DAVIS, *JONES*, AND THE GOOD-FAITH EXCEPTION: WHY REASONABLE POLICE RELIANCE ON PERSUASIVE APPELLANT PRECEDENT PRECLUDES APPLICATION OF THE EXCLUSIONARY RULE

INTRODUCTION

Suppose officers tracked a vehicle with a GPS device, but without a search warrant, because they relied on the persuasive authority of appellate courts in other circuits that authorized the practice while the issue remained an open question in their own circuit. Further, suppose that the Supreme Court subsequently ruled the practice unconstitutional. Should the evidence obtained through the GPS tracking be excluded? What if the officers also relied on Supreme Court precedent thought to be controlling but later ruled not to be? Would the decision change if officers were following agency procedure or the advice of government attorneys? Would it make a difference if the officer or a group the officer is a part of had demonstrated a pattern of abuse? What about if the defendant was a serial killer who would go free without the evidence?

In *Davis v. United States*, the Supreme Court ruled that the good faith exception to the exclusionary rule applies to objectively reasonable reliance on binding appellate authority that is

subsequently overruled.[1] As Justice Sotomayor pointed out in her concurrence, however, the case failed to address whether the exclusionary rule applies when "the law governing the constitutionality of a particular search is unsettled."[2]

United States v. Jones produced issues raising the questions left open in *Davis* such as those mentioned above in the first paragraph. In January 2012, the Supreme Court ruled in *Jones* that the attachment of a GPS to a vehicle and the subsequent tracking of the vehicle using the GPS constituted a search within the meaning of the Fourth Amendment and required a warrant.[3] The decision, however, did not determine the admissibility of evidence obtained from GPS tracking prior to the *Jones* decision. Many of the investigations that face these admissibility questions involved state and federal agencies from multiple states, expended significant law enforcement resources, spanned several years, and led to arrests that effectively dismantled several multi-million dollar drug operations.

Defendants in these cases contend that the evidence should be excluded, under the exclusionary rule, as a result of an improper search. The government counters that the evidence should be admitted as an exception to the exclusionary rule. In circuits that had binding appellate authority specifically authorizing warrantless GPS attachment and tracking, the evidence falls into an exception under *Davis*. It is unclear, however, how the rule should apply when officers in circuits that had not directly addressed the issue relied on persuasive appellate authority.[4]

In Justice Breyer's dissent in *Davis*, he wrote, "[A]n officer who conducts a search that he believes complies with the Constitution but which . . . falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous 'binding precedent.' Nor is an officer more

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[1] Davis v. United States, 131 S. Ct. 2419, 2429 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.").

[2] *Id.* at 2435 (Sotomayor, J., concurring).

[3] United States v. Jones, 132 S. Ct. 945 (2012), *rev'd sub nom.* United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).

[4] *Davis*, 131 S. Ct. at 2435-36 (Sotomayor, J., concurring).

culpable where circuit precedent is suggestive rather than 'binding.'"[5]

This Comment uses *Jones*, specifically post-*Jones* litigation on pre-*Jones* searches, to explore the scope of the exclusionary rule after *Davis*. It will argue that, given the *Leon* line of cases, the good faith exceptions to the exclusionary rule should be expanded to include situations where officers act in objectively reasonable reliance on persuasive appellant precedent[6] that is later deemed unconstitutional. Such an expansion should include situations where officers believe binding precedent authorizes a practice, but the courts later rule that the precedent was not applicable.[7] It will further suggest a totality of the circumstances balancing approach to determine whether reliance was objectively reasonable.

This Comment, in Part I, discusses the cases that articulate the exclusionary rule and establish the circumstances that qualify under the good faith exception to the rule. It also examines the state of the law prior to *United States v. Jones*. Part II surveys the post-*Jones* challenges to pre-*Jones* searches, and it shows how federal district courts have treated the challenges in order to (1) identify the cases and (2) understand the reasons for the decisions the courts reached. Part III demonstrates that, consistent with the *Leon* line of cases, the precedent is established by non-police actors, and if such reliance is reasonable, police conduct lacks culpability and cannot be deterred. Part IV sets forth a non-exhaustive list of factors for courts to consider under a totality of the circumstances balancing approach, and it also analyzes the post-*Jones* cases in the context of these factors. Part V discusses the impact the expansion could have on the incentive to litigate potential Fourth Amendment claims.

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[5] *Id.* at 2439 (Breyer, J., dissenting).

[6] This can include situations where officers rely on precedent they believe is binding, but then courts later rule the precedent inapplicable and reliance on formerly persuasive precedent becomes no longer valid.

[7] In post-*Jones* challenges to evidence obtained through pre-*Jones* GPS searches, the government has repeatedly argued that *Davis* applies to persuasive authority. This Comment does not embrace that argument, but rather it contends that the good faith exceptions should be expanded to include persuasive appellate authority based on the reasoning of *Davis*.

I. BACKGROUND

A. The Exclusionary Rule

The Court established in *Weeks v. United States*, that evidence obtained in violation of a person's Fourth Amendment rights should be excluded at trial,[8] abandoning the common law practice of admitting relevant evidence despite its illegal origins.[9] For years, the Court treated the rule as implicit in the Fourth Amendment and forbid the introduction of evidence obtained in violation of the Amendment.[10] As late as 1971, the Court "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation."[11]

Beginning in the early 1960s, however, the Court began to reject the view of the rule as implicit in the Fourth Amendment and has consistently rejected that view since the early 1970s, opting instead to treat it as a prophylactic rule. The Court has repeatedly stated that the rule is "not a personal constitutional right,"[12] but rather a "judicially created remedy."[13] It serves "to

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[8] Weeks v. United States, 232 U.S. 383, 398 (1914). While the *Weeks* Court specifically stated that the exclusionary rule only applied to the federal government, the Court extended the rule to apply to state courts in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court.").

[9] United States v. Blue, 384 U.S. 251, 255 (1966).

[10] Olmstead v. United States, 277 U.S. 438, 462 (1928) (upholding the practice of forbidding the introduction of evidence obtained in violation of the Fourth Amendment); *Mapp*, 367 U.S. at 655 (1961) (declaring all illegally obtained evidence inadmissible).

[11] Arizona v. Evans, 514 U.S. 1, 13 (1995).

[12] Stone v. Powell, 428 U.S. 465, 486 (1976).

[13] United States v. Calandra, 414 U.S. 338, 348 (1974); Elkins v. United States, 364 U.S. 206, 217 (1960) (stating that the exclusionary rule was created "to compel respect for the constitutional guaranty"); Herring v. United States, 555 U.S. 135, 141 (2009) ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.").

prevent, not to repair" Fourth Amendment violations.[14] Therefore, the sole purpose of the exclusionary rule is to deter.[15]

B. Exceptions

1. The Good Faith Exception

Given the deterrence rationale, "[t]he fact that a Fourth Amendment violation occurred . . . does not necessarily mean the exclusionary rule applies."[16] In fact, exclusion "has always been [the Court's] last resort, not [its] first impulse."[17] The existence of real deterrent value is a "necessary condition for exclusion"—although not a sufficient condition.[18] "Where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.'"[19] In determining whether to exclude evidence, courts apply a balancing test that weighs the possible benefit of deterrence against the "substantial social costs" of exclusion.[20] In order for suppression to be appropriated, the deterrence benefits of suppression must outweigh the costs.

Beginning in *United States v. Leon*, the Court has recognized several specific exceptions, known collectively as the good faith exception, to the exclusionary rule.[21] The *Leon* Court articulated

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[14] *Elkins*, 364 U.S. at 217; *Stone*, 428 U.S. at 484, 486 ("It is not calculated to redress the injury to the privacy of the victim of the search or seizure."); *see also* Linkletter v. Walker, 381 U.S. 618, 637 (1965) ("[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.").

[15] Davis v. United States, 131 S. Ct. 2419, 2426 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations."); *see also* United States v. Leon, 468 U.S. 897, 909 (1984) (reiterating that the exclusionary rule is meant to deter).

[16] *Herring*, 555 U.S. at 140; *see also* Illinois v. Gates, 462 U.S. 213, 223 (1983) ("[A]pplication of the exclusionary rule was merely a routine act . . . and not considered judgment.").

[17] Hudson v. Michigan, 547 U.S. 586, 591 (2006).

[18] *Id.* at 596; *Calandra*, 414 U.S. at 350 ("[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct."); *Leon*, 468 U.S. at 910.

[19] *Davis*, 131 S. Ct. at 2426-27 (quoting United States v. Janis, 428 U.S. 433, 454 (1976)).

[20] Illinois v. Krull, 480 U.S. 340, 352-53 (1987); *Herring*, 555 U.S. at 141; *Leon*, 468 U.S. at 908 (stating that the cost of exclusion "offends basic concepts of the criminal justice system"); *Davis*, 131 S. Ct. at 2427 ("[S]ociety must swallow this bitter pill . . . only as a 'last resort.'").

[21] *Leon*, 468 U.S. at 920.

an exception when officers obtain evidence while "acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate" but eventually discovered to be invalid.[22] The Court stressed, in its reasoning, that objectively reasonable police conduct cannot be deterred "'unless it is to make him less willing to do his duty'"[23] and that a judge or magistrate, not the officers, make the error in this situation.[24] Applying the same rationale, the Court has since recognized the good faith exception when officers rely on a statute that is later found to be unconstitutional,[25] when officers rely on a negligent recordkeeping error,[26] and when officers rely on binding appellate precedent that is subsequently overruled.[27] In *Herring*, the Court also discussed the culpability of the officers, stating that exclusion acts "to deter deliberate, reckless, or grossly negligent conduct, or . . . recurring or systemic negligence."[28]

2. *Davis v. United States*

In April 2007, police stopped and eventually arrested Stella Owens and Willie Davis. Owens and Davis were handcuffed and placed in police cars. Officers then searched the vehicle and found a revolver in Davis's jacket. After being indicted on a possession charge, Davis filed a motion to suppress the revolver. The court denied the motion, and Davis was convicted.[29]

In denying the motion, the trial court relied on the Eleventh Circuit's interpretation of *New York v. Belton*, which "firmly establish[ed] arresting officers' ability to conduct a contemporaneous warrantless search of a passenger compartment and containers."[30] In

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[22] *Id.* at 900.

[23] *Id.* at 920 (quoting Stone v. Powell, 428 U.S. 465, 540 (White, J., dissenting)).

[24] *Id.* at 921 ("[T]here is no police illegality and thus nothing to deter. It is the magistrate's responsibility."); *Stone*, 428 U.S. at 498 (Burger, J., concurring) ("Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.").

[25] *Krull*, 480 U.S. at 360.

[26] Arizona v. Evans, 514 U.S. 1, 16-17 (1995); Herring v. United States, 555 U.S. 135, 146 (2009).

[27] Davis v. United States, 131 S. Ct. 2419, 2423 (2011).

[28] *Herring*, 555 U.S. at 144.

[29] *Davis*, 131 S. Ct. at 2426.

[30] United States v. Davis, No. 2:07-cr-0248-WKW, 2008 WL 1927377, at *3 (M.D. Fla. Apr. 28, 2008) (quoting New York v. Belton, 453 U.S. 454, 460 (1981) ("[W]hen a

Arizona v. Gant, however, the Court limited *Belton* to apply only when "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or when it is "'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"[31] The Eleventh Circuit subsequently ruled that the search incident to Davis's arrest violated his Fourth Amendment rights, but it affirmed his conviction, failing to apply the exclusionary rule.[32]

The Supreme Court, in *Davis v. United States*, affirmed the Eleventh Circuit, establishing a good faith exception for evidence obtained in objectively reasonable reliance on binding appellate precedent. The court recognized that the Fourth Amendment violation resulted from the error of non-police actors.[33] Police culpability, however, was the central focus of the Court's rationale.[34] The "absence of police culpability doom[ed] Davis's claim."[35]

C. Fourth Amendment GPS Jurisprudence and Jones

1. State of the Law Prior to *Jones*

United States v. Knotts established that monitoring the signals of a beeper on public roads was not a search under the Fourth Amendment.[36] In *United States v. Karo*, the Court further

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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.")), *aff'd*, *Davis*, 131 S. Ct. 2419.

[31] Arizona v. Gant, 556 U.S. 332, 343 (2009) (quoting Thornton v. United States, 541 U.S. 615, 632 (2004)).

[32] United States v. Davis, 598 F.3d 1259, 1268 (11th Cir. 2010).

[33] *Davis*, 131 S. Ct. at 2429 (refusing to "[p]enaliz[e] the officer for the [appellate judges'] error").

[34] George M. Dery III, *"This Bitter Pill": The Supreme Court's Distaste for the Exclusionary Rule in* Davis v. United States *Makes Evidence Suppression Impossible to* Swallow, 23 GEO. MASON U. C.R. L.J. 1, 28 (2012) (asserting that *Davis* shifts to a "singular requirement" that evidence only be excluded when police commit the "most culpable behavior"); Eleanor De Golian, Davis *and the Good Faith Exception: Pushing Exclusion to Extinction?*, 63 MERCER L. REV. 751, 759-60 (2012).

[35] *Davis*, 131 S. Ct. at 2428, 2429 (stating that the Court has "never applied the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct").

[36] 460 U.S. 276, 283-85 (1983) (finding it was not a Fourth Amendment search or seizure because it did not invade a "legitimate expectation of privacy").

established that installation of a beeper device did not constitute a search or seizure.[37] While the Court had not specifically addressed warrantless GPS tracking and installation prior to *United States v. Jones*, *Knotts* and *Karo* were widely considered to be applicable to GPS devices as well.

Between February 2007 and May 2010, the Seventh, Ninth, and Eighth Circuits specifically ruled that warrantless attachment of GPS devices and subsequent tracking using the devices was constitutional.[38] In each of these cases, the courts considered *Knotts* and *Karo* to be controlling. In August 2010, the D.C. Circuit became the first to rule warrantless GPS use unconstitutional.[39] In July 2011, the Fifth Circuit, relying on *Knotts* and the Fifth Circuit case *United States v. Michael*,[40] ruled that warrantless GPS tracking did not constitute a search.[41]

Additionally, recent Supreme Court Fourth Amendment jurisprudence suggested that the GPS tracking was constitutional. In early wiretapping and electronic eavesdropping cases, a search occurred when monitoring resulted from an "unauthorized physical penetration into the premises occupied" by the subject of the search.[42] By contrast, in cases in which no trespass occurred, the Court found that no search occurred.[43] In *Katz v. United States*, the Court questioned whether police conduct "violated the privacy upon which [the defendant] justifiably relied" in determining whether the conduct constituted a search.[44] *Katz* established the reasonable expectation of privacy test and stated that "the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine

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[37] 468 U.S. 705, 713 (1984).

[38] United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007); United States v. Pineda-Moreno, 591 F.3d 1212, 1216 (9th Cir. 2010), *vacated*, 132 S. Ct. 1533 (2012) (after the Court decided *Jones*); United States v. Marquez, 605 F.3d 604, 609-10 (8th Cir. 2010).

[39] United States v. Maynard, 615 F.3d 544, 568 (D.C. Cir. 2010), *aff'd on other grounds sub nom.*, United States v. Jones, 132 S. Ct. 945 (2012).

[40] 645 F.2d 252, 259-60 (5th Cir. 1981).

[41] United States v. Hernandez, 647 F.3d 216, 221 (5th Cir. 2011).

[42] Silverman v. United States, 365 U.S. 505, 509 (1961).

[43] *See* Olmstead v. United States, 277 U.S. 438, 466 (1928); Goldman v. United States, 316 U.S. 129, 135 (1942).

[44] 389 U.S. 347, 353 (1967).

there enunciated can no longer be regarded as controlling."[45] Following *Katz*, the Court repeatedly recognized the *Katz* holding as overruling the trespass-based rule.[46] Under the reasonable expectation of privacy test, warrantless electronic surveillance has generally been constitutional if the same evidence could have been obtained constitutionally through physical surveillance.[47]

2. *United States v. Jones*

In late June 2011, the Supreme Court granted certiorari to hear *United States v. Maynard*.[48] Antoine Jones and Lawrence Maynard appealed their convictions after a joint trial for trafficking narcotics.[49] As part of the investigation, agents attached a GPS device, without a warrant,[50] to a vehicle driven by Jones, but registered to his wife. Agents tracked the movements using the device for twenty-eight days. Relying on *Knotts*, the trial court allowed the GPS evidence that had been obtained, except evidence obtained while the vehicle was at the Jones's residence.[51] The evidence connected Jones to the stash house where officers found $850,000 in cash, ninety-seven kilograms of cocaine, and

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[45] *Id.* at 353.

[46] *See, e.g.*, United States v. Karo, 468 U.S. 705, 713 (1984) ("[A]n actual trespass is neither necessary nor sufficient to establish a constitutional violation."); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (stating that *Katz* "repudiate[ed]" the trespass doctrine).

[47] Kevin Emas & Tamara Pallas, United States v. Jones*: Does* Katz *Still Have Nine Lives?*, 24 ST. THOMAS L. REV. 116, 132 (2012) ("Visual surveillance . . . by the police would have revealed the same information") (Citing United States v. Knotts, 460 U.S. 276, 281 (1983)).

[48] United States v. Jones, 131 S. Ct. 3064 (2011) (granting certiorari *sub. nom.* to hear United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).

[49] The joint trial was addressed on appeal by the D.C. Circuit Court in *Maynard*, 615 F.3d at 563, 565, *aff'd on other grounds sub nom. Jones*, 132 S. Ct. 945.

[50] The district court had actually granted a warrant to attach the device to the vehicle, but the warrant authorized the device to be installed in the District of Columbia within ten days. United States v. Jones, 451 F. Supp. 2d 71, 88 (D.D.C. 2006) The device was installed in Maryland on the eleventh day, so the government argued that placement was proper because Jones did not have a reasonable expectation of privacy in the whereabouts of his vehicle. *Id.*

[51] *Id.* at 88 (agreeing with the government to a certain point by looking to *United States v. Knotts*, 460 U.S. 276, 281 (1983), which concluded that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another").

one kilogram of cocaine base. The jury found Jones guilty, and the court sentenced him to life imprisonment.[52]

The D.C. Circuit Court of Appeals reversed the convictions, finding the warrantless use of the GPS device violated the Fourth Amendment.[53] Applying *Katz*, the D.C. Circuit found that the evidence was not actually exposed to the public; therefore, Jones had a reasonable expectation of privacy.[54]

The Supreme Court concluded that installation of a GPS device and tracking the vehicle using GPS was a Fourth Amendment search, which required a warrant.[55] In doing so, however, the Court, with Justice Scalia writing, did not rely on the same reasoning as the D.C. Circuit. Rather, it found the installation and subsequent tracking violated the Fourth Amendment through application of the trespass-first test, which, before this case, was widely thought to have been overruled by *Katz*.[56] The Court found that, because the government physically intruded on Jones's property, the installation violated his expectation of privacy.[57] The Court stated that "the *Katz* reasonable-expectation-of-privacy test has been *added to,* not *substituted for,* the common-law trespassory test."[58]

Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, concurred in the judgment, concluding that prolonged GPS monitoring of a vehicle violates a person's reasonable expectation

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[52] The guilty verdict was obtained in the second trial against Jones, after the first trial produced a hung jury. *Jones*, 132 S. Ct. at 949.

[53] *Maynard*, 615 F.3d at 568. The court denied the government's request for an en banc rehearing. 625 F.3d 766 (D.C. Cir. 2010). Four judges dissented to the denial for rehearing, stating that the decision was inconsistent with every other circuit and with controlling Supreme Court precedent. *Id.* at 767 (Sentelle, C.J., dissenting).

[54] The government cited the statement derived from *Knotts* in *United States v. Gbemisola*, stating that "[t]he decisive issue . . . is not what the officers saw but what they could have seen." United States v. Gbemisola, 225 F.3d 753, 759 (D.C. Cir. 2000). However, in *Maynard*, the court rejected the government's interpretation, saying whether information is exposed to the public, as required to diminish the expectation of privacy under *Katz*, "depends not upon on the theoretical possibility, but upon the actual likelihood, of discovery by a stranger." *Maynard*, 615 F.3d at 560. Neither the court nor Maynard's attorneys argued the trespass-based test.

[55] *Jones*, 132 S. Ct. at 949.

[56] Kevin Emas & Tamara Pallas, *supra* note 47, at 147.

[57] *Jones*, 132 S. Ct. at 953.

[58] *Id.* at 952.

of privacy.[59] While concurring in the judgment, Alito referred to the holding as a decision "based on 18th-century tort law" that was "unwise," "highly artificial," and having "little if any support in current Fourth Amendment case law."[60] According to the concurrence, the *Jones* holding revived an unpopular old approach that *Katz* "repudiate[ed]" and "did away with."[61]

II. POST-*JONES* LITIGATION OF PRE-*JONES* SEARCHES

The *Jones* decision left in jeopardy the admissibility of evidence obtained from GPS tracking. A number of cases on the issue of GPS tracking were still undecided when the *Jones* decision was reached. In light of the decision, defendants across the country filed motions to suppress GPS evidence against them. In the four circuits that had specifically ruled that GPS evidence did not violate the Fourth Amendment, trial courts, relying on *Davis*, denied the motions.[62]

Where appellate courts had not specifically addressed the issue at the time of the attachment, trial courts are splitting as to whether to exclude or allow the evidence, with at least five excluding and at least five admitting.[63] In each of these cases,

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[59] *Id.* at 964 (Alito, J., concurring).

[60] *Id.* at 957-58.

[61] *Id.* at 959-60.

[62] United States v. Heath, No. CR12-4-H-DWM, 2012 WL 1574123 (D. Mont. May 3, 2012); United States v. Aguilar, No. 4:11-cr-298-BLW, 2012 WL 1600276 (D. Idaho May 7, 2012); United States v. Amaya. 853 F. Supp. 2d 818 (N.D. Iowa 2012). This is assuming that the appellate court had ruled prior to the search. There is an exception in some cases in which the trial court did not rely on *Davis* in circuits with binding precedent because the search took place before the court had addressed the issue.

The trial court, in *United States v. Shelburne*, applied *Davis* despite the fact that the Sixth Circuit, where the court was located, had not specifically allowed warrantless GPS attachment and tracking. The court reasoned that because the search occurred in Indiana, which is in the Seventh Circuit, the search was constitutional based upon the Seventh Circuit's precedent regarding warrantless GPS attachment and tracking. No. 3:11-cr-156-S, 2012 WL 2344457, at *4 (W.D. Ky. June 20, 2012).

In another case, the Eleventh Circuit ruled that *United States v. Michael*, the beeper case decided by the former Fifth Circuit, was binding and controlling at the time of the search, thus, *Davis* applied. United States v. Rosas-Illescas, 872 F. Supp. 2d 1320, 1327 (N.D. Ala. 2012).

[63] There is also at least one case, *United States v. Baker*, where the defendant appealed based on *Jones* in the Tenth Circuit and the government argued for a good faith exception. No. 11-20020-01-CM, 2011 WL 6118603, at *2 (D. Kan. Dec. 7, 2011); Brief of Appellee at 25-26, *Baker*, 2011 WL 6118603 (No. 12-3023).

defendants filed motions to suppress GPS evidence in circuits that did not have precedent specifically allowing warrantless GPS attachment and tracking of vehicles at the time the search in question occurred. All of the decisions were reached in federal district courts.

A. Cases that Suppressed GPS Evidence

In at least five cases, *United States v. Lujan*,[64] *United States v. Katzin*,[65] *United States v. Ortiz*,[66] *United States v. Lee*,[67] and *United States v. Robinson*,[68] courts suppressed the GPS evidence. All of the cases except *Robinson* involved possession or distribution of illegal drugs. Lujan was charged with conspiracy to possess with intent to distribute cocaine hydrochloride, and he sought to suppress over $85,000 worth of currency.[69] Katzin faced charges of possession of Schedule II narcotics with intent to distribute in addition to pharmacy burglary,[70] and he sought to suppress GPS data from a device affixed to his car that would place him at the scene of the burglary. Ortiz was charged with distribution of and conspiracy to distribute five kilograms or more of cocaine, and he moved to suppress $2.3 million in cash that was positive for narcotics as well as data and observations.[71] Lee moved to suppress over 150 pounds of marijuana after being indicted on related charges.[72] Lastly, Robinson sought to suppress data and observation evidence that led to him facing charges for wire fraud and federal program theft.[73]

Each of the cases focused extensively, and some almost exclusively, on the language of *Davis* requiring that precedent be

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[64] United States v. Lujan, No. 2:11CR11–SA, 2012 WL 2861546 (N.D. Miss. July 11, 2012).

[65] United States v. Katzin, No. 11–226, 2012 WL 1646894 (E.D. Pa. May 9, 2012).

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

[67] United States v. Lee, 862 F. Supp. 2d 560 (E.D. Ky. 2012).

[68] United States v. Robinson, No. S2–4:11CR00361AGF(DDN), 2012 WL 4893643 (E.D. Mo. Oct. 15, 2012).

[69] United States v. Lujan, No. 2:11CR11-SA, 2012 WL 2861546, at *1 (N.D. Miss. July 11, 2012).

[70] Katzin faced charges along with two codefendants. *Katzin*, 2012 WL 1646894, at *1.

[71] *Ortiz*, 878 F. Supp. 2d at 525.

[72] *Lee*, 862 F. Supp. 2d at 563.

[73] *Robinson*, 2012 WL 4893643 at *10.

binding in order for the good faith exception to apply.[74] The court, in *Ortiz*, wrote "*Davis* does not refer to persuasive or well-reasoned precedent, permit reliance on a growing trend in decisions, or purport to apply to situations in which a plurality, majority, or even overwhelming majority of circuits agree. Instead, *Davis* states, repeatedly, that it applies to *binding* precedent."[75] *Robinson* expressed a very similar opinion, adding that "[t]he language of *Davis* is narrow, and quite specific."[76]

Several of the courts expressed concerns that could arise from extending the exception beyond binding authority. For example, multiple courts expressed the concern that applying the exception in the absence of binding authority could "effectively eviscerate the exclusionary rule."[77] The court, in *Katzin*, acknowledged the decision of *United States v. Leon*[78] and even conceded that "an argument could be made . . . that the more general language found in *Davis* . . . would allow for individualized determination" of objective reasonableness in each specific case.[79] It determined, however, that such an interpretation of *Davis* posed too great a threat to the exclusionary rule.

Courts also expressed concern that expanding the good faith exception would allow officers to pick and choose which law to follow. According to the court in *Lee*, excluding evidence can "deter the officer who picks and chooses which law he wishes to follow" from "guessing at what the law might be."[80] *Katzin* further stated that allowing such behavior would "encourage law enforcement to

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[74] *Lujan*, 2012 WL 2861546, at *3; *Katzin*, 2012 WL 1646894, at *3-4; *Ortiz*, 878 F. Supp. 2d at 539-40; *Lee*, 862 F. Supp. 2d. at 569; *Robinson*, 2012 WL 4893643, at *14.

[75] *Ortiz*, 878 F. Supp. 2d at 539-40.

[76] *Robinson*, 2012 WL 4893643, at *14.

[77] United States v. Katzin, No. 11-226, 2012 WL 1646894, at *9 (E.D. Pa. May 9, 2012); *Lee*, 862 F. Supp. 2d at 569. Also, the *Lujan* court did not specifically discuss evisceration of the exclusionary rule, but the court's opinion almost exclusively relied on *Katzin*. United States v. Lujan, No. 2:11CR11-SA, 2012 WL 2861546 (N.D. Miss. July 11, 2012).

[78] The next section of this Comment discusses *United States v. Leon* in detail. *See infra* Part II.B.

[79] *Katzin*, 2012 WL 1646894, at *9.

[80] United States v. Lee, 862 F. Supp. 2d 560, 569 (2012); see Davis v. United States, 131 S.Ct. 2419, 2435 (2011) (Sotomayor concurrence) ("[W]hen police decide to conduct a search or seize in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations.").

beg forgiveness rather than ask permission in ambiguous situations involving basic civil rights."[81] *Ortiz* articulated the same point by stating that when "different circuits are doing different things . . . then you can't possibly think that this is good faith, it's willful blindness."[82]

These courts did recognize, however, several factors that might suggest the good faith exception. Both *Lee* and *Ortiz* acknowledged that the officers who conducted the search acted in strict compliance with DEA policy. In fact, the court in *Lee* wrote that the officer acted "just as any police officer should"[83] and *Ortiz* found that the agent "may well have believed he was acting lawfully."[84] *Ortiz* also recognized the "unanticipated rationale of the *Jones* decision"[85] and briefly mentioned Justice Breyer's dissent in *Davis*.

B. Cases that Admitted the Evidence Under the Good Faith Exception

In at least five cases, *United States v. Leon*,[86] *United States v. Baez*,[87] *United States v. Oladosu*,[88] *United States v. Ford*,[89] and *United States v. Rose*,[90] courts admitted GPS evidence under the good faith exception. *Leon*, *Rose*, and *Oladosu* involved possession and distribution of illegal drugs. Leon was charged with possessing methamphetamine with intent to distribute and sought to suppress eleven pounds of methamphetamine.[91] Both Rose and Oladosu were charged with conspiracy to possess with intent to distribute 100 grams or more of heroin. Oladosu sought to

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[81] *Katzin*, 2012 WL 1646894, at *9

[82] United States v. Ortiz, No. 11-251-08, 2012 WL 2951391, at *21 (E.D. Pa. July 20, 2012).

[83] United States v. Lee, No. 11-65-ART, 2012 WL 1880621, at *6 (E.D. Ky. May 22, 2012).

[84] *Ortiz*, 2012 WL 2951391, at *24.

[85] *Id.* at *21.

[86] United States v. Leon, 856 F. Supp. 2d 1188 (D. Haw. 2012).

[87] United States v. Baez, 878 F. Supp. 2d 288 (D. Mass. 2012).

[88] United States v. Oladosu, 887 F. Supp. 2d 437 (D. R.I. 2012).

[89] United States v. Ford, No. 1-11-CR42, 2012 WL 5366049 (E.D. Tenn. Oct. 30, 2012).

[90] United States v. Rose, 11-10062-NMG, 2012 WL 4215868 (D. Mass. Sept. 14, 2012).

[91] *Leon*, 856 F. Supp. 2d at 1189.

suppress 761 grams of heroin.[92] Rose, who was also charged with conspiracy to possess with intent to distribute 500 grams or more of cocaine sought to suppress tracking data, surveillance observations, intercepted conversations and physical evidence, without listing specific evidence.[93]

Baez was charged in multiple instances of arson and sought to suppress tracking data that lead police to locate him near one of the fires, as well as matches, bottles with gasoline residue, and numerous arson materials.[94] Ford faced charges on numerous crimes resulting from a store robbery in which a woman was sexually assaulted. He sought to suppress jewelry, a ski mask, gloves, a cell phone, and two semi-automatic weapons, all of which matched items worn or used in the robbery.[95]

A focus on the culpability discussion in *Davis* emerged as the most common theme among these cases. Each of the five cases discussed *Davis*'s culpability language, with most of them citing it as the ultimate reason for the decision to admit the evidence.[96] In *Leon*, for example, the court wrote that its determination must be "whether the agents exhibited 'deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.'"[97] *Oladosu* noted that "as much as defendant[s] . . . latch[] on to the term binding appellant precedent as suggesting a limitation on the good faith rule, it was the 'absence of police culpablity' that 'doom[ed] Davis's claim.'"[98]

In relying on the *Davis* culpability language, the courts in *Leon* and *Rose* emphasized Justice Breyer's dissent in *Davis*.[99] Both quoted the section of the dissent in which Justice Breyer wrote, "[I]f the Court means what it now says" culpability would be determinative, and "an officer is no more culpable when

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[92] *Oladosu*, 887 F. Supp. 2d at 441.

[93] *Rose*, 2012 WL 4215868, at *3.

[94] United States v. Baez, 878 F. Supp. 2d 288, 292-93 (D. Mass. 2012).

[95] United States v. Ford, No. 1:11-CR-42, 2012 WL 5366049, at *3 (E.D. Tenn. 2012).

[96] United States v. Leon, 856 F. Supp. 2d 1188, 1193-95 (D. Haw. 2012); *Rose*, 2012 WL 4215868, at *4; *Ford*, 2012 WL 5366049, at *10-11.

[97] *Leon*, 856 F.vSupp. 2d 1888, 1193 (quoting Davis v. United States, 131 S.Ct. 2419, 2427 (2011)).

[98] United States v. Oladosu, 887 F. Supp. 2d 437. 445 (D. R.I. 2012) (quoting United States v. Davis, 131 S.Ct. 2419, 2428 (2011)).

[99] *Leon*, 856 F. Supp. 2d at 1194-95; *Rose*, 2012 WL 4215868, at *5.

precedent is "suggestive rather than binding."[100] The court in *Rose* wrote, "This Court presumes that the Supreme Court meant what it said."[101]

The second most common argument among the courts was a rejection of a strict reading of the binding language in *Davis*. *Baez*, *Oladosu*, and *Ford* specifically articulated the argument, while it is arguably implicit in the other cases.[102] Although Baez argued that *Davis* should be limited to its precise holding, the trial court considered that interpretation "entirely too static an approach"[103] and instead "appli[ed] the teachings of *Davis*."[104] The court further stated that *Davis* demonstrates the Court's intention to severely limit the application of the exclusionary rule.[105] Similarly, the court in *Ford* "believe[d] a rule limiting *Davis* to binding precedent ignores the underlying rationale in *Davis* and *Herring*."[106] The Court in *Oladosu* opined that interpreting *Davis* as creating a strict limitation to cases of binding precedent results in a "rigid reading" that "cannot withstand scrutiny."[107]

The courts emphasized several other arguments or factors supporting their decisions to admit evidence. *Leon* and *Rose* recognized reliance on *Knotts* as reasonable, with *Leon* stating that "the agents were certainly justified in relying on *Knotts* rationale"[108] and *Rose* calling such reliance "a common-sense reading of Supreme Court doctrine."[109] *Rose* raised two additional concerns that if officers have to wait until a circuit unequivocally rules on a specific issue, it would sometimes mean being "forced to

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[100] *Davis*, 131 S.Ct. at 2439 (Breyer dissent) (internal quotation marks deleted).

[101] *Rose*, 2012 WL 4215868, at *5.

[102] *Leon*, 856 F. Supp. 2d at 1193; *Rose*, 2012 WL 4215868, at *5.

[103] United States v. Baez, 878 F. Supp. 2d 288, 294 (D. Mass. 2012).

[104] *Baez*, 878 F. Supp. 2d at 288.

[105] *Id.* at *8.

[106] United States v. Ford, No. 1:11-CR-42, 2012 WL 5366049, at *11 (E.D. Tenn. Oct. 30, 2012) ("The Court did not simply hold law enforcement acted reasonably by relying on binding law, but also acknowledged the officer's reasonable reliance rendered his conduct inculpable.").

[107] United States v. Oladosu, 887 F. Supp. 2d 437, 444 (D. R.I. 2012).

[108] United States v. Leon, 856 F. Supp. 2d 1188, 1193 (2012). The court further stressed that the Ninth Circuit (this case was in the Ninth Circuit), also relying on *Knotts*, found GPS tracking unconstitutional in *Pineda Moreno* after the search in *Leon*. *Id.*

[109] United States v. Rose, No. 11-10062-NMG, 2012 WL 4215868, at *4 (D. Mass. Sept. 14, 2012).

wait decades to implement new technology,"[110] and that, under a strict reading of the binding language in *Davis*, courts would spend too much time trying to determine whether a set of facts is "sufficiently analogous" to be considered binding.[111] Several courts also expressed concerns that applying the exclusionary rule could result in making officers unduly cautious.[112]

III. THREE REASONS WHY THE GOOD-FAITH EXCEPTION EXTENDS TO PERSUASIVE APPELLANT PRECEDENT

A. Officers Relying on Persuasive Authority Act in Reliance on Non-police Actors

One of the central themes of jurisprudence regarding the exclusionary rule is that the rule is not directed at non-police actors. Every good faith exception, with the possible exception of *Herring*, has involved law enforcement reliance on non-police actors. In *Leon,* the Court stated that the rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates."[113] The Court in *Krull* included that "legislators, like judicial officers, are not the focus of the rule."[114] The Court asserts that judges and legislators lack inclination to intentionally ignore Fourth Amendment protections as the rationale for not punishing their errors with exclusion.[115] *Davis* specifically stated that the same rule should apply to mistakes made by appellate judges.[116]

Consistent with the other good faith exceptions, officers relying on persuasive appellant authority act in reliance on non-police actors. As in *Davis*, appellate judges are responsible for the errors in these cases. While precedent from other circuits may not

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[110] *Id.* at *5 ("That the First Circuit had not yet weighed in at the time of the GPS installation and monitoring does not compel a contrary result. If it did, police in some jurisdictions would be forced to wait decades to implement new technology or risk suppression even where, as here, the warrantless use of the technology was universally considered to be constitutionally permissible. Such a bright-line rule would also be unworkable in practice").

[111] *Id.*

[112] *See, e.g.*, *Oladosu*, 887 F. Supp. 2d at 445 (quoting United States v. Leon, 469 U.S. 897, 909, 919 (1984)).

[113] *Leon*, 468 U.S. 897.

[114] Illinois v. Krull, 480 U.S. 340, 349-50 (1987).

[115] *Leon*, 468 U.S. at 916; *Krull*, 480 U.S. at 351-52.

[116] Davis v. United States, 131 S.Ct. 2419, 2429 (2011).

be binding authority, officers may rely on the opinion of appellate judges in other circuits for several reasons. When answering questions of federal law, as in these cases, appellate judges are subject to and interpret the same law regardless of jurisdiction. While law enforcement officers are not expected to be experts in the intricacies of federal law, appellate judges are recognized as legal experts who are constitutionally charged with the power to interpret the law.[117] They are also neutral, detached actors and, as such, are sometimes the only source for officers to find an unbiased opinion on a question of law that may not have been specifically addressed in their circuit.

When the Supreme Court subsequently overturns a case, it disagrees with the rationale of the lower court's interpretation of the law in accordance with existing precedent. The judges committed error, regardless of the jurisdiction from which the opinion originated. In such a case, law enforcement relied on the judges' expert interpretation of the law in the same manner as if the decision had been binding. Therefore, exclusion would punish law enforcement for the judges' errors.

B. Officers Relying on Persuasive Authority Lack the Requisite Culpability for Application of the Exclusionary Rule

Recent Supreme Court cases have emphasized a focus on the culpability of law enforcement in determining whether the exclusionary rule should apply. "The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue."[118] "In twenty-seven years of practice under *Leon's* good faith exception, we have never applied the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct."[119] Rather, the rule is applied "when the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights."[120]

Some argue that officers act culpably when relying on persuasive appellate authority from another circuit when circuits are split. The defendant in *Ortiz* argued that "where a law

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[117] United States v. Lee, 862 F. Supp. 2d 560, 568 (E.D. Ky. 2012).

[118] *Davis*, 131 U.S. at 2427 (internal quotation marks omitted).

[119] *Id.* at 2429.

[120] *Id.* at 2427.

enforcement agent knows that different circuits are doing different things . . . then you can't even possibly think that it is good faith, it's willful blindness."[121] That argument may be true if reliance is unreasonable.

Officers acting in objectively reasonable reliance on persuasive authority, however, exhibit no greater culpability than officers relying on binding appellate authority. Justice Breyer expressed this sentiment in his dissent to *Davis*, in which he said, "But an officer who conducts a search that he believes complies with the Constitution but . . . falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous 'binding precedent.' Nor is an officer more culpable where circuit precedent is simply suggestive rather than 'binding,' [or] where it only describes how to treat roughly analogous instances."[122]

While Justice Breyer wrote against the ruling reached by the majority in *Davis*, the majority did reach that decision, thus becoming law. Clearly, this interpretation of the rationale of the now existing law in *Davis*, extends to instances of non-culpable police conduct relying on persuasive authority.

C. Conduct of Officers Relying on Persuasive Authority Cannot be Deterred

In recent cases expanding the good faith exception, the Court has emphasized that "the [exclusionary] rule's sole purpose . . . is to deter future Fourth Amendment violations."[123] "If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted ."[124]

When officers act in objectively reasonable reliance on persuasive authority, their conduct cannot be deterred. When the factors discussed later combine such that officers feel certain or almost certain that conduct falls within the requirements of the law, they will perform their duty in investigating potential

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[121] United States v. Ortiz, 878 F. Supp. 2d 515 (E.D. Pa. 2012) (internal quotation marks omitted).

[122] *Davis*, 131 S. Ct. at 2439 (dissenting opinion).

[123] *Id.*; *see also* Herring v. United States, 555 U.S. 135, 141 (2009); United States v. Leon, 468 U.S. 897, 909 (1984); Elkins v. United States, 164 U.S. 206, 217 (1960).

[124] United States v. Janis, 428 U.S. 433, 454 (1976); *Davis*, 131 S. Ct. at 2426-27.

criminal activity. The only way to deter officers in this type of situation would have the additional effect of deterring "objectively reasonable law enforcement activity," in which case the exclusionary rule does not apply.[125] As a matter of safety and public policy, courts do not want to take action that would hinder the willingness of officers to perform objectively reasonable police work. The public has a great interest in preventing the social harm that results if officers are discouraged from "act[ing] as a reasonable officer would and should act" in "doing his duty."[126]

IV. WHEN IS RELIANCE ON PERSUASIVE APPELLANT PRECEDENT REASONABLE—A MULI-FACTOR APPROACH

Courts have suggested several legal standards for determining when evidence gathered in reliance on persuasive authority but later deemed unconstitutional, can be admitted under an exception to the exclusionary rule. Two potential bright line rules that favor exclusion would be (1) to exclude evidence when precedent in the governing circuit does not address the issue regardless of the treatment in other circuits and (2) to exclude evidence when contrary precedent exists in any circuit. The three district courts that found an exception to the rule in post-*Jones* cases applied three different approaches. In *Leon,* the court found the officers' conduct to have been objectively reasonable based on judicial precedent at the time yet failed to state a rule.[127] In *Baez,* the court created a rule that allows law enforcement to rely on a "substantial consensus among precedential courts."[128] In *Oladosu*, the court suggested an approach that would conduct an analysis of the conduct in the context of the judicial landscape at the time of the violation on a case-by-case basis.[129]

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[125] *Leon*, 468 U.S. at 918-19.

[126] *Id.* at 920.

[127] United States v. Leon, 856 F.Supp. 2d 1188, 1193-95 (D. Haw. 2012) ("Given the state of the law in 2009, the court simply finds no sufficiently culpable conduct by the agents.").

[128] United States v. Baez, 878 F. Supp. 2d 288, 288 (D. Mass. 2012).

[129] United States v. Oladosu, 887 F. Supp. 2d 437, 447 (D. R.I. 2012) ("The better approach in this Court's view is to conduct an analysis of whether law enforcement relied in good faith on judicial precedent, which in turn requires a case-by-case assessment of the legal landscape at the time of the Fourth Amendment violation at issue.").

Both *Leon* and *Oladosu* rightly evaluated the legal landscape at the time of the search, but both are overly vague in that they fail to state a rule or suggest a legal framework for other courts considering a similar issue. The "substantial consensus" requirement in *Baez* provides a more concrete method of analysis, but the analysis of the trial court in *Oladosu* indicates that the existence of contrary authority in one circuit destroys the consensus as articulated in *Baez*, which would make it the same as the second bright-line rule. In some circumstances, however, other factors can compound to make conduct objectively reasonable even when contrary authority exists in one circuit.

The preferable standard would simply continue to ask if a reasonable, well-trained officer would have believed the search was legal. To answer that question, this analysis will (1) suggest a balancing test approach consistent with the balancing test courts apply in any decision of whether to exclude evidence due to a Fourth Amendment violation that will consider the totality of the circumstances contributing to each side of the balancing test, will (2) suggest a thorough but non-exhaustive list of factors that courts should consider in balancing based on the totality of the circumstances, and will (3) apply the analysis to the post-*Jones* challenges to pre-*Jones* searches discussed in Part III.

A. Balancing Test Considering the Totality of the Circumstances

While bright lines rules are often preferable for the purposes of clarity and consistency among courts, courts should apply the same balancing test approach in cases involving reliance on persuasive authority as in all other cases questioning whether to apply the exclusionary rule. The deterrence benefits of exclusion should be weighed against the substantial social harm that results from exclusion. To adequately apply such a balancing test, the totality of relevant circumstances should be considered. Given a totality of the circumstances approach, all relevant factors cannot be articulated or even foreseen. Several factors, however, will consistently be crucial to a court's analysis in cases involving reliance on persuasive authority.

B. Factors to be Considered

1. Legal Landscape at the Time of the Search

In each case, courts should consider the state of the law as it existed at the time of the search in question in determining whether to admit or exclude evidence. Aditionally, courts may consider the accepted rationale behind existing precedent, whether the Supreme Court had already granted certiorari to rule on the issue in question, and other factors that may be pertinent in a particular case.

a. Substantial Consensus Among Precedential Courts at the Time of the Search

Consensus among precedential courts should be considered as the primary but not controlling factor. If multiple circuits have addressed a question of law and unanimously agreed as to the outcome, it should create a strong presumption that reliance on the appellate courts' decisions is objectively reasonable. If only one circuit has ruled on the issue, however, in the absence of other factors, that decision creates no such presumption.

A circuit split prevents the presumption of objective reasonableness based strictly on the consensus among precedential courts, but it should not, as some of the post-*Jones* cases suggest, automatically doom the chances of having evidence admitted. Rather, a court may still admit the evidence if it finds that a substantial number of the subsequent factors support the government's case such that the conduct was still objectively reasonable. When contrary authority exists in multiple circuits, however, a scenario in which officers acted reasonably is difficult to imagine.

b. Existence of Authority Thought to Control but Distinguished by the Supreme Court

All four of the circuits[130] that ruled GPS installation and tracking of a vehicle was not a search, determined that the cases

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[130] United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007); United States v. Pineda-Moreno, 591 F.3d 1212, 1216 (9th Cir. 2010), *vacated*, 132 S. Ct. 1533 (2012)

were bound by *Knotts* and *Karo*. When binding authority is reasonably thought to control, the courts should consider that authority as a factor. The authority must not be simply analogous, but must be reasonably thought to control the particular conduct so that it is in keeping with the *Katz* rule that a search without a warrant "is per se unreasonable."[131]

c. Combination of Substantial Consensus and Authority Thought to Control

When the combination of a substantial consensus among precedential courts and binding authority that was thought to control is applicable to a particular case, it provides a significant boost to the government's claim.

2. Expert Legal Opinions

This factor is very similar to consideration of the law at the time of the search except that it extends beyond the opinions of precedential courts to include other legal experts. If a substantial portion of legal experts, including the opinions of judges, professors, and others who possess special legal knowledge, agreed, prior to the Court decision, that the police conduct was constitutional, courts should consider that as another factor.

3. Reliance on Advice from Attorneys

In several post-*Jones* cases, the government offers that the officers relied on the advice of government attorneys as a reason for applying the good faith exception.[132] If the good faith exception applies to reliance on another officer's negligent recordkeeping error, the government argues that reliance on the objectively reasonable understanding of a government attorney trained in application of Fourth Amendment law is much more reasonable.

(after the court decided *Jones*); United States v. Marquez, 605 F.3dd 604, 609-10 (8th Cir. 2010); United States v. Hernandez, 647 F.3d 216, 221 (5th Cir. 2011).

[131] Katz v. United States, 389 U.S. 347, 357 (1967).

[132] *See, e.g.*, United States v. Robinson, No. S2-4:11CR00361AGF(DDN), 2012 WL 4893643, at *33 (E.D. Mo. Oct. 15, 2012); United States v. Katzin, No. 11-226, 2012 WL 1646894, at *7 (E.D. Pa. May 9, 2012); United States v. Oladosu, 887 F. Supp. 2d 437, 439 (D. R.I. 2012).

The problem with this approach is that prosecuting attorneys, while non-police actors, are not detached and neutral but are often involved in the investigations and always part of the same "team" as the officers. Recognizing such an exception might also incentivize the attorneys to encourage searches on close questions of law in hopes that, even if a violation occurred, evidence could still be admitted if a court deemed their advice to be reasonable. For this reason, reliance on advice from attorneys cannot be a separate basis for application of the good faith exception.

Reliance on the reasonable advice of attorneys, however, should be considered as a factor. Officers have often had no formal education in Fourth Amendment law. Rather, they tend to rely on the advice of attorneys and their superiors to determine whether techniques are constitutionally acceptable.[133] The Supreme Court and others have questioned whether exclusion has any real deterrent value on officers.[134] Prosecutors, however, have a clear interest in having evidence admitted at trial. Knowing that their advice is not subject to an exception, government attorneys have no incentive to intentionally give advice that they know is likely to result in exclusion of valuable evidence but rather will likely err on the side of caution to protect their case.

4. Pattern of Abuse or Negligence

Herring[135] and *Davis*[136] stated that deterrence may be more achievable in instances in which law enforcement demonstrates a pattern of abuses or systemic negligence. Officers who repeatedly violate rights should be encouraged to be more knowledgeable and less reckless, and their conduct is not likely objectively reasonable, regardless of whether their violations are intentional. If a defendant can demonstrate that a law enforcement agency in a particular location or individual officers in a case have demonstrated a pattern of abuse or systemic negligence, evidence

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[133] United States v. Lee, 862 F. Supp. 2d 560, 568 (E.D. Ky. 2012).

[134] The argument behind this concern is that officers may sometimes be more concerned about getting dangerous people off the streets than with taking steps to ensure a successful prosecution.

[135] 555 U.S. 135, 144 (2009).

[136] 131 S. Ct. 2419, 2428 (2011).

may be excluded even if the good faith exception would otherwise apply.

5. Severity of Costs of Exclusion

Severity of the costs of excluding evidence comprises the largest consideration regarding one half of the traditional balancing approach in consideration of the exclusionary rule. The Supreme Court has emphasized its distaste for the negative effects of excluding evidence. The severity of the effects varies depending on other available evidence, the charges against a defendant, etc. As the severity of costs increases, so does the government and societal interest in having the evidence admitted.

6. Other Relevant Factors

As with any standard applying the totality of the circumstances to reach a conclusion, all circumstances that may be important in a case cannot be predicted and are too numerous to specifically articulate. A court should, however, consider any other factor that it deems to be relevant and pertinent to a specific case in addition to considering the factors specifically addressed above.

*C. Application to Post-*Jones *Cases*

This Section applies the proposed standard to the post-*Jones* litigation of pre-*Jones* searches in an attempt to provide examples of how the proposal would operate in actual cases. In applying the standard, several limitations of this Section should be noted. As indicated previously, the legal landscape at the time of the search is the most critical aspect of the analysis. While the consensus among precedential courts changed some through the progression of post-*Jones* challenges, each case presents the same authorities thought to control (*Knotts* and *Karo*). Therefore, the analysis of that factor remains relatively consistent throughout the discussed cases. Furthermore, the amount of information based on filings, transcripts, motions, etc., varies considerably among the cases and, in almost all cases, differs substantially from the amount of information that would be available to a court in making the decision of whether to exclude evidence. Therefore, this Comment

cannot reach a concrete conclusion as to how the cases would be decided under the standard.

Finally, this Section merely gives examples of how the standard should be applied. Consistent with the nature of judicial interpretation, especially in considering the totality of the circumstances and applying balancing tests, different courts reach different conclusions when applying the same standard to very similar facts. A reader may disagree with the application but still accept the proposed standard.

1. *Garcia* to *Pineda-Moreno*—*Rose*, *Leon*, *Baez*

In *United States v. Garcia*, the Seventh Circuit became the first circuit to specifically address the issue, determining that the GPS use did not constitute a Fourth Amendment search.[137] *Garcia* remained the only circuit to address the issue until *United States v. Pineda-Moreno*.[138] Because the ruling of only one circuit does not create a presumption of objective reasonableness, other factors must be considered.

The existence of authority thought to control is crucial to the government's argument in the cases in this group.[139] As previously discussed, *Knotts* and *Karo* were widely believed to control the issue.[140] The opinion in *Garcia* further supports that belief. Therefore, absent evidence supporting factors that would suggest otherwise, a reasonably well-trained officer would have had no reason to even expect the searches were unlawful. Such evidence, while it may exist, is not presented in the cases. Therefore, based on the available information, the evidence should have been admitted in these cases.

2. *Pineda-Moreno* to *Maynard*—*Robinson*, *Oladosu*, *Rose*

In *United States v. Pineda-Moreno*, the Ninth Circuit became the second circuit to specifically address the issue, also finding the

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[137] 474 F.3d 994, 998 (7th Cir. 2007).

[138] 591 F.3d 1212, 1216 (9th Cir. 2010), *vacated*, 132 S. Ct. 1533 (2012) (after the Court decided *Jones*).

[139] Absent the general understanding that the cases controlled the issue, an isolated occurrence of one circuit ruling on an issue would give officers no reason to conclude that the conduct was, in fact, acceptable in other jurisdictions.

[140] *See* Part I.C.i.

attachment and tracking was not a search.[141] Multiple circuits agreeing on a particular issue in the face of no contrary authority creates a strong presumption in favor of objective reasonableness. *United States v. Marquez*[142] further supported that presumption, with the Eighth Circuit agreeing with the two previous decisions.[143]

The existence of authority thought to control did not change from the previous section. Thus, the combination of consensus among precedential courts and existence of authority thought to control should bolster the already strong presumption in favor of objective reasonableness.

None of the three cases that arose from challenges of devices attached during this period present arguments or facts that would go toward rebutting the presumption of objective reasonableness created by the legal landscape at the time. To the contrary, the defendant in *Robinson* recognized the government's "lack of bad faith" in arguing that good faith was not enough to prevent exclusion.[144]

Again, the question is whether a reasonably well-trained officer would have believed the search was illegal. An officer who believed, based on experience and the advice of government attorneys, agency attorneys, and supervisors[145] supervisors and in agreement with multiple circuits while none disagreed, that he/she was acting in accordance with binding Supreme Court precedent would certainly not believe his or her conduct was illegal.[146] Therefore, under the proposed standard, the evidence would have been admitted in each case.[147]

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[141] *Pineda-Moreno*, 591 F.3d at 1216.

[142] 605 F.3d 604, 609-10 (8th Cir. 2010).

[143] Of the three cases discussed in this section, only the attachment of the second and third devices at issue in *Rose* occurred between *Marquez* and *Maynard*.

[144] United States v. Robinson, No. 4:11-CR-361-AGF, 2012 WL 6900185 (E.D. Mo. Mar. 20, 2012) (defendant's motion to suppress government's use of GPS in light of *United States v. Jones*).

[145] In each of these cases, officers did rely on their own knowledge of customary procedure in GPS tracking as well the advice of government attorneys, agency attorneys, and supervisors.

[146] The officer could conceivably have some doubt, which means exclusion could have some deterrent value. This argument, however, is one for, not against, granting the exception, because the effect of exclusion would be to deter objectively reasonable police work, which the Court has clearly indicated it wants to avoid. *See, e.g.*, *Robinson*,

3. After *Maynard—Lujan*, *Rose*, *Katzin*, *Ortiz*, *Lee*

In *United States v. Maynard*, the D.C. Circuit became the first circuit to find that warrantless GPS attachment and tracking constitutes a Fourth Amendment search. Subsequently, the Fifth Circuit sided with the majority of circuits on the issue. The circuit split prevents the presumption of reasonableness but should not preclude evidence from being admitted in situations in which a substantial number of factors support the government's case. The existence of contradictory authority also clouds the understanding of binding precedent believed to control.

Due to the existence of contradictory authority and the skepticism that will occur as a result, the additional factors under the proposed standard will be most crucial for determining whether a reasonably well-trained officer would have believed the search was legal in the circumstances presented by cases in this group. For example, in several of the cases, officers relied on the advice of attorneys. In several cases officers strictly adhered to agency protocol. Both of these factors could support the objective reasonableness of the conduct. However, factors that would tend to work against the government, such as a history of violations, are not discussed in these cases. Without that information, each factor cannot be analyzed in enough detail to determine the appropriate outcome of these cases.

V. REASONABLE RELIANCE OF PERSUASIVE AUTHORITY AND INCENTIVES TO LITIGATE

The chief concern created by this extension of the good faith exception would be the argument that such an exception would take away incentive for defendant's to litigate potential Fourth Amendment claims.[148] *Davis* addressed this concern but responded, in part, by saying defendants still have incentive to litigate claims arising in circuits that lack binding precedent. The

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2012 WL 6900185; United States v. Lee, 862 F. Supp. 2d 560, 567 (E.D. Ky. 2012); United States v. Oladosu, 887 F. Supp. 2d 437, 439 (D. R.I. 2012).

[147] This assumes the absence of additional unknown factors that might rebut the presumption of objective reasonableness.

[148] Laura E. Collins, Davis v. United States*: Expanding the Good Faith Exception to the Exclusionary Rule to Objective Reliance on Binding Appellant Precedent Presents Too Many Threats to Constitutional Protections*, 81 MISS. L.J. SUPRA 163 (2012).

extension discussed in this Comment could reduce that incentive. *Davis* offered as a suggestion that, if needed, the Court could grant an exception to the good faith exception for defendants who successfully litigate a claim of a Fourth Amendment violation. Even without the exception, defendants would still have incentive to litigate claims on questions that have not been specifically addressed or in which a substantial consensus among precedential courts may not exist.

In previous good faith exception cases, the Court has found similar arguments to be unpersuasive. *Leon* stated that "the magnitude of the benefit conferred on defendants by a successful [suppression] motion makes it unlikely that litigation of colorable claims will be substantially diminished."[149] *Krull* further stated that "a defendant has no reason not to argue that a police officer's reliance . . . was not objectively reasonable."[150] Regardless, the Court has held that encouraging litigation is not a goal of the Fourth Amendment.

As in *Davis*, however, the Court could always reconsider its decision if empirical evidence could prove that the extension had significantly reduced litigation, and that the Court believed the reduced litigation to be having a negative impact. In addition, it is crucial to remember that this Comment supports a narrow standard that would require a very specific set of circumstances and then require that multiple factors combine to ensure the objective reasonableness of police conduct.

CONCLUSION

The totality of the circumstances balancing test considering the articulated factors and other relevant factors ensures that the exception will only be applied to cases in which a reasonably well-trained officer would have believed he or she was following the law as it existed at the time of the Fourth Amendment violation. When officers act according to what they reasonably believe to be the law, their conduct is non-culpable and cannot be deterred.

Because such reliance results in non-culpable police conduct that cannot be deterred without discouraging police from their

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[149] United States v. Leon, 480 U.S. 897, 924 (1984).

[150] Illinois v. Krull, 480 U.S. 340, 354 (1987).

investigative duties, excluding the evidence does not serve the purpose of the exclusionary rule. To exclude the evidence, the Court must decide to impose an arbitrary limit on the exclusionary rule or retreat from its opinion in *Davis* and the rationale of the *Leon* line of cases.

Given the recent Supreme Court decisions regarding the good faith exception and the underlying intention of limiting the exclusionary rule, the good faith exception should apply to objectively reasonable reliance on persuasive authority. To determine whether deterrence benefits outweigh the costs of exclusion, courts should apply the classic balancing test through consideration of the totality of the circumstances.

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