ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	
	)	**CASE NO.: 2013-1973**
Appellee,	)	
	)	
vs.	)	**On Appeal from the Court of**
	)	**Appeals for the Twelfth District**
SUDINIA JOHNSON,	)	**Case No.: CA2012-11-235**
	)	
Appellant.	)	

REPLY BRIEF OF APPELLANT, SUDINIA JOHNSON

Attorneys for Appellant:

WILLIAM R. GALLAGHER (0064683)
Arenstein & Gallagher
114 East 8th Street
Cincinnati, Ohio 45202
(Counsel of Record)
513-651-5666
513-651-5688
bill@arensteingallagher.com

ELIZABETH CONKIN (0064678)
Arenstein & Gallagher
114 East 8th Street
Cincinnati, Ohio 45202

Attorneys for Appellee:

MICHAEL T. GMOSER (002132)
Butler County Prosecuting Attorney

MICHAEL A. OSTER, JR. (0076491)
Assistant Prosecuting Attorney
and Chief, Appellate Division
Government Services Center
315 High Street, 11th Floor
Hamilton, Ohio 45012
(Counsel of Record)
513-887-3473
513-785-5206
Osterm@butlercountyohio.org

LINA N. ALKAMHAWI (0075462)
Assistant Prosecuting Attorney
Appellate Division

FILED
JUL 08 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUL 08 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii-iii

ARGUMENT.....2-14

CONCLUSION.....14-15

CERTIFICATE OF SERVICE.....16

TABLE OF AUTHORITIES

Cases **Pages**

United States Supreme Court

Atwater v. City of Lago Vista, 532 U.S. 318,121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).....4
Coolidge v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L. Ed.2d 564 (1971).....3, 4
Davis v. United States, ___ U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).....passim
Dunaway v. *New York*, 442 U. S. 200, 9 S.Ct. 2248, 60 L.Ed.2d 824 (1979).....3
Herring v. United States, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).....7
Illinois v. Krull, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987).....6
Katz v. United States, 389 U.S. 347, 358, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).....4, 8, 15
Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552, ___ L.Ed.2d ___ (2013).....3
Michigan v. *Summers*, 452 U. S. 692,101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).....3
Riley v. California, 573 U. S. __, __ S.Ct. __, __ L.Ed.2d __ (2014) 2, 3, 4
Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004).....4
United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (2012).....1, 7, 8
United States v. Knotts, 460 U.S. 460 U.S. 276, 103 S.Ct. 1081, 75 l.Ed.2d 55 (1983)...1,7,8,9,11
United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)..... 2, 6, 7, 11, 13

United States Circuit Courts

Roe v. Anderson, 134 F.3d 1400, 1404 (9th Cir. 1998).....5
United States v. Barraza–Maldonado, 732 F.3d 865 (8th Cir.2013).....6
United States v. Buford, 632 F.3d 264 (6th Cir. 2011).....8
United States v. Garcia, 690 F.3d 860 (7th Cir. 1999).....10
United States v. Katzin, 732 F.3d 187 (3d Cir. 2013) vac'd pending *en banc* reh'g,
Order, No. 12-2548 (3d Cir. 2013).....4, 5, 12
United States v. Martin, 712 F.3d 1080 (7th Cir. 2013).....2, 5
United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).....8
United States v. McCane, 573 F.3d 1037 (10th Cir. 2009).....8
United States v. McIver, 186 F.3d 1119 (9th Cir. 1999).....10
United States v. Pineda Moreno, 688 F.3d 1087 (9th Cir. 2012).....6, 8
United States v. Tracey, 597 F.3d 140 (3rd Cir. 2010).....7

United States District Courts

Gutter v. E.I. DuPont de Nemours and Co., No. 95-2152-CIV-GOLD, 2001 WL 36086589, at *6 (S.D. Fla.
2001).....5
United States v. Lee, 862 F. Supp.2d 560 (E.D. Ky. 2012).....5, 13
United States v. Lujan, No. 2:11-CR-11, 2012 WL 2861546 (N.D. Miss. 2012).....5
United States v. Ortiz, 878 F.Supp.2d 515 (E.D. Pa. 2012).....1, 5, 13

United States v. Richard, No. 2:09-992-PMD, slip op. (D.S.C. Apr. 12, 2012), aff'd 528 F. App'x 323 (4th Cir. 2013) (*per curiam*).....5
United States v. Robinson, 903 F. Supp. 2d 766 (E.D. Mo. 2013), appeal pending, No. 12-2548 (8th Cir.).....5
United States v. Ventura, No. 10-0770, 2013 WL 1455278 (D. Md. 2013).....5

State Courts

Osburn v. State, 44 P.3d 523 (Nev. 2002).....9
People v. Lacey, No. 2463N/02, slip op. (N.Y. Nassau County Ct. May 6, 2004).....9
State v. Jackson, 150 Wash.2d 251, 76 P.3d 217 (Wash. 2003).....9
State v. Johnson, 2013-Ohio-4865; No. 2012-11.235, 1 N.E.2d 491 (12th Dist.).....1, 7
State v. Mitchell, No. 1 CA–CR 13–0339 (April 2014).....8

Statutes

3d Cir. I.O.P. 9.5.9 (2010).....9

Secondary Sources

Kate Bolduan, "Is GPS a high-tech crime-fighting tool or Big Brother?", CNN.COM, Aug. 18, 2008, http://www.cnn.com/2008/CRIME/08/18/gps.tracking/index.html.....11

William A. Herbert, "No Direction Home: Will the Law Keep Pace with Human Tracking Technology to Protect Individual Privacy and Stop Geoslavery?", 2 I/S: J.L. & Pol'y for Info. Soc'y. 409, 409–17 (2006) (discussing concern over employers' ability to utilize tracking devices to monitor employees).....10

Kerr, "Fourth Amendment Remedies and Development of the Law: A Comment on *Camreta v. Greene* and *Davis v. United States*", 2010–2011 CATO Sup. Ct. Rev. 237...12

April A. Otterberg, "Note, GPS Tracking Technology: The Case for Revisiting *Knotts* and Shifting the Supreme Court's Theory of the Public Space under the Fourth Amendment", 46 B.C. L. REV. 661, 665 (2005).....11

INTRODUCTION

The Twelfth Appellate District did not premise its denial of Mr. Johnson's Motion to Suppress upon the determination *Knotts* and *Karo*[1] were binding precedent. Nor did the Twelfth District rely upon the theory *Davis* does not limit the application of the good faith exception to the exclusionary rule to reliance upon binding appellate precedent. Rather, the Twelfth District concluded law enforcement acted in good faith reliance upon what it believed the law was regarding the warrantless use of a GPS tracking device, and therefore, the good faith exception to the exclusionary rule applied. *See State v. Johnson*, 2013-Ohio-4865 at ¶29; No. 2012-11.235, 1 N.E.2d 491 (12th Dist.).

The Ohio Supreme Court has the opportunity to resolve a conflict among Ohio district appellate courts on the sole issue of whether *United States v. Davis* authorizes application of the good faith exception to the exclusionary rule, when no binding appellate precedent exists to authorize a police officer's warrantless use of a GPS tracking device. The Twelfth District's Decision is out of step with those of its sister districts and must be reversed. The officer did not act in good faith reliance on anything; he just acted. His search was not sanctioned by binding precedent, a neutral magistrate or a statute, but rather, by the very individuals carrying out the investigation. As such, the fruits from that search should not be used against Mr. Johnson.

[1] *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (2012). *United States v. Knotts*, 460 U.S. 460 U.S. 276, 103 S.Ct. 1081, 75 l.Ed.2d 55 (1983).

ARGUMENT

Law Enforcement Officers Should not be Vested with Discretion in Predicting or Anticipating how the Law will Develop and how it Should be Applied[2]

The United States Supreme Court may decide to expand *Davis* in the coming years, but until it does so, we are bound to continue applying the traditional remedy of exclusion when the government seeks to introduce evidence that is the "fruit" of an unconstitutional search. *United States v. Martin,* 712 F.3d 1080, 1082 (7th Cir. 2013). In *Martin* (suppression denied on other grounds), there was no binding appellate precedent in the Eighth Circuit at the time Iowa law enforcement officials attached the GPS device to Martin's car.[3] *Id.* On appeal, the Seventh Circuit "reject[ed] the government's invitation to allow police officers to rely on a diffuse notion of the weight of authority around the country, especially where that amorphous opinion turns out to be incorrect in the Supreme Court's eyes." *Id.* "*Davis* expanded the good-faith rationale in *United States v. Leon,* only to 'a search [conducted] in objectively reasonable reliance on *binding appellate precedent,*' finding that this set of searches are not subject to the exclusionary rule." *Id.* citing *Davis v. United States,* __ U.S. __, 131 S.Ct. 2419, 2434, 180 L.Ed.2d 285 (2011)(emphasis in original). The District Court's ruling was an "unwarranted expansion of the Supreme Court's decision in *Davis*" and "not one it should adopt". *Martin,* 712 F.3d at 1082.

A. Clear Guidance Preferred to Law Enforcement Through Categorical Rules

---

[2] *United States v. Ortiz,* 878 F.Supp.2d 515, 542 (E.D. Pa. 2012).

[3] After a bank robbery in Burlington, Iowa, police officers received a tip that Martin was one of the robbers. The police located Martin, attached a GPS device to his car, and tracked him into Illinois, where a local deputy sheriff stopped and searched his car. The search revealed drugs and a revolver underneath the hood of the car, and Martin eventually admitted during a police interview that he knew about the gun. *Martin,* 712 F.3d 1080 (7th Cir. 2013).

The State's position is flawed and contravenes the United States Supreme Court's general preference to provide clear guidance to law enforcement through categorical rules. *Riley v. California,* 573 U. S. at ____. "[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.'" *Id.* quoting *Michigan* v. *Summers*, 452 U. S. 692, 705, n. 19, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (quoting *Dunaway* v. *New York*, 442 U. S. 200, 219–220 (1979) (White, J., concurring)).

The warrant requirement "is an important working part of our machinery of government," not merely "an inconvenience to be somehow weighed against the claims of police efficiency." *Riley*, 573 U.S. at _____ quoting *Coolidge v. New Hampshire*, 403 U. S. 443, 481, 91 S.Ct. 2022, 29 L. Ed.2d 564 (1971). Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. *See Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, (slip op., at 11–12) (2013) (Roberts, C. J., concurring in part and dissenting in part) (slip op., at 8) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes").

In refusing to approve seizures based on less than probable cause, the *Dunaway* Court declined to adopt a "multifactor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests." *Summers*, 452 U. S. at 705, n.19, quoting *Dunaway*, 442 U. S. at 213. "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the

first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.'" *Id.*

"Over and again [the Supreme] Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment— subject only to a few specifically established and well-delineated exceptions" *Katz v. United States,* 389 U.S. 347, 358, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (citations and internal quotation marks omitted). Privacy comes at a cost. United States Supreme Court cases have historically recognized the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Riley*, 573 U.S. at ___ quoting *Coolidge*, 403 U.S. at 481.

The muddled standard proposed by the State would complicate the work of police and prosecutors, for whom bright-line rules provide great benefits. *See, e.g., Thornton v. United States*, 541 U.S. 615, 620-24, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (reasoning that rules requiring *ad hoc* determinations by police are impracticable); *Atwater v. City of Lago Vista*, 532 U.S. 318, 347, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) ("[A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations . . . lest every discretionary judgment . . . be converted into an occasion for constitutional review.") The Supreme Court has already drawn this bright line; this Court should decline the State's invitation to muddy it.

Davis' clear rule relieves courts and police of the difficult line drawing problem rooted in the depth and breadth of potentially relevant sources of law available under a standard requiring only a good faith guess at what unsettled law will later become. *See United States v. Katzin,* 732 F.3d 187, 196, 209-10 (3d Cir. 2013) vac'd pending en banc reh'g, Order, No. 12-2548 (3d Cir. Dec. 12, 2013).[4] The systemic risk posed by leaving these questions to retrospective adjudication of good faith unguided by any specific touchstone, such as a warrant, statute, or binding appellate precedent, would "yield[] an unworkable framework," and undermine the very foundations of the Fourth Amendment. *United States v. Robinson,* 903 F. Supp. 2d 766, 784 (E.D. Mo. 2013), appeal pending, No. 12-2548 (8th Cir.). The single source of developing law on which officers should be allowed to rely without risking exclusion is binding appellate precedent. Otherwise, get a warrant. *See Martin,* 712 F.3d at 1082.

B. The line of exclusionary rule cases leading to *Davis* supports the conclusion that absent binding precedent authorizing the use of GPS tracking devices without a warrant, the evidence seized as a result of such a search must be suppressed.

District courts in multiple circuits, where there was no binding circuit law on GPS searches at the time police conducted them, have adopted the proper view of how *Davis* applies to GPS searches conducted before *Jones*, declining to apply the good faith exception to the exclusionary rule. See, e.g., *United States v. Ventura*, No. 10-0770, 2013 WL 1455278, at *21 (D. Md. Apr. 8, 2013); *United States v. Lujan,* No. 2:11-CR-11, 2012 WL 2861546, at *3 (N.D. Miss. July 11, 2012); *United States v. Ortiz,* 878 F. Supp.2d 515, 539-43 (E.D. Pa. 2012); *United States v. Lee*, 862 F. Supp. 2d 560, 570-71 (E.D. Ky.

[4] Pursuant to its internal operating procedures, when the Third Circuit grants a petition for rehearing *en banc*, it vacates the panel opinion as a matter of course. 3d Cir. I.O.P. 9.5.9 (2010). Nonetheless, this Court may look to the *Katzin* panel opinion as persuasive authority. *See Roe v. Anderson,* 134 F.3d 1400, 1404 (9th Cir. 1998); *Gutter v. E.I. DuPont de Nemours and Co.*, No. 95-2152-CIV-GOLD, 2001 WL 36086589, at *6 (S.D. Fla. Mar. 27, 2001)

2012); *United States v. Richard*, No. 2:09-992-PMD, slip op. at 9 (D.S.C. Apr. 12, 2012), aff'd 528 F. App'x 323 (4th Cir. 2013) (*per curiam*).

Where circuit law specifically authorized warrantless GPS tracking prior to *Jones*, on the other hand, courts have applied *Davis* to deny motions to suppress the evidence. *See, e.g., Barraza-Maldonado*, 732 F.3d at 867-68; *United States v. Pineda Moreno*, 688 F.3d 1087, 1090-91 (9th Cir. 2012). These cases are straightforward applications of *Davis*, relying on binding appellate precedent authorizing the precise practice at issue, warrantless attachment of GPS trackers, rather than on cases addressing older technologies used in different ways.

The line of exclusionary rule cases leading to *Davis* supports the conclusion that absent binding precedent authorizing the use of GPS tracking devices without a warrant, the evidence seized as a result of such a search must be suppressed. *Davis* grew out of two other good faith exception cases. *See Illinois v. Krull,* 480 U.S. 340, 349-50, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (exempting searches conducted in reliance on later overturned statutes); *Leon,* 468 U.S. 897 (1984) (exempting searches conducted in reliance on later invalidated warrants). These cases share a common element that the State's interpretation of *Davis* cannot sustain: All involve sources of law that "specifically authorize[] a particular police practice." *Davis*, 131 S.Ct. at 2429.

No United States Supreme Court, Ohio Supreme Court or Twelfth District case specifically authorized the warrantless installation and monitoring of GPS trackers at the time of the search at issue. Under *Davis*, the exclusionary rule must apply to the evidence that this search produced. *Davis*, 131 S.Ct. at 2426. The Fourth Amendment error here lies not with an authoritative third party—a magistrate, legislature, or appellate court with

direct authority—but rather with the law enforcement officers who gambled on their choice not to seek a warrant to conduct an invasive search. *See Davis,* 131 S.Ct. at 2428. The rule *Davis* sets forth promotes clear, system-wide knowledge of what is permissible and what is not, eliminating the constitutional violations that result from erroneous guesswork. Suppressing the evidence in this case will result in "'appreciable deterrence'" of unconstitutional searches, thus serving the central goal of the good faith exception cases. *Leon*, 468 U.S. at 909.

C. The Warrant Requirement and the Good Faith Exception

As the Supreme Court has explained, "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); *Davis*, 131 S. Ct. at 2429. Thus, the exclusionary rule applies when ... it will "deter recurring or systemic negligence". *United States v. Tracey*, 597 F.3d 140, 151 (2010) quoting *Herring*, 555 U.S. at 144.

In this case, the State argues the officer's conduct was not reckless or grossly negligent, as necessary for the exclusionary rule to apply. (State's Brief, p. 14); *Johnson*, 2013-Ohio-4865 at ¶29. Therefore, the balancing test outlined in *Herring* and *Davis* militated in favor of applying the good faith exception. *Id.* The State premises its position on three factors. The rationale of these arguments, however, is unpersuasive.

1. Neither *Knotts* nor *Karo* is Binding Precedent Authorizing the Officer's Warrantless use of the GPS Tracking Device

In deciding *Davis*, the Supreme Court reasoned, "[r]esponsible law-enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to these rules." 131 S. Ct. at 2429. The police in *Davis* behaved as

"reasonable officer[s] would and should act." *Id.* Consequently, "[t]he deterrent effect of exclusion in such a case can only be to discourage the officer from do[ing] his duty." *Id.* This is not "the kind of deterrence the exclusionary rule seeks to foster." *Id.* Accordingly, the *Davis* Court held the actions of the police were covered by the good faith exception to the exclusionary rule and evidence recovered pursuant to the search was not suppressed. *Id.*

In *Davis,* the police relied on binding appellate precedent that "specifically authorize[d the] particular police practice." *Id.* at 2429. By its plain terms, the express holding in *Davis* is inapposite to this case because *Knotts* and *Karo* do not qualify as appropriate binding appellate precedent. Neither case involved a physical trespass onto the target vehicle - in both cases the police placed the beeper inside of a container (with the container owner's permission) which the driver loaded into the target vehicle. See *Karo*, 468 U.S. at 708; *Knotts*, 460 U.S. at 278; *State v. Mitchell,* No. 1 CA–CR 13–0339, April 21, 2014 (The State's reliance on *Pineda–Moreno* is misplaced for two reasons. First, the court in *Pineda–Moreno* analyzed GPS tracking under *Katz*, not under the trespass test. Second, decisions of the Ninth Circuit, although persuasive, are not binding on Arizona courts). Additionally, both *Karo* and *Knotts* addressed the use of beepers, which are markedly different from GPS trackers. *See United States v. Maynard*, 615 F.3d 544, 556-57 (D.C. Cir. 2010).

Davis extends good faith protection only to acts explicitly sanctioned by clear and well-settled precedent.[5] Neither *Knotts* nor *Karo* sanction the type of intrusion at issue in this case. In

[5] The Eleventh Circuit's opinion in *Davis* was explicit on this point: "[We refuse] to apply the exclusionary rule when the police have reasonably relied on clear and well-settled precedent. They stressed that their precedent on a given point must be unequivocal before they would suspend the exclusionary rule's operation." *United States v. Davis*, 598 F.3d 1259, 1266 (11th Cir. 2010) (citations omitted); see also *United States v. Buford*, 632 F.3d 264, 276 n.9 (6th Cir. 2011) ("Like the Eleventh Circuit, we also stress our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation." (quoting *Davis,* 598 F.3d at 1266)); *United States v. McCane,* 573 F.3d 1037, 1045 n.6 (10th Cir. 2009) (finding the good faith exception applied because "Tenth Circuit jurisprudence supporting the search was settled. Thus, there was no risk that law enforcement officers would engage in the type of complex legal research and analysis better left to the judiciary and members of the bar")

Knotts, the respondent "expresse[d] the generalized view that the result of the holding sought by the Government would be that 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.'" *Knotts,* 460 U.S. at 284. In response, the Court held, [I]f such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. *Id.*

Based upon the foregoing, this Court should hold the State's reliance on beeper cases does not insulate the warrantless placement of the GPS tracking device in this case from the exclusionary rule.

2. It was Unreasonable for Law Enforcement to Conclude Warrantless use of a GPS Tracking Device was Constitutional

Prior to October 23, 2008, warrantless use of GPS tracking devices was unsettled and the subject of debate throughout the country.

State v. Jackson, 150 Wash.2d 251, 76 P.3d 217 (Wash. 2003) ("... the mere act of parking a vehicle on a public street does not give law enforcement the unfettered right to tamper with the vehicle by surreptitiously attaching a tracking device without either the owner's consent or without a warrant issued by a Court");

People v. Lacey, 2004 NY Slip Op 50358(U) at 8 (N.Y. Nassau County Ct. May 6, 2004) (the Fourth Amendment and Article 1 § 12 which protect a person from a warrantless search of his effects extends to the attaching of a GPS on a vehicle. Simply, this amounts to a search and seizure);

Osburn v. State, 44 P.3d 523, 527-28 (Nev. 2002) (Rose, J., dissenting) (failure to require warrants could lead to arbitrary and capricious use of GPS by police);

State v. Zichwic, No. H021621 (Ct. of Appeals, Sixth District, California, 2001) (federal circuit courts disagree about whether the installation of a monitoring device is a search);

United States v. McIver, 186 F.3d 1119 (9th Cir. 1999) (Kleinfeld, J., concurring) (People care about their cars, planes and boats, and often object vehemently to any unconsented to mechanical work or even touching of these valuable effects. That concern is protected by the law of property and by the Fourth Amendment right to be free from unreasonable seizures. In the absence of a warrant issued by a neutral magistrate, or applicability of an exception to the Fourth Amendment warrant requirement, people are entitled to keep police officers' hands and tools off their vehicles.);

United States v. Garcia, 690 F.3d 860 (7th Cir. 1999) (Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive. Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues that fortunately we need not try to resolve in this case.);

United States v. Berry, 300 F. Supp. 2d 366, 367-8 (D. Md. 2004) (The Supreme Court's analysis may not cover GPS because unlike a beeper, GPS is a substitute for surveillance. The Supreme Court may conclude GPS technology is so intrusive the police must obtain a court order before using it.);

State v. Campbell, 306 Or. 157, 172, 759 P.2d 1040, 1041 (Or. 1988) (the installation of a GPS device was "a significant limitation on freedom from scrutiny" and "a staggering limitation on personal freedom");

William A. Herbert, No Direction Home: Will the Law Keep Pace with Human Tracking Technology to Protect Individual Privacy and Stop Geoslavery? 2 I/S: J.L. & POL'Y FOR

INFO. SOC'Y. 409, 409–17 (2006) (discussing concern over employers' ability to utilize tracking devices to monitor employees);

April A. Otterberg, Note, GPS Tracking Technology: The Case for Revisiting Knotts and Shifting the Supreme Court's Theory of the Public Space Under the Fourth Amendment, 46 B.C. L. REV. 661, 665 (2005); and

Kate Bolduan, Is GPS a high-tech crime-fighting tool or Big Brother? CNN.COM, Aug. 18, 2008, http://www.cnn.com/2008/CRIME/08/18/gps.tracking/index.html.

At the time of the officer's investigation of Mr. Johnson, the plethora of debate on this issue should have precluded any reasonable person, specifically prosecutors and law enforcement agents, from concluding the use of GPS tracking devices did not require a warrant.

3. Reliance on Non-Binding Case Law does not Support Application of the Good Faith Exception

The Court in *Davis* recognized the good faith exception applies to situations where the police "conducted a search in objectively reasonable reliance on binding appellate precedent," *Davis*, 131 S. Ct. at 2434, because "[t]he deterrent effect . . . in such a case can only be to discourage the officer from do[ing] his duty," which was not "the kind of deterrence the exclusionary rule seeks to foster," *Id.* at 2429. The same cannot be said where the law is unsettled in a particular jurisdiction, even where persuasive authority may exist in decisions by courts of appeal or state courts outside that jurisdiction. Decisions by non-binding courts cannot dictate the conclusions of Ohio state courts, and any law enforcement officer who acts in reliance on their Fourth Amendment proclamations does so at his own peril for purposes of the exclusionary rule.

Moreover, lower courts should not be required to perform the type of case-by-case assessment the State's position would require. Unlike the archetypal situations in *Leon* or *Davis,*

finding the good faith exception applies in this case would require courts to discern what is sufficient out-of-circuit authority for purposes of an objectively reasonable good faith belief. Is the presence of good faith to be decided with an abacus or does the strength of each court's argument bear consideration? These courts would need to consider how many circuits had addressed the police practice in question, what each one had said, whether the statements were mere *dicta*, and myriad other factors.

Such an approach has no limiting principle and defies rational application. Because it could lead to a sprawling, amorphous, and self-contradicting doctrine, reliance on out-of-circuit precedent, even where there is a so-called "consensus", cannot in and of itself support application of the good faith exception. *See e.g. Katzin*, 732 F.3d at 210.

D. Excluding Evidence Obtained in the Absence of Case Law or Other Authority Specifically Sanctioning Such Conduct Deters Fourth Amendment Violations

If good faith were to apply in every instance when law enforcement attempts to determine what type of search is constitutional by extrapolating from, or analogizing to, existing case law, "then all Fourth Amendment protections would be rendered ineffective --the police could intrude upon anyone's Fourth Amendment rights without fear of suppression merely by relying on a particularly broad-sweeping, self-derived constitutional principle." *Katzin,* 732 F.3d at 213.

Allowing law enforcement to rely on their fellow officers, superiors, and prosecutors to determine the difficult question of whether a particular legal issue is the subject of "settled" and "persuasive" law is fundamentally at odds with the deterrence rationale that underlies the suppression remedy. This is especially true in light of rapidly-changing technology. *See* Kerr, "Fourth Amendment Remedies and Development of the Law: A Comment on *Camreta v. Greene*

and *Davis v. United States*", 2010–2011 CATO Sup. Ct. Rev. 237, 258–59 ("The introduction of new technology in criminal investigations often raises fresh and difficult questions of Fourth Amendment law. The new technology changes the implication of the old rules, and the question is if and how the Fourth Amendment should adapt.")

The U.S. District Court for the Eastern District of Kentucky in *United States v. Lee* succinctly and persuasively explained why suppression of evidence obtained in the absence of non-binding precedent would deter police misconduct and violations of our Fourth Amendment rights.

> If a police officer conducts a search based on a non-binding judicial decision – that is, an opinion by a trial court, an unpublished opinion by his own circuit's court of appeals, or a published opinion by another circuit's court of appeals-he is guessing at what the law might be, rather than relying on what a binding legal authority tells him it is. When a police officer follows binding law, suppression can only "discourage the officer from "doing his duty."'

Lee, 862 F.Supp.2d 560, 569 quoting *Davis,* 131 S. Ct. at 2429 (quoting *Leon, 468* U.S. at 920). But suppression might deter the officer who picks and chooses which law he wishes to follow. *Cf. Davis*, 131 S. Ct. at 243 (Sotomayor, J., concurring) ("[W]hen police decide to conduct a search or seize in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations.")

A clear rule not only deters police misconduct and negligence, but it is also far more practicable for law enforcement and efficient for the courts. In *United States v. Ortiz,* 878 F.Supp.2d 515, 542 (E.D. Pa. 2012), the district court held that "the *Davis* requirement of 'binding appellate precedent' means that government agents should not be and need not be vested with discretion in predicting or anticipating how the law will develop and how it should be applied." The court went on to say, "[t]he solution is simple: the import of *Davis* is that officers acting without clearly applicable binding appellate guidance should err on the side of

caution and obtain a warrant." *Id.; See also Lee,* 862 F.Supp.2d at 570 ("Limiting the good-faith exception to binding appellate precedent also promotes the 'essential interest in readily administrable rules' to govern police.")

E. A Cost-Benefit Analysis Favors Suppression[6]

Davis reiterated that "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Davis,* 131 S.Ct. at 2427. In this case, the cost of suppressing the evidence seized in violation of Mr. Johnson's Fourth Amendment rights is minimal. Mr. Johnson is not a violent criminal or a repeat offender, and the evidence seized will be destroyed. The type of error committed by law enforcement in this case is uniquely preventable. Where the law is unsettled in a specific jurisdiction, law enforcement has the option to obtain a warrant until the law is unresolved. Requiring law enforcement to obtain a warrant in the absence of binding precedent is a minimal cost to safeguarding our Fourth Amendment rights.

The greatest benefit from suppressing evidence under the circumstances in this case is the creation of a clear rule in Ohio - when no binding precedent exists, law enforcement must obtain a warrant. *See Leon,* 468 U.S. at 914. Such a ruling will prevent future violations of defendants' Fourth Amendment rights, and more important, deter law enforcement from speculating on the constitutionality of their conduct.

---

[6] Mr.Johnson maintains only the United States Supreme Court should engage in the cost-benefit analysis when determining whether to apply the good faith exception to the exclusionary rule and includes this argument for the sole purpose of responding to the cost-benefit analysis contained in the State's Brief.

F. CONCLUSION

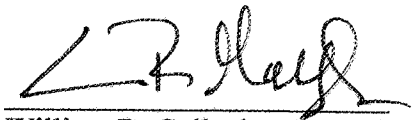
When police conduct a warrantless search in the absence of binding appellate precedent authorizing that action, they are not acting in an objectively reasonable manner. They are guessing. What their guesses are based upon may vary from city to city and county to county, resulting in unequal treatment of Ohio's citizens. Although this may not rise to the level of egregious conduct, the Supreme Court has never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground the officer's conduct could be characterized as non-culpable. *Davis,* 131 S.Ct. at 2435 (Sotomayor, J., concurring) (whether an officer's conduct can be characterized as "culpable" is not itself dispositive).

At the very least, in 2008 the law regarding trespassory device placement was unsettled. Therefore, application of the exclusionary rule would provide meaningful deterrence because, as Justice Sotomayor emphasized in her *Davis* concurrence, it incentivizes law enforcement to err on the side of constitutional behavior. *Davis*, 131 S.Ct. at 2435 (Sotomayor, J., concurring). Finally, as Justice Scalia made clear in *Jones, Katz* supplemented rather than replaced the Fourth Amendment trespass test. *Jones*, 132 S.Ct. at 951. *Jones* did not overrule prior Supreme Court precedent or announce a new legal standard, but instead simply applied existing—*albeit* dormant—Fourth Amendment principles. While law enforcement is not expected to anticipate new developments in the law, a reasonable reading of the relevant binding case law should have alerted law enforcement that, before attaching a tracking device to private property, it must obtain either a warrant or the property owner's permission to install the device.

The placement, continued presence and subsequent use of the GPS device to monitor Mr. Johnson's movements was an unlawful search under *Jones*, to which no exception to the

exclusionary rule applies. Accordingly, this Court should reverse the decision of the Twelfth District and exclude all evidence obtained as a fruit of the unlawful GPS surveillance.

Respectfully Submitted,



William R. Gallagher (64683)
Elizabeth Conkin, Of Counsel (64678)
Arenstein & Gallagher
114 E. 8th Street
Cincinnati, Ohio 45202
513-651-5666
Counsel for Appellant, Sudinia Johnson

Certificate of Service

I certify that on July 8, 2014, a copy of the foregoing Reply Brief of Defendant-Appellant, Sudinia Johnson, was served *via* ordinary U.S. mail and e-mail to:

MICHAEL A. OESTER, JR. 0076491
Assistant Prosecuting Attorney
Appellate Division
Government Service Center
315 High Street
Hamilton, Ohio 45012
COUNSEL FOR APPELLEE, STATE OF OHIO

William R. Gallagher (64683)