No. _____

In The

# Supreme Court of the United States

HENRY R. BROWN,

*Petitioner,*

v.

THE UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

CALEB E. MASON
*Counsel of Record*
MILLER BARONDESS, LLP
1999 Avenue of the Stars
Suite 1000
Los Angeles, CA 90067
310-552-7568
cmason@millerbarondess.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTION PRESENTED

Whether caselaw decided prior to the existence of Global Positioning System ("GPS") tracking technology can be held to have "specifically authorized" the warrantless use of GPS tracking technology within the meaning of *Davis v. United* States, 131 S. Ct. 2419 (2011).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, in *United States v. Henry Brown*, No. 11-1565.

## OPINION BELOW

The opinion of the Court of Appeals, including the order denying rehearing and rehearing en banc, is published at 744 F.3d 474. Pet. App. 1.

## JURISDICTION

The Court of Appeals issued its judgment, and denied rehearing and rehearing en banc, on April 16, 2014. Pet. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part: "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."

## STATEMENT OF THE CASE

1. On August 2, 2006, Milwaukee Police Department Detective David Baker, working in conjunction with federal agencies and the U.S. Attorney's office, placed a GPS tracking device on a vehicle, a 2005 Jeep Cherokee, and used it to monitor the movements of petitioner Henry Brown. Government's Appellate Brief, No. 11-1565, Dkt. #75 ("Gov. Br."), 9-11.

2. At the time, no Seventh Circuit opinion had specifically addressed the constitutionality of warrantless GPS tracking. Pet. App. 3-4.

3. At the time of the installation of the GPS tracker, the Cherokee was in the possession of one Kevin Arms, a gang member and drug trafficker. Gov. Br. 9. Arms was recruited as an informant by Milwaukee Police Department Detective David Baker in the late 1990s, and in 2005 was tasked by the department with "setting up" Brown. Gov. Br. 8.

4. The Milwaukee Police Department directed Arms to arrange a "car swap" with Brown. Brown's Opening Appellate Brief, No. 11-1565, Dkt. #62 ("Brown Br."), at 9. Arms made the arrangements for the swap, and a police detective secreted the GPS tracker on the Cherokee. Gov. Br. 9.

5. After the car swap, Brown drove away in the Cherokee, and Detective Baker monitored its location for the next four days using the GPS

tracker. Gov. Br. 10; Brown Br. 9. The GPS tracker provided real-time transmissions of the location of the vehicle, and could be monitored remotely from Detective Baker's computer. *Id*. The GPS tracker was the sole means of monitoring; the government did not engage in any physical surveillance of the vehicle during that period. Brown Br. 9.

6. The GPS tracker revealed that Brown brought the Cherokee to a residence in Berkeley, Illinois. Gov. Br. at 10; Brown Br. 9. The Cherokee remained parked at the residence from August 2, 2006 to August 5, 2006, and was kept in Brown's garage. Brown Br. 9.

7. On August 5, 2006, Detective Baker monitored the GPS signal and learned that the Cherokee had left Brown's residence and was travelling toward Wisconsin. Brown Br. 9.

8. Detective Baker then contacted the Racine County Sheriff's Department, transmitted the identifying information and likely location of the Cherokee, and arranged for a pretextual traffic stop of the Cherokee. Gov. Br. 10; Brown Br. 10. The Cherokee was stopped, and a subsequent search revealed ten kilograms of cocaine; Brown was not in the Cherokee. *Id*.

9. On November 16, 2006, relying on the GPS tracking, federal agents obtained a search warrant for Brown's residence in Berkeley, Illinois. Brown Br. 10. The warrant was executed on November 21, 2006, and additional

evidence was discovered. Gov. Br. 18; Brown Br. 10.

10. On December 7, 2006, relying on the evidence obtained during the search of the Berkeley, Illinois residence, agents obtained a search warrant for a residence in Westchester, Illinois. Brown Br. 11. The warrant was executed on December 10, 2006, and the search yielded additional evidence.

11. Evidence from the traffic stop and from the two residential searches was introduced against Brown at trial. Gov. Br. 18, 20; Brown Br. 10; Pet. App. 8-9. Brown was convicted on February 7, 2009, and sentenced on February 7, 2011. Gov. Br. 5. Judgment was entered on February 28, 2011, and Brown timely appealed. *Id*. at 6. On January 23, 2012, during the pendency of Brown's direct appeal, this Court decided *United States v. Jones*, 132 S. Ct. 945 (2012), holding that warrantless GPS tracking is a "search" under the Fourth Amendment.

12. The briefing in the Seventh Circuit was filed in 2013. Brown Br. 1 (filed June 10, 2013); Gov. Br. 1 (filed Sep. 23, 2013); Brown Reply Brief, No. 11-1565, Dkt. #84 (filed Oct. 16, 2013). The parties addressed the applicability of *United States v. Jones*, 132 S. Ct. 945 (2012), to the GPS tracking conducted in this case. Brown Br. 15-22; Gov. Br. 24-33.

13. The Seventh Circuit declined to address any substantive Fourth Amendment issues raised by the GPS tracking, on the grounds that the

exception to the exclusionary rule announced by this Court in *Davis v. United States*, 131 S. Ct. 2419 (2011), applied. Pet. App. 2-3. The Seventh Circuit reasoned that this Court's decisions in *United States v. Knotts*, 460 U.S. 276 (1981), and *United States v. Karo*, 468 U.S. 705 (1984), constituted sufficient appellate precedent to trigger the *Davis* exception. Pet. App. 5-6. The Seventh Circuit acknowledged that there are technological differences between "beepers" and GPS trackers, but reasoned that those differences are irrelevant because "the information the police obtain is the same no matter which technology they use." Pet. App. 5.



## REASONS FOR GRANTING THE WRIT

In *Davis v. United States*, 131 S. Ct. 2419 (2011), this Court announced a new exception to the exclusionary rule, for warrantless searches subsequently held unconstitutional, but conducted at the time in objectively reasonable reliance on "binding appellate precedent that specifically authorizes a particular police practice." 131 S. Ct. at 2429.

This petition concerns the scope of the phrase "binding appellate precedent that specifically authorizes a particular police practice." Where the "particular police practice" is a new surveillance technology, does the exception require the existence of prior caselaw that specifically addressed that particular technology? Or does it extend to caselaw that authorized a

different surveillance technology that was similar in some respect to the new one? And if so, how similar must the old one be?

Lower courts have interpreted the *Davis* exception in four different ways with respect to GPS tracking evidence obtained prior to *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that installation and monitoring of GPS trackers is a search within the meaning of the Fourth Amendment). The different approaches adopted by the lower courts reflect different views of what constitutes a "particular police practice" for purposes of the *Davis* exception.

Lower courts, law enforcement, and the public are in need of clarification. Uncertainty over the scope of the *Davis* exception affects not just GPS tracking evidence, but all new surveillance technologies and practices. New surveillance technologies are regularly introduced and deployed by law enforcement. And motions to suppress are the principal forum in which the courts can evaluate the constitutionality of such new technologies.

The importance of continuing judicial analysis of the Fourth Amendment implications of technological change was underscored by this Court's recent landmark ruling on searches of the digital contents of cell phones. *Riley v. California*, 134 S. Ct. 2473. An overly broad *Davis* exception will prevent courts from rendering these vital constitutional decisions.

## I. Lower Courts Are Divided About What Pre-*Jones* Caselaw, If Any, "Specifically Authorized" GPS Tracking Within the Meaning of *Davis*

### A. Background

Law enforcement agencies made widespread use of warrantless GPS tracking prior to January 2012, when this Court decided *United States v. Jones*, 132 S. Ct. 945. Cases on direct appeal after *Jones*, in which GPS evidence was obtained before *Jones*, have forced the lower courts to confront the problem of applying the *Davis* exception to changes in surveillance technology. *Davis* itself gave little guidance on that problem because the "practice" at issue in *Davis* was simply incident-to-arrest vehicle searches, and did not involve the adoption of new surveillance technology.

Lower courts have struggled to adapt the *Davis* test to the problem of pre-*Jones* warrantless GPS tracking. They have adopted four different interpretations of the *Davis* exception as applied to GPS surveillance. Some courts – the Eighth and Ninth Circuits – have interpreted the *Davis* rule strictly, applying it to GPS tracker surveillance only when a prior case actually addressed GPS tracker surveillance.

By contrast, the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits have held that even in the absence of any circuit case addressing GPS tracking, the *Davis* exception should still apply. These

circuits held that that decades-old cases involving short-range radio transmitters, or "beepers," were sufficient appellate precedent as to trigger the *Davis* exception. The principal "beeper" cases are *United States v. Knotts*, 460 U.S. 276 (1981), and *United States v. Karo*, 468 U.S. 705 (1984).

One court – the Sixth Circuit – has gone even farther along this analogical road, holding that a case concerning the use of cell-phone tower triangulation to establish a target's location could be read under *Davis* as "specifically authorizing" warrantless GPS tracker surveillance.

And five courts – the Third Circuit, and appellate courts in Kansas, Illinois, Arizona and Ohio – have refused to apply the *Davis* exception where then-extant caselaw did not specifically address GPS tracking. (As of the filing of this petition, only the Kansas decision is final.)

### B. GPS Caselaw: The Eighth and Ninth Circuits Apply the *Davis* Exception Under Binding Appellate Caselaw Specifically Addressing GPS Tracking

When faced with post-*Jones* challenges to evidence obtained by pre-*Jones* warrantless GPS tracking, the Eighth and Ninth Circuits looked to binding circuit caselaw, extant at the time of the search, as the basis for the *Davis* exception. *United States v. Pineda-Moreno*, 688 F.3d 1087 (9th Cir. 2012); *United*

*States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013).[1]

In *Pineda-Moreno*, the Ninth Circuit examined its prior caselaw and concluded that the agents acted in "objectively reasonable reliance on then-binding precedent," 688 F.3d at 1090, because in 1999, in *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999), the Ninth Circuit had specifically held that attaching and monitoring GPS trackers was not a Fourth Amendment search. *Id*.

*McIver* specifically authorized the use of GPS trackers. 186 F.3d at 1123 (noting that "one of the devices was a global positioning system"); *id*. at 1126-27 (holding that warrantless installation and monitoring of the devices did not violate the Fourth Amendment).

Neither the Eighth nor the Ninth Circuit held that *Knotts* and *Karo* were sufficient to trigger the *Davis* exception.

[1] Both courts relied on prior Ninth Circuit caselaw, because in the Eighth Circuit case, the GPS tracker was installed in Phoenix. *Barraza-Maldonado*, 732 F.3d at 868.

### C. "Beeper" Caselaw: the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits, in the Absence of Any Caselaw on GPS Tracking, Apply the *Davis* Exception Under Decades-Old "Beeper" Caselaw

By contrast, the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits have applied the *Davis* exception to pre-*Jones* GPS tracking despite the lack of prior circuit precedent considering GPS tracking. None of these courts had circuit precedent on GPS tracking. Nonetheless, they applied the Davis exception based on *Knotts* and *Karo*, and even earlier circuit "beeper" cases.

*See United States v. Sparks*, 711 F.3d 58, 65 (1st Cir. 2013) (holding that *Knotts*, *Karo*, and a pre-*Knotts* circuit case, *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977)) were sufficient precedent for the *Davis* exception, despite the fact that no circuit case had "directly addressed the propriety of warrantless GPS tracking prior to *Jones*"); *United States v. Aguiar*, 737 F.3d 251, 261-62 (2d Cir. 2013) (holding that *Knotts* and *Karo* were sufficient precedent for the *Davis* exception); *United States v. Henry Brown*, 744 F.3d 474, 478 (7th Cir. 2014) (same).

In the case at bar, the Seventh Circuit held that *Knotts* and *Karo* specifically authorized warrantless GPS tracking. The Seventh Circuit held that the differences in time and technology were irrelevant to the *Davis* exception "because the police obtain the

same information no matter which technology they use." Pet App. 6.[2]

The Fifth and Eleventh Circuits relied on an even earlier circuit case, *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981), as the basis for applying the *Davis* exception.[3] *United States v. Ransfer*, 749 F.3d 914, 923 (11th Cir. 2014); *United States v. Andres*, 703 F.3d 828, 835 (5th Cir. 2013). *Michael* considered the same "beeper" technology at issue in *Knotts* and *Karo*. 645 F.2d at 255-58.

Most recently, a divided panel of the Fourth Circuit adopted the broadest possible interpretation of *Davis*, reading the "specifically authorized" language right out of the rule. *United States v. Stephens*, ___ F.3d ___, 2014 WL 4069336 (4th Cir. Aug. 19, 2014).

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[2] In fact, *Brown* was not the first Seventh Circuit case to address the application of *Davis* to pre-*Jones* GPS tracking. In the first case, *United States v. Martin*, 712 F.3d 1080 (7th Cir. 2013), a different panel of the Seventh Circuit *rejected* the argument that *Knotts* and *Karo* were sufficient for the Davis exception. *Martin*, 712 F.3d at 1082. The *Martin* court explained why the *Davis* exception should not be expanded to encompass the use of novel technologies that did not exist at the time the prior caselaw was decided. But the *Martin* court ultimately decided the case on a different ground, *viz*., that the use of the GPS tracker was attenuated from the evidence at issue. *Id*. Thus the *Brown* court categorized the *Martin* court's reasoning as mere "ruminat[ion]," and disregarded it. 744 F.3d at 477.

[3] The Eleventh Circuit was split from the Fifth Circuit in October 1981, so Fifth Circuit cases decided prior to that date are binding precedent in the Eleventh Circuit. *Ransfer*, 749 F.3d at 923 n.9 (citing *Bonner v. City of Prichard*, 661 F.3d 1206, 1207 (11th Cir. 1981).

The panel majority never mentions the "specifically authorized" language in *Davis*; concedes that at the time of the GPS tracking at issue, "neither the Supreme Court nor this Court had expressly approved or disapproved of warrantless GPS usage," *id.* at *8; and concedes that "*Knotts* is not exactly on point with the facts of this case," *id.* Yet it applies the exception anyway. *Id. See id.* at *12 (Thacker, J., dissenting) (criticizing majority for failing to apply the "specifically authorized" standard).

### D. Cell-Phone Caselaw: The Sixth Circuit Applies the *Davis* Exception Under A Case Addressing Cell-Phone Location Triangulation

The Sixth Circuit has declined to follow the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits. In its *Davis* analysis of pre-*Jones* GPS tracking, it expressly declined to hold that *Knotts* and *Karo* had authorized warrantless GPS tracking. *United States v. Fisher*, 745 F.3d 200, 203-04 (6th Cir. 2014).

The court noted that *Knotts* and *Karo* "strongly suggested that the warrantless installation and monitoring of a tracking device to follow an individual in public spaces was permissible." *Id*. at 204. "Some appellate courts have taken this a step farther," the court continued, "holding that *Knotts* and *Karo* actually authorized the warrantless use of GPS devices and therefore are themselves a basis for asserting the good-faith exception." *Id*.

The Sixth Circuit declined to join these other courts: "We need not go that far here, because at the time of the search the Sixth Circuit had already approved the police conduct." *Id*. at 204. But the Sixth Circuit had no pre-*Jones* GPS caselaw either. Instead, the court cited a case, *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004), that involved the practice of "cell tower triangulation." Triangulation is a means of approximating the location of a cell phone by obtaining information from a phone company regarding the locations of the transmission towers a particular phone contacts when in operation. *Id*. at 947.

*Forest* did not address the installation of a "beeper" or any other kind of device. The Sixth Circuit acknowledged the differences between cell tower triangulation and the attachment of a GPS tracker to a vehicle, but held that those differences did not matter because "the effect . . . is nearly identical." *Id*. at 204-05. It read the *Davis* exception to extend generally to "the warrantless use of electronic tracking devices." *Id*. at 204.

### E. No GPS Caselaw, No *Davis* Exception: Courts That Have Declined to Apply the *Davis* Exception Because "Beeper Caselaw" Did Not Specifically Authorize Warrantless GPS Tracking

A third group of courts has considered the application of the *Davis* exception in jurisdictions that lacked any pre-*Jones* appellate caselaw on GPS tracking. This group of courts – the Third Circuit, and appellate courts in Kansas, Arizona, Illinois, and Ohio – has held that the *Davis* exception does not

apply where no binding caselaw addressed GPS tracking at the time of the search. *United States v. Katzin*, 732 F.3d 187 (3d Cir. 2013); *State v. Hohn*, 321 P.3d 799 (Kan. App. 2014); *People v. LeFlore*, 996 N.E.2d 678 (Ill. App. 2013); *State v. Mitchell*, 234 Ariz. 410, 323 P.3d 69 (Ariz. App. 2014); *State v. Allen*, 997 N.E.2d 621, 627 (Ohio App. 2013).

These courts held that prior caselaw that did not consider GPS tracking did not "specifically authorize" GPS tracking for purposes of the *Davis* exception. All of them expressly rejected the argument that *Knotts* and *Karo* were sufficient precedent to apply the *Davis* exception. As the Court of Appeals of Ohio explained:

> Until the United States Supreme Court addresses questions left unanswered by *Jones*, specifically, what is the proper remedy when the governing law is unsettled, we will adopt a strict reading of *Davis* and apply the exclusionary remedy to suppress evidence gathered from a warrantless GPS initiative, because no binding precedent existed in our jurisdiction prior to *Jones*. . . .

*Allen*, 997 N.E.2d at 627 (citations omitted).

The Court of Appeals of Kansas reasoned as follows:

> It is clear to us the best rule is to only allow an exclusionary rule exception to the good-faith reliance on binding precedent because it (1) best comports with the language in Davis; (2) prevents states and circuits without clear rulings from being forced to accept the decisions in other states and circuits; (3) ensures

> that police err on the side of caution; (4) leaves adjudication of complex Fourth Amendment questions with the courts and not the police; and (5) is easier to apply at the district court level.

*Hohn*, 321 P.3d 799 at *7.[4]

As of the filing of this petition, the decisions of the Third Circuit and the Arizona, Illinois and Ohio courts are not yet final. The Third Circuit accepted *Katzin* for en banc review, and heard argument on May 28, 2014, *see* Order, 2013 WL 7033666; and review of the Arizona, Illinois, and Ohio cases is pending in those states' Supreme Courts. *See* Docket, CR-14-0160-PR (Ariz. Sup. Ct. 2014); *People v. LeFlore*, 3 N.E.3d 799 (Ill. 2014); *State v. Allen*, 6 N.E.3d 1206 (Ohio 2014).

However, the Kansas decision is final. The Kansas Supreme Court denied review on June 20, 2014. *See* Docket, No. 109919, *available at* http://intranet.kscourts.org. And the case exemplifies the potential for confusion and unwarranted disparity if the issue presented herein is not resolved. The defendant, Amanda Hohn, was arrested along with her husband, based on the same evidence and the same conduct. Amanda Hohn was prosecuted in state court, and her case was dismissed following her successful suppression motion, upheld over the government's *Davis* argument in *Hohn*.

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[4] *Hohn* is unpublished, though citeable per Kan. Sup. Ct. Rule 7.04(f).

Her husband Stephen, however, was prosecuted in federal court, which took a broader view of the *Davis* exception. Stephen Hohn's suppression motion, based on the exact same argument and authorities as his wife's, was denied, and he was sentenced to 360 months in prison. *See* Brief for Appellant at 7, 14, *United States v. Stephen Hohn*, No. 14-3030 (10th Cir. 2014).

The facts and law were identical in the two cases. The state case was analyzed and decided purely under the federal Fourth Amendment, *see* 321 P.3d 799 at *3-7. Yet the results were diametrically opposed, and one spouse is free while the other is doing 30 years, solely because of a split between the state and federal courts over the scope of the *Davis* exception.[5]

## II. The Scope of the *Davis* Exception Should Be Resolved Now

### A. Law Enforcement and Lower Courts Need A Clear and Administrable Rule

Law enforcement relies increasingly on sophisticated surveillance technologies. These technologies are rapidly evolving, as police acquire new surveillance technologies from private industry and the military. *See*, *e.g.*, Somini Sengupta, *Rise of Drones in*

[5] Indeed, under *LeFlore*, if Brown had been charged in Illinois state court, the evidence against him would have been suppressed.

*U.S. Drives Efforts to Limit Police Use*, New York Times, Feb. 15, 2013; Matt Apuzzo, *War Gear Flows to Police Departments*, New York Times, June 8, 2014; Al Baker, *For the Police, an Expo That's Almost Like Christmas in July*, New York Times, July 12, 2008.

Technology evolves far faster than caselaw, so the application of Fourth Amendment precedents to new inventions is always uncertain and contested. Law enforcement officers need a clear and administrable rule to allow them to accurately determine when they should obtain a warrant prior to deploying a particular surveillance technology.

That rule should be a bright and administrable line, not a guess about how to construe prior caselaw. *See*, *e.g.*, *Virginia v. Moore*, 553 U.S. 164 (2008) (noting the "great weight" this Court gives to "the essential interest in readily administrable rules" under the Fourth Amendment, and citing *Atwater v. Lago Vista*, 532 U.S. 318, 347-51 (2001) (adopting a bright-line rule allowing arrest for any criminal offense because a more nuanced rule would not be administrable).

Officers attempting to apply the broad *Davis* interpretation adopted below would need to continually engage in the kind of "tank in the park" hermeneutic exercises that flummox law students (and lawyers). *See*, *e.g.*, Bernard V. Bell, "*No Vehicles in the Park": Reviving the Hart-Fuller Debate to Introduce Statutory Construction*, 48 JOURNAL OF LEGAL EDUCATION 88 (1998).

For example, how would an officer attempt to apply the Seventh Circuit's holding that the *Davis* exception applies to *any* new surveillance technology that provides the police with "the same information" as a previously authorized technology? How similar must the information be to be "the same"? (As the Seventh Circuit acknowledged, a GPS tracker provides more information than a "beeper." 744 F.3d at 477.) Does it matter how the information is obtained? Or how much additional information is also obtained? Or how the police use the information?

Or, to take another example, how would an officer evaluate a handheld thermal imaging scanner that shows the infrared radiation emanating from a person's body, and reveals the outlines of solid objects carried under the person's clothing? *See*, *e.g.*, Caleb Mason, *New Police Technologies and the Good-Faith Exception: Warrantless GPS Tracker Evidence After* United States v. Jones, 13 NEVADA LAW JOURNAL 60, 87 (2012), 87 (discussing such a scanner now being tested by the NYPD).

An officer trying to apply the Seventh Circuit's "same information" test would have to engage in sophisticated analogical reasoning from this Court's precedents. Is the scanner analogous to a public-place dog sniff (not a search, per *Illinois v. Caballes*, 543 U.S. 405 (2005)) or to a thermal imaging scan of the exterior of a house (a search, per *Kyllo v. United States*, 533 U.S. 27 (2001))? Did *Kyllo* turn on the fact that the scanner was used on a house, or on the "intimate nature" of the details potentially revealed?

Should the exterior of a house be analogized to the exterior of a person's clothing?[6]

Making such doctrinal deconstruction by officers the predicate for the permissibility of warrantless searches would "contravene[ this Court's] general preference to provide clear guidance to law enforcement through categorical rules." *Riley v. California*, 134 S. Ct. 2473, 2491 (2014).

On the narrow reading of *Davis* advocated by Petitioner, no such pontification is required. The rule is categorical and the officer's task is easy: If there is a binding appellate case specifically authorizing use of the particular device or practice the officer wishes to deploy, then he may proceed without a warrant.

If not, then the law is uncertain, and the evidence will be suppressed if the surveillance is later held to be a Fourth Amendment search. The officer should therefore get a warrant to protect his investigation. *See*, *e.g.*, *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring) ("But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute

[6] Undersigned counsel can attest that many law enforcement agents with whom he worked are eager to engage in legal and philosophical debate about the doctrinal and policy underpinnings of Fourth Amendment rules. But such doctrinal/philosophical pontification should not be the touchstone for admissibility of evidence where express legal authority is ambiguous or silent.

a Fourth Amendment search, the police may always seek a warrant.").

Law enforcement and the public both benefit from clear, bright-line rules establishing what forms of warrantless surveillance are permissible. The constitutional rules of criminal investigation should not be murky. Ambiguity leads to disparities in local practices; creates uncertainty and inefficiency in litigation; and undermines public trust in the police and the judiciary.

As this Court announced forcefully and unanimously in *Riley*, the courts have the power and obligation to promulgate clear, bright-line rules at the intersection of technology and the Fourth Amendment. In *Riley*, this Court rejected the Government's proposal to let the constitutional rule remain murky while law-enforcement agencies developed their own protocols: "the Founders did not fight a revolution to gain the right to government agency protocols." 134 S. Ct. at 2491.

The strongest argument for granting this Petition is that the broad reading of *Davis* adopted by the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits will prevent the courts from developing precisely the sort of clear, bright-line rules on technological surveillance that this Court ringingly endorsed in *Riley*.

If courts are to apply the Fourth Amendment to the ever-evolving menagerie of surveillance technology, they must address substantive Fourth Amendment challenges as they arise. A broad reading of

*Davis* will preempt such challenges. If caselaw approving any technological ancestor is sufficient to "specifically authorize" all arguable descendants and thus cut off suppression claims, then courts will be foreclosed from analyzing new technologies on their merits.

Indeed, some courts have already used a broad reading of *Davis* as a basis for declining to decide significant Fourth Amendment questions. *See*, *e.g.*, *United States v. Holleman*, 743 F.3d 1152, 1159 (8th Cir. 2014) (declining under *Davis* to consider how *Florida v. Jardines*, 133 S. Ct. 1409 (2013), applies to hotels); *United States v. Smith*, 741 F.3d 1200 (11th Cir. 2013) (declining under *Davis* to address whether warrantless GPS tracking might ever be "reasonable," a question left open in *Jones*).

The absence of judicial analysis of new technologies is bad for defendants, the public, and law enforcement. Law enforcement officers need a clear and administrable rule. They should not be put in the position of having to guess whether a new surveillance technology is similar enough to previously-addressed technologies to implicate *Davis*.

### B. Additional Percolation Would Not Aid This Court's Consideration of the Issue

There is no good reason to delay resolution of the question presented in the hopes that additional lower court opinions will unearth new legal theories or

converge on a uniform legal regime. The four different approaches adopted by lower courts, as set forth herein, represent the full spectrum of applications of the *Davis* exception to new surveillance technologies.

In addition, because the scope of the *Davis* exception is so important to the future of Fourth Amendment law, there is a rich body of academic scholarship exploring the doctrinal and policy-related consequences of the different approaches. *See*, *e.g.*, Orin S. Kerr, *Fourth Amendment Remedies and the Development of New Law*, 2011 CATO SUPREME COURT REVIEW 237 (2011); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEORGETOWN LAW JOURNAL 1077 (2011); David Twombly, *The Good-Faith Exception and Unsettled Law: A Study of GPS Tracking Cases After United States v. Jones*, 74 OHIO STATE LAW JOURNAL 807 (2013); Caleb Mason, *New Police Technologies and the Good-Faith Exception: Warrantless GPS Tracker Evidence After* United States v. Jones, 13 NEVADA LAW JOURNAL 60 (2012).

### C. This Case Is An Excellent Vehicle For the Court To Resolve This Issue

This case is an excellent vehicle for this Court to clarify the *Davis* exception as it applies to evolving surveillance technologies. The Seventh Circuit held squarely that caselaw decided *more than 20 years before the existence* of the small, concealable GPS tracking devices used in this case, nonetheless "specifically authorized" their use.

This case presents this Court with a clear and focused opportunity to decide whether such a proposition is logically, technically, semantically, or legally correct.

Moreover, this case rests squarely on the scope of the *Davis* exception. The Seventh Circuit expressly declined to decide any substantive issues regarding the application of *Jones* to the facts of this case, so there are no alternative bases for the Seventh Circuit's order affirming the conviction. This is a focused case that sets cleanly before this Court the Question Presented for Review.

## III. *Knotts*, *Karo* and "Beeper Cases" Did Not "Specifically Authorize" GPS Tracking Within the Meaning of *Davis*.

### A. GPS Tracking Technology Did Not Exist When The "Beeper" Cases Were Decided

*Knotts* and *Karo* were decided in 1983 and 1984, respectively. *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981), the Fifth Circuit case relied on by the Fifth and Eleventh Circuits, was decided in 1981. At that time, GPS tracking was a dream in the minds of military scientists.[7] The "beepers" at issue in *Knotts*,

[7] *See*, *e.g.*, Rick W. Sturdevant, "Navstar, the Global Positioning System: A Sampling of Its Military, Civil, and Commercial Impact," in SOCIETAL IMPACT OF SPACEFLIGHT 331-332 (NASA 2007), available at http://history.nasa.gov/sp4801-chapter17.pdf (GPS system conceived in principle by Defense

(Continued on following page)

*Karo* and *Michael* were simple, short-range radios whose signal could only be detected by a law enforcement officer following a vehicle. *Knotts*, 460 U.S. at 277.

The first decisions mentioning surveillance of vehicles by means of GPS trackers would not appear for two decades after the "beeper" cases. *See*, *e.g.*, *United States v. Levitt*, 39 F.Appx. 97 (6th Cir. 2002); *United States v. Berry*, 300 F.Supp.2d 366 (D. Md. 2004); *United States v. Mack*, 272 F.Supp.2d 1174 (D. Colo. 2003); *United States v. Butler*, 2000 WL 134697 (D. Kan. 2000); *State v. Gaines*, 2004 WL 1461524 (Ohio App. 2004); *People v. Lacey*, 787 N.Y.S.2d 680 (N.Y. Co. Ct. 2004); *State v. Jackson*, 150 Wash.2d 251 (Wash. 2003); *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999). The earliest reference in any case, state or federal, to law-enforcement use of a GPS tracker to monitor a vehicle is in *United States v. Eberle*, 993 F.Supp. 794 (D. Mont. 1998).[8]

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Department scientists in early 1970s; did not become fully operational until 1995).

[8] Petitioner ran searches in Westlaw for the terms "GPS" or "global positioning system" in the same sentence as "car," "vehicle," "track," "tracker," or "tracking," for any dates prior to 1/1/2005, for all federal and state cases.

### B. The *Knotts* and *Karo* Courts Could Not Have Anticipated the Capabilities of GPS Tracking Technology

Recent cases considering the constitutional ramifications of electronic surveillance have emphasized that constitutional rules cannot remain static in the face of changing technology, because courts do not – and cannot – anticipate the development of future technologies.

Decisions about the constitutionality of surveillance technologies from one era are not written in stone for all time. Rules appropriate for one technological context must be reconsidered and reconfigured as technology evolves.

In *Riley v. California*, 134 S. Ct. 2473 (2014), this Court confirmed forcefully and unanimously that new technologies require new Fourth Amendment rules. This Court updated the venerable search-incident-to-arrest rule to take into account the technological realities of modern cell phones. Updating was necessary, this Court held, because cell phones are "based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided." *Id*. at 2485.[9]

Another recent example is Judge Leon's searching opinion regarding the application of this Court's

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[9] *See Chimel v. California*, 395 U.S. 752 (1969); *United States v. Robinson*, 414 U.S. 218 (1973).

analysis of "pen registers" in *Smith v. Maryland*, 442 U.S. 735 (1979), to today's large-scale data collection by the National Security Agency ("NSA"):

> The question before me is not the same question that the Supreme Court confronted in *Smith*. To say the least, "whether the installation and use of a pen register constitutes a 'search' within the meaning of the Fourth Amendment," *id*. at 736, 99 S. Ct. 2577 – under the circumstances addressed and contemplated in that case – is a far cry from the issue in this case.
>
> Indeed, the question in this case can more properly be styled as follows: When do present-day circumstances – the evolutions in the Government's surveillance capabilities, citizens' phone habits, and the relationship between the NSA and telecom companies – become so thoroughly unlike those considered by the Supreme Court thirty-four years ago that a precedent like *Smith* simply does not apply? The answer, unfortunately for the Government, is now.

*Klayman v. Obama*, 957 F.Supp.2d 1, 31 (D.D.C. 2013); *see also*, *e.g.*, *The Matter of United States*, ___ F.Supp.2d ___, 2014 WL 1395082 (D.D.C. April 17, 2014) (holding that application of *Smith* to cell-site location technologies is uncertain and requires detailed factual analysis of such technologies).

And as Justice Sotomayor observed in *Jones*, the same technological discontinuity undermines the

analogy between GPS tracking technology and "beepers":

> In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. . . . Government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility.

*United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring) (internal citations and quotation marks omitted).

The Illinois Court of Appeals, considering GPS tracking with precisely the sort of device at issue here, emphasized the importance of considering a device's specific technological capabilities when analyzing *Davis* claims. *People v. LeFlore*, 996 N.E.2d 678, 692-93 (Ill. App. 2013) (declining to apply the *Davis* exception because prior cases had not authorized the technology at issue). Specifically, the court deemed it significant that the GPS tracker in that case transmitted a continuous location record that

could be monitored remotely – just like the one in this case.

Technical details matter. A smart phone is not a desk drawer or a cigarette packet, and a GPS tracker is not a "beeper." *Knotts* and *Karo* did not "specifically authorize" GPS tracking any more than *Chimel* and *Robinson* "specifically authorized" searches of digital files on cell phones, or *Smith* "specifically authorized" the creation of terabit-scale databases of metadata on citizens' communications.

### C. The Government Has Conceded That *Knotts* and *Karo* Did Not Specifically Authorize Warrantless GPS Tracking Under *Davis*

In the *Katzin* en banc argument, the government conceded that it does not believe that *Knotts* and *Karo* constitute sufficient precedent for application of the *Davis* exception. The government candidly asserted that applying the *Davis* exception to warrantless GPS tracking would require an "extension" of *Davis*:

> The Court: Mr. Zauzmer, do you agree with the Second and Seventh Circuits that *Knotts* and *Karo* are binding precedent?
>
> Mr. Zauzmer: That goes slightly beyond what the government has argued in this case. . . .
>
> [Mr. Zauzmer:] And the Second and Seventh Circuits go a bit beyond the position that the United States has taken. . . .

> [Mr. Zauzmer:] What I've suggested here is that it's not binding in that we didn't have an explicit Third Circuit decision in the way we had an explicit Eleventh Circuit decision about *Belton*. . . . If the Supreme Court had addressed the installation of a GPS device before, I could certainly say that was binding. I'm making this really hairline distinction in that we didn't have an explicit Third Circuit or Supreme Court case on the conduct here but we were so close that our position is that when you read all about good faith and what it means, read about the balancing test, that the conclusion has to be that in our situation the exclusionary rule can't apply. . . .
>
> The Court: You're asking for an expansion of good-faith doctrine, as the Supreme Court has expressed, aren't you?. . . .
>
> Mr. Zauzmer: No doubt, we are asking for what I've described as a very, very slight extension of *Davis* based on the reasoning explained by the Supreme Court in explaining when the exclusionary rule applies.

*United States v. Katzin*, No. 12-2548, Transcript of Oral Argument, Doc. 003111649341, at 17, 21-23.

This is an extraordinary concession. *See*, *e.g.*, *id*. at 30 ("The Court: Thank you. I do want to just commend – I think lesser advocates would not have done this. When asked directly if you're advocating an extension of *Davis* you conceded you're advocating

a slight extension of *Davis* . . . I want to really commend you on your candor there.").

The fact that the government – *contra* the court below and other circuits – *concedes* that the *Davis* exception, by its terms, cannot justify warrantless GPS tracking based on *Knotts* and *Karo*, is in itself sufficient to warrant consideration of the issue by this Court

## IV. This Court Should Cabin the *Davis* Exception to Caselaw that Specifically Considered the Technology at Issue

### A. An Officer's Mistake of Law Cannot Be A Basis for An Exception to the Exclusionary Rule

When an officer chooses to interpret the law himself, rather than getting judicial authorization, a mistake of law comes with the risk of suppression – whether or not made in "good faith." This rule is among the chestnuts of criminal procedure jurisprudence.

*See*, *e.g.*, *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) (vacating conviction where seizure was based on officer's mistake of law); *United States v. Nicholson*, 721 F.3d 1236, 1241 (10th Cir. 2013) (same); *United States v. McDonald*, 453 F.3d 958, 960-62 (7th Cir. 2006) (same); *United States v. Chanthasouxat*, 342 F.3d 1271, 1278-80 (11th Cir. 2003) (same); *United States v. Lopez-Soto*, 205 F.3d

1101, 1106-07 (9th Cir. 2000) (same); *United States v. Miller*, 146 F.3d 274, 277-79 (5th Cir. 1998) (same).

An officer's mistaken belief that the law gave him the right to do what he did is simply not a basis for an exception to the exclusionary rule. An officer's belief that it was legal to deploy GPS tracking without a warrant is a mistake of law. It is no different structurally or conceptually from an officer's mistaken belief that it was legal to pull over a driver for the size of his mudflaps, *see Tibbetts*, 396 F.3d at 1139, or for leaving his turn signal on too long, *see McDonald*, 453 F.3d at 960-61.

There is no principled basis for a distinction between a mistake of law as to whether the defendant's conduct was *illegal*, and a mistake of law as to whether the officer's conduct was *legal*. In either case, "to create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000).

Of course, if the officer was acting in strict compliance with binding caselaw that specifically authorized his action, then the officer did *not* make a mistake of law, and under *Davis*, suppression is not warranted. Thus, the challenge Petitioner brings here would not lie in the Ninth Circuit, or in any jurisdiction with pre-*Jones* precedent authorizing warrantless GPS tracking.

But there was no such clear judicial authorization in the Seventh Circuit at the time the officers carried out the GPS tracking in this case. There was only decades-old caselaw concerning short-range radio "beepers." The officers' belief that the "beeper" caselaw extended to GPS tracking was a *mistaken interpretation* of that caselaw.

The good-faith exception has never been extended to officers' *mistaken interpretations* of caselaw. In *United States v. Leon*, 468 U.S. 897 (1984), the officer obtained a warrant that authorized the search. *Id*. at 902. In *Herring v. United States*, 555 U.S. 135 (2009), the officer queried a state computer system and was informed that there was a warrant that authorized the arrest. *Id*. at 137-38.

In *Illinois v. Krull*, 480 U.S. 340 (1987), and *Davis v. United States*, 131 S. Ct. 2419 (2011), the officers relied on a statute and an appellate decision, respectively – and were *correct* in their interpretations. In those cases, there *was no mistake* about what the Illinois statute and the Eleventh Circuit decision held, but the statute and the decision were subsequently overturned by this Court. The mistake of law in those cases was *not* the officer's, but rather the Illinois legislature's, and the Eleventh Circuit's. And that distinction made all the difference. *See Krull*, 480 U.S. at 350-53; *Davis*, 131 S. Ct. at 2428-29.

Indeed, in *Davis* the parties *agreed* that the relevant circuit precedent was crystal clear, and

unambiguously authorized the officers' conduct. *Davis*, 131 S. Ct. at 2428 (noting that both parties "agree that the officers' conduct was in strict compliance with then-binding Circuit law. . . ."). There is no such agreement in this case, and no possible claim of "strict compliance." Here, petitioner argues that the officers *exceeded* the bounds of what was specifically authorized by then-governing legal authorities.

Nothing in *Davis*, or any other good-faith case, even hints that if an officer engaged in warrantless GPS tracking based on a *mistake of law*, the exclusionary rule should not apply. Hence the *Davis* Court's use of the carefully worded phrase, "specifically authorized a particular police practice."

Because a mistake of law cannot excuse an officer's unconstitutional search, this Court must reject attempts to extend the *Davis* exception to "reasonable mistakes of law." Mistakes of law by law enforcement officers (as distinct from legislatures and judges) are never excuses; they are objectively unreasonable and require suppression.

### B. Deploying New Surveillance Technologies In the Absence of Explicit Judicial Authorization Is Systemic Negligence that the Fourth Amendment Seeks to Deter

In *Herring v. United States*, 555 U.S. 135 (2009), this Court held that while an isolated, individual

instance of negligence – a failure to make a timely correction to a state computer database – does not require exclusion of unconstitutionally-obtained evidence, "recurring or systemic negligence" can. *Id*. at 144. Since then, this Court has not had the occasion to clarify what sorts of law-enforcement practices are "systemic negligence."

This case presents an opportunity for this Court to do so. It is systemic negligence for a law enforcement agency to regularly deploy new surveillance technologies for warrantless surveillance in the absence of any explicit judicial authorization. The "ask forgiveness, not permission" regime exemplified by this case is precisely the sort of systemic, recurring, and easily deterred negligence that the exclusionary rule – as interpreted by this Court in *Herring* – is intended to prevent.

The police act negligently when they fail to take due care to ensure that they are not engaging in unreasonable warrantless searches. Recurring and systemic warrantless use of new surveillance technologies in the absence of judicial authorization is precisely the sort of negligence that warrants application of the exclusionary rule.

It is negligent for officers to conduct warrantless GPS surveillance on the basis of the officers' mistaken guesses about the meaning of decades-old Fourth Amendment cases. Indeed, it is the very definition of recurring, systemic negligence. The Ohio Court of Appeals put it well:

> The risk of institutionalizing a policy of permitting reliance on non-binding authority, particularly in the face of other, contrary non-binding authority, at least borders on being categorized as systemic negligence. Indeed, allowing the government the shelter of the good-faith exception in this case would encourage law enforcement to beg forgiveness, rather than ask permission, in ambiguous situations involving basic civil rights.

*State v. Allen*, 997 N.E.2d 621, 627 (Ohio App. 2013) (citations omitted).

Moreover, this is precisely the sort of negligence that the exclusionary rule can effectively deter. When the law is uncertain as to a particular surveillance technology or practice, the potential exclusion of evidence incentivizes officers to go to a judge and get a warrant. Failure to apply the exclusionary rule in such circumstances incentivizes officers to go ahead and use new, unapproved surveillance technologies without any judicial oversight.

### C. Extending *Davis* Will Incentivize Constitutional Recklessness

This Court has consistently held that the exclusionary rule pays its way when it deters police negligence and misconduct and rewards responsible police work. *See*, *e.g.*, *Davis*, 131 S. Ct. at 2427. The good-faith exception has always incentivized officers to "Ask permission, not forgiveness," as undersigned

counsel, like countless other prosecutors, advised agents. The traditional *Leon* rule provides a clear incentive: Go to a judge and get a warrant. Officers know that if they go to a judge and get a warrant, their busts are secure and their evidence will see the courtroom. If they don't go to a judge, they risk suppression.

The *Davis* rule, in its narrow sense – on the facts of *Davis*, for example, or as applied by the Eighth and Ninth Circuits – is consistent with the underlying "Ask permission" rationale. In the Ninth Circuit in 2011, for example, there was no ambiguity about the legality of warrantless GPS tracking. Officers had been given specific authorization by the governing appellate court; there was "nothing to deter" in their compliance with that judicial permission.

But the incentives created by the expanded rule endorsed by the First, Second, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits are very different, and are not at all consistent with the core "Ask permission" principle. In fact, they are the opposite.

A pre-*Jones* tracker investigation, in a jurisdiction lacking any binding GPS caselaw, is a circumstance of legal ambiguity. As noted above, the government conceded in *Katzin* that it does not believe that *Knotts* and *Karo* provided specific authorization for warrantless GPS tracking. In the government's view, specific authorization was lacking, but the caselaw was "so close," in the view of agents and prosecutors, that the exclusionary rule should not

apply. Extending the *Davis* exception to such situations incentivizes agents and prosecutors *not* to seek judicial permission when deploying novel surveillance technologies, or otherwise dipping investigatory toes into uncharted constitutional waters.

The temptation to act without judicial permission is vividly on display in this case. There was no emergency here. The entire operation was engineered by the police, on their own timetable. It was 2006; neither the Seventh Circuit nor the Supreme Court, nor the Wisconsin or Illinois appellate courts, had specifically authorized warrantless GPS tracking.

The detectives, agents, and prosecutors who organized this operation could easily have applied for a warrant. They chose not to. They chose to interpret the law themselves, and ask forgiveness rather than permission.

"[W]here uncertainty exists" about the constitutionality of their surveillance practices, the law should incentivize officers to "seek a warrant." *See Jones*, 132 S. Ct. at 964 (Alito, J., concurring). This case presents this Court with the opportunity to reinforce that basic rule of constitutional policing, and to clarify that it is perfectly consistent with – indeed, implied by – the *Davis* exception.

### D. The Fourth Amendment Can Only Evolve to Accommodate New Technologies Through Substantive Analyses of Those Technologies

It is vitally important that the constitutionality of new surveillance technologies be substantively addressed by the courts. A rule that allows courts to avoid deciding substantive questions about the impacts of new technologies simply by finding decades-old prior technologies that are somewhat similar will directly frustrate the core social function of this Court as arbiter of the constitutionality of technological surveillance.

The history of Fourth Amendment caselaw is a history of courts wrestling with the constitutional implications of new technologies: automobiles; telephones; wiretaps; pen registers; breath and blood analysis; x-rays; airplane overflights; thermal imaging; e-mail; text messages; cell phones; surveillance cameras; computer files and hard drives; "metadata" collection. *See*, *e.g.*, *Warshak v. United States*, 532 F.3d 521, 526-27 (6th Cir. 2008) (considering the analogical relationship between e-mail and traditional mail); *United States v. Comprehensive Drug Testing, Inc*., 621 F.3d 1162 (9th Cir. 2010) (en banc) (considering how the "plain view" exception applies to electronic searches of computer hard drives); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICHIGAN LAW REVIEW 801 (2004) (collecting cases).

For example, when this Court decided *California v. Ciraolo*, 476 U.S. 207 (1986), upholding warrantless aerial surveillance against a Fourth Amendment challenge, it could not have anticipated the ubiquity and technological capabilities of surveillance drones thirty years later. *See*, *e.g.*, Richard M. Thompson II, DRONES IN DOMESTIC SURVEILLANCE OPERATIONS: FOURTH AMENDMENT IMPLICATIONS AND LEGISLATIVE RESPONSES 3-4 (Congressional Research Service 2013) (setting forth the technical capabilities of modern surveillance drones).

*Ciraolo* is to modern drone surveillance what *Knotts* is to modern GPS surveillance. Yet on the broad reading of *Davis*, Fourth Amendment challenges to myriad forms of modern aerial surveillance would be foreclosed on the grounds that newly adopted surveillance technologies were somehow "specifically authorized" by decades-old cases authorizing their distant technological ancestors.

If judicial approval of distant technological antecedents is held to immunize the use of far more sophisticated successor technologies, courts would be precluded from engaging in regular technological updating of the Fourth Amendment.

In *Davis*, this Court acknowledged the importance of the exclusionary rule to the development of Fourth Amendment law, and emphasized that its holding would *not* apply in jurisdictions in which "the question remains open":

> This Court reviews criminal convictions from 12 Federal Courts of Appeals, 50 state courts of last resort, and the District of Columbia Court of Appeals. If one or even many of these courts uphold a particular type of search or seizure, defendants in jurisdictions in which the question remains open will still have an undiminished incentive to litigate the issue. This Court can then grant certiorari, and the development of Fourth Amendment law will in no way be stunted.

*Davis*, 131 S. Ct. at 2433; *see also id*. at 2435 (Sotomayor, J., concurring) ("This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.").

This Court's own recent cases, most dramatically *Riley v. California*, 134 S. Ct. 2473 (2014), have underscored the importance of continual judicial evaluation of new surveillance technologies. Expanding the *Davis* exception will cut off that vital constitutional obligation of the courts, just when it is most needed.

### E. Unrestrained Expansion of the *Davis* Exception Does Violence to this Court's Precise and Limited Language in *Davis*

This Court's reasoning in *Davis* turned on the fact that there was no ambiguity in the caselaw: a binding decision of the Eleventh Circuit held that when a person is arrested in a vehicle, the police may search the vehicle. That bright-line rule was part of

the black-letter architecture of criminal procedure, memorized by every first-year law student and every police trainee. And the parties stipulated that the police acted in strict compliance with it.

The dramatic expansion of the *Davis* exception in the decisions of the First, Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits is at odds with logic, facts, and language of *Davis*. This Court should reject the lower courts' attempts to transform the *Davis* exception into a rule-swallowing vortex that this Court neither announced nor intended.

In *Davis*, this Court chose its words carefully, and the words it chose were "specifically" and "particular." These words are not compatible with an interpretation of the exception that stretches it to cover large categories of searches that bear general similarities to police practices considered in prior cases. Indeed, "specifically" and "particular" are antonyms of "generally" and "general."

*Webster's Dictionary* defines "specific" as, inter alia, "restricted to a particular individual, situation, or effect," def. 2(a); and "free from ambiguity," def. 3. It defines "particular" as, inter alia, "separated from the whole or from others of the class," def. 1; and "belonging to one only; not general," def. 2.

"Specifically" does *not* mean "arguably," "colorably," or "potentially." "Particular practice" does *not* mean "general class of similar practices."

This Court, like Congress, says what it means and means what it says. This Court could have held

in *Davis* that the exception applies if prior caselaw "arguably authorized" a given police practice. This Court could have held that the exception applies if prior caselaw authorized a "category," or "class," of police practices.

This Court chose not to do so in *Davis*. This Court insisted on "*specific*" authorization of a "*particular*" practice. The Seventh Circuit and the other courts referenced herein have turned this Court's language on its head.

This Court should hold that the *Davis* exception cannot be triggered by prior caselaw that did not address the specific technology employed in a particular search.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CALEB E. MASON
*Counsel of Record*
MILLER BARONDESS, LLP
1999 Avenue of the Stars
Suite 1000
Los Angeles, CA 90067
310-552-7568
cmason@millerbarondess.com

August 26, 2014

**UNITED STATES of America,**
**Plaintiff-Appellee,**

**v.**

**Henry R. BROWN,**
**Defendant-Appellant.**

**No. 11-1565.**

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 4, 2013.

Decided March 4, 2014.

Rehearing and Rehearing En Banc
Denied April 16, 2014.

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Jonathan H. Koenig, Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee.

William S. Stanton, Law Office of William S. Stanton, Chicago, IL, for Defendant-Appellant.

Before EASTERBROOK, KANNE, and TINDER, Circuit Judges.

EASTERBROOK, Circuit Judge.

A jury convicted Henry Brown of conspiring to distribute more than five kilograms of cocaine. Brown's recidivism led the judge to sentence him to life imprisonment. His principal contention on appeal is that the court should have prevented the prosecutor from introducing evidence traceable to information gleaned from a GPS (Global Positioning System) monitor that investigators attached to a car in 2006.

The Supreme Court held in 2012 that the intrusion on the property interest of a car's owner is a "search," valid only if reasonable. *United States v. Jones,* ___ U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). Brown maintains that employing GPS location services is reasonable only with the support of a warrant issued on probable cause.

*Jones* did not hold – though five Justices suggested in concurring opinions – that monitoring a car's location for an extended time is a search even if the car's owner consents to installation of the GPS unit, so that no property rights have been invaded. 132 S.Ct. at 954-57 (Sotomayor, J., concurring), 957-64 (Alito, J., concurring, joined by Ginsburg, Breyer & Kagan, JJ.). An extension of *Jones* along the concurring opinions' lines is essential to Brown's position, since this GPS unit was installed without a trespass. A Jeep's owner decided to cooperate with the police in their investigation of his confederates and authorized the attachment of a tracker. The police thought that this step is as permissible as asking their informant to wear a concealed recording or broadcasting device; Brown, by contrast, maintains that monitoring a GPS locator requires probable cause and a warrant even if monitoring an informant's wire does not. We bypass that question, as well as other issues such as whether a person using someone else's car (or that person's co-conspirator) can protest the use of evidence derived from a device that shows no more than the car's location. No matter how these substantive issues come out, it would be inappropriate to use the

exclusionary rule to suppress evidence derived from this GPS locator before the Supreme Court's decision in *Jones*. Until then, precedent would have led reasonable officers to believe that using GPS to track a car's location was not a search.

The exclusionary rule is designed to deter violations of the fourth amendment. The Supreme Court has concluded that the slight deterrent benefit of excluding evidence derived from searches that were proper when conducted – but held to be invalid in light of later precedent – does not justify the injury to the public weal when criminals go unpunished. *Davis v. United States,* ___ U.S. ___, 131 S.Ct. 2419, 2423-24, 180 L.Ed.2d 285 (2011), announced this rule: "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule" even if that precedent is later held to be incorrect. Before *Jones,* "binding appellate precedent" in this circuit had established that installation of a GPS device, and the use of the location data it produces, are not within the scope of the fourth amendment. *See United States v. Garcia,* 474 F.3d 994 (7th Cir.2007); *United States v. Cuevas-Perez,* 640 F.3d 272 (7th Cir.2011). It appears to follow that the exclusionary rule does not apply to the acquisition of GPS location data, within the Seventh Circuit, before *Jones*.

That proposition would be straightforward if the evidence had been derived from a GPS device after February 2, 2007, when *Garcia* created the "binding precedent" for this circuit. *See, e.g.*, *United States v.*

*Sparks,* 711 F.3d 58 (1st Cir.2013); *United States v. Andres,* 703 F.3d 828 (5th Cir.2013); *United States v. Pineda-Moreno,* 688 F.3d 1087 (9th Cir.2012); *United States v. Ransfer,* 2014 U.S.App. LEXIS 1669 (11th Cir. Jan. 28, 2014). All of these decisions conclude that *Davis* forecloses the use of the exclusionary rule for pre-*Jones* monitoring that had the blessing of circuit-level precedent.

But the GPS data that led to the evidence at Brown's trial was acquired in 2006. He contends that there was no "binding appellate precedent" in 2006 and that the exclusionary rule therefore is available. He relies on *United States v. Martin,* 712 F.3d 1080 (7th Cir.2013), which doubted whether *Davis* applies to pre-*Jones* GPS data within the states of the Eighth Circuit, which lacked any decisions comparable to *Garcia* and *Cuevas-Perez.* A panel of the Third Circuit lent support to Brown's position by holding that *Davis* is irrelevant to pre-*Jones* GPS data within the Third Circuit's territory, precisely because it had not held (before *Jones*) that using GPS to reveal a car's location was not a search. *United States v. Katzin,* 732 F.3d 187 (3d Cir.2013).

*Martin* ruminated about the effect of *Davis* but did not produce a holding on that score because the panel found that the GPS unit was only remotely related to the contested evidence. *Katzin* has been vacated on the grant of rehearing en banc. 2013 WL 7033666, 2013 U.S.App. LEXIS 24722 (3d Cir. Dec. 12, 2013). And *United States v. Aguiar,* 737 F.3d 251 (2d Cir.2013), disagreeing with the Third Circuit's panel,

squarely holds that *Davis* covers pre-*Jones* GPS monitoring in a jurisdiction that, like the Third and Eighth Circuits, did not have local precedents. *Aguiar* concludes that for the purpose of *Davis* the "binding appellate precedent" is supplied by *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), and *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), both of which long predate the monitoring to which Brown objects.

*Knotts* holds that monitoring a signal from a "beeper" – a radio that transmits a signal whose location may be derived via triangulation – is not a search. A GPS unit used in law enforcement transmits or stores its own location; triangulation by the police is not required; but the information the police obtain is the same no matter which technology they use. *Karo* adds that the installation of a beeper is not a search, or at least does not require probable cause or a warrant, if the owner of the property into which the beeper is placed consents, even if the beeper then is used to monitor the location of someone who did not consent. We concluded in *Garcia* and *Cuevas-Perez* that *Knotts* and *Karo* jointly show that tracking a car's location by GPS is not a search no matter how long tracking lasts. We earlier held in *Garcia,* relying on those two decisions, that installation of the GPS locator does not come within the fourth amendment because it does not interfere with the vehicle's use in transportation. *Jones* rejects that understanding but states that the holding of *Karo* concerning devices

installed with consent "is perfectly consistent with the one we reach here." 132 S.Ct. at 952.

Because the GPS unit that played a role in the gathering of evidence against Brown was installed with the consent of the Jeep's owner, *Knotts* and *Karo* are "binding appellate precedent" for the purpose of *Davis*. It may well be that five Justices (those who joined the two concurring opinions in *Jones*) are prepared to hold that long-term monitoring of a GPS tracker is a search, even if installation has the imprimatur of the vehicle's owner, but *Jones* did not reach that conclusion, and as of 2006 *Karo* supported the device's installation, while *Knotts* meant that the monitoring was not within the fourth amendment's scope. If those conclusions are wrong, the Supreme Court has yet to *hold* so, so *Knotts* and *Karo* provided solid ground for objectively reasonable reliance by the police.

That conclusion makes it unnecessary to decide whether this circuit will follow *Aguiar* in holding that *Davis* governs *all* pre-*Jones* GPS tracking. How *Davis* applies to non-consensual installation before February 2, 2007, when *Garcia* was released, remains an open question here. But with the panel decision in *Katzin* having been vacated, all of the extant appellate precedent is on the side of applying *Davis*. There is legitimate debate about whether precedent from Circuit A could be deemed "binding" (for the purpose of *Davis*) when the search occurs in Circuit B, where the issue remains unresolved. Still, police and the FBI (or the lawyers advising them) often rely on

precedent from one circuit when another has yet to address a question. One can doubt that much deterrence is to be had from telling the police that they are not entitled to rely on decisions issued by several circuits, just because the circuit covering the state in which an investigation is ongoing lacks its own precedent. If the question were whether police who installed a GPS locator, in reliance on Circuit A's precedent, could be ordered to pay damages when, years later, Circuit B disagreed with Circuit A, the answer would be no. It's hard to see why the exclusionary rule should be handled differently. But that's a question for another day.

Brown makes three other arguments, none of which requires extended discussion.

Kevin Arms owned the Jeep in which the GPS unit had been installed. He alerted police one day that Troy Lewis was driving the Jeep to Milwaukee with 10 kilograms of cocaine for Arms and his confederates (including Brown). A GPS device does not reveal a vehicle's contents, but it may have been used to locate the Jeep, which was stopped in Racine. Police found 10 kilograms of cocaine, just as Arms said they would. And Lewis, like Arms, flipped after being caught; he testified against Brown at trial. Brown proposed to cross-examine Lewis about a 1995 conviction; the district judge curtailed this cross-examination under Fed.R.Evid. 403, ruling that it would take the trial too far afield. That was not an abuse of discretion. The right to cross-examine witnesses is not unlimited; it suffices if the judge allows

the accused to explore a witness's background and potential bias. The judge allowed the defense that latitude and acted reasonably in concluding that diverting the trial into an investigation of a mid-1990s drug enterprise, operating eight years before the outset of the conspiracy with which Brown was charged, could confuse the jury. That's an adequate basis for invoking Rule 403. *See, e.g.*, *United States v. Smith,* 454 F.3d 707, 714 (7th Cir.2006).

The second dispute concerns evidence that Brown fled from the police when they tried to arrest him. (The flight was a high-speed car chase, but details do not matter.) The district judge allowed the jury to infer, from that flight, Brown's consciousness of his own guilt. He maintains that he did not know that he was under investigation; if so, it would be inappropriate to infer from the flight any mental state other than unwillingness to be in custody. *See United States v. Russell,* 662 F.3d 831, 850 (7th Cir.2011). But the prosecution introduced evidence that a search warrant had been executed at the residence of Brown's brother Randye the week before, and that during the search the officers said that they were looking for Brown, for whom an arrest warrant had been issued, as part of an investigation into the distribution of cocaine. The jury was entitled to conclude that Brown and his brother were in contact; Brown fled in Randye's car.

Finally, Brown contends that the district judge should not have admitted an affidavit from attorney Jack Rimland attesting that a receipt for $10,000

found in a search of Brown's residence was a business record – in other words, that Rimland had issued the receipt to Brown as payment for legal services. He allows that *if* the receipt was a business record it was admissible under Fed.R.Evid. 803(6) and 902(11), and was relevant to the prosecution's case, but maintains that the affidavit was hearsay and, since Rimland did not testify, violated the confrontation clause of the sixth amendment. (The receipt, by contrast, is not testimonial and is outside the scope of the confrontation clause. On the definition of "testimonial" materials, *see Michigan v. Bryant,* ___ U.S. ___, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). The affidavit likewise was not testimonial, *see United States v. Ellis,* 460 F.3d 920, 923-24 (7th Cir.2006).)

The district judge should not have allowed the jury to see Rimland's affidavit, which in addition to being hearsay was not relevant to any issue in the prosecution. Its only function was to get the receipt into evidence. The prosecutor, the defense attorney, and the judge all appear to have assumed that the jury needed the affidavit in order to decide whether the receipt is a business record. Yet judges, not juries, decide whether evidence is admissible, and for the purpose of that decision the hearsay rule does not apply. *See* Fed.R.Evid. 104(a). The judge should have decided for himself whether the receipt is a business record (which it is) and, having made that decision, allowed only the receipt into the trial record.

Although the affidavit should not have been admitted, the error was harmless precisely because it

served only to pin down the status of the receipt. If the judge had followed Rule 104(a) and used the affidavit outside the jury's presence, the receipt still would have been admitted, for whatever value it had. The affidavit did not make matters worse for Brown and so does not entitle him to a new trial.

AFFIRMED

**United States Court of Appeals**
For the Seventh Circuit
Chicago, Illinois 60604

April 16, 2014

Before

FRANK H. EASTERBROOK, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

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| No. 11-1565<br>UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br>*v.*<br>HENRY R. BROWN,<br>*Defendant-Appellant.* | Appeal from the United States District Court for the Eastern District of Wisconsin.<br>No. 06-CR-327<br>C.N. Clevert, Jr., *Judge.* |

**Order**

(Filed Apr. 16, 2014)

Defendant-appellant filed a petition for rehearing and rehearing en banc on April 1, 2014. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.