

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EMILIO JEAN,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

Attorneys for Petitioner Emilio Jean

QUESTION PRESENTED FOR REVIEW

The Arizona Supreme Court agreed with Petitioner’s contention that law enforcement violated his reasonable expectation of privacy in the warrantless utilization of GPS tracking of a vehicle in which he was a passenger. The Court nonetheless denied Petitioner relief below based on the good-faith exception to the exclusionary rule. *State v. Jean*, 243 Ariz. 331, ¶47 (January 3rd, 2018).

Davis v. United States, held that “when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.” 131 S.Ct. 2419, 2434 (2011). “[W]hen binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities.’ *Id.*, 2429.

This case presents the following question:

What qualifies as “binding appellate precedent” upon which law enforcement may rely when invoking the good-faith exception to the exclusionary rule?

PARTIES TO THE PROCEEDING

Emilio Jean, Petitioner.

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

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

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

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OPINIONS BELOW

The opinion of the Arizona Supreme Court, *State v. Jean*, 243 Ariz. 331, 407 P.3d 524 (2018), which is the subject of this petition, is included in the Appendix as A-1. The opinion of the Arizona Court of Appeals, which was reversed by *Jean, Id.*, is included in the Appendix as A-2.

STATEMENT OF JURISDICTION

On February 17th, 2010, law enforcement, without a warrant, placed a Global Positioning System (GPS) tracking device under the tractor portion of a semi-truck which Petitioner was co-driving across country with the semi's owner. Law enforcement utilized the GPS device for a period of days to monitor the vehicle as it travelled from Arizona to California and back through Arizona- ultimately stopping the vehicle and discovering marijuana in the vehicle's trailer.

Petitioner challenged the warrantless placement of the GPS device pre-trial, but the court upheld the GPS tracking, ruling that Petitioner lacked "standing to argue that he had a reasonable expectation of privacy in a vehicle that he was just a passenger in." (Appendix A-3, Partial Reporter's Transcript, September 20th, 2014.)

A jury ultimately found Petitioner guilty of transporting marijuana and related offenses. Petitioner sought appellate relief with the Arizona Court of Appeals where he asserted that warrantless GPS monitoring violated his Fourth Amendment rights. The Court of Appeals ruled that Petitioner "had no reasonable expectation of privacy in his movements as a passenger or driver of the truck." Appendix A-2, ¶20.

After accepting jurisdiction of Petitioner's request to review the Appellate decision, the Arizona Supreme Court reversed the Appellate Court's ruling and held that Petitioner did have a reasonable expectation of privacy from warrantless GPS monitoring as he travelled across our western states. The Court additionally found, however, that law enforcement acted in good faith in their GPS tracking of Petitioner, thus denying Petitioner relief by refusing to apply the exclusionary rule to Petitioner's case. Appendix, A-1.

Petitioner timely filed this petition, pursuant to Supreme Court Rule 13.1, within 90 days after the Arizona Supreme Court issued its opinion. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

PROVISIONS OF LAW INVOLVED

Fourth Amendment to the U.S. Constitution

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

STATEMENT OF THE CASE

In *State v. Jean, supra*, ¶32, the Arizona Supreme Court held that "passengers travelling with the owner in a private vehicle generally have a reasonable expectation of privacy that is invaded by the government's continually tracking the vehicle through a surreptitious GPS tracking device." In so ruling, the Court distinguished *United States v. Knotts*, 103 S.Ct. 1081 (1983), noting: 1) *Knotts* involved a relatively short-term intermittent beeper monitoring, and thus was not dispositive as to GPS

tracking, *Jean, supra*, ¶28; 2) “GPS monitoring involves materially different technology than did the ‘very primitive’ radio technology used decades ago in *Knotts*”, *Id.* ¶29; 3) GPS monitoring “allows the government to continually gather, store, and mine vast amounts of information at relatively little cost, thereby evading the ordinary checks that “constrain abusive law enforcement practices . . .”, *Id.* ¶30; 4) GPS tracking records all travels “and thus can provide a detailed picture of one’s life”, *Id.*; and 5) “GPS devices do not distinguish between private property and public thoroughfares, continuing to generate data even from locations where police themselves would have no right to be.” *Id.*

Notwithstanding its agreement with Petitioner’s contention that GPS tracking violated his reasonable expectation of privacy, a divided Court in *Jean* refused to grant Petitioner relief, holding that “the good-faith exception applies based on *Knotts*.” *Id.*, ¶41. Petitioner takes issue with the application of the good-faith exception in this case and similar cases.

REASONS CERTIORARI SHOULD BE GRANTED

I.

Review is Warranted as the *Jean* Decision Conflicts With Decisions of Another State Court of Last Resort and a United States Court of Appeals.

Petitioner is aware that the majority of federal circuit courts and state courts of last resort agree with the *Jean* court’s decision that the good-faith exception

precludes application of the exclusionary rule to pre-*Jones*¹ cases. This general trend, however, is not universal.

In *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014), a case strikingly similar to Petitioner's matter, law enforcement placed a GPS device on Adams's vehicle and monitored his travels over a five day period before ultimately stopping the vehicle and finding Adams with a considerable amount of cocaine. The court specifically addressed the government's contention that law enforcement's warrantless placement of the GPS device in Adams's case should be subject to the good-faith exception to the exclusionary rule.

In declining to adopt the government's position, the court quoted *Jones* as follows: “ ‘*Knotts* noted the limited use which the government made of the signals from [the] particular beeper, and reserved the question whether different constitutional principles may be applicable to dragnet-net type law enforcement practices of the type that GPS [tracking] makes possible . . . ’ *Jones*, 132 S.Ct.at 952 n.6 . . . ”. The Adams court, prior to ordering suppression of the evidence against Adams, went on to “conclude *Knotts* and *Karo* did not constitute binding precedent that authorized law enforcement's warrantless actions in this case.” *Adams, supra*, 652, 347.²

¹ *United States v. Jones*, 132 S.Ct. 945 (2015).

² *United States v. Karo*, 104 S.Ct. 3296 (1984), also involved intermittent beeper signals, as opposed to GPS tracking, supplemented by law enforcement observation. The *Karo* Court found the initial placement of a beeper into a car, with the owner's permission did not violate Karo's constitutional rights. Additionally, the court held, under *Knotts*, monitoring of the beeper while on public streets did not run afoul of the Fourth Amendment.

Although preceding the *Davis* decision, and not addressing the term “good-faith exception” directly, the District of Columbia Circuit Court specifically rejected the idea that *Knotts* allowed law enforcement to engage in warrantless GPS tracking. In *United States v. Maynard*, 615 F.3d 544 (2010), the court suppressed evidence procured through law enforcement’s warrantless tracking of a vehicle utilizing GPS for a period of four weeks. In differentiating *Knotts*, the *Maynard* court explained, at 556, 557 :

“[T]he [*Knotts*] Court explicitly distinguished between the limited information discovered by use of the beeper – movement during a discreet journey – and more comprehensive or sustained monitoring of the sort at issue in this case. . . . Most important for the present case, the Court specifically reserved the question whether a warrant would be required in a case involving ‘twenty-four hour surveillance.’” (Internal citations omitted.)

“In short, *Knotts* held that [a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another . . . not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it.” (Internal citations omitted.)

The *Maynard* court approved language from *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195 (2009):

“*Knotts* involved a ‘single trip’ and Court [sic] ‘pointedly acknowledged and reserved for another day the question of whether a Fourth Amendment issue would be posed if twenty-four hour surveillance of any citizen of this country [were] possible.’” Citing *Knotts* at 1081.

“As we have explained, in *Knotts* the Court actually preserved the issue of prolonged surveillance.” *Maynard* at 558.³

The New York Court of Appeals, in *People v. Weaver, supra*, at 440, also a pre-*Davis decision*, emphasized that *Knotts* does not constitute binding precedent which would allow law enforcement to utilize GPS technology to warrantlessly track a vehicle. In suppressing evidence obtained through warrantless GPS tracking, the *Weaver* court detailed the differences between the *Knotts* beeper technology and GPS tracking as follow:

Knotts involved the use of what we must now, more than a quarter century later, recognize to have been a very primitive tracking device. The device was, moreover, used in a focused binary police investigation for the discreet purpose of ascertaining the destination of a particular container of chloroform. And, in this application, during the single trip from the place where the chloroform was purchased to the *Knotts* cabin, the beeper was fairly described by the Court as having functioned merely as an enhancing adjunct to the surveilling officers’ senses; the officers actively followed the vehicle and used the beeper as a means of maintaining and regaining actual visual contact with it. The technology was, in this context, not unconvincingly analogized by the Court to a searchlight, a marine glass, or a field glass.

GPS is a vastly different and exponentially more sophisticated and powerful technology that is easily and clearly deployed and has virtually unlimited and remarkably precise tracking capability. With the addition of new GPS satellites, the technology is rapidly improving so that any person or object, such as a car, may be tracked with uncanny accuracy to virtually any interior or exterior location, at any time regardless of atmospheric conditions. Constant, relentless tracking of

³ Also see *United States v. Ortiz*, 878 F.Supp.2d 515, 541 (2012), explaining, “*Knotts* and *Karo* were decided almost twenty years before the investigation in this case, addressed different technology in a world that used technology very differently, and specifically stated that they did not reach the question of the constitutionality of installing a tracking device on a person’s property to perform surveillance. The Court thus concludes that *Knotts* and *Karo* did not ‘specifically authorize[]’ warrantless GPS installation and tracking, see *Davis*, 131 S.Ct. at 2429, and are thus not ‘binding appellant precedent’ for the purposes of *Davis*”. Additionally, *United States v. Lee*, 862 F. Supp.2d 560, 570 (2012), found, in suppressing fruits of a vehicle search, that no binding appellate precedent justified law enforcement’s warrantless GPS tracking of defendant’s vehicle.

anything is now not merely possible but entirely practicable, indeed much more so than the surveillance conducted in *Knotts*. GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over . . . a practically unlimited time period. The potential for a similar capture of information or ‘seeing’ by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp.

The *Weaver* court noted, at 444-445, that “[t]he placement of the Q-ball [GPS device] and the ensuing disclosure of defendant’s movements over a 65-day period comes within no exception to the warrant requirement, and the *People* do not contend otherwise.”

The majority opinion in *Jean*, on the issue of good-faith exception application, directly conflicts with the holding in *Adams*. Although pre-*Davis* cases, language in *Maynard* and *Weaver* unconditionally demonstrates that each of those courts would not consider *Knotts* as binding precedent under *Davis*. Petitioner respectfully submits that review by this Court is warranted.

II

The Arizona Supreme Court in *Jean* has Decided an Important Federal Question in a Way That Conflicts with a Relevant Decision of this Court.

In *Davis v. United States*, 131 S.Ct. 2419 (2011), this Court discussed and elucidated the good-faith exception to the exclusionary rule. Prior to *Arizona v. Gant*, 129 S.Ct. 1443 (2009), *New York v. Belton*, 101 S.Ct. 2860 (1981), unconditionally allowed police to search the passenger compartment of a vehicle incident to the arrest of its occupant. “[W]hen a policeman has made a lawful custodial arrest of the

occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” *Belton*, at 2864. *Gant* abrogated the *Belton* bright line rule and created a new rule in which an automobile search incident to arrest passes constitutional muster only when “(1) . . .the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains ‘evidence relevant to the crime of arrest.’” *Davis* at 2425, citing *Gant* at 1719.

Davis had been subject to a *Belton* authorized vehicle search two years prior to this Court’s *Gant* decision. This Court rendered its decision in *Gant* during the pendency of Davis’s appeal. The officers in *Davis* had acted in strict compliance with the *Belton* rule and all parties agreed “that the officers’ conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.” *Davis*, at 2428.

The *Davis* Court declined to apply the exclusionary rule, as doing so would have no deterrence on inappropriate police action where, as in *Davis*, “binding appellate precedent specifically *authorize[d]* a particular police practice.” *Davis* at 2429. In her *Davis* concurrence, Justice Sotomayor noted that the *Davis* 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”, and quoted with approval the Eleventh Circuit’s limiting of the good-faith exception to “situations where its ‘precedent on a given point [is] unequivocal.’” *Davis* at 2435.

In contrast to *Belton's* bright line rule that the officers relied on in *Davis*, *United States v. Knotts*, *supra*, left wholly unsettled the constitutionality of prolonged warrantless GPS monitoring. In *Knotts*, the Court held that utilizing a beeper⁴ to augment visual surveillance of a vehicle over a relatively short time period and distance did not infringe on the vehicle occupant's reasonable expectation of privacy. *Knotts* posited to the Court that allowing warrantless beeper tracking would sanction "twenty-four hour surveillance of any citizen of this country . . . without judicial supervision." In answer to this concern, the *Knotts* court stated:

"[I]f such dragnet type law enforcement practice as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Knotts* at 1086, (emphasis supplied.)

Knotts did not create binding appellate precedent authorizing the particular police practice of GPS monitoring. To the contrary, the *Knotts* Court specifically warned law enforcement that twenty-four hour warrantless surveillance such as occurred in *Jean* may well unconstitutionally impinge on a citizen's Fourth Amendment rights. Consequently, the decision in *Jean* violated *Davis's* decision which mandated that the good-faith exception to the exclusionary rule only applies

⁴ "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *Knotts* at 1083. "Beepers require active involvement by a police officer on the street because they only work if an officer with a radio receiver is physically close enough to the beeper to pick up the signal it emits. Beepers also lack the ability to provide location information with pinpoint precision. GPS devices, on the other hand, are much more precise, require fewer resources, and store significantly more data. Indeed, some modern GPS devices can determine location 'within accuracy to within ten inches'. And, GPS devices can store '8,000 to 17,000 data points' per day all with very little active involvement required on the part of law enforcement officers. Zachary C. Bolitho, *Specifically Authorized by Binding Precedent Does Not Mean Suggested by Persuasive Precedent: Applying the Good Faith Exception after Davis v. United States*, 118 W. Va. L. Rev. 643, 666 (2016) (internal citations omitted).

to situations where law enforcement relies on “binding appellate precedent specifically *authori[zing]* a particular police practice.”⁵

In dissenting to the good-faith ruling in *Jean*, Chief Justice Bales succinctly explained why the majority erred in applying the exception:

“[A]pplying the good-faith exception to the exclusionary rule here . . . reads *Davis and Knotts* too broadly and *Jones* too narrowly. . . . *Knotts* was not clearly binding precedent on the issue of whether GPS installation and monitoring constituted an illegal search. . . . In *Jones* . . . the United States Supreme Court recognized that *Knotts* did not resolve the issue of the placement and use of a GPS tracking device. . . . For the good-faith exception to apply, it is insufficient that law enforcement might have reasonably interpreted precedent as supporting the challenged conduct. Instead, ‘*Davis* instructs that law enforcement acts in good faith if ‘binding appellate practice specifically *authorizes* a particular police practice.’ [Internal citations omitted.]

If *Knotts* had authorized GPS tracking, the Court in *Jones* would have had to overrule rather than distinguish *Knotts*. Because neither the United States Supreme Court nor our Court had addressed the propriety of GPS monitoring, no binding appellate precedent specifically authorized the monitoring here, and the State therefore cannot rely on the good-faith exception to admit the evidence. . . .

At bottom, the majority applies the good-faith exception because law enforcement officers might have reasonably interpreted *Knotts* and *Karo* as allowing warrantless GPS surveillance of vehicle travel. That approach misapprehends *Davis* . . .”

⁵ “The officer in *Davis* searched a car incident to the lawful arrest of a recent occupant, and he followed ‘to the letter’ an Eleventh Circuit decision involving a virtually identical fact pattern. The fact patterns were the same, and the legal questions identical. . . . [T]he Supreme Court declared in *Jones* that neither *Knotts* nor *Karo* authorize the warrantless installation and monitoring of GPS vehicle trackers. . . . [T]he Supreme Court has made clear that neither *Knotts* nor *Karo* authorize officers to install and monitor GPS trackers without a warrant. It is, therefore, virtually beyond the realm of possibility to believe that the Supreme Court would view *Knotts* as ‘binding appellate precedent [that] specifically *authorize[d]*’ the installation and monitoring of GPS vehicle trackers.” Bolitho, *supra*, 667, citing *Jones* and *Davis*.

The *Jean* majority applied the good-faith exception to the exclusionary rule in a way that conflicts with this Court's decision in *Davis*; therefore, Jean requests that this Court grant review of Jean's case.

CONCLUSION

The Arizona Supreme Court applied the good-faith exception to the exclusionary rule in a manner which conflicts with the well-reasoned decisions in both the Supreme Court of South Carolina, the New York Court of Appeals and the D.C. Circuit. More importantly, the *Jean* Court decided that the good-faith exception to the exclusionary rule applied to Jean's case in a manner wholly at odds with this Court's decision in *Davis*.

The import of the *Jean* decision is of grave public concern. As modern technology quickly outpaces dated technology and stale law enforcement techniques addressed in older cases, law enforcement should not be guessing whether they may rely on those older cases to justify warrantless conduct. Allowing such law enforcement conduct to remain inconsequential through utilization of the good-faith exception will emasculate the exclusionary rule and ultimately the protections ostensibly guaranteed by the Fourth Amendment. The remedy for this bleak result is to hold reviewing courts to *Davis's* dictate that "binding appellate precedent" must **specifically authorize a particular police practice equivalent to the law enforcement conduct in question.**

Based on the foregoing, Petitioner respectfully requests that this Court accept review of the Arizona Supreme Court's opinion in *Jean*.

Respectfully submitted,

/S/

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

Attorneys for Petitioner Jean