surveillance is particularly problematic: "[S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." 565 U.S. at 430 (Alito, J., concurring in the judgment). Three months' worth of continuous surveillance of a home poses the same

dilemma; society would not expect law enforcement to undertake this kind of "pervasive tracking" of the activities occurring in one's curtilage. *See Carpenter*, 138 S. Ct. at 2220.

¶46 And the pole camera surveillance at issue here—continuous surveillance of Tafoya's curtilage for more than three months—shares many of the troubling attributes of GPS tracking that concerned Justice Sotomayor in *Jones*. First, it created "a precise, comprehensive record" of the activities at Tafoya's home. *See Jones*, 565 U.S. at 415 (Sotomayor, J., concurring). This record, while not of Tafoya's movements as he traveled, still "reflects a wealth of detail" about him and his associations. *See id.* The area recorded was Tafoya's curtilage, which is part of his home. The camera continuously recorded when Tafoya left his house and when he came home. Thus, the footage would show Tafoya's everyday habits and routines. The camera also continuously recorded who came to Tafoya's home and how long they stayed. As a result, police would know who Tafoya's friends and associates were, how often they came and went, and how long they stayed at his home. And these observations were not just on days that police suspected that an illegal transaction might happen. Rather, the camera recorded the activities in Tafoya's enclosed backyard all day, every day for three months. Like the court of appeals, we find that this type of surveillance is "at least as intrusive as tracking a person's location—a dot on a map—if not more so." *Tafoya*, ¶ 43, 490 P.3d at 540.

¶47 Second, the information was stored, allowing the government to "efficiently mine [the record] for information years into the future." *See Jones*, 565 U.S. at 415 (Sotomayor, J., concurring). Third, the surveillance here was surreptitious compared to traditional surveillance; if a police officer had manned the utility pole for three continuous months, obviously Tafoya would have noticed. *See id.* at 416. Finally, because it was cheap and surreptitious, the surveillance here "evade[d] the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *See id.* (quoting *Lidster*, 540 U.S. at 426).

¶48 The People nevertheless assert that the "public exposure" of the area precludes Fourth Amendment protection because it would be unreasonable for Tafoya to expect privacy. The People emphasize that the area surveilled was visible through gaps in Tafoya's fence, from a particular spot on the stairway of an adjacent building, and from the utility pole itself. These are legitimate facts to consider. To be sure, courts across the country are split on this issue because asking what society accepts as a reasonable expectation of privacy is a complex question. With that said, we find that the People's argument misconstrues settled Fourth Amendment precedent: Public exposure of an area may diminish one's reasonable expectation of privacy, but "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary,

'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" *Carpenter*, 138 S. Ct. at 2217 (alteration in original) (quoting *Katz*, 389 U.S. at 351). Here, Tafoya did seek to "preserve as private" the area surveilled so that any typical public exposure of the area would be fleeting—the area would only be visible while someone walked up the apartment stairway or perhaps for as long as his neighbor (though not the general public) could peer through the gaps in the fence. Therefore, while the "public exposure" of Tafoya's curtilage does factor into the calculus of whether he had a reasonable expectation of privacy, under these facts, it is not determinative.

¶49 Instead, considering all the circumstances of this case, we conclude that the limited public exposure of the area did not make Tafoya's expectation of privacy unreasonable. The house was set back from the street, and the area was enclosed by a privacy fence that included a wooden gate across the driveway. The area was also curtilage, which is considered part of his home for Fourth Amendment purposes, an area first among equals and whose historical significance should not be overlooked. Here, most significantly, the surveillance occurred continuously over a long period of time; the pole camera not only could see into the backyard, but it also recorded the activities of Tafoya's backyard all day, every day for over three months. While police may use technology to "augment[] the sensory faculties bestowed upon them at birth" without necessarily violating the Fourth

Amendment, *Knotts*, 460 U.S. at 282, such use does not automatically escape Fourth Amendment scrutiny.

¶50 Put simply, this surveillance "involved a degree of intrusion that a reasonable person would not have anticipated." *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment). Thus, we agree with the court of appeals that police use of the pole camera under these specific facts constituted a warrantless search in violation of the Fourth Amendment.

III. Conclusion

¶51 Therefore, the judgment of the court of appeals is affirmed and the defendant's convictions are reversed. The matter is remanded to the court of appeals with instructions to return the matter to the trial court for further proceedings consistent with this opinion.