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**KATZ AND DOGS: THE BEST PATH FORWARD IN
APPLYING *UNITED STATES V. DAVIS*' GOOD FAITH
EXCEPTION TO THE EXCLUSIONARY RULE AND
HOW THE SEVENTH CIRCUIT HAS GONE ASTRAY**

ARLO WALSMAN*

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INTRODUCTION

Sometimes, law enforcement officers violate the Fourth Amendment¹ and in the process find and seize evidence they wish to use in a subsequent criminal prosecution. In these circumstances, a question that has long troubled courts, and a question that is becoming more and more difficult to answer, is whether such evidence should be admissible at trial.

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¹ The Fourth Amendment provides that:

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.

U.S. CONST. amend. IV.

In *Weeks v. United States*,² the Supreme Court established that evidence seized in violation of the Fourth Amendment was not admissible in federal prosecutions,³ and in *Mapp v. Ohio*,⁴ the Court extended the rule to state prosecutions.⁵ This rule has become known as the exclusionary rule.⁶ However, in a line of cases beginning with *United States v. Leon*,⁷ the Court has held, in a variety of different circumstances, that evidence should not be excluded if officers are acting in “good faith”⁸ or “objectively reasonably,”⁹ even when those officers’ actions violate the Fourth Amendment.

For example, the Court has declined to suppress evidence, even though the law enforcement officers’ conduct was unconstitutional, when those officers: executed facially valid¹⁰ and invalid¹¹ search warrants with a good faith (but incorrect) belief that the warrants were valid; conducted a warrantless search of a business in objectively reasonable reliance on a state statute authorizing the search, even when the statute was subsequently declared unconstitutional;¹² arrested a suspect based on an objectively reasonable belief that a computer record, which indicated that an outstanding warrant existed for a suspect’s arrest, was accurate, even when that record was inaccurate;¹³ and arrested a suspect based on a good faith belief that an

² 232 U.S. 383, 398 (1914).

³ *Id.* at 388–89.

⁴ 367 U.S. 643 (1961).

⁵ *Id.* at 645–646.

⁶ *United States v. Leon*, 468 U.S. 897, 900 (1984).

⁷ *Id.* at 925.

⁸ *See Herring v. United States*, 555 U.S. 135, 147–48 (2009); *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984); *Leon*, 468 U.S. at 918–26.

⁹ *See Arizona v. Evans*, 514 U.S. 1, 15–16 (1995); *Illinois v. Krull*, 480 U.S. 340, 360–61 (1987).

¹⁰ *Leon*, 468 U.S. at 926.

¹¹ *Sheppard*, 468 U.S. at 991.

¹² *Krull*, 480 U.S. at 360–61 (1987).

¹³ *Evans*, 514 U.S. at 15–16 (1995).

arrest warrant existed in a neighboring county for the suspect, even when the record was inaccurate and the warrant had been rescinded.¹⁴

The Court's justification for this good faith exception to the exclusionary rule has been twofold. First, the Court has recognized that the exclusionary rule is not a personal constitutional right, but instead a judicially created remedy designed to deter law enforcement officers from committing future Fourth Amendment violations.¹⁵ Second, because of the rule's purpose as a deterrent, the Court has held that it should only be applied when the benefits of applying it (detering police misconduct) outweigh its costs (the suppression of reliable evidence of guilt, which often results in the guilty going free or getting reduced sentences through plea-bargaining).¹⁶ Put differently, the Court has created the good faith exception because it has held that punishing law enforcement by excluding evidence would not yield any appreciable deterrent effect when officers act in good faith, and because it has considered the suppression of evidence a "bitter pill" for society to swallow.¹⁷

The most recent case in this line of good faith exception cases is *Davis v. United States*, where the Court held that "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."¹⁸ This good faith exception holds true even if the binding precedent the officers rely on is subsequently overruled. For example, in *Davis*, the Court held that evidence found during a search of Davis' car incident to his arrest was properly admitted at his trial, because at the time the search occurred (April 2007) the police were relying on the Court's holding in *New York v. Belton*¹⁹ (decided in 1981) that such searches were authorized.²⁰ And, *Davis* held that the exclusionary rule should not

¹⁴ *Herring v. United States*, 555 U.S. 135, 147–48 (2009).

¹⁵ *Leon*, 468 U.S. at 906.

¹⁶ *Id.* at 907.

¹⁷ *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011).

¹⁸ *Id.* at 2429.

¹⁹ 453 U.S. 454, 460 (1981).

²⁰ *Davis*, 131 S. Ct. at 2423.

apply even though *Belton*'s holding had been subsequently limited by *Arizona v. Gant*²¹ (decided in 2009), and that under *Gant* the police's conduct would have been unlawful.²²

Because of the potential breadth of its holding, *Davis* is an incredibly important case in Fourth Amendment jurisprudence, and it has already led to a great variety of interpretations in lower courts.²³ To illustrate this point, it is useful to briefly examine two key questions posed by *Davis*.

The first question is, what exactly constitutes binding precedent? If one jurisdiction lacks precedent authorizing a specific police practice, can another jurisdiction's precedent authorizing that practice be considered "binding" under *Davis*?²⁴ Second, if there is binding precedent available, what are the limits of officers' good faith reliance on that precedent? If the Supreme Court has said that officers may install a beeper in a package with the consent of the package's owner in order to monitor it for a few days without committing a Fourth Amendment search,²⁵ can officers rely in good faith on this case when they install a GPS monitoring device on a suspect's car without his consent and use it to monitor his movements for 347 days?²⁶

Because these questions have been answered in very different ways, courts' interpretations of *Davis* have led to very different results.²⁷ This Comment focuses on the Seventh Circuit's

²¹ 556 U.S. 332 (2009).

²² *Davis*, 131 S. Ct. at 2426.

²³ Compare *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013) (refusing to consider out of jurisdiction precedent as binding), with *Taylor v. State*, 410 S.W.3d 520, 526 (Tex. App. 2013) (accepting "federal precedent in the majority of the federal circuit courts" as binding precedent).

²⁴ See, e.g., *United States v. Stephens*, 764 F.3d 327, 338–89 (4th Cir. 2014); *Martin*, 712 F.3d at 1082.

²⁵ *United States v. Knotts*, 460 U.S. 276, 285 (1983).

²⁶ See *United States v. Baez*, 744 F.3d 30, 36 (1st Cir. 2014) (holding that officers could have such good faith reliance).

²⁷ See, e.g., *United States v. Aguiar*, 737 F.3d 251 (2d Cir. 2013) (holding that officers could rely in good faith on *Knotts*, 460 U.S. 276, and *United States v. Karo*,

interpretation of *Davis* in a 2014 case, *United States v. Gutierrez*, where the court held that drugs found in Gutierrez's home were properly admitted into evidence at his criminal trial because the officers were relying in good faith on binding precedent.²⁸ Consistent with *Davis*, the court in *Gutierrez* reached this holding even though it recognized that under a Supreme Court case²⁹ decided after the officers found the drugs, the officers' conduct was unconstitutional.

This Comment suggests that Seventh Circuit read *Davis* too broadly in *Gutierrez*, and in doing so failed to adopt the best possible interpretation of *Davis*. Part A of this Comment discusses *Gutierrez* in detail. Part B contains a brief history of the exclusionary rule. Part C discusses the history of the good faith exception to the exclusionary rule, including a detailed discussion of *Davis*. Part D discusses lower courts' applications of *Davis* and some of the most common questions courts have faced when determining whether law enforcement officers were relying in good faith on binding precedent. Part E discusses the best path forward for courts when interpreting and applying *Davis*. Finally, Part F discusses how the Seventh Circuit failed to follow this best path when deciding *Gutierrez*, and how the court erred in its analysis.

BACKGROUND

A. *United States v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014)

In November 2012, law enforcement officers in Indiana received a confidential tip that a man named Oscar Gutierrez was involved in drug trafficking and resided at an address in

468 U.S. 705 (1984) when installing a GPS device onto a suspect's car and using the device to monitor the car's movements); *State v. Adams*, 763 S.E.2d 341, 347 (S.C. 2014) (holding that officers could not rely in good faith on *Knotts* and *Karo* when installing a GPS device onto a suspect's car and using the device to monitor the car's movements).

²⁸ 760 F.3d 750, 759 (7th Cir. 2014).

²⁹ *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

Indianapolis.³⁰ Based on that tip, numerous law enforcement officers went to Gutierrez's home, bringing with them a certified drug detection dog named Fletch.³¹ At the home, the officers knocked on the front door and saw movement inside, but no one answered.³² A detective named Cline then had Fletch examine Gutierrez's front door for the scent of drugs, and the dog gave a positive alert.³³

The officers continued to knock, but after about fifteen minutes of receiving no answer, they were instructed by the county prosecutor to enter and secure the home.³⁴ So, the officers forcibly entered, conducted a sweep for occupants, found Gutierrez and a man named Cota, and then handcuffed them and brought them to the kitchen of the home.³⁵ Sometime after the entry, Cline left and obtained a search warrant in which he identified the informant's tip, the knock-and-talk attempt, and Fletch's positive indication at the front door as bases for probable cause.³⁶ When Cline returned, the officers began their search of Gutierrez's home and found 11.3 pounds of methamphetamine.³⁷

In December 2012, Gutierrez was charged with a single count of possession with intent to distribute over fifty grams of methamphetamine.³⁸ In March 2013, the Supreme Court decided *Florida v. Jardines*,³⁹ in which the Court held that a dog-sniff of the curtilage of a home is a Fourth Amendment search for which a warrant is ordinarily required.⁴⁰ So, two months after *Jardines* was decided, Gutierrez filed a motion to suppress arguing that the officers were

³⁰ *Gutierrez*, 760 F.3d at 752.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 752.

³⁷ *Id.*

³⁸ *Id.* at 753.

³⁹ 133 S. Ct. 1409.

⁴⁰ *Gutierrez*, 760 F.3d at 753 (citing *Jardines*, 133 S. Ct. at 1414).

required to get a warrant before having Fletch sniff his home, and that any evidence recovered inside his home should be suppressed.⁴¹

The district court denied his motion, holding that because at the time of the dog-sniff the officers were relying in good faith on binding judicial precedent, the exclusionary rule did not apply.⁴² Gutierrez then entered into a conditional guilty plea, allowing him to appeal the district court's denial of his motion.⁴³

On appeal, the Seventh Circuit affirmed the decision of the district court.⁴⁴ First, the court discussed the history of the exclusionary rule, and the Court's recent decision in *Davis*.⁴⁵ In *Davis*, which is discussed in more detail in Part C-2, the Court held that if law enforcement officers "conduct a search in objectively reasonable reliance on binding judicial precedent," the exclusionary rule does not bar the admission of evidence found during that search, even if the judicial precedent is later held invalid.⁴⁶ Given this rule, the *Gutierrez* court held that "the evidence in Gutierrez's case should not be suppressed if binding appellate precedent authorized the officers' conduct."⁴⁷

So, the court next had to review the Circuit's relevant precedent, *United States v. Brock*,⁴⁸ to determine whether the case was binding in November 2012 when Fletch sniffed Gutierrez's front door, and whether or not the officers could rely in good faith on *Brock* to authorize their conduct.⁴⁹

In *Brock*, law enforcement officers went to David Brock's residence at 3375 Payton Avenue in Indianapolis and executed a

⁴¹ *Id.* at 753.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 759.

⁴⁵ *Id.* at 753–54.

⁴⁶ 131 S. Ct. at 2428.

⁴⁷ *Gutierrez*, 760 F.3d at 754.

⁴⁸ 417 F.3d 692 (7th Cir. 2005).

⁴⁹ *Gutierrez*, 760 F.3d at 754–57.

search warrant.⁵⁰ To execute the warrant, the officers conducted a full search of the home during which they recovered drugs and other contraband.⁵¹ Brock was not present during the search, but three individuals named Godsey, Knock, and Hayden were.⁵² After an officer put all three in handcuffs, read them their *Miranda* rights, and questioned them, Godsey told the police he lived next door at 3381 Payton Avenue and that he watched over both houses.⁵³ Godsey then gave the police a key to 3381, and consented to a search of the common areas of that residence.⁵⁴ He also informed the police that Brock rented a room at 3381, and used it as a stash house to store drugs.⁵⁵

After hearing this information, an officer (Miller) returned to his office to prepare an affidavit to obtain a search warrant for the entire 3381 residence.⁵⁶ Other officers entered 3381 with Godsey's key.⁵⁷ Inside, one bedroom was locked and had a sign on the door reading "Stay Out. David."⁵⁸ After the police saw the door, a canine officer and his dog were called to 3381 to corroborate the presence of narcotics in the bedroom.⁵⁹ Inside the home, the dog gave a positive alert for the presence of drugs while sniffing just outside Brock's locked bedroom.⁶⁰

Officer Miller then prepared an affidavit in which he detailed the evidence collected from 3375, as well as the dog's alert in front of Brock's door at 3381 as bases for probable cause.⁶¹ Based on these

⁵⁰ 417 F.3d at 693.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Brock*, 417 F.3d at 693.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 693–94.

⁶¹ *Id.* at 694.

facts, a judge issued a search warrant authorizing a search of 3381.⁶² When Miller returned with the warrant, the police entered Brock's bedroom and discovered more drugs and other contraband.⁶³ Brock was later charged with drug and firearm offenses.⁶⁴

Prior to his trial, Brock moved to suppress the evidence found in 3381, but the trial court denied his motion.⁶⁵ On appeal, Brock argued that the dog sniff outside his locked bedroom door was an illegal warrantless search, and that the warrant to search 3381 issued in reliance on that sniff violated the constitution.⁶⁶ The government argued that the dog sniff was not a search, because the police were lawfully inside Brock's home due to Godsey's consent, and that Brock had no reasonable expectation that of privacy in his drugs going undetected.⁶⁷

Ultimately, the court affirmed the trial court's denial of Brock's motion.⁶⁸ This was because the dog sniff at Brock's door could only reveal the presence or absence of narcotics, and because Brock's expectation that his possession of narcotics would remain private was not objectively reasonable.⁶⁹ In reaching this holding, the court relied on three Supreme Court decisions,⁷⁰ and several decisions of federal appellate courts,⁷¹ almost all of which held that dog sniffs used only to detect the presence or absence of contraband are not

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 695.

⁶⁸ *Id.* at 700.

⁶⁹ *Id.* at 696.

⁷⁰ See *Illinois v. Caballes*, 543 U.S. 405 (2005); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983).

⁷¹ See *United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997); *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993); *United States v. Vasquez*, 909 F.2d 235, 238 (7th Cir. 1990); *United States v. Colyer*, 878 F.2d 469, 477 (D.C. Cir. 1989).

searches because individuals do not have a reasonable expectation of privacy in concealing contraband.⁷²

Also, the court noted that a “critical” aspect of its holding was the fact that the police were “lawfully present inside the common areas of the residence with the consent of Brock’s roommate.”⁷³

In *Gutierrez*, Gutierrez argued that *United States v. Jones*,⁷⁴ which was decided before the police used their dog to sniff his front door, had overruled *Brock*.⁷⁵ This was because *Jones* held that the government could commit a search by trespassing into a constitutionally protected area like the home or a person’s effects.⁷⁶ So, Gutierrez argued that the dog sniff in his case was a search because the police physically intruded into the curtilage of his home to conduct the sniff.⁷⁷ And, because the dog-sniff was a search, the fact that the police lacked a warrant to conduct the sniff rendered it unlawful.

However, the court in *Gutierrez* held that *Jones* did not overrule *Brock*, despite Jones’ clear holding that the “common-law trespassory test”⁷⁸ could be used to determine whether a search occurred.⁷⁹ First, the court noted that the Court had previously ruled that dog sniffs are “sui generis,” (of their own kind) which suggested that doctrinal changes to Fourth Amendment principles might not apply to dog sniffs due to their unique nature.⁸⁰ Second, the court noted that in *Kentucky v. King*,⁸¹ decided less than a year before *Jones*, the Court had held that police may, without a warrant, knock on a door

⁷² *Brock*, 417 F.3d at 696–97 (citations omitted).

⁷³ *Id.* at 697.

⁷⁴ 132 S. Ct. 945 (2012).

⁷⁵ *United States v. Gutierrez*, 760 F.3d 750, 756 (7th Cir. 2014).

⁷⁶ *Id.* (citing *United States v. Jones*, 132 S. Ct. 945, 949–51 (2012)).

⁷⁷ Brief and Required Short Appendix for Defendant-Appellant at 10, *United States v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014) (No. 14-1159).

⁷⁸ *Jones*, 132 S. Ct. at 952.

⁷⁹ *Gutierrez*, 760 F.3d at 756.

⁸⁰ *Id.* (citing *United States v. Place*, 462 U.S. 696, 707 (1983)).

⁸¹ 131 S. Ct. 1849 (2011).

of a home, including for investigatory purposes, because in doing so the officers do no more than any private citizen.⁸²

So, the court reasoned that before *Jardines* was decided, the Court had allowed police officers to use dog sniffs and to enter the curtilage of a home to seek information without trespassing, and that these two holdings were “sufficient to determine that *Brock* was still good law at the time of the search of Gutierrez’s home”⁸³

Gutierrez also argued that the police officers did not act in good faith on any precedent, because the officers “acted in obvious disregard of established trespass principles.”⁸⁴ However, the court rejected this argument because it found that the case was “exactly like *Brock* in all-important respects.”⁸⁵ According to the court, in both *Brock* and the present case, the law enforcement officers were lawfully present in the areas they where in when using their dogs to sniff for drugs.⁸⁶ So, the court held that “because binding appellate precedent permitted law enforcement’s conduct at the time it took place,” the case fell within *Davis*’ exception to the exclusionary rule.⁸⁷

B. The Exclusionary Rule

In *Weeks v. United States*, Weeks was convicted of using the mails for the purposes of transporting tickets or shares in a lottery.⁸⁸ However, before Weeks was ever arrested, police officers entered his home without a warrant and searched it, finding and seizing various papers that were turned over to a U.S. Marshall.⁸⁹ Later in the same

⁸² *Gutierrez*, 760 F.3d at 756 (citing *King*, 131 S. Ct. at 1862, and WAYNE LAFAVE, SEARCH AND SIEZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(e), at 592–93 (4th Ed. 2004)).

⁸³ *Gutierrez*, 760 F.3d at 756.

⁸⁴ *Id.* at 758.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 232 U.S. 383, 386 (1914).

⁸⁹ *Id.*

day, the Marshall returned to Weeks' home and again entered without a warrant, searched the home, and found and took more papers.⁹⁰

Before his trial started, Weeks filed a petition for the return of his papers, on the grounds that the government had entered his home unlawfully.⁹¹ In ruling on the petition, the trial court did order the return of papers that did not relate to Weeks' charges, but declined to order the return of the papers that were pertinent his charges that would be used in evidence at his trial.⁹²

So, on appeal, the question before the Court was, what must trial courts do when faced with motions to exclude evidence seized in violation of the Fourth Amendment?⁹³ Ultimately, the Court unanimously held that the purpose of the Fourth Amendment was to limit the power and authority of federal courts and officials, and to "forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law."⁹⁴ Further, the Court held that the duty of giving the Fourth Amendment its true force and effect was "obligatory" upon all those entrusted in the federal system with enforcing the law.⁹⁵ So, the Court held that the unlawfully seized evidence should have been excluded from use at Weeks' trial.⁹⁶

In *Mapp v. Ohio*, Mapp was convicted of possessing lewd books and pictures, but her conviction was based primarily evidence (the lewd books and pictures) that the police seized during an unlawful search of her home.⁹⁷ Ohio argued that, even if the search was unlawful, the evidence could be admitted because the Court had previously ruled that Fourteenth Amendment did not forbid the

⁹⁰ *Id.*

⁹¹ *Id.* at 387–88.

⁹² *Id.* at 388.

⁹³ *Id.* at 389.

⁹⁴ *Id.* at 391–92.

⁹⁵ *Id.* at 392.

⁹⁶ *Id.* at 388–89.

⁹⁷ 367 U.S. 643 (1961).

admission of unlawfully seized evidence in state prosecutions.⁹⁸ However, the Court rejected this argument and held that Fourth Amendment's exclusionary rule was applicable to the states through the Fourteenth Amendment.⁹⁹ In the Court's view, the right to have unlawfully obtained evidence excluded in a criminal trial was a "constitutional privilege," and that individuals should not be restrained from enforcing this privilege in state courts.¹⁰⁰

C. The Good Faith Exception to the Exclusionary Rule

1. Pre-Davis Case Law

In *United States v. Leon*, the Court for the first time carved out an exception to the exclusionary rule.¹⁰¹ The case arose after a confidential informant of "unproven reliability" told a police officer in Burbank, California that two persons were selling drugs from their residence at 620 Price Drive in Burbank.¹⁰² Based on this information, the police began investigating the residence, and eventually applied for and obtained a facially valid warrant to search it as well as two other residences and various suspects' cars.¹⁰³

However, in response to a motion to dismiss brought by Leon and others, the trial court held that the officer's affidavit in support of the warrant application was insufficient to establish probable cause and therefore suppressed the evidence.¹⁰⁴ The trial court did rule that the officers had acted in good faith, but it rejected the government's position that the exclusionary rule should not apply when evidence is seized in reasonable, good faith reliance on a search warrant.¹⁰⁵ But,

⁹⁸ *Id.* at 645–646 (citing *Wolf v. Colorado*, 338 U.S. 25 (1949)).

⁹⁹ *Mapp*, 367 U.S. at 655.

¹⁰⁰ *Id.*

¹⁰¹ 468 U.S. 897 (1984).

¹⁰² *Id.* at 901.

¹⁰³ *Id.* at 901–02.

¹⁰⁴ *Id.* at 903.

¹⁰⁵ *Id.* at 903–04.

the Court reversed, holding that the exclusionary rule should be modified so as not to require the suppression of evidence when officers act in “good-faith reliance on a search warrant that is subsequently held to be defective.”¹⁰⁶ According to the Court, this modification was appropriate for three basic reasons.

First, the Court held that because the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, the use of unlawfully seized evidence at trial does not constitute a new Fourth Amendment violation.¹⁰⁷ So, because of this, the exclusionary rule only operated as a “judicially created remedy” designed to protect Fourth Amendment rights through its deterrent effect and was not a “personal constitutional right.”¹⁰⁸ This holding notably moved away from the Court’s previous position in *Mapp* that the ability to have unconstitutionally seized evidence excluded at trial was a “constitutional privilege.”¹⁰⁹

Second, because the exclusionary rule was not a personal constitutional right, the Court held that the question of whether to apply it must be a separate inquiry from whether the Fourth Amendment rights of the person seeking to invoke the rule were violated by the government.¹¹⁰ Stated differently, the fact that there should be two independent inquiries meant that a Fourth Amendment violation did not automatically trigger application of the exclusionary and the suppression of evidence found during the violation.

Third, the Court held that deciding when to apply the exclusionary rule must be resolved by “weighing the costs and benefits” of preventing the use in the prosecution’s case in chief of “inherently trustworthy tangible evidence”¹¹¹ On the cost side of this equation, the Court recognized that exclusion was “substantial,”

¹⁰⁶ *Id.* at 905.

¹⁰⁷ *Id.* at 906.

¹⁰⁸ *Id.*

¹⁰⁹ 367 U.S. at 655.

¹¹⁰ *Leon*, 468 U.S. at 906.

¹¹¹ *Id.* at 906–07.

because it would unacceptably impede the truth-finding functions of the judge and jury.¹¹² And, as a collateral consequence of this interference, some guilty defendants may go free or receive reduced sentences after plea-bargaining.¹¹³ So, on the benefit side of the equation, the Court held that the rule should be restricted to situations in which its remedial deterrent objectives were “most efficaciously served.”¹¹⁴ Therefore, because the officers believed in good faith that their warrant was valid, the Court held that suppressing the evidence found in reliance on the warrant would not serve any deterrent purpose and the exclusionary rule should not apply.¹¹⁵

After *Leon*, the Court decided a string of cases extending this good faith exception in a number of different circumstances. In *Massachusetts v. Sheppard*, the Court extended *Leon* to hold that, even though a search warrant was facially invalid, items found during execution of the warrant should not be suppressed because the officers acted in good faith on the warrant.¹¹⁶

In *Illinois v. Krull*, an Illinois statute, in order to regulate the sale of cars, authorized state officials to inspect the premises of business that sold cars or car parts.¹¹⁷ Pursuant to the statute, a detective of the Chicago police department went to an auto-wrecking yard to investigate the yard’s license and any potential stolen vehicles.¹¹⁸ During his investigation, the detective discovered that three of the cars at the lot were stolen.¹¹⁹

In the trial court, the respondents moved to suppress the evidence seized from the yard, because a federal court had held (one day after the detectives’ search) that the statute was unconstitutional

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 907.

¹¹⁵ *Id.* at 918–926.

¹¹⁶ 468 U.S. 981, 991 (1984).

¹¹⁷ 480 U.S. 340, 342–43 (1987).

¹¹⁸ *Id.* at 343.

¹¹⁹ *Id.*

due to the fact it authorized warrantless searches.¹²⁰ However, the Supreme Court reversed the trial court, holding that because the detective was acting in “objectively reasonable reliance” on the statute that authorized the search, the evidence should not be suppressed.¹²¹

In *Arizona v. Evans*, a police officer saw Evans driving the wrong way on a one-way street in front of a police station.¹²² After stopping Evans and entering Evans’ name into a computer in the officer’s patrol car, the computer indicated that there was an outstanding misdemeanor warrant for his arrest.¹²³ During Evans’ subsequent arrest, he dropped a marijuana cigarette that led to the police searching his car and finding a bag of marijuana.¹²⁴

In his subsequent criminal proceeding for possession of marijuana, Evans argued that the drugs should be suppressed because his arrest warrant had been quashed seventeen days before his arrest, making the arrest unlawful.¹²⁵ The trial court agreed and granted Evans’ motion because it concluded that, “the State had been at fault for failing to quash the warrant.”¹²⁶ But, the Supreme Court reversed, and held that because the officer was acting “objectively reasonably” on the computer record, it did not matter that the record was inaccurate and the exclusionary rule did not apply.¹²⁷

The Court’s most recent good faith case, prior to *Davis*, was *Herring v. United States*.¹²⁸ In *Herring*, a police officer learned that Herring had driven to a county sheriff’s department to pick something

¹²⁰ *Id.* at 344 (citing *Bionic Auto Parts & Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981)).

¹²¹ *Krull*, 480 U.S. at 360–61.

¹²² 514 U.S. 1, 4 (1995).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 5.

¹²⁷ *Id.* at 15–16.

¹²⁸ 555 U.S. 135 (2009).

up from his impounded truck.¹²⁹ In response to this, the officer asked the county's warrant clerk (Pope) to check to see if Herring had any outstanding warrants for his arrest.¹³⁰ When Pope found no warrants, the officer asked her to check with the clerk of a neighboring county (Morgan), and Morgan reported that there was an active arrest warrant.¹³¹ So, the officer and a deputy followed Herring as he left the impound, pulled him over, and arrested him.¹³² During a search incident to the arrest, the police found drugs on Herring's person and a pistol in his car.¹³³

However, there had been a mistake about the existence of the warrant.¹³⁴ Morgan's computer records indicated that there was an arrest warrant, but when she went to retrieve the physical copy in order to fax it to the officer, she could not find it.¹³⁵ Morgan then called a court clerk and "learned that the warrant had been recalled five months earlier."¹³⁶ Morgan called Pope to alert her of the mistake, and Pope then called the officer, but by this time Herring had already been arrested.¹³⁷

After Herring was indicted, he moved to suppress the evidence based on the unlawful warrantless arrest.¹³⁸ However, the trial court denied the motion because the officers had "acted in a good-faith belief that the warrant was still outstanding."¹³⁹ The Court affirmed, holding that because at the very worst the officer's actions were negligent, the exclusionary rule should not apply.¹⁴⁰ The Court held

¹²⁹ *Id.* at 137.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Herring*, 555 U.S. at 137.

¹³⁵ *Id.* at 137–38.

¹³⁶ *Id.* at 138.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 147–48.

that applying the rule would only yield “marginal deterrence,” and that this marginal deterrence did not outweigh the cost of letting Herring go free.¹⁴¹

2. *Davis v. United States*, 131 S. Ct. 2419 (2011)

Davis is the latest case in the Supreme Court’s good faith jurisprudence. Although the concepts the Court used to reach its holding are familiar, the case has the potential to dramatically change the way the exclusionary rule is applied, and it has already changed the way some courts approach individuals’ motions to suppress evidence brought on Fourth Amendment grounds.¹⁴²

In *Davis*, police officers in Greeneville, Alabama conducted a routine stop of a car in which Davis was a passenger in April 2007.¹⁴³ The stop ultimately led to Davis’ arrest, and he was placed in the back of a patrol car.¹⁴⁴ The police then searched the car and found a revolver in Davis’ jacket, and Davis was subsequently indicted for being a felon in possession of a firearm.¹⁴⁵ To better understand the procedural posture of the case, and to better understand the Court’s overall holding, it is useful (as Justice Alito did in the majority opinion) to briefly describe the history of the Court’s search incident to arrest cases.

In *Chimel v. California*, the Court held that a police officer that makes a lawful arrest may conduct a warrantless search of the arrestee’s person and the area within his immediate control.¹⁴⁶ In the years directly after *Chimel*, its rule became difficult to apply,

¹⁴¹ *Id.*

¹⁴² *See, e.g., United States v. Sparks*, 711 F.3d 58, 62 (2013) (declining to address whether or not the government’s conduct violated the Fourth Amendment and instead focusing only on whether the officers were acting in good faith and whether the exclusionary rule should apply).

¹⁴³ 131 S. Ct. at 2425.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2425–26.

¹⁴⁶ 395 U.S. 752, 763 (1969).

“particularly in cases that involved searches inside of automobiles after the arrestees were no longer in them.”¹⁴⁷

Some courts “upheld the constitutionality of vehicle searches that were substantially contemporaneous with occupants’ arrests,”¹⁴⁸ while others “disapproved of automobile searches incident to arrests, at least absent some continuing threat that the arrestee might gain access to the vehicle and destroy evidence or grab a weapon.”¹⁴⁹ In 1981, the Court granted certiorari in *New York v. Belton*¹⁵⁰ to address this conflict.¹⁵¹

In *Belton*, a police officer pulled over a car in which Belton and three other men were traveling.¹⁵² After suspecting the passengers of possessing marijuana, he ordered all of them out of the car and arrested them.¹⁵³ The officer then split them up into four different areas of a “[t]hrway,” and subsequently searched the passenger compartment of the car.¹⁵⁴ Inside, he found a jacket belonging to Belton that contained cocaine.¹⁵⁵ Ultimately, the Court ruled that the search was lawful, and held that “when 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.”¹⁵⁶

Many courts understood *Belton* to have announced a bright line rule that authorized searches of cars incident to arrests of occupants regardless of whether the arrestee was within reaching distance of the

¹⁴⁷ *Davis v United States*, 131 S. Ct. 2419, 2424 (2011) (citing *New York v. Belton*, 453 U.S. 454, 458–59 (1981)) (alteration in original) (internal quotation marks omitted).

¹⁴⁸ *Id.* at 2424 n.1 (citations omitted) (internal quotation marks omitted).

¹⁴⁹ *Id.* at 2424 n.2 (citations omitted) (internal quotation marks omitted).

¹⁵⁰ 453 U.S. 454.

¹⁵¹ *Davis*, 131 S. Ct. at 2424 (citing *Belton*, 453 U.S. at 459–60).

¹⁵² 453 U.S. at 455.

¹⁵³ *Id.* at 456.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 460.

car during the search.¹⁵⁷ This was true even when the arrestee had exited the vehicle and been taken into custody by the police.¹⁵⁸

However, as *Davis* recognized, not every Court agreed with this interpretation of *Belton*.¹⁵⁹ For example, in *State v. Gant*, the Arizona Supreme Court held that where no exigency existed endangering the safety of the arresting officer or officers, *Belton* did not apply and a search of the passenger compartment of a vehicle would be unlawful.¹⁶⁰ On appeal, the Court in *Arizona v. Gant* (decided in 2009) affirmed and held that the *Belton* rule only applied where “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”¹⁶¹ The end result of *Gant* is that an automobile search incident to an occupant’s arrest is now constitutional only if the arrestee is within reaching distance of the car during the search, or if the police have reason to believe that there is “evidence relevant to the crime of arrest” in the vehicle.¹⁶²

Davis was indicted in the Middle District of Alabama and later convicted.¹⁶³ While his appeal was pending, the Court decided *Gant*.¹⁶⁴ The Eleventh Circuit then applied *Gant*’s new rule to *Davis*’ case, and held that the search of the vehicle he was in was unlawful. But, the Eleventh Circuit nevertheless declined to suppress the evidence,¹⁶⁵ because the court concluded that penalizing the arresting officer for following what at the time was binding precedent (*Belton*) would not deter future Fourth Amendment violations.¹⁶⁶

¹⁵⁷ *Davis v. United States*, 131 S. Ct. 2419, 2424 (2011) (citing *Thornton v. United States*, 541 U.S. 615, 628 (2004)).

¹⁵⁸ *Davis*, 131 S. Ct. at 2424 n.3.

¹⁵⁹ *Id.* at 2425.

¹⁶⁰ *Id.* (citing *State v. Gant*, 162 P.3d 640, 643 (Ariz. 2007)).

¹⁶¹ *Davis*, 131 S. Ct. at 2425 (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)).

¹⁶² *Davis*, 131 S. Ct. at 2425 (quoting *Gant*, 556 U.S. at 343).

¹⁶³ *Davis*, 131 S. Ct. at 2426.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citing *United States v. Davis*, 598 F.3d 1259, 1263, 1265–66 (11th Cir. 2010)).

So, on appeal in the Supreme Court, the question was “whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent.”¹⁶⁷ In the end, the Court held that the exclusionary rule should not apply for three reasons.

First, the Court noted that Davis had conceded that at the time of the search, the officers were strictly complying with binding Eleventh Circuit precedent that authorized the search.¹⁶⁸ So, from the very start, the Court held that this concession doomed Davis’ argument. This was because, second, the Court recognized that in twenty-seven years of jurisprudence since the good-faith exception was first created in *Leon*, the Court had “never applied” the exclusionary rule to “suppress evidence obtained as a result of nonculpable, innocent police conduct.”¹⁶⁹ Finally, because the police officers were in no way culpable of any wrongdoing, the Court held that the only thing excluding the evidence would deter would be “conscientious police work.”¹⁷⁰ As the Court noted, “when 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.”¹⁷¹ So, consistent with the its long standing cost-benefit analysis, the Court declined to exclude the evidence and held that “when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.”¹⁷²

Justice Sotomayor wrote a very important concurring opinion. In the opinion, she agreed with the majority that because the primary purpose of the exclusionary rule was to deter police misconduct, the rule should not apply when binding precedent specifically authorizes a particular police practice, and that the authorization was “in accord

¹⁶⁷ *Davis*, 131 S. Ct. at 2428.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 2429.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 2434.

with the holdings of nearly every other court in the country.”¹⁷³ However, she suggested that if the underlying law regarding the constitutionality of a law enforcement practice was “unsettled,” a different result may be warranted and the exclusionary rule may apply.¹⁷⁴ This was because, in these circumstances, exclusion might “appreciably deter Fourth Amendment violations”¹⁷⁵

ANALYSIS

D. Lower Courts’ Applications of Davis

Courts applying *Davis*’ good faith exception to the exclusionary rule have faced two interpretive challenges. The first has been to determine what constitutes binding precedent. The second has been determining the limits of officers’ reliance on that precedent if any of relevance can be found. As one court has phrased the issue: “[t]he scope of [the] reasonable-reliance-on-precedent test turns on two subsidiary questions: what universe of cases can the police rely on? And how clearly must those cases govern the current case for that reliance to be objectively reasonable?”¹⁷⁶

Due to the complexity of these challenges, lower courts have applied *Davis* in a variety of different ways, leading to very different and inconsistent results.

1. What Constitutes Binding Precedent?

One of the key questions that have divided courts when interpreting *Davis* has been whether decisions from other jurisdictions qualify as binding precedent. For example, some courts have held that only decisions from that court or the United States Supreme Court

¹⁷³ *Id.* at 2434–45.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 2436.

¹⁷⁶ *United States v. Sparks*, 711 F.3d 58, 63 (1st Cir. 2013).

constitute binding precedent,¹⁷⁷ while other courts have held that officers may rely on precedent from outside the reviewing court's jurisdiction.¹⁷⁸ More commonly, courts have suggested, without explicitly holding, that binding precedent may come from other jurisdictions.¹⁷⁹

¹⁷⁷ See, e.g., *United States v. Aguiar*, 737 F.3d 251, 261 (2d Cir. 2013) (“In the context of statutory interpretation, ‘binding precedent’ refers to the precedent of this Circuit and the Supreme Court.”); *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013) (rejecting the government’s argument that the police should be able to rely in good faith on “the weight of authority around the country”); *State v. Mitchell*, 323 P.3d 69, 77 (Ariz. Ct. App. 2014) (rejecting the government’s argument that officers could rely on the decisions of federal circuit courts); *Parker v. Commonwealth*, 440 S.W.3d 381, 387 (Ky. 2014) (defining binding precedent as “clearly established precedent from this Court or the United States Supreme Court”); *Kelly v. State*, 82 A.3d 205, 215 (Md. 2013) (“[O]peration of the exclusionary rule is suspended only when the evidence seized was the result of a search that, when conducted, was a ‘police practice’ specifically authorized by the jurisdiction’s precedent in which the officer operates.”); *State v. Allen*, 997 N.E.2d 621, 626–27 (Ohio Ct. App. 2013) (focusing solely on “binding appellate precedent in Ohio”).

¹⁷⁸ *United States v. Stephens*, 764 F.3d 327, 338 (4th Cir. 2014) (holding that officers could rely on the “general legal landscape” and a decision of the Court of Special Appeals of Maryland to authorize their conduct); *Taylor v. State*, 410 S.W.3d 520, 526 (Tex. App. 2013) (holding that the good faith exception should apply because the officers “acted in reasonable reliance on federal precedent in the majority of the federal circuit courts of appeal”).

¹⁷⁹ *United States v. Sparks*, 711 F.3d 58, 63–64 (1st Cir. 2013) (holding that *Davis*’ emphasis on the absence of police culpability could be read to imply that officers could rely in good-faith on out of circuit precedent, but declining to expressly decide the issue); *United States v. Fisher*, 745 F.3d 200, 203 (6th Cir. 2014) (holding that officers were acting in good faith because at the time of their conduct, the Sixth Circuit and three other circuits had held that similar conduct was permissible); *United States v. Brown*, 744 F.3d 474, 478 (7th Cir. 2014) (strongly suggesting that officers may rely on decisions from other federal circuits because not allowing police to do so would not yield much deterrence); *People v. LeFlore*, 996 N.E.2d 678, 692 (Ill. Ct. App. 2013) (examining whether any decisions of the Seventh Circuit authorized the police’s conduct); *State v. Adams*, 763 S.E.2d 341, 346–47 (S.C. 2014) (looking for federal decisions that the officers could have relied upon, but finding none). See also *United States v. Katzin*, 769 F.3d 163, 177–82 (3d Cir. 2014) (en banc) (holding that, even if *Davis*’ binding precedent exception did not apply, the officers were still acting in good faith because their conduct

Another question has been, when an investigation takes place in several different states or jurisdictions, must officers comply with each jurisdiction's precedents in order to be acting in good faith?¹⁸⁰ For example, in *United States v. Barraza-Maldonado*, DEA agents attached a GPS monitoring device onto a car in Phoenix.¹⁸¹ Four weeks later, Barraza-Maldonado borrowed the car from its registered owner, and agents monitored the car as he drove it from Phoenix to Minneapolis.¹⁸² When the car entered Minnesota, the agents told state law enforcement officers that the car was suspected of transporting drugs, and advised officers of the car's location.¹⁸³ After a state trooper conducted a traffic stop and found drugs inside the vehicle, Barraza-Maldonado was subsequently tried in federal court in Minnesota, which is under the Eighth Circuit's jurisdiction.¹⁸⁴

One day after Barraza-Maldonado's arrest, the Supreme Court decided *United States v. Jones*, and held that the use of a GPS device to monitor a car's movements was a search for which a warrant would ordinarily be required.¹⁸⁵ So, on appeal, the question before the Eighth Circuit was whether the agents acted in good faith on any binding precedent when they installed the device.¹⁸⁶

The court began its analysis by holding that “[f]or the good faith exception to apply, officers performing a particular investigatory action—such as GPS tracking—must strictly comply with binding appellate precedent governing the jurisdiction in which they are acting.”¹⁸⁷ So, because the DEA agents had installed the device in

comported with the “general legal landscape” around the country, including out of circuit decisions).

¹⁸⁰ See, e.g., *United States v. Andres*, 703 F.3d 828 (5th Cir. 2013); *United States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013); *Martin*, 712 F.3d at 1082.

¹⁸¹ *Barraza-Maldonado*, 732 F.3d at 866.

¹⁸² *Id.* at 866.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 866–67.

¹⁸⁵ *United States v. Jones*, 132 S. Ct. 935, 954 (2012).

¹⁸⁶ *Barraza-Maldonado*, 732 F.3d at 867.

¹⁸⁷ *Id.*

Phoenix, which was under the Ninth Circuit's jurisdiction, and because Ninth Circuit precedent at the time of the installation authorized the agents' conduct,¹⁸⁸ the court held that the good faith exception did apply and the drugs were admissible.¹⁸⁹

Barraza-Maldonado argued that the agents could not have acted in good faith, because Minnesota state law required "court approval before law enforcement officers may use a mobile tracking device."¹⁹⁰ However, the court rejected this argument, and instead focused only of the law of the jurisdiction where the agents had installed the device.¹⁹¹

A related case is *United States v. Andres*.¹⁹² In *Andres*, DEA agents in Laredo, Texas installed a GPS monitoring device on a truck belonging to suspected drug traffickers without a warrant.¹⁹³ After learning that the car would be traveling to Chicago, the agents continued to monitor it with the GPS device as it left Texas.¹⁹⁴ Once it became clear through the agents' monitoring that the car was in fact heading to Chicago, the agents contacted the Illinois State Police, and a state trooper then conducted a traffic stop of the truck in Illinois and found drugs.¹⁹⁵ On appeal, the court held that agents did rely in good faith on binding Fifth Circuit precedent¹⁹⁶ when installing the device, but the court never analyzed whether the agents' installation of the device and monitoring of the car must have also comported with the precedent of Illinois, the Seventh Circuit, or any other jurisdictions the car traveled through on its way from Texas to Illinois.¹⁹⁷

¹⁸⁸ See *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010).

¹⁸⁹ *Barraza-Maldonado*, 732 F.3d at 869.

¹⁹⁰ *Id.* at 868.

¹⁹¹ *Id.* at 868-69.

¹⁹² 703 F.3d 828 (5th Cir. 2013).

¹⁹³ *Id.* at 830.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 830-31.

¹⁹⁶ See *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981).

¹⁹⁷ See *Andres*, 703 F.3d at 834-35.

Similarly, in *United States v. Martin*, Iowa police officers attached a GPS device to Martin's Car in Iowa, and then tracked Martin as he drove the car to Illinois.¹⁹⁸ Once in Illinois, a local sheriff stopped him and found a gun under the car's hood.¹⁹⁹ In Martin's subsequent prosecution in the Seventh Circuit, the court only looked to see whether there was any precedent authorizing the officers' use of the GPS device in the Eighth Circuit (which has jurisdiction over Iowa) and not the Seventh Circuit.²⁰⁰

Finally, another question faced by courts when deciding what constitutes binding precedent has arisen from the fact that often, federal and state law enforcement officers work together to investigate crime. For example, in *Gutierrez*, both DEA agents and Indianapolis police detectives went to Gutierrez's house to investigate drug trafficking.²⁰¹ So, in these circumstances, it is unclear whether different rules apply to each set of officers.²⁰²

May federal officers rely on both federal and state decisions to authorize their conduct, or must they only rely on federal decisions?²⁰³ Conversely, if federal officers may look to state law, can that state law limit the bounds of the officers' good-faith reliance on federal law? Here, decisions like *Barraza-Maldonado* and others suggest the answer is no.²⁰⁴ May state officers rely on both federal and state

¹⁹⁸ 712 F.3d 1080, 1081 (7th Cir. 2013).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1081–82.

²⁰¹ 760 F.3d 750, 752 (7th Cir. 2014).

²⁰² Oral Argument, *United States v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014) (Case No. 14-1159), http://media.ca7.uscourts.gov/sound/2014/ab.14-1159.14-1159_06_02_2014.mp3 (last visited Jan. 15th, 2015).

²⁰³ *United States v. Sparks*, 711 F.3d 58, 63–64 (1st Cir. 2013) (holding that *Davis*' emphasis on the absence of police culpability could be read to imply that officers could rely in good-faith on out of circuit precedent, but declining to expressly decide the issue); *United States v. Stephens*, 764 F.3d 327, 338 (4th Cir. 2014) (holding that officers could rely on the "general legal landscape" and a decision of the Court of Special Appeals of Maryland to authorize their conduct).

²⁰⁴ 732 F.3d 865 (8th Cir. 2013); *United States v. Andres*, 703 F.3d 828 (5th Cir. 2013).

decisions to authorize their conduct,²⁰⁵ or must they only rely on state decisions?²⁰⁶ Conversely, can federal law limit the bounds of state officers' reliance on state law?²⁰⁷ These questions have all been difficult, and led to different answers by courts.

2. What are the Limits of Officers' Good Faith Reliance on Binding Precedent?

In *Davis*, the Court summarized the law that has developed since *Leon* regarding when a law enforcement officer's conduct will be sufficiently culpable to warrant application of the exclusionary rule:

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. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way.²⁰⁸

In terms of applying this standard in the realm of *Davis*' binding precedent exception, courts have faced a complicated task. Essentially, courts have had to compare an old case (or cases) with the present one under review in order to evaluate whether the officers' reliance on the

²⁰⁵ See *State v. Mitchell*, 323 P.3d 69, 77–78 (Ariz. Ct. App. 2014).

²⁰⁶ *Taylor v. State*, 410 S.W.3d 520 (Tex. App. 2013); *People v. LeFlore*, 996 N.E.2d 678, 693 (Ill. Ct. App. 2013).

²⁰⁷ See generally *Smallwood v. State*, 113 So.3d 724, 739 (Fla. 2013) (suggesting the answer is yes).

²⁰⁸ 131 S. Ct. 2419, 2427–28 (2011) (alterations in original) (citations omitted) (internal quotation marks omitted).

old case was in good faith, or whether the officers' actions were culpable enough to warrant application of the exclusionary rule.

This task is has been a significant undertaking, and several difficult questions have arisen. The first is, how similar must the binding precedent be to the present case under review? Or, as *Davis* suggested the inquiry should be, whether or not the precedent “specifically authorizes” the officers’ current conduct?²⁰⁹ More importantly, if the precedent that officers rely on does not actually authorize their conduct when it is performed, and the officers mistakenly rely on that precedent, can they still be held to be acting in good faith?²¹⁰ Second, even if one piece of precedent does specifically authorize the officers’ conduct, do other cases reaching different results suggest that the constitutionality of the practice is an unsettled question thus prohibiting officers from relying on the precedent?²¹¹ Third, what is the relevance of officers seeking advice on the law from prosecutors or other government attorneys? If an officer receives advice from a prosecutor that his conduct will be lawful if performed, is this a factor to be used in considering whether the officer acted in good faith on binding precedent?²¹² Fourth, what significance should be given to the fact that, at the time the officers carry out their conduct, a challenge to the constitutionality of similar conduct is currently pending in a court of review? Is this a proper factor for courts to consider in their analyses, and will this fact bar officers from relying in good faith on the old case authorizing a police practice?²¹³

²⁰⁹ *Id.* at 2429.

²¹⁰ *See* *United States v. Davis* (“Davis DNA”), 690 F.3d 226 (4th Cir. 2012).

²¹¹ *Davis*, 131 S. Ct. 2419 at 2435 (Sotomayor, J., concurring).

²¹² *See* *United States v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014).

²¹³ *See* *United States v. Barraza-Maldonado*, 732 F.3d 865, 869 (8th Cir. 2013).

i. How Similar Must the Binding Precedent be to the Present Case Under Review?

Two police practices have been responsible for many decisions in which courts have applied *Davis*' good faith exception. The first has been when law enforcement officers use GPS devices to track suspects' cars, and the second has been when officers search suspects' cars incident to an arrest. Because each situation has arisen so often after *Davis*, the relevant background precedent is discussed below before analyzing the cases that have applied *Davis*' holding in each context.

a. The GPS Cases

The Supreme Court made no ruling on whether the government's placement of a GPS device on a car to monitor a suspect's movements was Fourth Amendment search until it decided *United States v. Jones* in 2012.²¹⁴ However, before discussing *Jones*, it is useful to discuss two other relevant cases that preceded that decision: *United States v. Knotts*²¹⁵ and *United States v. Karo*.²¹⁶

In *Knotts*, law enforcement officers placed a beeper in a five-gallon drum of chloroform with the consent of the drum's owner (the Hawkins Chemical Company).²¹⁷ When Hawkins then sold the drum to a man named Armstrong, officers used the beeper to track the movements of a car (in which the drum had been placed) as the car traveled along public streets.²¹⁸ Eventually, officers used the device to track the drum to an area outside a cabin belonging to Knotts, where the officers later found drugs.²¹⁹ The Court ultimately held that this monitoring was not a Fourth Amendment search because the

²¹⁴ 132 S. Ct. 945 (2012).

²¹⁵ 460 U.S. 276 (1983).

²¹⁶ 468 U.S. 705 (1984).

²¹⁷ 460 U.S. at 278.

²¹⁸ *Id.*

²¹⁹ *Id.*

government's monitoring of the beeper signals did not invade any legitimate expectation of privacy that Knotts held.²²⁰ According to the Court, Knotts would have no expectation of privacy in his movements from one place to another while traveling in a car on public roads.²²¹

In *Karo*, the DEA learned that Karo and two others were planning on buying fifty gallons of ether from a government informant.²²² According to the informant, the ether was going to be used to extract cocaine from clothing that had been shipped into the United States.²²³ So, the government obtained a court order authorizing them to install and monitor a beeper in a can of ether that was to be sold the group.²²⁴ After installing a beeper into a can of ether that the DEA owned, the DEA then gave the can to the informant, and agents then subsequently saw Karo receive the can from the informant.²²⁵ Over the next several months, the government followed the can as it was moved from one place to another, eventually being placed inside a home in Taos, New Mexico.²²⁶ The agents had used the beeper to determine that the can was inside the house.²²⁷ After suspecting that the ether was being used in the home, the agents obtained a warrant to search the Taos residence, based in part on the information they learned from using the beeper.²²⁸ When the warrant was executed, cocaine was found.²²⁹

After Knotts challenged the use of the beeper in his criminal case, the question before the Court on appeal was, “whether a warrant

²²⁰ *Id.* at 285.

²²¹ *Id.* at 281.

²²² 468 U.S. at 708.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 708–10.

²²⁷ *Id.* at 710.

²²⁸ *Id.* at 710.

²²⁹ *Id.*

was required to authorize either the installation of the beeper or its subsequent monitoring.”²³⁰

In terms of the installation, the Court held that no Fourth Amendment search or seizure occurred.²³¹ No search occurred because the can into which the beeper was placed belonged (at the time) to the DEA, and no seizure occurred because the placement of the beeper into the can did not interfere with anyone’s possessory interest in the can in a meaningful way.²³² However, in terms of the monitoring, the Court held that a search had occurred.²³³ This was because the agents had used the beeper to monitor the can while it was inside a private residence, and this violated a justifiable expectation of privacy in that residence.²³⁴

In *Jones*, law enforcement officers began investigating Jones after suspecting him of drug trafficking.²³⁵ Based on their initial investigation, the government applied for a warrant authorizing the use of a GPS tracking device on a Jeep registered to Jones’ wife.²³⁶ A warrant was issued requiring the device to be installed within ten days in the District of Columbia, but the officers did not install the device until the 11th day, and they installed it in Maryland.²³⁷ The agents then used the device to monitor the Jeep’s movements for twenty-eight days.²³⁸ Ultimately, the Court held that the government’s installation of the GPS device on a Jones’ vehicle, and its use of that device to monitor the vehicle’s movements, did constitute a Fourth Amendment search because the government “physically occupied private property for the purpose of obtaining information.”²³⁹

²³⁰ *Id.* at 711.

²³¹ *Id.*

²³² *Id.* at 711–13.

²³³ *Id.* at 714.

²³⁴ *Id.* at 714–15.

²³⁵ 132 S. Ct. 945, 948 (2012).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 949.

The government argued that, based on the Court's landmark decision in *Katz v. United States*,²⁴⁰ no search had occurred.²⁴¹ In *Katz*, the Court held that a Fourth Amendment search occurs when the government violates an expectation of privacy that society is prepared to consider reasonable.²⁴² So, the government argued there was no search because, given *Knotts*, and *Karo*, Jones had no expectation of privacy in the underbody of jeep that the agents accessed in placing the device, or in the locations of the Jeep as it traveled on public roads.²⁴³

But, the Court disagreed, and held that Jones' Fourth Amendment rights did not "rise or fall" based on the test articulated in *Katz*.²⁴⁴ In other words, the Court held that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."²⁴⁵ So, because the government had committed a trespass by attaching the device onto the undercarriage of Jones's wife's jeep, the Court held that a search had occurred within the meaning of the Fourth Amendment.²⁴⁶ It is also important to note that before *Jones*, lower courts were split on whether the government's installation of a GPS device and its use to monitor a suspect's car constituted a search.²⁴⁷

²⁴⁰ 389 U.S. 347 (1967).

²⁴¹ *Jones*, 132 S. Ct. at 950.

²⁴² 389 U.S. at 353 (Harlan, J., concurring). Justice Harlan's concurrence became the test adopted by the Court in many future cases. *See, e.g.*, *Bond v. United States*, 529 U.S. 334, 338 (2000); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Smith v. Maryland*, 442 U.S. 735, 739 (1979). *But see* *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (criticizing the test).

²⁴³ *Jones*, 132 S. Ct. at 951–52.

²⁴⁴ *Id.* at 950.

²⁴⁵ *Id.* at 952.

²⁴⁶ *Id.* at 949.

²⁴⁷ *See, e.g.*, *United States v. Garcia*, 474 F.3d 994, 996–98 (7th Cir. 2007) (holding that the government's GPS monitoring of a vehicle's public movements was not a Fourth Amendment search); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216–17 (9th Cir. 2010); *United States v. Maynard*, 615 F.3d 544, 555–56

Given this background, virtually all of the cases discussed below follow a similar fact pattern: law enforcement officers place a GPS device on a suspect's car without a warrant before the Court's decision in *Jones* (January 2012), and then courts of review are asked to determine after *Jones* was decided whether the officers could rely in good faith on any binding precedent that using the GPS devices did not constitute a Fourth Amendment search for which a warrant would be required.²⁴⁸

One common question in these cases has been whether law enforcement officers could rely in good faith on *Knotts* and *Karo* when both installing GPS devices on suspects' cars, and using the devices to monitor those cars' movements.²⁴⁹ Among these decisions, courts are split, with some courts answering that the officers could rely in good faith on *Knotts* and *Karo* to authorize both GPS installation and monitoring,²⁵⁰ and other courts answering that officers could not

(D.C. Cir. 2010) (holding that government's GPS monitoring of a vehicle's movements was a Fourth Amendment search).

²⁴⁸ See *United States v. Baez*, 744 F.3d 30 (1st Cir. 2014); *United States v. Sparks*, 711 F.3d 58 (1st Cir. 2013); *United States v. Aguiar*, 737 F.3d 251 (2d Cir. 2013); *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014); *United States v. Stephens*, 764 F.3d 327 (4th Cir. 2014); *United States v. Andres*, 703 F.3d 828 (5th Cir. 2013); *United States v. Fisher*, 745 F.3d 200 (6th Cir. 2014); *United States v. Brown*, 744 F.3d 474 (7th Cir. 2014); *United States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013); *United States v. Ransfer*, 749 F.3d 914 (11th Cir. 2014); *State v. Mitchell*, 323 P.3d 69 (Ariz. Ct. App. 2014); *People v. LeFlore*, 996 N.E.2d 678 (Ill. App. Ct. 2013); *Kelly v. State*, 82 A.3d 205 (Md. 2013); *State v. Adams*, 763 S.E.2d 341 (S.C. 2014); *Taylor v. State*, 410 S.W.3d 520 (Tex. App. 2013); *State v. Oberst*, 847 N.W.2d 892 (Wis. Ct. App. 2014).

²⁴⁹ *Aguiar*, 737 F.3d at 256–57; *United States v. Katzin*, 732 F.3d 187, 206–07 (3d Cir. 2013) (*rev'd en banc*, 769 F.3d 163); *Katzin*, 769 F.3d 163; *Stephens*, 764 F.3d at 332–34; *Mitchell*, 323 P.3d at 76–78; *LeFlore*, 996 N.E.2d at 692; *Adams*, 763 S.E.2d at 347.

²⁵⁰ *Aguiar*, 737 F.3d at 261–62; *Katzin*, 769 F.3d at 173–74; *Stephens*, 764 F.3d at 337–38. These cases' holdings are interesting, given the fact that the Court itself in *Jones* held that *Knotts* and *Karo* did not authorize the law enforcement officers' conduct. See 132 S. Ct. at 951–52.

have such good faith reliance.²⁵¹ Another court has held that officers could rely on *Knotts* and *Karo* when using a GPS device to monitor a suspect's car, but did not have to reach the question of installation of the device because it had been done without a trespass.²⁵² Other courts have held that officers could rely in good faith on *Knotts* or *Karo* when using GPS devices to monitor suspects' cars, but have relied on other authority as providing the source of officers' good faith reliance when installing the devices.²⁵³ Some courts, despite the obvious fact that *Knotts* and *Karo* will always qualify as binding precedent because they are Supreme Court cases, have failed to discuss their significance entirely, although this is likely because there were other binding decisions that were more on point.²⁵⁴ However, in one case, a court did discuss the relevance of *Knotts* (without discussing *Karo*), when other more on point Circuit precedent authorized the officers' conduct.²⁵⁵ Finally, one court has expressly declined to decide the issue of whether the officers could have relied in good faith on *Knotts* and *Karo*, because it held that the officers could rely in good faith on other precedent.²⁵⁶

So, on the question of whether officers could rely in good faith on *Knotts* and *Karo* when installing GPS devices and using the devices to monitor suspects' cars, courts are very split.

²⁵¹ *Mitchell*, 323 P.3d at 78; *LeFlore*, 996 N.E.2d at 692; *Adams*, 763 S.E.2d at 347; *Katzin*, 732 F.3d at 206.

²⁵² *Brown*, 744 F.3d at 478.

²⁵³ *Baez*, 744 F.3d at 35; *Sparks*, 711 F.3d at 65.

²⁵⁴ *Andres*, 703 F.3d at 834–35; *United States v. Barraza-Maldonado*, 732 F.3d 865, 867–68 (8th Cir. 2013).

²⁵⁵ *United States v. Ransfer*, 749 F.3d 914, 922–23 (11th Cir. 2014).

²⁵⁶ *United States v. Fisher*, 745 F.3d 200, 204 (6th Cir. 2014) (“Some appellate courts have [held] that *Knotts* and *Karo* actually authorized the warrantless use of GPS devices and therefore are themselves a basis for asserting the good-faith exception We need not go that far here because at the time of the search the Sixth Circuit had already approved the police conduct.”).

b. Cases Involving Searches of Cars Incident to Arrest

In terms of searches of cars incident to arrest, the Court in *New York v. Belton* held that “when 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.”²⁵⁷ Many courts understood *Belton* to have announced a bright line rule authorizing searches of cars incident to arrests of recent occupants regardless of whether the arrestee was within reaching distance of the car during the search.²⁵⁸ This was true even when the arrestee had exited the vehicle and been taken into custody by the police.²⁵⁹ However, in *Arizona v. Gant* (decided in April 2009), the Court changed course and held that the *Belton* rule only applied where “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”²⁶⁰ The end result of *Gant* is that a search of a car incident to an occupant’s arrest is now constitutional only if the arrestee is within reaching distance of the car during the search, or if the police have reason to believe that there is “evidence relevant to the crime of arrest” in the vehicle.²⁶¹

Again, like the GPS cases, all cases interpreting *Davis* in this context follow a similar fact pattern: law enforcement officers conduct a search of a car incident to an arrest in violation of *Gant*’s holding but before *Gant* was decided, and then courts of review have had to determine after *Gant* whether the officers could have relied in good faith on any binding precedent (usually *Belton* or lower decisions applying *Belton*) that their conduct was permissible under the Fourth

²⁵⁷ 453 U.S. 454, 459–60 (1981).

²⁵⁸ *Davis v. United States*, 131 S. Ct. 2419, 2424 (citing *Thornton v. United States*, 541 U.S. 615, 628 (2004)).

²⁵⁹ *Id.* at 2424 n.3.

²⁶⁰ 556 U.S. 332, 343 (2009).

²⁶¹ *Id.* at 332–33.

Amendment.²⁶² However, unlike the GPS cases, the courts in this context have uniformly held that the officers were acting in good faith, due to the fact that *Belton*, or lower courts' applications have *Belton*, established a bright-line rule that such searches were constitutionally permissible.²⁶³

So, in terms of how similar precedent must be to the case at hand for officers to rely on the precedent in good faith, the search incident to arrest cases have been more uniformly decided than the GPS cases, because of the presence of the bright-line rule that existed before *Gant*. However, there was no such bright line rule concerning officers' installation and use of GPS monitoring devices. So, in the GPS cases, this absence of any underlying bright line rule has led to far more varied results.

In the cases applying *Davis*' discussed above, the common question has been whether the binding precedent law enforcement relied on actually *authorized* the police's conduct when it was being performed.²⁶⁴ This focus is in line with the *Davis* opinion, where the Court held that "when 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."²⁶⁵

However, some courts have turned away from *Davis*' suggestion that binding precedent must actually authorize law enforcement's conduct for officers to be able to reasonably rely on that

²⁶² *United States v. Baker*, 719 F.3d 313 (4th Cir. 2013); *United States v. Madden*, 682 F.3d 920 (10th Cir. 2012); *United States v. Soza*, 643 F.3d 1289 (10th Cir. 2011); *Parker v. Commonwealth*, 440 S.W.3d 381, 385 (Ky. 2014); *Briscoe v. State*, 30 A.3d 870, 873 (Md. 2011); *People v. Mungo*, 813 N.W.2d 796, 797 (Mich. Ct. App. 2012); *State v. Johnson*, 354 S.W.3d 627, 630 (Mo. 2011); *Narciso v. State*, 723 S.E.2d 369, 372 (S.C. 2012).

²⁶³ *Baker*, 719 F.3d at 320; *Madden*, 682 F.3d at 927; *Soza*, 643 F.3d at 1291; *Parker*, 440 S.W.3d at 385; *Briscoe*, 30 A.3d at 873; *Mungo*, 813 N.W.2d at 797; *Johnson*, 354 S.W.3d at 630; *Narciso*, 723 S.E.2d at 372. *See also* *People v. Hopper*, 284 P.3d 87, 90 (Colo. App. 2011) (Hopper conceded that the search of his car was proper under then binding precedent).

²⁶⁴ *See, e.g., United States v. Baez*, 744 F.3d 30, 33 (1st Cir. 2014).

²⁶⁵ 131 S. Ct. at 2429.

precedent.²⁶⁶ In *Katzin*, the court construed the “specifically authorizes” language in *Davis* (for the sake of argument only) to mean that, “the relied-upon case must affirmatively authorize the precise conduct at issue in the case under consideration.”²⁶⁷ But, the court went on to hold:

While reliance is likely reasonable when the precise conduct under consideration has been affirmatively authorized by binding appellate precedent, it may be no less reasonable when the conduct under consideration clearly falls well within rationale espoused in binding appellate precedent, which authorizes nearly identical conduct.²⁶⁸

In other words, *Katzin* held that, even where precedent does not actually authorize the police’s conduct, and only authorizes conduct that is similar to that authorized in a past case, officers may still reasonably rely on that precedent.²⁶⁹

Another court has gone even further, and held that even if officers are mistaken about the law and the precedent they rely on does not authorize their conduct, *Davis*’ good faith exception can still apply.²⁷⁰

In *United States v. Davis* (“*Davis DNA*”), law enforcement extracted DNA from clothing that had been seized from Davis after he went to a hospital with a gunshot wound and claimed to be a victim of a robbery.²⁷¹ Under the court’s binding precedent,²⁷² if Davis had been a victim he would have had an expectation of privacy in his DNA, thus

²⁶⁶ *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014); *United States v. Davis* (“*Davis DNA*”), 690 F.3d 226 (4th Cir. 2012).

²⁶⁷ 769 F.3d at 176.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Davis DNA*, 690 F.3d at 230.

²⁷¹ *Id.* at 230–31.

²⁷² *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

making the police's later extraction of his DNA from his clothing unlawful.²⁷³ But, if Davis had been a suspect, he would not have had such a privacy interest, making the extraction lawful.²⁷⁴ Despite this precedent, the court held that even if the officers knew that Davis was a victim, the extraction of the DNA based on a misreading of the relevant precedent would be permissible and in good faith under *Davis*, making the exclusionary rule inapplicable.²⁷⁵

The court reached this holding even though it candidly and repeatedly recognized that the law surrounding individuals' privacy in their DNA was unsettled.²⁷⁶ So, *Davis DNA* represents at least one court that has held that, even if binding precedent does not actually authorize a police practice at the time it is carried out, but officers mistakenly think that it does, *Davis*' good faith exception may still apply.

Justice Breyer's foresaw this exact issue in his dissent in *Davis*, and warned of the dangers of such holdings:

[A]n officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, 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," where it only describes how to treat roughly analogous instances, or where it just does not exist. Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or

²⁷³ *Davis DNA*, 690 F.3d at 244.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 254.

²⁷⁶ *Id.* at 240, 246.

grossly negligent,” then the “good faith” exception will swallow the exclusionary rule.²⁷⁷

Given the remarkable breadth of some courts’ applications of *Davis*’ new rule, and the lack of any concrete limiting principle for declining to apply *Davis*’ good faith exception, Justice Breyer’s prediction that the exclusionary rule will be swallowed may very likely come true if courts do not begin interpreting the rule more narrowly.

ii. Is the Law Authorizing the Police’s Conduct Settled?

Some defendants have argued that the police should not be able to act in good faith reliance on binding precedent if that precedent is currently being challenged in a court of review.²⁷⁸ In *Barraza-Maldonado*, Barraza-Maldonado argued that the DEA could not have acted in good faith reliance on any precedent²⁷⁹ when they installed a GPS monitoring device onto his car, because at the time of the installation (December 21st, 2011)²⁸⁰ the constitutionality of this practice was being challenged and was pending in the Supreme Court.²⁸¹ However, the court rejected this argument, and held that the fact that the officers may have known the legality of their conduct may soon become unlawful was irrelevant.²⁸²

A similar argument was also rejected in *United States v. Davis* (“*Davis Dog*”).²⁸³ In that case, on December 12th, 2012, the police used a drug-sniffing dog to sniff the front door of Davis’ apartment

²⁷⁷ *Davis v United States*, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting).

²⁷⁸ *United States v. Davis* (“*Davis Dog*”), 760 F.3d 901, 905 (8th Cir. 2014); *United States v. Barraza-Maldonado*, 732 F.3d 865, 869 (8th Cir. 2013).

²⁷⁹ See *United States v. Pinedo-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

²⁸⁰ Brief and Addendum of the Appellant at 3, *United States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013) (No. 12-3903).

²⁸¹ *Barraza-Maldonado*, 732 F.3d at 869. The Supreme Court heard oral arguments in *United States v. Jones* on November 11th, 2011, roughly five weeks before the agents attached the device to Barraza-Maldonado’s car.

²⁸² *Id.* at 869.

²⁸³ 760 F.3d 901 (8th Cir. 2014).

without a warrant.²⁸⁴ Davis argued that one reason the officers could not have been acting in good faith on any precedent when using the dog was because, as in *Barraza-Maldonado*, the legality of such a practice was currently pending in the Supreme Court.²⁸⁵ However, again the court held that this fact was irrelevant.²⁸⁶

A related question has been the relevance of the timing of an officer's actions *after* a decision has been announced holding a specific practice unconstitutional. For example, in *State v. Fierro*, the Supreme Court of South Dakota held that an officer could not rely on precedent to authorize his conduct when that precedent had been overruled by the State Supreme Court four months earlier.²⁸⁷ However, if negligent police mistakes are permissible under *Davis*, a situation could arise in which reliance on precedent that had been overruled could be determined to be in good faith. Would an officer be more than negligent if the precedent he was relying on had been overruled just a few hours prior to his actions? One day? Two days? One week? It is hard to define the precise moment in time when the officer's conduct would turn from simple negligence to culpable negligence or recklessness that a court may aim to deter.

3. Other Issues In Applying *Davis*

i. The Actor Problem

Generally, the Supreme Court has held that the exclusionary rule is only designed to deter police officers, and that the rule cannot be used to deter other actors who may be involved in the police's

²⁸⁴ *Id.* at 902.

²⁸⁵ *Id.* at 905. The Supreme Court heard oral arguments in *Florida v. Jardines* on October 31st, 2012, roughly six weeks before the agents used the dog to sniff Davis' door.

²⁸⁶ 760 F.3d at 905. *See also* *State v. Edwards*, 853 N.W.2d 246, 254 (S.D. 2014) (holding that an officer was acting in good faith on binding precedent even though the legality of the practice he engaged in was pending before the Supreme Court in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013)).

²⁸⁷ 853 N.W.2d 235, 245 (S.D. 2014).

constitutional violations. For example, in *Leon*, the Court held that “the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates [who issue warrants].”²⁸⁸ In *Krull*, the Court held that “legislators, like judicial officers, are not the focus of the rule,” and that the exclusionary rule should not be used to deter legislators unless they “ignore or subvert the Fourth Amendment,” because legislators are not adjuncts of law enforcement.²⁸⁹ In *Evans*, the Court noted that, “the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees.”²⁹⁰ Further, the Court held that rule should not be used to try to deter court employees because, at least in the case at bar, there was no evidence that such employees were “inclined to ignore or subvert the Fourth Amendment”²⁹¹ Finally, in *Davis*, the Court also held that the exclusionary rule should not be used to try to deter appellate judges from writing unconstitutional opinions.²⁹²

What the Court has not had occasion to rule on is whether the exclusionary rule can be invoked to deter prosecutors or other government lawyers who advise the police on the constitutionality of their conduct. However, the Court’s holding in *Krull* does suggest that the exclusionary rule could be used to deter prosecutors, because they are clearly adjuncts of law enforcement. After *Davis* was decided, this issue has arisen in a few federal appellate court decisions.

In *Katzin*, the court held that one of the reasons the officers had “an objectively reasonable good faith belief that their conduct was lawful,” was because before the officers installed a GPS device on the car in question they consulted with an Assistant United States Attorney (AUSA) about their proposed conduct.²⁹³ So, because the

²⁸⁸ *United States v. Leon*, 468 U.S. 897, 916 (1984).

²⁸⁹ *Illinois v. Krull*, 480 U.S. 340, 350–51 (1987).

²⁹⁰ *Arizona v. Evans*, 514 U.S. 1, 14 (1995).

²⁹¹ *Id.* at 14–15.

²⁹² *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011).

²⁹³ *United States v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014).

AUSA approved the agents' conduct²⁹⁴, this fact aided the court in holding the officers were acting in good faith.²⁹⁵ Katzin argued that application of the exclusionary rule would deter prosecutors from "engaging in overly aggressive readings of non-binding authority," however the court never really addressed the significance of deterring prosecutors, suggesting that it found such deterrence irrelevant.²⁹⁶

However, the principal dissent sharply criticized the majority's position. First, the dissent noted that the consultation with the AUSA was not a "panacea" for the constitutional issues raised, because the AUSA was not a neutral party (unlike a magistrate).²⁹⁷ Further, the dissent argued that the good faith exception should be limited to cases involving "nondeterrable" mistakes, or to cases where officers rely on a neutral third party.²⁹⁸ So, the dissent strongly suggested that the exclusionary rule could be used to deter officers from relying exclusively on advice from AUSAs, and that the exclusionary rule could even be used to deter the AUSAs themselves.²⁹⁹

In *Brown*, the Seventh Circuit took a similar position to the principal dissent in *Katzin*, and did suggest that the exclusionary could be used to deter lawyers advising federal or state law enforcement officers.³⁰⁰ However, this suggestion was a very minor part of the court's overall opinion.

So, *Katzin* has suggested that the exclusionary rule should not be used to try to deter prosecutors from aggressive readings of authority, and that the fact that police rely on a prosecutor's advice can be a factor suggesting the officer was acting in good faith. However, *Brown* has suggested the opposite.

²⁹⁴ See *id.* at 168. It was the Department of Justice's policy that warrants were not required to install GPS devices on cars parked in public streets and survey the car on public roads.

²⁹⁵ *Id.* at 181.

²⁹⁶ See *id.* at 185–87.

²⁹⁷ *Id.* at 187.

²⁹⁸ *Id.* at 189–90.

²⁹⁹ *Id.* at 191.

³⁰⁰ *United States v. Brown*, 744 F.3d 474, 478 (7th Cir. 2014).

ii. Courts Have Assumed Fourth Amendment Issues Without Deciding Them

A very large number of courts have declined to actually discuss or reach a holding about whether a Fourth Amendment violation occurred, and instead have assumed without deciding that there was a Fourth Amendment violation (or accepted the government's concession that violation occurred) in order to reach a good faith analysis.³⁰¹ This is important because, when courts do this, they fail to set meaningful precedent about what is and what is not constitutional.

iii. Courts are Interpreting *Davis* Very Broadly

Overall courts are interpreting *Davis*' rule incredibly broadly, and not giving much consideration to Justice Sotomayor's concurrence that the law must be settled in order for the police to reasonably rely on it.³⁰² For example, although *Davis*' exception has been raised in a variety of different circumstances, and some cases are easier to decide than others, only one federal court of appeal³⁰³ and six state courts of review³⁰⁴ to consider *Davis*' good faith exception have held that officers were not in fact acting in good faith on binding precedent.

³⁰¹ *United States v. Sparks*, 711 F.3d 58, 62 (1st Cir. 2013); *Katzin*, 769 F.3d at 170; *United States v. Stephens*, 764 F.3d 327, 334 (4th Cir. 2014); *United States v. Davis*, 690 F.3d 226, 233 (4th Cir. 2012); *United States v. Andres*, 703 F.3d 828, 834 (5th Cir. 2013); *Brown*, 744 F.3d at 476; *United States v. Davis* ("Davis Dog"), 760 F.3d 901, 903 (8th Cir. 2014); *United States v. Thomas*, 726 F.3d 1086, 1093 (9th Cir. 2013); *United States v. Pineda-Moreno*, 688 F.3d 1087, 1090 (9th Cir. 2012); *Kelly v. State*, 82 A.3d 205, 214 (Md. 2013).

³⁰² *See, e.g., United States v. Davis* ("Davis DNA"), 690 F.3d 226, 240, 246 (4th Cir. 2012).

³⁰³ *See United States v. Martin*, 712 F.3d 1080 (7th Cir. 2013).

³⁰⁴ *State v. Mitchell*, 323 P.3d 69 (Ariz. Ct. App. 2014); *Smallwood v. State*, 113 So.3d 724 (Fl. 2013); *People v. LeFlore*, 996 N.E.2d 678, 691 (Ill. Ct. App. 2013); *State v. Thomas*, 334 P.3d 941, 945 (Okla. Ct. App. 2014); *State v. Adams*, 763 S.E.2d 341 (S.C. 2014); *State v. Fierro*, 853 N.W.2d 235, 244 (S.D. 2014).

Conversely, seventeen federal courts of appeal³⁰⁵ and thirteen state courts of review³⁰⁶ have held that officers were acting in good faith on binding precedent.

E. The Best Path Forward in Applying Davis

The exclusionary rule began as a device to give effect to the Fourth Amendment, and make citizens more secure in their persons, houses, papers, and effects.³⁰⁷ By limiting the government's incentive to violate individuals' Fourth Amendment rights, and by significantly weakening its ability to convict individuals of crimes subsequent to such violations, the exclusionary has served as an incredibly important limit on government power.

The best path forward in applying *Davis*' binding precedent exception is consistent with the exclusionary rule's origins and purpose, and colored by a deep respect for the rule's survival as a limit on the government's power to search and seize in the future. The best path forward thus limits officers' ability to rely on precedent, and also limits result-oriented courts from interpreting *Davis* however they

³⁰⁵ *United States v. Baez*, 744 F.3d 30 (1st Cir. 2014); *Sparks*, 711 F.3d 58; *United States v. Aguilar*, 737 F.3d 251 (2d Cir. 2013); *Katzin*, 769 F.3d 163; *Stephens*, 764 F.3d 327; *United States v. Baker*, 719 F.3d 313 (4th Cir. 2013); *Davis*, 690 F.3d 226; *Andres*, 703 F.3d 828; *United States v. Fisher*, 745 F.3d 200 (6th Cir. 2014); *Brown*, 744 F.3d 474; *Davis*, 760 F.3d 901; *United States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013); *Thomas*, 726 F.3d 1086; *Pinedo-Moreno*, 688 F.3d 1087; *United States v. Madden*, 682 F.3d 920 (10th Cir. 2012); *United States v. Soza*, 643 F.3d 1289 (10th Cir. 2011); *United States v. Ransfer*, 749 F.3d 914 (11th Cir. 2014).

³⁰⁶ *People v. Hopper*, 284 P.3d 87 (Colo. Ct. App. 2011); *Henderson v. State*, 953 N.E.2d 639 (Ind. Ct. App. 2011); *State v. Carlton*, 304 P.3d 323 (Kan. 2013); *Parker v. Commonwealth*, 440 S.W.3d 381 (Ky. 2014); *Briscoe v. State*, 30 A.3d 870 (Md. 2011); *Kelly v. State*, 82 A.3d 205 (Md. 2013); *People v. Mungo*, 813 N.W.2d 796 (Mich. Ct. App. 2012); *State v. Johnson*, 354 S.W.3d 627 (Mo. 2011); *State v. Hoffman*, No. 2013-0688, 2014 WL 5648448 (Ohio 2014); *State v. Brown*, 736 S.E.2d 263 (S.C. 2012); *State v. Edwards*, 853 N.W.2d 246 (S.D. 2014); *Taylor v. State*, 410 S.W.3d 520 (Tex. App. 2013); *State v. Oberst*, 847 N.W.2d 892 (Wis. Ct. App. 2014).

³⁰⁷ *Weeks v. United States*, 232 U.S. 383, 391-92 (1914).

wish, to reach whatever result they wish. The following hypothetical will be used throughout the discussion of the best path in order to illustrate its merits.

Over the last century, a common situation in which the Court has constantly been confronted with Fourth Amendment problems is when the police develop new technology to investigate crime.³⁰⁸ So, as a useful hypothetical, suppose that law enforcement agencies around the country develop, and begin to use, a new sophisticated device that allows them to remotely scan individuals, and indicate whether the individual has used illegal drugs within the last thirty days (much like a drug test). Now suppose the police use their new device, without a warrant, to scan Randy, a young man walking down the street in a bad neighborhood. The scan is done without Randy's knowledge, and the device informs the police that Randy has recently ingested cocaine, probably within the last seventy-two hours. So, the police conduct a *Terry* stop, things go downhill for Randy, and the police find drugs and a knife on his person after a lawful *Terry* pat-down.³⁰⁹

In his subsequent criminal trial, Randy argues that the police's act of using the device constituted a Fourth Amendment search, and he asks the trial court to suppress the evidence because the search was unreasonable and the fruit of the officers' initial unlawful use of the device. However, the government argues that the use of the device was not a search, that even if there was a search it was reasonable, and that no matter how the first two issues are resolved the evidence should not be suppressed because, pursuant to *Davis*, the police were acting in good faith on binding precedent when using the device. The trial court could determine that the police's use of the device was not a search, but for our purposes the court does not do so and proceeds to consider the government's good faith argument under *Davis*.³¹⁰

³⁰⁸ See, e.g., *United States v. Jones*, 132 S. Ct. 945 (2012); *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983); *Olmstead v. United States*, 277 U.S. 438 (1928).

³⁰⁹ See *Terry v. Ohio*, 392 U.S. 1 (1968).

³¹⁰ The court could also choose not to address the merits of whether a Fourth Amendment violation occurred, and only conduct a good faith analysis, as some

1. How Binding Precedent Should Be Defined

The question of what exactly should constitute precedent is a tricky one. For example, the court in Randy's case, regardless of what universe of cases it decides is binding and what those cases hold, can use *Davis*' holding to do whatever it wishes. If the court desires to reach a certain result, instead of trying to objectively apply the law, whatever result the court desires can be readily reached through various interpretive techniques. All lawyers know that precedent can be shaved down to a fine point, or flattened into a bludgeon, as long as the craftsman is skilled. For this portion of the discussion, it also does not matter whether Randy is tried in federal or state court.

If the court wants to admit the evidence and hold that the officers were acting in good faith, it could find some precedent from its own jurisdiction or from the United States Supreme Court, and hold that the precedent authorized the police to use their device. For example, the court could use *Kyllo*, and hold that because the device was available to the public for general use, the police acted in good faith belief they were not conducting a Fourth Amendment search.³¹¹

If no reasonable argument could be made that the device was available for public use (meaning the court would lose legitimacy if it held to the contrary), or if the court did not want to use *Kyllo* for whatever reason, it could instead look at the general legal landscape around the country, as some courts have done.³¹² After this review, the court would find some cases holding that individuals do not have a reasonable expectation of privacy in concealing contraband, and thus a police practice that only reveals the presence or absence of contraband is not a search.³¹³ Of course, given *Jones*, the court would also have to hold that the government had not physically trespassed into Randy's body, but this would be a reasonable argument to make.

courts have done. See *United States v. Sparks*, 711 F.3d 58, 62 (1st Cir. 2013); *Katzin*, 769 F.3d at 170; *United States v. Stephens*, 764 F.3d 327, 334 (4th Cir. 2014).

³¹¹ 533 U.S. 27, 34 (2001).

³¹² See *Katzin*, 769 F.3d at 177–82; *Stephens*, 764 F.3d at 338.

³¹³ *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005).

Simply put, if the court wanted to admit the evidence, it could either: (1) choose a case from its own jurisdiction and hold that it authorized the police to use the device, or (2) if no such useful case were available, expand the universe of binding cases until it found a case sufficiently similar to Randy's that authorized the officers' conduct. There is no doubt one will almost always exist somewhere, so long as courts are willing to look hard.

If the court wants to exclude the evidence, it could also easily do so, and again it is totally irrelevant what cases actually exist throughout the country. For example, the court could hold that the officers should have known the device was not widely available for public use under *Kyllo*, and thus that using the device would be a search. And again, if this is an unsavory statement to make and one the court wants to avoid, the court could (again quite reasonably) hold that the officers should have known that the device was much like a government trespass into Randy's body, and thus would be a search. Even if there was binding precedent within the court's jurisdiction that appeared to directly authorize the police's use of the device, the court could look to the legal landscape around the country, but this time look for cases that would indicate the use of such devices was unsettled. For example, even if no case in the country had addressed the use of the remote drug-testing device, the court could find a case holding that a suspicionless drug test of an individual constituted a search absent some special need.³¹⁴ Then, the court stress the importance of Justice Sotomayor's concurrence, and hold that because the legality of the device was not clearly settled, the police could not have acted in good faith.³¹⁵

Now, change the facts of the hypothetical slightly, and imagine the law enforcement officers using the device are agents with the DEA. Now, the agents are in East St. Louis in Illinois, very close to

³¹⁴ See, e.g., *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

³¹⁵ Another way to think about this kind of hypothetical is to consider, if the case of *Kyllo* arose "for the first time today rather than in 2001," whether the evidence unconstitutionally seized would be admissible under *Davis*. JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE INVESTIGATING CRIME* 527 (West, 5th ed. 2013).

the border between Illinois and Missouri. Randy the unfortunate is still in his bad neighborhood, but now he is in St. Louis, Missouri. What precedents may the agents now rely on? The Seventh Circuit's? The Eighth Circuit's? Illinois state law? Missouri state law?

The answer again is largely irrelevant, because if a court wants to admit the evidence, the only thing that will stand in its way is if all the jurisdictions have cases directly on point clearly prohibiting the use of the device. As long as one jurisdiction allows it, a court could hold that that jurisdiction alone enabled the agents to act in good faith. One out of four might be a hard sell, but the court's holding could be bolstered by concluding that the jurisdiction's precedent that authorized the conduct was the only jurisdiction that mattered.³¹⁶

For example, the court that the agents' conduct suggests that the government intended to prosecute Randy in the jurisdiction that allowed the use of the device, and it should not matter if plans changed after the contraband was found. Or, to get better odds (one out of two), the court could hold that all that mattered was where Randy was (Missouri or the Eighth Circuit), or all that mattered was where the agents were (Illinois or the Seventh Circuit).

And again, if the court wished to keep the evidence out, it could go through similar interpretive hurdles, holding that the choice precedent provided an unsettled landscape rather than judicial authorization. The only thing standing in its way would be if all four jurisdictions had cases on point clearly authorizing the practice.

"Binding precedent" is a nebulous concept. In this nebula, law enforcement officers and courts alike are free to maneuver without limitation and pursue any subjective goal they wish, without much regard to how the Fourth Amendment protects all people. Given this reality, binding precedent should be defined narrowly, in order to accomplish two important goals: (1) providing clarity, and (2) providing limitations.

Therefore, "binding precedent" should be defined for both state and federal law enforcement officers as the decisions of the state and

³¹⁶ See, e.g., *United States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013).

federal circuit in which they are acting, and the decisions of the United States Supreme Court. When federal and state law conflicts, this should be a factor suggesting the officers could not have relied in good faith on either jurisdictions' precedent (due to its unsettled nature).

This rule should also hold true if federal officers' conduct extends over many jurisdictions. In these situations, precedential universe expands, but the limiting principle remains with equal if not greater force, because any conflicts that arise are still a factor suggesting the officers could not have relied in good faith on any jurisdictions' precedent, again due to its unsettled nature. In these circumstances, agents must strictly comply with all jurisdictions' precedents in which they may act, and if they fail to do this courts should lean towards holding the officers did not act in good faith. This would go along way to solve the multi-jurisdictional issues discussed above.

Good officers should be trained on what the law allows,³¹⁷ but this will be incredibly hard if "binding precedent" is not defined clearly and narrowly. Officers should not be tasked with knowing how the Fourth Amendment is being interpreted in fifty different states and twelve different federal circuits. Further, limiting the definition of binding precedent will prevent overly aggressive police officers from unnecessarily risking violations of people's Fourth Amendment rights. If officers feel that courts will support their actions by looking around the entire country for precedent to authorize their conduct after the fact, such risks may be taken more frequently without the officers seeking a warrant from an independent judicial officer.

Courts of review should also be interested in limiting themselves, and lower courts over which they sit. Limiting what constitutes precedent as described above will restrict (although not stop entirely) lower courts using whatever interpretive tools they wish to reach any result they wish. This limitation would also provide more clear guidance for judges trying to objectively apply the law without regard for what result is reached. And, by doing so, such a rule would

³¹⁷ See *United States v. Leon*, 468 U.S. 897, 919 (1984) (holding that officers should have a reasonable knowledge of what the law prohibits).

provide more consistent results, as opposed to the incredibly varied results that courts have thus far reached.

2. Defining the Limits of Officers' Good Faith Reliance on Binding Precedent

This question is complicated, because it is hard to precisely apply *Davis*' culpability rubric when dealing with officers' reliance on precedent. For example, under the Court's current regime, an officer will not be culpable if he acts with isolated or simple negligent reliance on precedent.³¹⁸ But, the officer will be culpable if his reliance on precedent was grossly negligent or reckless.³¹⁹ The line between these two standards of culpability is obviously a very hard to draw.

Because of this difficulty, and because of the variety of different contexts in which past precedent can guide officers' present conduct, no fixed line can ever be drawn. Instead a variety of different tests for each conceptual problem raised needs to be considered.

i. Binding Precedent Must Be Very Similar to the Present Case Under Review

The best approach to use when determining how similar precedent must be to a present case under review is to hold that, consistent with *Davis*, the precedent must "specifically authorize" the officers' conduct in order for officers to be able to rely in good faith on that precedent.

To determine whether precedent specifically authorizes the officers' current conduct, courts should examine two factors: (1) whether the facts of the old case are similar to the present case, and (2) whether the underlying rationales used to decide the old case could have led the officers to think their present conduct was constitutional. For example, *Davis* held that *Belton* "specifically authorized" the

³¹⁸ *Davis v. United States*, 131 S. Ct. 2419, 2427–28 (2011).

³¹⁹ *Id.*

police's search of Davis' car, because the conduct at issue in both cases was incredibly similar (searches of cars incident to the arrest of a recent occupant). And, *Belton*'s underlying rationale, that police officers could always conduct such searches regardless of whether the arrestee was in reaching distance of the vehicle due of the need for officer safety and clear guidelines in that specific context also applied with full force to the search of Davis' car.

However, if this two-part test does not indicate that the old precedent specifically authorized the officers' current conduct, this should constitute a *per se* bar to a finding of good faith, and the inquiry can end. This will stop courts from completely eroding the exclusionary rule over time. If officers can be held to be acting in good faith even when the past precedent does not specifically authorize their conduct, no limiting principle to application of *Davis*' holding will exist and the exclusionary rule will disappear.³²⁰

Applying this test to our hypothetical with Randy above would almost certainly lead to the conclusion that the officers were not in fact acting in good faith on any precedent when using their device. First, unlike in *Davis* where the officers could have relied on *Belton* to specifically authorize their conduct, in our hypothetical no such precedent would lead the officers to believe that their conduct was not a search (unless other binding precedent had already resolved that nearly identical conduct was not a search). So, the good faith inquiry could end there.

However, if a court holds that precedent does specifically authorize the police's conduct, such a court should proceed to the next step in the analysis, which is determining whether or not the constitutionality of the practice is settled.

ii. The Law Authorizing the Police's Conduct Must be Settled

As Justice Sotomayor noted in her concurrence in *Davis*, courts should consider whether the law authorizing a practice is settled, because a situation where the law is unsettled is a very different

³²⁰ See *Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting).

situation than one where the law is clearly settled, as was the case in *Davis*.³²¹ The difference is of course that when the law is unsettled, officers should be much less certain that their conduct is authorized, and courts in these circumstances should not find that the officers acted in good faith.

To determine whether the law is settled, courts should only look at binding precedent (defined above as the law of the relevant federal circuit and state). This is because it would be unfair to ask officers to only look to binding precedent for guidance regarding the constitutionality of their actions, but allow courts to look outside this sphere to determine whether the law was settled.

Although determining when the law is “settled” may be difficult in some circumstances, courts should consider this factor with an eye towards always holding that the underlying law is unsettled absent a high degree of clarity. For example, if a state Supreme Court was reviewing the constitutionality of a practice about which lower courts had disagreed, this should strongly suggest that the law was unsettled, regardless of the weight of authority on each side of the split.

Also, the fact that a particular practice is being challenged in a court of review is important in determining whether the law is settled. For this inquiry, the court hearing the challenge to a police practice will be relevant. For example, an appellate court’s decision may only call into question the constitutionality of a police practice, while a Supreme Court (either state or federal) has a greater ability and likelihood to definitively settle the constitutionality of a practice. Further, the fact that a court where a defendant has an appeal of right has taken the case would have less significance than the fact that a court which only grants such defendants permissive appeals has taken the case. This is because, when a court which grants permissive appeals such as a state Supreme Court or the United States Supreme Court takes a case, the courts are making a deliberate decision to consider the constitutionality of a particular practice. Such a decision

³²¹ *Id.* at 2434–35 (Sotomayor, J. concurring).

should put officers on notice that their conduct may be unconstitutional.

Although some courts have held that the fact that a practice is being challenged does not matter,³²² the Court in *Leon* held that officers should be tasked with having a reasonable understanding of what the law is. Knowing what the law is involves knowing when a practice is authorized and the law authorizing it is settled, and when the law concerning the practice is unsettled and under review. The fact that a practice is being challenged is certainly not dispositive in the good faith analysis, but it should be a factor courts consider.

3. Resolving Other Issues Raised By *Davis*

i. The Actor Problem

The exclusionary rule should be used to deter prosecutors, especially when the government seeks to justify the officers' good faith on the fact that the officers consulted with a prosecutor. Because prosecutors are "adjuncts to the law enforcement team,"³²³ courts applying *Davis* should use the exclusionary rule to deter prosecutors from over-aggressive advising of officers. However, courts should not hold prosecutors to a higher burden of knowing the law in these circumstances, and be quicker to find bad faith, because such a rule would act as a disincentive for police officers from seeking advice on the law from government lawyers.

ii. Courts should not Assume Fourth Amendment Issues Without Deciding Them

One final issue is that courts should not avoid deciding the merits of a case simply because the court has determined that the

³²² See *United States v. Davis*, 760 F.3d 901, 905 (8th Cir. 2014); *United States v. Barraza-Maldonado*, 732 F.3d 865, 869 (8th Cir. 2013).

³²³ *Illinois v. Krull*, 480 U.S. 340, 350–51 (1987).

officers were acting in good faith.³²⁴ Instead of leaping to a good faith analysis, courts must first analyze whether the underlying conduct is reasonable under the Fourth Amendment. Doing this will set new precedent about the boundaries of the Fourth Amendment, and provide guidance to law enforcement in the future.

If all courts from 2015 onwards begin refusing to decide the merits of cases, and instead simply decide whether officers were acting in good faith on previous precedent, our common law system would largely end in the Fourth Amendment context. When law enforcement develops new technology in the future, courts would forever be deprived of the ability to make reasoned holdings based on what the Fourth Amendment requires, because as time moves on less and less precedent will be available to them. Instead, courts will have to decide, based on cases resolving the constitutionality of conduct decided before 2015, whether or not the officers were acting in good faith that their conduct was reasonable, not whether in fact the conduct was reasonable. There may seem to be little distinction between these choices now, but in one hundred years the problem will be more severe.

To avoid this problem, courts must make holdings regarding the constitutionality of officers' conduct before deciding if the officers were acting in good faith on binding precedent.

E. How the Seventh Circuit Went Astray In Gutierrez

In *Gutierrez*, the Seventh Circuit erred in both the analytical tools it chose use in applying *Davis*, and the results it reached in using the tools it choose.

³²⁴ See *United States v. Sparks*, 711 F.3d 58, 62 (1st Cir. 2013); *United States v. Katzin*, 769 F.3d 163, 170 (3d Cir. 2014); *United States v. Stephens*, 764 F.3d 327, 334 (4th Cir. 2014).

1. The Court Failed to Adopt the Best Interpretation of Binding Precedent

Before *Gutierrez* was decided, a split existed within the Seventh Circuit as to what constituted binding precedent under *Davis*. In *Martin*, the court rejected the government's argument that the police should be able to rely in good faith on "the weight of authority around the country,"³²⁵ while in *Brown* the court strongly suggested that officers may rely on decisions from other federal circuits because not allowing police to do so would not yield much deterrence.³²⁶

Gutierrez failed to resolve this split, and the court also failed to adopt the best interpretation possible of what constitutes binding precedent. Although the court held that officers could have relied on one of the Seventh Circuit's previous cases, *United States v. Brock*,³²⁷ the court failed to address an important case decided by Indiana Court of Appeals, *Hoop v. State*.³²⁸ And, *Hoop* had been addressed at length by the district court,³²⁹ and in the parties' briefs to the Seventh Circuit.³³⁰ So, the court should have taken the opportunity, given the existence of *Hoop*, to weigh in on the split in the Seventh Circuit over what constitutes binding precedent. Given the best definition discussed above, the court should have evaluated *Hoop* in conjunction with *Brock* as binding precedent.

The court probably choose not to address *Hoop* because doing so would have raised two difficult questions: (1) whether federal officers can rely on state cases to authorize their conduct, and (2) whether those state cases may also limit the bounds of federal officers'

³²⁵ *United States v. Brown*, 744 F.3d 474, 478 (7th Cir. 2014).

³²⁶ *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013).

³²⁷ 417 F.3d 692 (7th Cir. 2005).

³²⁸ *Hoop v. State*, 909 N.E.2d 463 (Ind. Ct. App. 2009).

³²⁹ *United States v. Cota*, 2013 WL 4510163 at *4 (N.D. Ind. 2013).

³³⁰ Brief and Required Short Appendix for Defendant-Appellant at 10, *United States v. Gutierrez*, 760 F.3d 750 (7th Cir. 2014) (No. 14-1159); Brief of the Plaintiff-Appellee, *United States of America* at 18–19, *Gutierrez*, 760 F.3d (No. 14-1159); Reply Brief of Defendant Appellant at 1–2, *Gutierrez*, 760 F.3d (No. 14-1159).

good faith that their conduct was lawful. Although questions along these lines arose at oral argument,³³¹ the court did not give any answer in its opinion. So overall, the court's analysis of what constitutes binding precedent was very unsatisfactory.

2. Good Faith Issues

Gutierrez's treatment of the good faith inquiry was also unsatisfactory. First, the court failed to enunciate a clear standard regarding how similar binding precedent must be to the present case under review in order for officers to be able to rely in good faith on that precedent. Second, the court failed to address the question of whether the precedent the officers relied on was settled, which is important because the legality of the officers' conduct in *Gutierrez* was very unsettled. Third, the court failed to address the significance of the officers' reliance on the advice they received from a State prosecutor.

In terms of whether previous precedent specifically authorized the officers' conduct, the court failed to enunciate a clear standard by which to evaluate cases. The court, on two occasions, cited *Davis'* holding that the evidence should not be suppressed if precedent specifically authorized the officers' conduct.³³² However, on each occasion, the court then almost immediately afterward held that the evidence should not be suppressed if precedent authorized the officers' conduct.³³³ So, it appears the court did not follow *Davis'* suggestion that precedential authorization of police conduct must be specific, but the court did not explicitly state why it choose authorization instead of specific authorization, or whether it was choosing to use this slightly different language deliberately.

³³¹ Oral Argument, *Gutierrez*, 760 F.3d (Case No. 14-1159), available at http://media.ca7.uscourts.gov/sound/2014/ab.14-1159.14-1159_06_02_2014.mp3 (last visited Jan. 15th, 2015).

³³² *Gutierrez*, 760 F.3d at 750, 752, 754.

³³³ *Id.*

Further, the court erred in holding that past precedent was in fact similar enough to the case at bar to authorize the officers' conduct. As an initial matter the court should have considered *Hoop* as part of the binding precedent universe. *Hoop* provides that under the Indiana State constitution, law enforcement officers must have reasonable suspicion before conducting a dog-sniff of a private residence.³³⁴ And, *Hoop* expressly declined to state whether an anonymous tip, like the officers had in *Gutierrez*, would be enough to supply this reasonable suspicion.³³⁵ So, under *Hoop*, the officers' conduct was not clearly authorized.

However, even if *Hoop* is put aside and only *Brock* is considered, the court still erred in holding that the officers could have relied in good faith on *Brock* at the time they used Fletch to examine Gutierrez's front door. Essentially, *Brock* held that law enforcement officers do not commit a Fourth Amendment search, and thus do not need a warrant, to use a drug-sniffing dog to smell a home so long as the officers are lawfully present where the sniff is conducted. So, the key question for the court in *Gutierrez* was whether the police were lawfully present at Gutierrez's front door when they used Fletch.

Gutierrez correctly argued that, under *Jones*, the lawfulness of the officers' presence at his front door was unclear. *Jones* held that in addition to *Katz's* privacy test, the common law trespass test should be used to determine when a Fourth Amendment search occurs.³³⁶ So, if the officers committed a trespass in searching for evidence at Gutierrez's front door, *Jones* held that such a trespass is relevant for Fourth Amendment purposes and would thus ordinarily render officers' conduct unconstitutional under the Fourth Amendment if such a trespass were done without a warrant.

The court in *Gutierrez* held that there was no trespass, because under the Court's decision in *Kentucky v. King*,³³⁷ the police are allowed to approach a homeowner's front door and knock on it

³³⁴ *Hoop v. State*, 909 N.E.2d 463, 470 (Ind. Ct. App. 2009).

³³⁵ *Id.*

³³⁶ *Gutierrez*, 760 F.3d at 756.

³³⁷ 131 S. Ct. 1849 (2011).

because in doing so, the police do no more than the ordinary citizen.³³⁸ However, the officers in *Gutierrez* did more than an ordinary citizen would do because they approached the home with a drug-sniffing dog. And, this is exactly why the Court in *Florida v. Jardines* held that such conduct is a search; officers who approach a home with a drug-sniffing dog exceed their implied license to enter a person's property.³³⁹ The court in *Gutierrez* recognized that the officers may not have been lawfully present if they "lingered" at Gutierrez's front door before using the dog (because such conduct also exceeds individuals' implied license to approach a home and knock on the door),³⁴⁰ but the court failed to explain why the officers' approach of the home with Fletch would not also exceed their implied license, rendering their presence in front of Gutierrez's door unlawful and their subsequent actions unauthorized under *Brock*.

So, at the time of the officers' conduct in *Gutierrez*, *Brock*'s validity had been significantly called into question by *Jones*, and *Brock* could not have provided sufficient authorization for the officers' conduct because the question of whether the officers were lawfully present in front of Gutierrez's front door was incredibly unclear.

The court also improperly characterized this portion of its analysis as whether or not *Jones* had "overruled" *Brock*, and whether *Brock* was still good law.³⁴¹ But, this was an incorrect approach. The more accurate question pursuant to *Davis* is, given binding precedent, could the officers have relied on good faith that *Brock* authorized their conduct. Given *Jones* and *King*, it was incredibly unclear whether *Brock* still provided such authorization, regardless of whether or not *Brock* had been formally overruled in its entirety.

The court also failed to discuss the importance of Justice Sotomayor's concurrence in *Davis*, and hold that the law regarding the constitutionality of a police practice must be settled in order for officers to rely in good faith that their conduct is authorized. This is

³³⁸ *Gutierrez*, 760 F.3d at 756.

³³⁹ 133 S. Ct. 1409, 1416 (2013).

³⁴⁰ *Gutierrez*, 760 F.3d at 758.

³⁴¹ *Id.* at 756.

important because again, *Jones* and *King* seriously called into question the validity of using drug dogs to sniff individuals' houses. Related to this, the court also failed to discuss the relevance of the fact that the law enforcement's practice of using a drug-sniffing dog to smell the outside of a person's home was being challenged in the Supreme Court when the officers used Fletch to examine Gutierrez's door.³⁴² As discussed above, this consideration is important, because it suggests that the conduct being reviewed may not in fact be constitutional.

The court also failed to discuss the relevance of the officers' consultation with a State prosecutor regarding the legality of their conduct. Although the prosecutor's advice came after the police had used Fletch, it did come before the police entered the home and discovered evidence. So, the court should have held that the exclusionary rule should have been used to deter future prosecutors from giving erroneous advice. The prosecutor should have been aware that under *Hoop*, the officers needed reasonable suspicion to use the dog sniff, and that the law was unclear whether the officers' anonymous tip would have been sufficient to provide such reasonable suspicion.

CONCLUSION

The exclusionary rule was created to be a very important and integral part of the Fourth Amendment's limit on the government's power. Courts need to interpret *Davis*' rule narrowly in order to limit government's power and enable citizens to be secure in their persons, houses, papers, and effects. So far, courts around the country, including the Seventh Circuit, have been failing to properly interpret *Davis*, and the result if continued may be the total erosion of the exclusionary rule.

³⁴² See *Florida v. Jardines*, 133 S. Ct. 1409. The case was argued October 31st, 2012, only a few weeks before the officers used Fletch.