IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, Vs. SUDINIA JOHNSON, Defendant-Appellant.	)	Case No. 2013-1973 On discretionary appeal from the Court of Appeals Twelfth Appellate District, Butler County, Ohio, Case No. CA 2012-11-235

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT

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I. Introduction

During the last several years, widespread and unchecked government surveillance of individuals has been exposed. We have learned that our Fourth Amendment privacy rights have been increasingly eroded, in large part due to the "war on terror." We have learned that the government is spying on people via drones and GPS technology, and is monitoring and storing information from our telephone calls, internet use, and emails without probable cause and without judicial oversight. Often one of the only sanctions available in order to keep "big brother" in check is the exclusion of evidence obtained in violation of the Fourth Amendment.

The Supreme Court of the United States has consistently held that the sole purpose of the exclusionary rule is to deter misconduct by law enforcement. The Court has applied the "good-faith exception" to the exclusionary rule in only a few circumstances in which law enforcement was not at fault: *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)(magistrate erroneously issued a warrant); *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed 2d 34 (1995) and *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)(database erroneously informs police there is a warrant); and *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed. 2d 364 (1987)(unconstitutional statute authorized search).

In *Davis v. United States*, 131 S.Ct. 2419, 2430, 180 L.Ed. 2d 285 (2011), the Supreme Court added another circumstance in which the good-faith exception will apply: when "[e]vidence [is] obtained during a search conducted in reasonable reliance on *binding* precedent." (emphasis added). In her concurrence, Justice Sotomayor clarified that *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." *Id.* at 2435 (Sotomayor, J., concurring).

Despite *Davis'* narrow holding, the Twelfth Appellate District held that where there is no binding precedent, courts must engage in a case-by-case determination of the culpability of law enforcement and should not apply the exclusionary rule unless law enforcement exhibited "a deliberate, reckless, or grossly negligent disregard for [the defendant's] Fourth Amendment rights." *State v. Johnson*, 2013 Ohio 4865, 1 N.E.3d 491, ¶30. Under this approach, as long as there was *some* persuasive non-binding authority authorizing the unconstitutional search, the good-faith exception would apply. The Twelfth Appellate District's application of the good-faith exception in Sudinia Johnson's case effectively eviscerates the exclusionary rule, taking away remedies for Fourth Amendment violations in any case in which the searches and seizures were not *egregiously* unreasonable.

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) urges this Court to construe *Davis* narrowly and adopt a bright-line rule that refuses to apply the exclusionary rule unless law enforcement relied on unequivocal binding precedent. This Court should hold that when there is no binding precedent, law enforcement should err on the side of constitutional behavior and seek a warrant from a neutral magistrate.

II. Statement of Interest of Amicus Curiae National Association of Criminal Defense Lawyers

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL files numerous amicus briefs each year in the United States Supreme Court and other courts, in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, NACDL has a strong interest in ensuring that the Fourth Amendment remains a robust protection against unreasonable encroachments on individual privacy and files amicus briefs in cases like this, which directly implicate those concerns.

III. Statement of Facts.

NACDL adopts the statement of facts from the appellant brief.

IV. Argument.

A. The Court of Appeals' Approach Relies on Dicta.

The Twelfth Appellate District held that "[w]e believe that a case-by-case approach examining the culpability and conduct of law enforcement is more appropriate given the preference expressed in *Davis* for a cost-benefit analysis in exclusion cases as opposed to a 'reflective' application of the doctrine to all cases involving a Fourth Amendment violation." *Johnson*, 2013 Ohio 4865, 1 N.E.3d 491, ¶23. The court went on to evaluate whether the Butler County Sheriff's Office acted with a "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Johnson's Fourth Amendment rights . . . ." *Id.* at ¶24.

In *Davis*, the majority reiterated *Herring and Leon* and stated that "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Davis*, 131 S.Ct. at 2427. The majority went on to note that "[t]he basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue." *Id.* (quoting *Herring*, 555 U.S. at 143).

While the majority discussed the examination of the culpability of law enforcement in both *Davis* and *Herring*, it must be pointed out that "culpability was not an issue in either case." Moran, *Hanging on by a Thread: The Exclusionary Rule (Or What's Left of It) Lives for Another Day*, 9 Ohio St. J. Crim. L. 363, 376 (2011-2012). In *Herring*, the majority believed the police acted reasonably in relying on a database of warrants and in *Davis*, the majority held that officers acted reasonably in relying on

binding Supreme Court precedent. Because a culpability assessment was not done and was irrelevant to the conclusion in both cases, the "deliberate, reckless, or grossly negligent" and "culpability" language must be considered dicta. *Id.* at 377. "There was absolutely no occasion in *Davis* to discuss or apply the *Herring* dicta distinguishing between mere negligence and more culpable forms of police misconduct." *Id.* at 376; *see also United States v. Ortiz*, 878 F.Supp.2d 515 (E.D.Pa. 2012)(finding that the government's argument that the good-faith exception applies if the officers did not act with a culpable mental state relies on *Davis* dicta: "[T]he sentence relied on by the government is dicta that must be read in context. . . . *Davis* holds that strict compliance with appellate precedent is covered by *Leon* because strict compliance necessarily entails good-faith and nonculpability.").

This discussion of dicta and the confusion that could, and ultimately has, flowed from it, was noted in Justice Breyer's dissent in *Davis*, when he claimed that the "broad dicta in *Herring* that the Court repeats and expands upon today" may already be leading lower courts to "place determinative weight upon the culpability of an individual officer's conduct" and "apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent . . . ." *Davis*, 131 S.Ct. at 2439 (Breyer, J., dissenting). This is exactly what was done by the Court of Appeals in Johnson's case.

Even Justice Sotomayor, in her concurrence, signaled that she did not necessarily agree with the *Herring* dicta: "We have never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground that the officer's conduct could be characterized as nonculpable. . . . Whatever we have said about culpability, the ultimate questions have always been, one,

whether exclusion would result in appreciable deterrence, and two, whether the benefits of exclusion outweigh its costs." *Id.* at 2435-36 (Sotomayor, J., concurring).

Accordingly, the Twelfth Appellate District was wrong to rely on dicta and focus on officer culpability in order to expand the narrow exceptions to the exclusionary rule.

B. This Court Should Apply The Exclusionary Rule When There Is No Unequivocal Binding Precedent Authorizing A Particular Search.

Putting aside the dicta, the rule in *Davis* is clear: the exclusionary rule does not apply when police conduct a search in objectively reasonable reliance on **binding** appellate precedent. The *Davis* majority so found "[b]ecause suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and public safety." *Davis*, 131 S.Ct. at 2423-24.

In her concurrence, Justice Sotomayor clarified that the *Davis* holding was a narrow one, and "[t]his case does not present the markedly different question whether the exclusionary rule applies when law governing the constitutionality of a particular search is unsettled." *Id.* at 2435 (Sotomayor, J., concurring). She clarified that the good-faith exception is limited to "situations where its precedent on a given point [is] unequivocal" and wrote that limiting application of the good-faith exception to situations in which precedent is "unequivocal" requires law enforcement to "err on the side of constitutional behavior." *Id.* (quoting *United States v. Johnson*, 457 U.S. 537, 561 (1982)).

Davis grew out of two other good-faith exception cases, *Leon*, 468 U.S. at 897 and *Krull*, 480 U.S. at 340. The common element in those cases was that the conduct of law enforcement was specifically authorized: in *Leon*, by a search warrant signed by neutral magistrate, and in *Krull*, by a statute later found to be unconstitutional. In *Davis*, the specific authorization was an outside party rather than an "adjunct[] to the

law enforcement team." *Leon*, 468 U.S. at 900, 917 ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them."). Thus, the *Davis* majority concluded, "[a]n officer who conducts a search in reliance on binding appellate precedent does no more than 'act as a reasonable officer would and should act' under the circumstances." *Davis*, 131 S.Ct. at 2429 (quoting *Leon*, 468 U.S. at 920).

1. *Knotts* and *Karo* were not unequivocal binding precedent at the time law enforcement placed a GPS tracking device on Johnson's car.

The State asserts that the binding precedent in Sudinia Johnson's case can be found in two old beeper cases, *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296 (1984) and *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983). The precedent from those cases cannot be said to have been "unequivocal" because all of the Justices agreed in *United States v. Jones*, 132 S.Ct. 945 (2012) that it was not necessary for the Court to overrule either case to conclude that attaching a GPS device to a car and monitoring the car's movements for 28 days was a search. *Knotts* and *Karo* are distinguishable because they do not involve modern GPS technology. Furthermore, the beepers in both cases were not installed pursuant to a physical trespass, were not used for long-duration tracking, and provided only limited, imprecise information.

The Third Circuit Court of Appeals recently held in *United States v. Katzin*, 732 F.3d 187, 207 (3d Cir. 2013)(reh'g en banc granted by 2013 U.S. App. LEXIS 24722 (Dec. 12, 2013), that "*Davis* extends good-faith protection only to acts that are explicitly sanctioned by clear and well-settled precedent, and neither *Knotts* nor *Karo* sanction that type of intrusion at issue in the case." Furthermore, as set forth in a recent Arizona

Court of Appeals case, "[i]t is clear . . . that 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." *State v. Mitchell*, Ariz. App. No. 1 CA-CR-13-0339, 2014 Ariz. App. LEXIS 65, *29 (April 21, 2014). While *Knotts* and *Karo* could be read to *suggest* that law enforcement would not need a warrant in Sudinia Johnson's case, they could not be considered "unequivocal" binding precedent.

Justice Breyer noted in his dissent that, "to apply the term 'binding appellate precedent' often requires resolution of complex questions of degree. . . . [L]itigants will now have to create distinctions to show that previous Circuit precedent was not 'binding' lest they find relief foreclosed even if they win their constitutional claim." *Davis*, 131 S.Ct. at 2437 (Breyer, J., dissenting). The dissent went on to discuss the various problems that will arise in trying to determine what cases are sufficiently analogous to be considered "binding precedent." *Id.* ("What rules can be developed for determining when, where, and how these different kinds of precedents do, or do not, count as relevant "binding precedent?"). The dissent further raised the concern of inconsistency, in that different interpretations of "binding precedent" will "treat[] similarly situated defendants whose cases are pending on appeal in a different way." *Id.* Lastly, the dissent expressed a concern that lower courts would lack an incentive to litigate and decide Fourth Amendment issues. *Id.*

Justice Breyer's concerns have become a reality. In the wake of the *Jones* decision, the lower courts have been inequitably applying the good-faith exception from *Davis*. While some have refused to apply the exception unless unequivocal and binding precedent existed, others have applied the exception when police relied on non-binding

precedent, or where the defendant failed to establish that the police acted with a reckless disregard for Fourth Amendment rights. By reading *Davis* very broadly, lower courts have been avoiding resolving the questions left unanswered *Jones*. See Susan Freiwald, *The Davis Good Faith Rule and Getting Answers to the Questions Jones Left Open*, 14 N.C. J.L. & Tech. 341 (Spring 2013)("They have relied on a broad version of the *Davis* rule to deny a suppression remedy to defendants who were victims of searches that are clearly unconstitutional under *Jones*. Additionally, lower courts have used the *Davis* rule, both in narrow and broad form, to avoid engaging in a meaningful analysis of the questions raised by Jones.").

2. A Cost-Benefit analysis tilts in favor of suppression in Johnson's case.

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 Johnson's case, the benefits of exclusion of the evidence obtained as the result the unconstitutional search, which was not sanctioned by binding precedent, outweighs its costs. Suppressing evidence under these circumstances will create a clear rule that when there is no binding precedent, law enforcement must err on the side of caution and obtain a warrant. *See Leon*, 468 U.S. at 914 ("stating that 'we have expressed a strong preference for warrants and declared that 'in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall'")(citations omitted). Requiring law enforcement to obtain a warrant in the absence of binding precedent is a minimal cost to safeguarding our Fourth Amendment rights.

The Twelfth Appellate District did not make the determination that *Knotts* and *Karo* were binding precedent. Rather, the court dove into the murky waters of attempting to

determine if it was objectively reasonable for law enforcement to rely on nonbinding precedent. It determined that a warrant was not necessary in Johnson's case by examining the steps taken by law enforcement and the legal landscape at that time. *See Johnson*, 2013 Ohio 4865 at ¶ 24. The court found that at the time of the placement of the device on Johnson's vehicle, no court had ruled that the warrantless installation and monitoring of GPS devices on vehicles on public roadways was a violation of the Fourth Amendment and that prosecutors, fellow officers, and other law enforcement agencies had approved the agent's placement of the GPS device on Johnson's vehicle. *Id.* at ¶25-26.

The officer made a deliberate decision to forego securing a warrant before attaching the GPS device. The fact that the officer felt the need to consult with the prosecutor and his fellow officers demonstrates that he questioned whether a warrant was necessary. In effect, he took a gamble that no Fourth Amendment violation would be found. The search was not sanctioned by binding precedent, a neutral magistrate, or a statute, but rather the very individuals carrying out the investigation. The prosecutor and the agent "extrapolated their own constitutional rule and applied it to this case." *See Katzin*, 732 F.3d at 212.

In *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013), 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." The Seventh Circuit also determined that even if the government could rely on a settled and persuasive body of case law, nothing of the sort existed. *Id.*

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*, 2011 Cato Supreme Court Review, 237, 256 (2011)("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."' *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

> 2435 (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.").

United States v. Lee, 862 F. Supp. 2d 560, 569 (E.D. Ky. 2012)(emphasis added).

A clear, simple rule is constitutionally superior to a murky one. 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 that "[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." *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.").

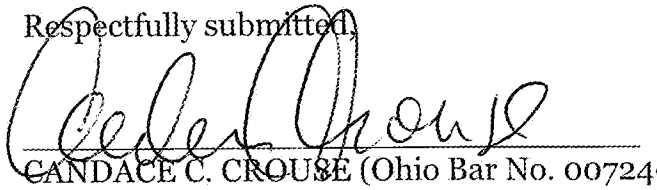
In a cost-benefit analysis, the costs are minimal. These types of errors are uniquely preventable because the government often has the option to obtain a warrant when the law is unresolved and, given the broad range of exceptions to the exclusionary rule, it will be applied sufficiently rarely so as to impose little burden.

V. Conclusion

Amicus Curiae NACDL respectfully urges this Court to construe *Davis* narrowly and adopt a bight-line rule that refuses to apply the exclusionary rule unless law enforcement relied on unequivocal binding precedent. This Court should hold that

when there is no binding precedent, law enforcement should err on the side of constitutional behavior, and seek a warrant from a neutral magistrate. Accordingly, the good-faith exception should not apply in Sudinia Johnson's case and all evidence obtained as the result of the clear violation of Johnson's Fourth Amendment rights must be suppressed.

Respectfully submitted,



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